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SUBPART A – GENERAL PROVISIONS

§ 5001.1 General.

(a) This part contains the regulations for Community Facilities *(CF)*, Water and Waste Disposal *(WWD)*, Business and Industry *(B&I)*, and Rural Energy for America Program *(REAP*) loans guaranteed by the Agency and applies to lenders, holders, borrowers, and other parties involved in making, guaranteeing, holding, servicing, and liquidating such loans. The loan guarantee programs covered by this regulation are more fully described as:

(1) Community Programs (*Facilities*) Guaranteed Loans (5 U.S.C. 301 and 7 U.S.C. 1989) as authorized by Section 306(a)(1) of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1926(a)(1), as administered by the Rural Housing Service (RHS), herein after referred to as CF.

(2) Water and Waste Disposal Program Guaranteed Loans (5 U.S.C. 301, 7 U.S.C. 1989, and 16 U.S.C. 1005) as authorized by Section 306(a)(1) of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1926(a)(1), as administered by the Rural Utilities Service (RUS), herein after referred to as WWD.

(3) Business and Industry Guaranteed Loans (7 U.S.C. 1932) as authorized by Section 310B, Business and Industry Direct and Guaranteed Loans, of the Consolidated Farm and Rural Development Act, 7 U.S.C. 1932, as administered by the Rural Business-Cooperative Service (RBCS), herein after referred to as B&I.

(4) Rural Energy for America Program Guaranteed Loans (5 U.S.C. 301, and 7 U.S.C. 8107) as authorized by Section 9007, Title IX of the Food, Conservation, and Energy Act of 2008, as administered by the Rural Business-Cooperative Service (RBCS), herein after referred to as REAP.

(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 regulatory provisions in effect at the complete application date for the program under which the Application was

submitted. *For CF 7 CFR 3575 subpart A; for WWD 7 CFR 1779; for B&I 7 CFR 4279 subparts A and B, and 7 CFR 4287 subpart B; and for REAP 7 CFR 4280 subpart B.*

(c) Any portion of this instruction appearing in italicized type is considered by the Agency to be administrative procedure and has not been published as part of the regulation in the Federal Register.

§ 5001.2 Structure.

This part is divided into six subparts as described in paragraphs (a) through (f) of this section. The provisions are applicable to each guaranteed loan made under this part, except as may be otherwise indicated. This part also contains several appendices as identified in paragraph (g) of this section.

(a) Subpart A. Subpart A contains provisions that are applicable to each guaranteed loan made under this part, except as may be otherwise indicated. Topics covered include definitions; exception authority; appeal and review rights; general lender responsibilities; special initiatives; approvals, regulations, and forms; and standards for financial information.

(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.

(c) Subpart C. This subpart contains provisions for general origination requirements, credit evaluation, appraisals, various types of guarantees, monitoring requirements, compliance with other laws, environmental responsibilities, and conflicts of interest that are applicable to each guaranteed loan made under this part.

(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.

(e) Subpart E. This subpart contains loan and guarantee provisions that are applicable to each guaranteed loan made under this part. Loan provisions cover interest rates, term length, loan schedule, repayment, lender fees, loan amounts, percentage of guarantee, and assignment of a guaranteed loan. Guarantee

provisions cover the conditional commitment, conditions precedent to issuing the loan note guarantee, the issuance of the loan note guarantee, guarantee and other fees, replacement of documents, borrower reorganizations, and other legal requirements.

(f) Subpart F. This subpart applies to provisions for servicing the loans guaranteed under this part, including oversight, monitoring and reporting requirements and project completion requirements that are applicable to each guaranteed loan made under this part, except as may be otherwise indicated. Servicing topics covered include audits and financial reports; collateral; loan transfers and assumptions; lender transfers; mergers; servicing fees; subordinations of lien position; repurchases; additional expenditures and loans; interest rate changes; lender failures; borrower defaults; protective advances; liquidation; bankruptcy; litigation; loss calculations and payments; future recovery; property acquired by the lender; and termination of the loan note guarantee.

(g) Appendices. These appendices provide specific information on various reports associated with applying for a loan guarantee under this part.

§ 5001.3 Definitions.

The following definitions are applicable to the capitalized terms used in this part.

Administrator means the Administrator of the Rural Housing Service, the Rural Utilities Service, or the Rural Business-Cooperative Service (or the applicable Service's successor), as applicable, within the Rural Development mission area of the U.S. Department of Agriculture (USDA).

Affiliates means persons who control or have the power to control another entity, or a third party or parties that control or have the power to control both.

Agency means USDA Rural Development, which includes the Rural Housing Service; the Rural Utilities Service; and the Rural Business-Cooperative Service or their successors.

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 AP 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 operation for less than 60 months but for at least 12 months, use average gross agricultural operations income and gross non-farm income for as long as the concern has been in operation. *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 should be made 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.*

Agricultural production means the cultivation, growing, or harvesting of plants and crops (including farming) breeding, raising, feeding, or housing of livestock (including ranching); forestry products, hydroponics, or nursery stock; or aquaculture.

Anaerobic digester means a renewable energy system that uses animal waste or other renewable biomass and may include other organic substrates to produce biogas that is sold in a gaseous or compressed liquid state or used to produce thermal or electrical energy.

Applicant lender debt means an existing debt owed by a borrower to the same lender that is applying for or has received the Agency guarantee.

Appraisal surplus means the excess between the market value of an asset and its cost or depreciated book value when the market value is higher.

Architectural report means a report, prepared by a professional, licensed architect, or other qualified party that describes the existing situation, analyzes alternatives and proposes a specific course of action from an architectural perspective.

Arm's length transaction means a transaction in which the buyer and seller act independently and have no relationship to each other. The concept of an arm's length transaction allows the market to ensure that both parties in the deal are acting in their own self-interest and are not subject to any pressure or duress from the other party.

Assignment guarantee agreement means a signed, Agency-approved agreement between the Agency, the lender, and the holder setting forth the terms and conditions of an assignment of a guaranteed portion of a loan.

Biofuel means a fuel derived from renewable biomass.

Biogas means a gaseous fuel (including landfill and sewage waste treatment gas) derived from the degradation and decomposition of renewable biomass.

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

Borrower means the person that borrows, or seeks to borrow, money from the lender (including any party or parties liable for the guaranteed loan except guarantors) through a loan guaranteed under this part.

Business plan means a comprehensive document that clearly describes the borrower's ownership structure and management experience including, if applicable, discussion of a parent company, any subsidiaries and affiliates of the borrower and discussion of how the borrower will operate the proposed project. If a business or industry is in decline or financial distress, the business plan must describe in detail how the project differs from the current industry trends or improves the borrower's financial position. *The applicant should document and explain how the business has overcome or will overcome business and industry adversity and distress.*

Byproduct means an incidental or secondary product, regardless of whether it has a readily identifiable commercial use or value, generated under normal operations of the proposed Project that can be reasonably measured and monitored.

Certificate of incumbency means an Agency-approved form used to validate authenticity of Agency representatives' signature and title.

Collateral means the asset(s) pledged by the borrower to the lender as security for the guaranteed loan. *Collateral may also include assignments of relevant agreements.*

Commercially available means a system that meets the requirements of either paragraph (1) or (2) of this definition. *(more guidance on definition of "commercially available" on OneRD Guarantee Loan Initiative InfoHub)*

(1) A domestic or foreign system that:

(i) Has both a proven and reliable operating history and proven performance data for at least one year specific to the use and operation to the proposed application;

(ii) Is based on established design and installation procedures and

practices and is replicable;

(iii) Has professional service providers, trades, large construction equipment providers, and labor who are familiar with installation procedures and practices;

(iv) Has proprietary and balance of system equipment and spare parts that are readily available;

(v) Has service that is readily available to properly maintain and operate the system; and

(vi) Has an existing established warranty that is valid in the United States for major parts and labor; or

(2) A domestic or foreign system that has been certified by a recognized industry organization whose certification standards are acceptable to the Agency. *By rule, a renewable energy system is considered to have demonstrated commercial availability if it has been certified by a recognized industry organization whose certification standards are acceptable to the Agency. Examples of recognized industry organization whose certification standards are acceptable to the Agency include, but are not limited to:*

(i) Small Wind Certification Council, http://smallwindcertification.org/

(ii) Solar Rating and Certification Corporation, http://www.solar-rating.org/

(iii) Florida Solar Energy Center, https://energyresearch.ucf.edu/

(iv) American Wind Energy Association, http://www.awea.org/

(v) Intertek Small Wind Certification Program, http://www.intertek.com/wind/small/directory/

Complete application means an application that contains all parts necessary for the Agency to determine borrower and project eligibility, the financial feasibility and technical merit of the project, and contains sufficient information to determine a priority score for the application, if applicable.

Conditional commitment means an Agency-approved form in which the Agency

agrees that, in accordance with applicable provisions of the program regulations contained in this part and related forms, it will execute the loan note guarantee, subject to the conditions and requirements specified in applicable provisions of the program regulations contained in this part and in the conditional commitment itself.

Conflict of interest means a situation in which a person has personal, professional, or financial interests that prevent, or appears to prevent the person from acting impartially. For purposes of this part, conflict of interest also includes, but is not limited to:

(1) A person acting as a compensated agent of the borrower and the lender on the same guaranteed loan,

(2) Distribution or payment of guaranteed loan funds to an individual owner, partner, stockholder, or member of the borrower, or to a beneficiary or immediate family member of the borrower;

(3) Refinancing debt that is owned by a loan packager, broker, or referral agent or its affiliates.

Cooperative means an entity that is legally chartered by the State in which it operates as a cooperatively-operated business, or an entity that is not legally chartered as a cooperative but is owned and operated for the benefit of its members, with returns of residual earnings paid to such members on the basis of patronage.

Credit evaluation means the analysis and evaluation by the lender of the credit factors associated with each application to ensure loan repayment through the use of credit documentation procedures and an underwriting process that is consistent with industry standards and the lender's written policy and procedures.

Debt Collection Improvement Act 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*.

Debt service coverage ratio means the ratio obtained when taking earnings before interest, taxes, depreciation, and amortization less reasonably expected replacement capital expenditures divided by the annual debt service (principal and interest payments) of the borrower.

Default means the condition that exists when a borrower is in non-compliance under the terms of any of the promissory notes, the loan agreements, security documents, program regulations *and guidance*, or other documents evidencing or collateralizing the loan. Default can be a monetary or non-monetary default.

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

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. *Delinquency in this definition provides guidance when completing borrower status reports and is not used to define monetary or non-monetary default or undertaking-related servicing actions.*

Departmental regulations means the regulations of the Agency's Office of Chief Financial Officer (or successor office) as codified in 2 CFR chapter IV.

Eligible project costs means those expenses approved by the Agency for the project as eligible uses of funds.

Energy assessment means an Agency-approved report assessing energy use, cost, and efficiency by analyzing energy bills and surveying the target building and/or equipment sufficiently to provide an Agency-approved energy assessment.

Energy assessor means a qualified consultant who has at least 3 years of experience and completed at least five energy assessments or energy audits on similar type projects and who adheres to generally recognized engineering principles and practices.

Energy audit means a comprehensive report that meets an Agency-approved standard prepared by an energy auditor or an individual supervised by an energy auditor that documents current energy usage; recommended potential improvements (typically called energy conservation measures) and their costs; energy savings from these improvements; dollars saved per year; and simple payback. The methodology of the energy audit must meet professional and industry standards. The final energy audit must be validated and signed off by the energy auditor who conducted the audit or by the supervising energy auditor of the individual who conducted the audit, as applicable. *Acceptable energy audits include but are not limited to those 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.

Energy auditor means a qualified consultant that meets one of the following criteria:

(1) A certified energy auditor certified by the Association of Energy Engineers;

(2) A certified energy manager certified by the Association of Energy Engineers;

(3) A licensed professional engineer in the State in which the audit is conducted with at least 1 year of experience and who has completed at least two similar type energy audits; or

(4) An individual with a 4-year engineering or architectural degree with at least three years of experience and who has completed at least five similar type energy audits.

Energy efficiency improvement (EEI) means improvements to or replacement of an existing building or systems or equipment *owned by the applicant* that reduces measurable energy consumption on an annual basis.

Energy efficient equipment and systems (EEE) means equipment or systems for agricultural production or processing that exceed any of the following standards:

(1) Energy efficiency building codes, if available;

(2) Federal or State energy efficiency standards, if available

(3) Energy efficiency standards determined appropriate by the Secretary. If no codes or standards described in paragraphs (1) through (3) of this definition apply to the EEE proposed, then the Secretary shall require such equipment or system to meet the same efficiency measurement as the most efficient available equipment or system in the market and the Secretary shall not provide such a loan guarantee for the purchase and installation of any energy efficient equipment or system unless more than one type of such equipment or system is available in the market.

Applications for energy efficient equipment and systems must clearly demonstrate energy efficiency.

Engineering documentation means a document, normally prepared by the borrower's consulting engineer or other qualified party, that describes the existing

system, analyzes alternatives, and proposes a specific course of action from an engineering perspective.

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 be 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.

Existing business means a business that has been in operation for at least one full year. The following will be treated as existing businesses provided there is not a significant change in operations of the existing business: mergers by an existing business with a new or existing businesses, a change in the business name, or a new business and an existing business applying as co-borrowers.

Farmer or rancher cooperative means an entity that is owned and controlled by agricultural producers and that is incorporated, or otherwise recognized by the State in which it operates as a cooperatively-operated business or an entity that is not legally chartered as a cooperative but is owned and operated for the benefit of its members, with returns of residual earnings paid to such members on the basis of patronage.

Feasibility study means a report including an opinion or finding conducted by an independent qualified consultant(s) evaluating the economic, market, technical, financial, and management feasibility of the proposed project or operation in terms of its expectation for success as outlined in Appendix A to subpart D of this part.

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*.

Federal fiscal year means the 12-month period beginning October 1 of each year and ends on September 30 of the following year; it is designated by the calendar year in which it ends.

Final loss claim means the Agency's payment of a final settlement amount with the lender after the collateral is liquidated or after settlement and compromise actions have been completed and as further set forth in § 5001.521(d)(3)(e).

Financial feasibility means the ability of a project to achieve sufficient income, credit, and cash flow to financially sustain the project over the long term and meet all debt obligations.

Future recovery means funds to be collected by the lender after a final loss claim is processed as set forth in § 5001.522. *If unanticipated funds are received, those are transmitted directly to finance as a collection.*

Geothermal direct generation means a system that uses thermal energy directly from a geothermal source.

Geothermal electric generation means a system that uses thermal energy from a geothermal source to produce electricity.

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 *or under one of the guaranteed loan programs identified in §* 5001.1.

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.

Holder means a person, other than the lender, who owns all or part of the guaranteed portion of the guaranteed loan with no servicing responsibilities.

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 (section1861(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 https://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 at one location and solar at another location is not eligible but installing wind/solar hybrid at both locations is eligible.*

Hydroelectric source means a renewable energy system producing electricity using various types of moving water including, but not limited to, diverted run-of-river water, in-stream run-of-river water, and in-conduit water.

Hydrogen project means a system that produces hydrogen derived from renewable biomass or water using wind, solar, ocean (including tidal, wave, current, and thermal), geothermal, or hydroelectric sources; or that uses hydrogen derived from renewable biomass or water using wind, solar, ocean (including tidal, wave, current, and thermal), geothermal or hydroelectric sources as an energy transport medium in the production of mechanical or electric power or thermal energy.

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

Indian tribe means the term as defined in 25 U.S.C. 5304(e).

In-house expenses means expenses associated with activities that are routinely the responsibility of a lender's internal staff, including in-house lawyers, or its agents and that are normally incurred for administration of the loan. In-house expenses include, but are not limited to, employees' salaries, staff lawyers, travel, and overhead.

Inspector means a qualified consultant who has at least 3 years of experience and has completed at least five inspections on similar type projects.

Insurance means a means of protection from financial loss by which a company provides a guarantee of compensation for a specified loss, damage, illness, or death in return for payment of a premium.

Intangible assets means an asset that lacks physical substance. This includes, but is not limited to, copyrights, patents, capitalized franchise fees, goodwill, customer lists, software, organizational expenses, loan closing expenses, social media assets, and bond fees.

Interconnection agreement means a contract containing the terms and conditions governing the interconnection and parallel operation of the borrower's electric generation equipment and the utility's electric power system or a borrower's biogas production system and a gas pipeline.

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

Interest termination date means the date on which no further interest will be payable by the Agency under the loan note guarantee.

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

Lender means a lending entity that the Agency has approved to originate, service, and collect payments on loans guaranteed under this part.

Lender's agreement means the Agency-approved form of contract between the Agency and the lender setting forth the lender's guaranteed loan responsibilities.

Liquidation expenses means costs directly associated with the liquidation of collateral, including, without limitation, costs associated with preparing collateral for sale (e.g., repairs and transport), the sale (e.g., advertising, public notices, auctioneer expenses, and foreclosure fees), and conducting appraisals. Legal fees are considered liquidation expenses provided that the fees are reasonable as determined by the Agency and cover legal issues pertaining to the liquidation that could not be properly handled by the lender and its in-house legal staff. Liquidation expenses do not include in-house expenses.

Loan agreement means the agreement between the borrower and lender containing the specified terms and conditions of the guaranteed loan and the responsibilities of the borrower and lender.

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

Loan documents mean the loan agreement, promissory note, mortgage/deed of trust, and other security documents entered into by the borrower and the lender in connection with the guaranteed loan.

Loan note guarantee means the Agency-approved form containing the terms and conditions of the guarantee of an identified guaranteed loan.

Loan packager means a person, including a loan referral agent, broker, or an agent other than the borrower or lender that prepares a guaranteed loan application on behalf of the borrower or lender.

Local government means a county, municipality, town, township, village, or other unit of general government below the State level. The term also includes Tribal governments when tribal lands are within the service area.

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 of the guaranteed loan project. *Normal commuting area is typically 100 miles or less.*

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

Market value means the most probable price that an asset should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby—

(1) Buyer and seller are typically motivated;

(2) Both parties are well informed or well advised, and each acting in what he or she considers his or her own best interest;

(3) A reasonable time is allowed for exposure in the open market;

(4) Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and

(5) The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale.

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

Material adverse change means any change in circumstances associated with a guaranteed loan, including, without limitation, any change in the purpose of the loan, the borrower's financial condition or collateral, that, individually or in the aggregate, have jeopardized, or could be reasonably expected to jeopardize, the borrower's repayment of the guaranteed loan.

Monetary default means a failure to make a scheduled or required payment on a guaranteed loan.

Multi-note system means an option for the lender to provide one promissory note for the unguaranteed portion and a separate promissory note(s) for the guaranteed portion of the loan. All promissory notes must reflect the same payment terms.

National Appeals Division (NAD) means the division of the United States Department of Agriculture pursuant to 7 CFR part 11.

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.*

Negligent loan origination means the failure of a lender to perform those services or actions that a reasonably prudent lender would perform in originating its own

portfolio of loans that are not guaranteed. The term includes the concepts of failure to act, not acting in a timely manner, and acting in a manner contrary to the manner in which a reasonably prudent lender would act.

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

New business means a business that has been in operation for less than one full year, including a new enterprise or new affiliate of an existing business moving or expanding into a new location involving new market or labor areas.

Non-monetary default means a situation where a borrower is not in compliance with the covenants or requirements of the loan documents, program requirements or loan.

Non-regulated lending entity means a lending entity that is not subject to supervision and examination by an agency of the United States or a State.

Ocean energy means energy created by use of various types of moving water in the ocean and other large bodies of water (e.g., Great Lakes) including, but not limited to, tidal, wave, current, and thermal changes.

Off-take agreement means the terms and conditions governing the sale and transportation of products produced by the borrower and sold to another party.

OneRD Guarantee Loan Initiative Project Manager means the individual who collects information and requests for the Executive Credit Committee and acts as manager and holder of information between differing groups and requests to the Executive Credit Committee. A graphic showing their role and responsibilities can be found on the OneRD InfoHub. The individual's name will also be listed on the OneRD InfoHub. Any item that needs to be submitted to the "national office" should go through this individual. This includes (but is not limited to): string requests, rural in character requests, non-regulated lender approval requests, state loan approval amount change requests, exception authority use, administrator points from the Administrator, and subordination request.

Otherwise improve means, but is not limited to, the following:

(1) The purchase of necessary equipment that will itself provide an essential service to the rural community, such as vehicles, emergency and medical equipment, telecommunication equipment, computers, water

meters and pumps;

(2) The purchase of equipment necessary to maintain, protect, operate, or use the eligible facility or service;

(3) The purchase of existing eligible facilities, when necessary, to either improve or prevent a loss of service provided the price paid for the facility is fair and reasonable and not directly related to the dollar amount of any debt to be retired by the seller; and

(4) Payment of tap fees and other utility connection charges as provided in utility purchase contracts.

Parity means a lien position whereby two or more separate lending entities or separate loans share a security interest of equal priority in collateral.

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

Passive investor means an equity investor who does not actively participate in management and operation decisions of the borrower or any affiliate of the borrower as evidenced by a contractual agreement.

Person means an individual or entity organized under the laws of a State or a Tribe.

Power purchase agreement means the terms and conditions governing the sale and transportation of electricity produced by the borrower to another party.

Problem loan means a designation for a loan that is not complying with its terms and conditions or is rated by a lender and/or a regulatory agency as substandard or below.

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.*

Project means the activity identified by a lender in its application for a loan guarantee for which the guaranteed loan funds will be used.

Promissory note means the legal instrument evidencing debt executed by the borrower to a lender with stipulated repayment terms. The term promissory note includes bonds and other related debt instruments issued by the lender to a borrower.

Protective advance means an advance made by the lender for the purpose of preserving and protecting the collateral where the borrower has failed to, and will not or cannot, meet its obligations to protect or preserve collateral. Protective advances include, but are not limited to, advances for property taxes, rent, hazard and flood insurance premiums, emergency repairs and annual assessments that protect the collateral. Legal and accounting fees are not a protective advance.

Public body means a state, county, city, township, incorporated town or village, borough, authority, district, or other political subdivision of a State, or Indian tribe.

Qualified consultant(s) means an independent third-party person possessing the knowledge, expertise, and experience to perform the specific task required.

Rated power means the maximum amount of energy that can be created at any given time.

Refurbished means a piece of equipment or renewable energy system (*RES*) 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. There are too many technologies and different equipment to track applicable warranties for components and a one size fits all warranty does not work well. Therefore, the Agency will need to ensure that the warranty being provided is similar to that industry standard for refurbished equipment.*

Regulated lending entity means a lending entity that is subject to supervision and examination by an agency of the United States or a State; or a lending entity created specifically by State statute and operating under the direct supervision of a State government authority.

Renewable biomass means—

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

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

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

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

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

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

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

Renewable energy means energy derived from—

(1) A wind, solar, renewable biomass, ocean (including tidal, wave, current, and thermal), geothermal or hydroelectric source; or

(2) Hydrogen derived from renewable biomass or water using an energy source described in paragraph (1) of this definition.

Renewable energy site assessment means a report providing information regarding and recommendations for the use of commercially available renewable energy technologies in the borrower's operation. The report must be prepared by

a qualified consultant for the specific energy system and project proposed.

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*.

Report of loss means an Agency-approved form used by lenders when reporting a financial loss under a guaranteed loan.

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) Taking an existing wind turbine and installing newly designed blades to enhance energy production.*

(*2) Adding equipment or processes to or altering or enhancing an existing renewable energy system to improve production, efficiency, or financial viability. Such as a feedstock pretreater on an existing biodiesel production plant;*

(*3) adding a battery system to an existing renewable energy system;*

(*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. *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. 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 1/4 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

https://www.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 should be sent to the Administrator, on behalf of the Under Secretary, that documents 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. *Template request letter is available on OneRD Guarantee Loan Initiative InfoHub*. 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. *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.*

(iii) Rural in character requests should go from the State Director to the OneRD Guarantee Loan Initiative Project Manager who will then shepherd the request through the Executive Credit Committee all the way to the Under Secretary of Rural Development and the decision back to the State Directors. Graphic of this process is available on the RD InfoHub.

(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 are considered not 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. Requests to verify exclusions must be submitted to the national office (via the OneRD Guarantee Loan Initiative Project Manager) with supporting documentation for review and verification. Template request letter is available on OneRD Guarantee Loan Initiative InfoHub. Once an area is approved as a string exception, any project within that area is eligible. OneRD Guarantee Loan Initiative Project Manager can be identified on the OneRD InfoHub.*

(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." *Requests, with supporting documentation as to why the area is not urban in character, must be forwarded to the National Office for review, analysis, and decision by the administrator.*

(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.

Applications cannot be approved subject to meeting rural area requirements.

Rural small business means a small business that is located in a rural area or that can demonstrate the proposed project for which assistance is being applied for under this part is located in a rural area.

Service area means the area identified to be served.

Significant ties means, as determined by the agency, a facility under private control will carry out a public purpose and continue to primarily serve rural areas for CF projects (not applicable to public bodies and Federally Recognized Tribes) as evidenced by the following: Association with or control by a public body or bodies; or Broadly based membership and controlled primarily by members residing in the project service area. Membership must be open without regard to race, color, religion, national origin, sex, age, disability, sexual orientation, or marital or familial status.

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

(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. *Note 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:

(1) An entity or utility, as applicable, as further defined in paragraphs (2)(i) through (iv) 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;

(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. 477) 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; and

(2) An entity that meets Small Business Administration (SBA) size standards in accordance with 13 CFR part 121 and criteria of 13 CFR 121.301 as applicable to financial assistance programs, including

paragraph (2)(i) or (ii) of this section. The size of the concern alone and the size of the concern combined with other entity(ies) it controls or entity(ies) it is controlled by, must not exceed the size standard thresholds designated for the industry in which the concern alone or the concern and its controlling entity(ies), whichever is higher, is primarily engaged.

(i) The concern's tangible net worth is not in excess of $15 million and average net income (excluding carry-over losses) for the preceding two completed fiscal years is not in excess of $5.0 million; *or the average net income and net worth thresholds as published by the Agency in a Federal Register notice. The size of the concern alone and the size of the concern combined with other entity(ies) it controls or entity(ies) it is controlled by, must not exceed the net worth and average net income thresholds listed above. or*

(ii) The size of the concern does not exceed the SBA size standard thresholds designated for the industry in which it is primarily engaged, as measured by number of employees or annual receipts. Industry size standard designations to be utilized are listed in the SBA's table of size standards found in 13 CFR *part* 121.201. Number of employees and annuals receipts are calculated as follows:

(A) Number of employees is calculated as the average number of all individuals employed by a concern on a full-time, part-time, or other basis, based upon numbers of employees for each of the pay periods for the preceding completed 12 calendar months. If a concern has not been in business for 12 months, the average number of employees is used for each of the pay periods during which it has been in business.

(B) Annual receipts are calculated as average total income plus cost of goods sold for the five most recent years. If a concern has been in operation for less than 60 months, average annual receipts for as long as the concern has been in operation are used.

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

State bond banks and State bond pools mean an entity authorized by the State to issue State debt instruments and use the funds received to finance eligible projects under this part.

Steady state operating level means that there is an adequate and consistent supply of the applicable renewable energy resource(s) for the project, both on a short-term (current) and long-term basis, and the renewable energy system and process(es) are operating at projected capacity, consistently yielding an adequate quantity and quality of renewable energy.

Subordination means the reduction of the lender's lien priority on certain assets pledged by the borrower to secure payment of the guaranteed loan to a position junior to, or on parity with, the lien position of another loan.

Total eligible project costs means the sum of all eligible project costs.

Total project costs means the sum of all costs associated with a completed project. *All costs associated with a completed project, including in-eligible project costs, must be included. Total project costs for retrofitting an existing renewable energy system would include the costs associated with the modifications or replacement of the existing components.*

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

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. High poverty rate can be found at: https://rdgisportal.sc.egov.usda.gov/portal/home/webmap/viewer.html?webmap=59331d4c73b342d3a8a7265402fb18f4. Instructions to access:*

1. *Open RDGIS Portal, https://rdgisportal.sc.egov.usda.gov using Internet Explorer*
2. *Click the 'Sign In' link at the top right side of the page.*
3. *Sign in using your USDA-RD Account*
4. *And log in with the Badge login.*

Uniform Standards of Professional Appraisal Practice (USPAP) means the appraisal standards promulgated by the Appraisal Standards Board of the Appraisal Foundation.

Used equipment means any equipment that has been used and is provided in an "as is" condition.

Useful life means estimated durations of utility placed on a variety of assets, including buildings, machinery, equipment, vehicles, electronics, and furniture. Useful life estimations terminate at the point when assets are expected to become obsolete, require major repairs, or cease to deliver economical results.

Veteran means a person who served in the active military, naval, or air service and was discharged or released therefrom under conditions other than dishonorable as defined in 38 U.S.C. 101(2).

Waste disposal means sanitary sewer (treatment and collection), solid waste, or storm drainage facilities.

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

§ 5001.4 Exception authority.

The Administrator may, on a case-by-case basis, grant an exception to any requirement or provision of this subpart provided that such an exception is in the best financial interests of the Federal Government. Exercise of this authority cannot be in conflict with applicable law. *State directors may request exceptions to the National Office Administrator of the applicable program area. The request must be in writing and supported with documentation to explain the adverse effect on the federal government's financial interest, proposed alternative courses of action, and show how the adverse effect will be eliminated or minimized if the exception is granted.*

§ 5001.5 Appeal and review rights.

Borrowers, lenders, and holders may have appeal or review rights for Agency decisions made under this part. Agency decisions that are adverse to the individual participant are appealable, while matters of general applicability are not subject to appeal; however, such

decisions are reviewable for appealability by the National Appeals Division (NAD). All appeals will be conducted by NAD and will be handled in accordance with 7 CFR part 11. *The national office administrator for the respective program decision under appeal must be notified in advance of appeal hearings and provided the results of any appeal hearings.*

(a) The borrower, lender, and holder can appeal any Agency decision that directly and adversely affects them.

(1) For an adverse decision that affects the borrower, the lender and borrower must jointly execute a written request for appeal of an adverse decision made by the Agency.

(2) An adverse decision that affects only the lender can be appealed by the lender only.

(3) An adverse decision that affects only the holder can be appealed by the holder only.

(b) In cases where the Agency has denied or reduced the amount of final loss payment to the lender, the adverse decision can be appealed only by the lender.

(c) A decision by a lender adverse to the interest of the borrower is not a decision by the Agency, even if it was concurred in by the Agency, and therefore cannot be reviewed for appealability or appealed to NAD.

§ 5001.6 General lender responsibilities.

(a) Lenders are responsible for originating and servicing loans guaranteed by the Agency under this part in accordance with the provisions of this part and, for those guaranteed loans issued under one of the guaranteed loan programs identified in § 5001.1(a)(1) through (4), with the provisions of the applicable guaranteed loan program. Any action or inaction on the part of the Agency does not relieve the lender of its 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.

(c) If a lender fails to comply with the requirements of this part, the Agency may reduce any loss payment in accordance with the lender's agreement and loan note guarantee.

§ 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 Agricultural Improvement Act of 2018 (Pub. L. 115-334*). The President, Congress, or the Secretary of Agriculture may announce priorities for the use of program funds involving one or multiple fiscal years, which then become a special initiative. These priorities may involve a reservation of funds or awarding of priority points.*

§ 5001.8 Approvals, regulations, and forms.

(a) When Agency approval or concurrence is required, it must be in writing and must be obtained prior to the action for which approval or concurrence is required is taken. *Written communication may be in the form of a letter, an email, or via an electronic Agency system, addressed to the respective party by an authorized Agency official, and regardless of form must made part of the official file.*

(b) All references to statutes and regulations include any and all successor statutes and regulations.

(c) All references to forms include any and all predecessor and successor forms as specified by the Agency.

(d) Copies of all regulations and forms referenced in this part can be obtained through the Agency and from the Agency's website at https://www.rd.usda.gov/onerdguarantee.

§ 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. *The type of financial statement (e.g. borrower prepared, compiled, reviewed or audited) required is the lender's decision.*

(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,*

*a*ssets, 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 Instruction; however, tax return information may be used to prepare financial statements and to determine REAP eligibility.

§ 5001.10 Federal Register notices and amendments.

Rural Development will issue annual Federal Register notices each year specifying the amount of funds available under this part for OneRD guarantees. Notices may also include the following information applicable to projects specifically funded under a particular notice: maximum loan amounts, fees, and priority scoring for discretionary points.

§§ 5001.11 – 5001.99 [Reserved]

§ 5001.100 OMB control number

The report and recordkeeping requirements contained in this part have been approved by the Office of Management and Budget and have been assigned OMB control number 0572-0155.

SUBPART B – Eligibility Provisions

§ 5001.101 Introduction

This subpart addresses the eligibility provisions for projects, borrowers, and lenders. This subpart also includes provisions for projects involving the purchase of cooperative stock or cooperative equity, the conversion of businesses to cooperatives or Employee Stock Ownership Plans (ESOP), and New Markets Tax Credits (NMTC).

(a) Project eligibility. Sections 5001.102 through 5001.108 identify requirements for projects to be eligible to receive a loan guarantee under this part. Section 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.

(c) Lender eligibility. Section 5001.130 identifies the requirements for a lending entity to be an eligible lender under this part. Section 5001.131 addresses the lender's agreement, which each approved lender must execute with the Agency in order to originate and service guaranteed loans under this part. Section 5001.132 addresses provisions necessary for a lender to maintain its approved lender status.

(d) Cooperative stock/cooperative equity/conversions. Section 5001.140 identifies requirements associated with issuing loan guarantees in connection with the purchase of cooperative stock, transferable stock shares, and cooperative equity and for the conversions of businesses to either cooperatives or Employee Stock Ownership Plans (ESOP).

(e) New Markets Tax Credits (NMTC). Section 5001.141 identifies the requirements specific to guaranteed loans involving projects that include NMTC available under the NMTC program authorized by the U.S. Department of the Treasury.

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

§ 5001.102 Project eligibility - general.

To be eligible for a loan guarantee under this part, a project must meet the requirements specified in this section and those in the applicable section in §§ 5001.103 through 5001.108.

(a) Service area. For projects with a defined service area, the boundaries for the proposed service area must be chosen in such a way that no user or area will be excluded because of race, color, religion, sex, marital status, age, disability, or national origin. This does not preclude financing or constructing:

(1) Projects in phases (each phase must be financially sustainable without consideration of future phases) when it is not practical to finance or construct the entire project at one time; and

(2) Projects where it is not economically feasible to serve the entire service area, provided the economic feasibility is determined on the basis of the entire system or facility and not by considering the cost of separate extensions to, or parts thereof.

The file must be documented if either (1) or (2) are used to justify not providing service to the entire service area.

(b) Location. A project must be located in a State and meet the rural or rural area requirements of the applicable section in §§ 5001.103 through 5001.108.

(c) Tax-exempt financing. The agency is prohibited from guaranteeing a project funded with tax-exempt financing. In cases where a project involves both tax-exempt and taxable financing, the portion of the project that involves taxable financing is eligible to receive a loan guarantee if that portion of the project is separate and distinct from the part that is financed by the tax-exempt obligation, and the guaranteed loan is not essential to issuance of the tax-exempt obligation.

(d) Debt refinancing. The Agency can guarantee loans for debt refinancing, as described in paragraphs (1) through (5) below. *Does 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. 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. *This can be achieved 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 Agricultural 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 of lines of credit is considered an eligible purpose for debt refinancing in the B&I program;

(iii) For loans where debt refinancing is a majority purpose of the guaranteed loan, the borrower must demonstrate historical actual cash available to provide a total debt service coverage ratio of not less than 1.1 times its new debt service requirements or that the borrower's current financial performance demonstrates it has corrected or recovered from impacts or issues adversely effecting its past financial performance.

(5) 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 1.1 to 1.0 *(i.e. 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. *The lender will provide this information on Form RD 5001-1, "Application For Loan Guarantee" and will attach supporting documentation.*

(6) The state office will document the file that the debt refinance meets the applicable requirements of paragraph (d) of this section.

§ 5001.103 Eligible CF projects and requirements.

For a CF projects 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 the construction, enlargement, extension, or to otherwise improve an essential community facility. Essential community facilities include, but are not limited to:

(1) Health care facilities and services, including but not limited to hospitals and a*ssisted living facilities providing daily living and health care assistance in compliance with state licensure or certification requirements*;

(2) Fire, rescue, and public safety facilities and services;

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

(i)Business incubators when 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.

(4) Transportation facilities such as streets, bridges, roads, ports, and airports;

(5) Utility projects such as hydroelectric generating facilities and related connecting systems and appurtenances; supplemental and supporting structures for other rural electrification or telephone systems including facilities such as headquarters, office buildings, storage facilities, and maintenance shops when not eligible for RUS financing; natural gas distribution systems; and recycling or transfer centers or stations.

(6) Telecommunications end-user equipment as it relates to public safety, medical, or educational telecommunications links when not eligible for RUS financing;

(7) Water infrastructure facilities such as levees, dams, reservoirs, inland waterways, canals, and irrigation systems;

(8) The purchase and installation of renewable energy systems for use by an essential community facility when:

(i) The renewable energy system will help defray the cost of facility operation over the life of the system;

(ii) The renewable energy system will improve the borrower's ability to provide the underlying essential community service, such as providing backup facilities or extending fuel supplies of backup

facilities;

(iii) The borrower does not, and will not, have any contract to sell power generated by the renewable energy system; however, receiving credit for excess production is permitted;

(iv) The borrower does not anticipate, and has no plan for, generation of more energy than it will use in a consecutive 12-month period. The borrower may receive credits from a utility for energy production that happens to exceed facility usage during a particular month;

(v) The renewable energy system is commercially available with proven operating history specific to the proposed application; and

(vi) The borrower provides a technical report as part of the financial feasibility study in accordance with § 5001.307(e)(1) and (2), as applicable of subpart D.

(9) Land acquisition and necessary site preparation including access ways and utility extensions to and throughout an industrial park site; and

(10) Community parks, community activity centers, and similar types of facilities that are an integral part of the orderly development of a community (meaning a development that is addressing a need in the community). Recreational components including, but not limited to, playground equipment of an otherwise non-recreational eligible community facility such as childcare, educational, or health care facilities are also eligible.

(11) Eligible projects may include leased space to ineligible organizations or used for ineligible commercial activities provided the floor space leased 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, and a pharmacy inside a medical facility.

(12) 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:

(i) 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

(ii) 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

(iii) 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.

(b) Public use. All facilities financed under the provisions of this section will be for public use.

(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 community groups.*

(i) However, 7 CFR 15a.215(b) provides that the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls are exempt from open membership practices on the basis of sex.

(ii) If membership or admission is customarily required to access and use the facility or service, any individual who applies for membership or admission must be given membership, admitted, or be placed on a waiting list to join as space becomes available on a first-come, first-served basis. This does not preclude an essential community facility from having a threshold admission requirement, such as a college or university requiring their applicants to have a certain grade point average before they are considered for admission. The standard must be applied consistently to all applicants and be common to the industry.

(c) Project location. The project must be located in a rural area as defined in § 5001.3 of this part, except that utility projects serving both rural and non-rural areas are eligible for a loan guarantee regardless of project location. For such utility projects, the Agency will guarantee the rural area portion of the project and only the portion of the project necessary to provide the essential services to rural areas. The part of the facility located in a non-rural area must be necessary to provide the essential services to rural areas. The availability of funds for CF projects is contingent on its rural area population and the reservation of funds outlined in § 5001.316(e).

§ 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 *5001.104* and be for a borrower eligible to submit an application for the project in accordance with § 5001.120.

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

(1) To construct, enlarge, extend, or otherwise improve the following types of facilities:

(i) Drinking water facilities;

(ii) Sanitary sewage facilities;

(iii) Solid waste disposal facilities; or

(iv) Storm wastewater disposal facilities.

(2) Purchase *and installation* of equipment to operate, maintain, or protect facilities. *Meters and pumps are considered equipment. The purchase of equipment must include its installation. The purpose of this item is not to increase a borrower's inventory.*

(b) Public use. The project must be for a public purpose.

(c) Project location. The project must be located in a rural area as defined in § 5001.3 of this part. For utility service projects serving both rural and non-rural areas the Agency will guarantee only the portion of the project necessary to provide the essential services to rural areas.

(d) Service area.

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

(2) The lender must determine that, when feasible and legally possible, inequities within the project's service area for the same type service proposed will be remedied by the borrower on, or before, completion of the project. Inequities are defined as unjustified variations in availability, adequacy, or quality of service. User rate schedules for portions of existing systems or facilities that were developed under different financing, rates, terms, or conditions do not necessarily constitute inequities.

§ 5001.105 Eligible B&I projects and requirements.

For a B&I 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) Purpose. The purpose of the project must be to improve, develop, or finance business, industry, and employment and improve the economic and environmental climate in rural communities; the conservation, development, and use of water for aquaculture purposes; and reducing reliance on nonrenewable energy resources through development and construction of solar energy and other renewable energy systems.

(b) Type of project. The project must be for one or more of the uses described in paragraphs (b)(1) through (22) of this section.

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

(2) Business acquisitions, start-ups, and expansions if jobs will be created or saved. A business acquisition is considered the acquisition of an entire business, not a partial stock acquisition in a business. However, acquisition or change of ownership between existing owners is an eligible project when the remaining owner(s) held their ownership and actively participated in the business operation for at least the past 24 months and the selling owner will not retain any ownership interest in the business directly or indirectly including through other entities or trusts or property rights.

(3) Purchase and installation of machinery and equipment.

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

(5) Pollution control and abatement.

(6) Purchase of membership, stocks, bonds, or debentures necessary to obtain a loan from a member owned lending institution provided the purchase is required for all their borrowers and is the minimum amount required.

(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.*

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

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

(A) Commercial nurseries engaged in the production of ornamental plants, trees, and other nursery products, such as bulbs, flowers, shrubbery, flower and vegetable seeds, sod, and the growing of plants from seed to the transplant stage;

(B) Forestry, which includes businesses primarily engaged in the operation of timber tracts, tree farms, forest nurseries, harvesting of forest products, and related activities, such as reforestation;

(C) The growing or harvesting of mushrooms;

(D) The growing of hydroponics;

(E) The boarding and/or training of animals;

(F) Commercial fishing; and

(G) Production of algae and aquaculture, including conservation, development, and utilization of water for aquaculture.

(8) Tourist and recreation facilities, including hotels, motels, bed and breakfast establishments, and resort trailer parks and campgrounds. *Many requests will meet the "loan purpose" eligibility test but may not be credit worthy due to high risk. Tourism and recreation projects can be a vital part of a rural area's economic development strategy. On the other hand, they are typically difficult credit decisions due to the risks involved. An independent feasibility study to make sure that demand, utilization, and related cash flow issues are looked at closely may be warranted. Work closely with the lender, early in the process, on credit quality.*

(9) Educational or training facilities.

(10) CF projects consistent with § 5001.103 when not eligible for financing through Rural Housing Service or Community Facilities programs.

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

(12) Constructing or equipping facilities for lease to private businesses engaged in commercial or industrial operations.

(13) Financing for mixed-use properties involving both commercial business and residential space is authorized, provided that not less than 50 percent of the business's projected revenue will be generated from business use.

(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, unless otherwise mitigated by the lender and approved by the Agency. *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) Projects that process, distribute, aggregate, store, and/or market locally or regionally produced agricultural food products to support community development and farm and ranch income.

(i) Subject to each of the following, projects may be located in non-rural areas as well as in rural areas if the project:

(A) Expands or preserves the availability of staple food in underserved areas with moderate and low-income populations by maintaining or increasing the number of retail or institutional outlets that offer an assortment of healthy perishable foods and staple food items;

(B) The project will create or retain quality jobs for low-income residents of the community;

(C) A significant amount of the food is locally or regionally produced and sold; and

(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. *This may be a condition of the conditional commitment. 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.*

(ii) The Agency will give funding priority to projects that provide a benefit to underserved communities in accordance with § 5001.318(d)(5) of this part.

(16) The purchase of cooperative stock by individual farmers or ranchers in a farmer or rancher cooperative or the purchase of transferable cooperative stock in accordance with § 5001.140(a) and (b); or the purchase of stock in a business by employees forming an ESOP or worker cooperative in accordance with § 5001.140(d).

(17) The purchase of preferred stock or similar equity issued by a cooperative or a loan to a fund that invests primarily in cooperatives in accordance with § 5001.140(c). *State directors are not authorized to approve or make any commitment on any application to purchase cooperative stock before the national office has reviewed the feasibility study of the cooperative and authorized processing of cooperative stock purchase loans. The state director should submit feasibility studies to the National Office Program Processing Division with an analysis and recommendation.*

(18) Loans to cooperatives.

(i) Guaranteed loans to eligible cooperative 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 cooperative may also be made in non-rural Areas provided:

(A) The primary purpose of the guaranteed loan is for a facility to provide value-added processing for agricultural producers that are

located within 80 miles of the facility;

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

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

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

(iii) An eligible cooperative may refinance an existing B&I guaranteed loan if the existing loan is current and performing, the existing loan is not and has not been in monetary default or the collateral has not been converted, and there is adequate security and collateral for the new guaranteed loan.

(19) Taxable corporate bonds when the bonds are fully amortizing and comply with all provisions of *§ 5001.451 of* this part, bond proceeds were used for an eligible purpose in this part, and the lender as bond holder retains the percent of the bond in accordance with § 5001.408(a)(3)(i) of this part. The bonds must be fully secured with collateral in accordance with § 5001.202(b)(4) of this part. The bonds must only provide for a trustee when the trustee is totally under the control of the lender. The bonds must provide no rights to bond holders other than the right to receive the payments due under the bond. For instance, the bonds must not provide for bond holders replacing the trustee or directing the trustee to take servicing actions, such as accelerating the bonds. In accordance with § 5001.127(f), convertible bonds are not eligible under this paragraph due to the potential conflict of interest of a lender having an ownership interest in the borrower. An explanation of the type of bond and other bond stipulations must be attached to the bond.

(i) The bond issuer must obtain the services and opinion of an experienced bond counsel, who must present a legal opinion stating that the bonds are legal, valid, and binding obligations of the issuer and that the issuer has adhered to all applicable laws.

(ii) The bond holder (lender) must purchase all the bonds issued pursuant to the guaranteed *loan* and comply with all Agency regulations. There must be a bond purchase agreement between the issuer and the bond holder. The bond purchase agreement must contain similar language to that required in a loan agreement and must not

conflict with this part. The bond holder is responsible for all servicing of the guaranteed loan evidenced by the bond, although the bond holder may contract for servicing assistance, including contracting with a trustee who remains under the lender's total control.

(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.*

(21) Development and construction of RES, including modification of existing systems that are commercially available and that are not otherwise eligible under REAP, or if funding is not available in the eligible REAP program. *All energy projects must be evaluated in the same manner as an eligible project financed under the REAP program.*

(22) Integrated processing equipment and systems, such as biorefineries, renewable energy systems, and chemical manufacturing facilities, must utilize commercially available technology, equipment, and systems and demonstrate technical merit. The Agency will evaluate the following areas in making the technical merit determination:

(i) Qualifications of the project team;

(ii) Agreements and permits;

(iii) Resource assessment;

(iv) Design and engineering;

(v) Project development;

(vi) Equipment procurement and installation; and

(vii) Operations and maintenance. *The demonstration of technical merit is the completion of 2 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.

(c) Facility location. The project must be located in a rural area, except for loans to cooperative in accordance with paragraph (b)(18)(ii) of this section and for loans to local foods projects in accordance with paragraph (b)(15)(i) of this section where such projects may also be located in non-rural areas. For an eligible project that located in both rural and non-rural areas, the Agency will guarantee only the amount necessary to finance that portion of the project located in the eligible rural area.

(d) Capital and equity. Borrowers are required to have sufficient capital or equity to mitigate the ongoing financial and operational risks of the business. Balance sheet equity will be determined based upon current and projected borrower financial statements. *Current and projected financial statements filed with the application are reviewed to determine if the balance sheet equity requirement can likely be met.* The following capital and equity requirements must be met at the time of lender's closing of the guaranteed loan. *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.*

(1) Existing businesses must meet one of the following requirements:

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

(ii) A 10 percent or more of total eligible project costs, borrower investment of equity or other funds into the project including grants or subordinated debt when subject to a standstill agreement;

(iii) Balance sheet equity includes owner-contributed capital of ten percent or more of total fixed assets (net total fixed assets plus depreciation.)

(2) New businesses with sales contract(s) with proceeds in an amount adequate to meet debt service and the term of the sales contract(s) are at least equal to the term of the guaranteed loan, and subject to Agency acceptance of the credit worthiness of the counterparty *(entity our borrower is contracting with),* the borrower must meet one of the following requirements:

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

(ii) Borrower investment of equity or other funds (including subordinated debt when subject to a standstill agreement and grants) into the project in an amount of 10 percent or more of total eligible project cost;

(3) New businesses with a project involving construction and when the lender will request the loan note guarantee prior to completion of construction must meet one of the following requirements:

(i) A minimum of 25 percent balance sheet equity at guaranteed loan closing; or

(ii) Borrower investment of equity or other funds into the project in an amount of 25 percent or more of total eligible project cost;

(4) All other borrowers that are new businesses must meet one of the following requirements:

(i) A minimum of 20 percent balance sheet equity, or a maximum debt-to-equity ratio of 4 to 1, at guaranteed loan closing, or;

(ii) Borrower investment of equity or other funds into the project in an amount of 25 percent or more of total eligible project cost;

(5) Variances in capital and equity requirements.

(i) Increases. The Agency may increase the capital or equity requirement specified under paragraphs (d)(1) through (4) of this section for guaranteed loans the Agency determines carry a higher risk. In determining whether a project or guaranteed loan carries a higher risk, the Agency will consider the current status of the industry, concentration of the industry in the Agency's portfolio, collateral coverage, value of personal or corporate guarantees, cash flow, and contractual relationships with suppliers and buyers; credit rating of the borrower; and the strength of the feasibility study and experience of management. The Agency may also increase the capital or equity requirement for new businesses using integrated processing equipment and systems such as biorefineries, renewable energy systems, chemical manufacturing facilities, and businesses producing new products to sell into new and emerging markets.

(ii) Reductions. The Agency may reduce the minimum equity requirement for an existing business when personal or corporate

guarantees are obtained in accordance with § 5001.204 of this part; and all pro forma and historical financial statements indicate the business to be financed meets or exceeds the median quartile (as identified in the Risk Management Association's Annual Statement Studies or similar publication) for the current ratio, quick ratio, debt-to-worth ratio, and debt service coverage ratio.

(6) Certification: The lender must certify that, as of the date the guaranteed Loan was closed, its credit analysis indicated that the borrower had sufficient capital or equity to mitigate the financial and operational risks of the business, and that the borrower met the minimum equity required by the Agency in its conditional commitment, or that the minimum borrower capital contribution toward project costs, as applicable and required by the Agency, was met. A copy of the borrower's loan closing balance sheet must be included with the lender's certification.

Table 1 to § 5001.105(d) – Capital Equity Requirements Summary
Borrower must meet one of the following at the time of the closing of the guaranteed loan:

Borrower	Percent balance sheet equity:	Borrower investment as percent of total eligible project cost:	Balance sheet equity includes owner contributed capital as percentage of total fixed assets:
Existing Business	≥10%	≥10%	≥10%
Borrowers that are new businesses with sales contract(s) adequate to meet debt service and the term of the sales contract(s) are at least equal to the term of the guaranteed loan.	≥10%	≥10%	N/A
Borrowers that are new businesses for a project involving construction and the lender will request the loan note guarantee prior to	≥25%	≥25%	N/A

completion of construction.			
All other borrowers that are new businesses	≥20%	≥25%	N/A

§ 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. If taxable bonds are utilized as debt instruments the provisions of § 5001.105(b)(19) must be met.

(a) The project must be for—

(1) The purchase of a new or existing RES;

(2) The purchase of a refurbished RES; or

(3) The retrofitting of an existing RES. *Examples include, but are not limited to:*

(i) installing a steam turbine at an ethanol plant;

(ii) installing a combined heat and power system for a pellet production facility;

(iii) installing a feedstock pre-treater on an existing biodiesel production plan;

(iv) Installing a battery as a power back up for a photovoltaic solar system; or

(v) replacing blades on a wind turbine.

(4) For the purposes of this section, only those hydroelectric sources with a rated power of 30 megawatts or less are an eligible RES.

(b) The RES project must use commercially available technology.

(c) The RES project must be located in a rural area unless the borrower is an agricultural producer and the application supports the production, processing, vertical integration, or marketing of agricultural products. If the agricultural

producer's operation is in a non-rural area, then the application can only be for RES components that are:

(1) Directly related to, and their use and purpose is limited to the agricultural production operation, such as vertically integrated operations, and

(2) Part of and co-located with the agricultural production operation.

(d) Where a residence is closely associated with an agricultural operation or rural small business to be served by the RES project, 50 percent or more of the energy to be generated by the RES project must be used by the agricultural operation or rural small business. This provision must be documented with the application and can be demonstrated using either of the methods identified in paragraphs (d)(1) and (2) of this section.

(1) Provide a renewable energy site assessment or other documentation and calculations that demonstrate based on historical energy use that 50 percent or more of the energy to be produced by the RES project will be used in the agricultural operation or rural small business. This includes documentation on historical residential energy use. The Agency may request additional data to determine residential versus business or agricultural operation usage. The actual percentage of energy determined to benefit the rural small business or agricultural operation will be the basis to determine eligible project costs.

(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) The RES project must have technical merit. The Agency will use the information provided in the technical report submitted with the application (see § 5001.307(e) of this part) to determine if the project has technical merit. In making this determination, the Agency may engage the services of other Government agencies or other recognized industry experts in the applicable technology field, at its discretion, to evaluate the technical report. *State staff will review for technical merit, however if assistance is requested, a request may be made to a qualified national office OneRD team member to perform or outsource the review.*

(1) Technical report areas. When making its technical merit determination, the Agency will evaluate the technical report using the areas specified in paragraphs (e)(1)(i) through (iii) of this section as applicable.

(i) RES projects with total project costs of $80,000 or less. For these projects, the Agency will evaluate the following areas in making the

technical merit determination:

(A) Project description;

(B) Resource assessment;

(C) Project economic assessment; and

(D) Qualifications of key service providers.

(ii) RES projects with total project costs of less than $200,000, but more than $80,000. For these projects, the Agency will evaluate the following areas in making the technical merit determination:

(A) Project description;

(B) Resource assessment;

(C) Project economic assessment;

(D) Project construction and equipment; and

(E) Qualifications of key service providers.

(iii) RES projects with total project costs of $200,000 and greater. For these projects, the Agency will evaluate the following areas in making the technical merit determination:

(A) Qualifications of the project team;

(B) Agreements and permits;

(C) Resource assessment;

(D) Design and engineering;

(E) Project development;

(F) Equipment procurement and installation; and

(G) Operations and maintenance.

(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.

(i) A project whose technical report receives a "pass" in each of the applicable areas will be considered to have "technical merit."

(ii) A project whose technical report receives a "pass with conditions" in one or more the applicable areas will be considered to have "conditional technical merit."

(iii) A project whose technical report receives a "fail" in any one area will be considered to be "without technical merit."

(4) Further processing of applications. A project that is determined to have "technical merit" or "conditional technical merit" is eligible for further consideration for funding. Projects with "conditional technical merit" would be subject to funding conditions that would need to be met to ensure full technical merit prior to completion of the project. A project that is determined to be "without technical merit" is not eligible to compete for funding.

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

For a REAP EEI project to be eligible for a loan guarantee under this part, it must meet the criteria specified in § 5001.102(a) through (c) and also specified in paragraphs (a) through (d) of this section and be for a borrower eligible to submit an application for the project in accordance with § 5001.126. If taxable bonds are utilized as debt instruments the provisions of §5001.105(b)(19) must be met.

(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 has completed at least five energy assessments or energy audits on similar type projects.

(b) Eligible EEI include, but are not limited to:

(1) Efficiency improvements to existing RES; and

(2) 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. *Refers to replacement buildings, not solely new building construction.*

(c) The EEI project must be for a commercially available technology.

(d) The EEI project must be located in a rural area unless the borrower is an agricultural producer and the Application supports the production, processing, vertical integration, or marketing of agricultural products. If the agricultural producer's operation is in a non-rural area, then the application can be for only EEI components that are:

(1) Directly related to and have a use and purpose limited to an agricultural production operation such as vertically integrated operations; and

(2) Part of and co-located within the agricultural production operation.

(e) The EEI project must have technical merit. The Agency will use the information provided in the technical report submitted with the application (see § 5001.307(e)) to determine whether the project has technical merit. In making this determination, the Agency may, at its discretion, engage the services of other Government agencies or other recognized industry experts in the applicable technology field to evaluate and rate the technical report.

(1) Technical report areas. When making its technical merit determination, the Agency will evaluate the technical report using the areas specified in paragraphs (d)(1)(i) and (ii) of this section as applicable.

(i) EEI project with total project costs of $80,000 or less. For these projects, the Agency will evaluate the following areas to determine the technical merit:

(A) Project description;

(B) Qualifications of EEI provider(s); and

(C) Energy assessment (or energy audit if applicable).

(ii) EEI projects with total project costs of greater than $80,000. For these projects, the Agency will evaluate the following areas to determine the technical merit:

(A) Project information;

(B) Energy assessment (or energy audit as applicable); and

(C) Qualifications of the contractor or installers.

(2) Pass/pass with conditions/fail assignments. The Agency will assign each area of the technical report, as specified in paragraph (d)(1) of this section, a "pass," "pass with conditions," or "fail" according to provisions of § 5001.106(e)(2).

(3) Determination. The Agency will compile the results for each area of the technical report to determine if the project has technical merit in accordance with provisions of § 5001.106(e)(3).

(4) Further processing of applications. Projects will be further processed in accordance with provisions of § 5001.106(e)(4).

§ 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. If the borrower plans to use

taxable bonds as debt instruments the provision § 5001.105(b)(19) must be met.

(a) The project must be for the purchase and installation of energy efficient equipment or systems for agricultural production or processing that exceed the following standards:

(1) Energy efficiency building codes, if available;

(2) Federal or State energy efficiency standards, if available; and

(3) Other energy efficiency standards determined appropriate by the Secretary.

(i) If no codes or standards described in such subparagraph apply to the energy efficient equipment or system to be purchased or installed pursuant to such subparagraph, the Secretary shall require, to the maximum extent practicable, such equipment or systems to meet the same efficiency measurements as the most efficient available equipment or system in the market; and

(ii) The Secretary shall not provide such a loan guarantee for the purchase or installation of any energy efficient equipment or system unless more than one type of such equipment or system is available in the market.

(b) The EEE project must be for commercially available technology.

(c) The EEE project must have technical merit as certified by the vendor/installer. An application that does not include said certification will be deemed incomplete and therefore is not eligible to compete for funding.

(d) 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) above.

§§ 5001.109 – 5001.114 [Reserved]

§ 5001.115 Ineligible projects - general.

The Agency will not issue a loan guarantee under this part for any of the projects identified in this section, unless otherwise noted. *If there is any doubt or question in any situation, contact the national office for guidance.* The following are ineligible projects for the CF, WWD, B&I and REAP programs:

(a) Any investment or arbitrage, or any speculative real estate investment other than cooperative stock, transferable stock, cooperative equity in accordance with § 5001.140 and NMTC projects in accordance with § 5001.141.

(b) Golf courses and golf course infrastructure, including par-3 and executive golf courses; racetracks or facilities for the conduct of races by animals, professional or amateur drivers or jockeys; for-profit zoos or safaris; and publicly-owned or non-profit amusement parks, water parks, and similar recreational type facilities inherently commercial in nature and primarily used for recreational purposes.

(c) Motion pictures and theatrical productions.

(d) Funding of political or lobbying activities.

(e) Guaranteeing loans made by other Federal agencies, lines of credit, or lease payments.

(f) Projects that the Agency determines create, directly or indirectly, a conflict of interest.

(g) Properties to be used for primarily commercial rental when the borrower has no control over tenants and services offered, except for industrial-site infrastructure development

(h) Projects that utilize technology, equipment, or systems that are not commercially available.

(i) Projects that will violate the requirements of 7 CFR part 1970, *Environmental Policies and Procedures*, or any statutes or Executive Orders regarding environmental requirements.

(j) Projects used primarily for the purpose of housing Federal, State, or quasi-Federal agencies, unless it is typical of the area for communities to provide this space.

(k) Community antenna television and radio services or facilities.

(l) Telephone systems. *Generally, financing telephone systems is an eligible purpose in the RUS Telecom programs. There may be an exception when the applicant or project is not eligible for the RUS Telecom program in which case one of the programs in 7 CFR 5001 may be considered. State Program Directors should discuss any project inquiries with the respective National Office program area before encouraging an application.*

(m) New combined sanitary and storm water sewer facilities.

(n) Owner-occupied housing.

(o) Loans on which the interest is excludable from income under current or a successor statute of the Internal Revenue Code. Funds generated through the issuance of tax-exempt obligations cannot be used to purchase the guaranteed portion of any Agency guaranteed loan and an Agency guaranteed loan cannot serve as collateral for a tax-exempt issue.

(p) Residential EEI projects.

(q) Except as provided in § 5001.106(d), residential RES projects.

(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. Borrowers and lenders inquiring about projects with faith based aspects will be provided a copy of 7 CFR Part 16 to clarify what is, and is not, allowable when federal funds are involved. The Office of General Counsel (OGC) will provide an eligibility review of all projects whose borrowers are religious organizations. The following items will be submitted to OGC:*

(1) Borrower's organizational documents;

(2) A detailed project description; and

(3) A memo that details:

(i) Type of Agency funding;

(ii) Collateral;

(iii) Project purpose;

(iv) Any religious aspect to the project; and

(v) Determination that the project is open to the entire community regardless of an individual's religious preference.

(s) Self-storage facilities. *Self-storage facilities typically have minimal job creation and there is limited or no control of the contents and actions of the tenants, therefore stand-alone self-storage facilities are not allowed.*

§ 5001.116 Ineligible CF projects

The following are ineligible projects for the CF program only:

(a) For industrial park sites, the financing of on-site utility systems or business and industrial buildings.

(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(a)(11) for the eligibility of a commercial enterprise leasing space in an eligible project*;

(c) Projects where construction is completed prior to filing an application with the Agency. This restriction applies to construction completed by or for the borrower and does not preclude the purchase or acquisition of a building constructed by an independent third party or refinancing of debt in accordance with § 5001.102(d).

(d) Projects where the borrower acts to circumvent the regulations provided in this subpart, causing the borrower or project being eligible when, previously, the borrower or project was ineligible.

(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.

§ 5001.117 Ineligible WWD projects

The following are ineligible projects for the WWD programs only:

(a) That portion of a project normally provided by a business or industrial user, such as wastewater pretreatment.

(b) Provided the existing borrower has the capacity to provide adequate service to their service territory, guaranteed loan funds may not be used to take away customers or service areas of existing *USDA* WWD Program direct or guaranteed loan borrowers. The requirements and limitations of 7 U.S.C. 1926(b) only apply to this section.

(c) Projects where the borrower acts to circumvent the regulations provided in this subpart, causing the borrower or project being eligible when, previously, the borrower or project was ineligible.

(d) 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.

§ 5001.118 Ineligible B&I projects

The following are ineligible projects for the B&I program only:

(a) The financing of timeshares, residential trailer parks, apartments, duplexes, or other residential housing where the primary purpose is independent housing except as authorized in § 5001.105(b)(8), or housing development sites except as authorized in § 5001.105(b)(1).

(b) Projects eligible for funding under B&I that are in excess of $1 million that would either:

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

(2) Increase direct employment by more than 50 employees, which is calculated to or likely to result in an increase in the production of goods, materials, commodities, or the availability of services or facilities in the area when there is not sufficient demand for such goods, materials, commodities, services, or facilities to employ the efficient capacity of existing competitive commercial or industrial enterprises, unless such financial or other assistance will not have an adverse effect upon existing competitive enterprises in the area. *If the loan application is in excess of $1 million and the project will increase direct employment by more than 50 employees, the state should immediately send notification to the National Office Program Processing Division to begin the Department of Labor clearance process.*

§ 5001.119 Ineligible REAP projects

Owner occupied bed and breakfasts are ineligible projects in the REAP program. *Non-owner occupied bed and breakfasts are eligible.*

§ 5001.120 [Reserved]

§ 5001.121 Eligible uses of loan funds.

Guaranteed loan funds can only be used for the items specified in this section *and for any other item the Agency identifies on the Agency's website at https://www.rd.usda.gov/onerdguarantee and in the Federal Register.*

(a) CF projects. Guaranteed loan funds for an essential CF project receiving a loan guarantee under § 5001.1 may be used to pay the expenses identified in paragraphs (a)(1) through (3) of this section.

(1) When necessary to ensure the successful operation or protection of the project authorized in § 5001.103*, subpart B*:

(i) Costs for the construction or relocation of public buildings, roads, bridges, fences, utilities, or to make other public improvements; and

(ii) Costs for the relocation of private buildings, roads, bridges, fences, or utilities, and other private improvements.

(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*, subpart B* 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 dirt work is being completed in preparation for the eligible road project, the borrower takes advantage of the construction site to install underground conduit in anticipation of installing fiber optic cables in the near future.*

(3) When necessary as part of a guaranteed loan to finance a project:

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

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

(iii) Professional service fees and charges provided the Agency agrees that the amounts are reasonable and customary in the area;

(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;

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

(vi) Costs of purchasing or renting equipment necessary to install, maintain, extend, protect, operate, or utilize facilities;

(vii) Obligations for construction worked performed prior to filing an Application with the Agency. Construction work must not be started (and obligations for such work or materials must not be incurred) before the conditional commitment is issued. If there are compelling reasons for proceeding with construction before the conditional commitment is issued, lenders may request Agency approval to pay such obligations and not jeopardize receipt of a loan guarantee from the Agency. Such request must comply with the following conditions:

(A) Provide conclusive evidence that the contract was entered into without intent to circumvent the Agency regulations, including but not limited to 7 CFR part 1970;

(B) Modify the outstanding contract to conform to the provisions of this part. When this is not possible, modifications will be made to the extent practicable and, at a minimum, the contract must comply with all State and local laws and regulations as well as statutory requirements and Executive Orders related to the Agency guarantee.

(C) When construction is complete and it is impracticable to modify the contract, the borrower and lender must provide a certification by an engineer or architect that any construction performed complies fully with the plans and specifications; and

(D) The borrower and the contractor must have complied with all statutory and Executive Order requirements related to the Agency guarantee for construction already performed even though the requirements may not have been included in the contract documents.

Refinancing in accordance with § 5001.102(d) is also an eligible use of funds.

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

(b) WWD projects. Guaranteed loan funds for a WWD project receiving a loan guarantee may be used to pay the expenses identified in paragraphs (b)(1) through (10) of this section when they are a necessary part of the WWD project.

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

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

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

(4) 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 development of the project.

(5) Purchasing or renting equipment necessary to install, maintain, extend, protect, or operate the project.

(6) Cost of additional borrower labor and other expenses necessary to install and extend service.

(7) Interest incurred during construction in conjunction with interim financing.

(8) Initial operating expenses, including interest, for a period ordinarily not exceeding one year when the borrower is unable to pay such expenses. *A longer time period may be allowed. The lender must provide justification and the Agency must document the reason for granting the longer time.*

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

(10) Purchase of equipment to operate, maintain, or protect facilities. *Equipment, such as meters, can be an eligible use of funds or a project itself.*

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

(c) B&I projects. Guaranteed loan funds for a project receiving a loan guarantee under § 5001.1 may be used to pay the expenses identified in paragraphs (c)(1) through (12) of this section.

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

(2) Business acquisitions provided that jobs will be created or saved. A business acquisition is considered the acquisition of an entire business, not a partial stock acquisition in a business. However, acquisition or change of ownership between existing owners is an eligible use of loan funds when the remaining owner(s) held their ownership and actively participated in the

business operation for at least the past 24 months and the selling owner will not retain any ownership interest in the business directly or indirectly including through other entities or trusts or property rights.

(3) Purchase of machinery and equipment.

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

(5) Pollution control and abatement.

(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 preapplication or 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. 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 payoff 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 preapplication 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 section 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.*

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

(8) Lender fees, as determined under § 5001.403.

(9) Professional service fees and charges, provided the Agency approves the amounts as reasonable and customary in the area and fees for construction permits and licenses.

(10) Feasibility studies and business plans.

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

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

(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.*

(1) Purchase and installation of new or refurbished RES.

(2) Purchase and installation of energy efficient equipment and systems by eligible agricultural producers.

(3) Construction, retrofitting, replacement, and improvements.

(4) Energy efficiency improvements (EEI) identified by vendor/installer certification or in the applicable energy assessment or energy audit.

(5) Fees for construction permits and licenses, including fees required by an interconnection agreement.

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

(7) Professional service fees and charges related to the project, which may include non-deferred developer fees, provided the Agency approves the amounts as reasonable and customary in the area.

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

(9) Working capital, which may include interest on interim financing, debt reserves, rent payments, insurance, and *loan* packaging and origination fees.

(10) Land acquisition.

(11) Energy assessments, energy audits, technical reports, business plans, and feasibility studies completed and acceptable to the Agency, provided no portion was financed by any other Federal or State grant or payment assistance, including, but not limited to, a REAP energy audit or renewable energy development assistance grant.

(12) For an eligible RES project in which a residence is closely associated with the rural small business or agricultural operation, the installation of a second meter to separate the residence from the portion of the project that benefits the rural small business or agricultural operation, as applicable.

(13) Land, building, and equipment for an existing RES.

(14) Refinancing outstanding debt when—

(i) The original purpose of the debt being refinanced meets the eligible project requirements of § 5001.106, § 5001.107 or § 5001.108, as applicable, of this part;

(ii) Debt being refinanced does not exceed 50 percent of the total use of funds in the new REAP guaranteed loan;

(iii) Refinancing is necessary to improve cash flow and viability of the project;

(iv) At the time of application, the loan being refinanced has been current for at least the past 6 months (unless such status is achieved by the lender forgiving the borrower's debt); and

(v) The lender is providing better rates or terms for the loan being refinanced.

The Agency does not consider it to be refinancing for REAP if a loan was structured as interim, as in a construction or bridge loan, for short term financing needs in preparation for a long term loan.

§ 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 (m) 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. *Payment of market area wages to employees of a closely-related company are permitted.*

(b) Notwithstanding § 5001.102(d), payment on any other Federal loan or debt.

(c) Payment of a Federal judgment, State or Federal tax lien, or other debt owed to the United States.

(d) Loan finder or broker fees.

(e) Refinancing debt that is owned by a loan packager or broker or their respective affiliates. *This is a conflict of interest issue.*

(f) For loans as specified under CF and WWD, costs normally provided by a business or industrial user (e.g., wastewater pretreatment).

(g) For loans as specified under CF and WWD, any portion of the cost of a project that does not serve a rural area.

(h) Rental for the use of equipment or machinery owned by the borrower.

(i) For purposes not directly related to operating and maintaining the project.

(j) Any EEI not identified in the applicable *vendor/installer certification,* energy assessment or energy audit.

(k) Agricultural tillage equipment, used equipment, and vehicles are ineligible for loans as specified under REAP. *Ineligible Project Costs include costs for RES and/or EEI projects that are used to improve a vehicle's ability to propel itself. 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. 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 project costs if all other borrower and project eligibility requirements are met.*

(l) Guaranteed loan funds cannot be used for the distribution or payment to a member of the immediate family of an owner, partner, stockholder, or member of the borrower except for a change in ownership of the business where the selling person does not retain an ownership interest and the Agency determines in writing the price paid to be reasonable based upon an independent 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 as 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.*

(m) For loans as specified under CF, initial operating expenses, short-term, working capital or operating loans; or annual recurring costs, including purchases or rentals that are generally considered to be operating and maintenance expenses.

(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.

§§ 5001.123 – 125 [Reserved]

§ 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 Project and services and to obtain, give security for, and repay the proposed loan.

(1) Operating, maintaining, and managing 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 project 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.*

(2) Co-borrowers. Except for CF guaranteed loans, in situations where any business or affiliate is dependent upon another's operations and are effectively one business or rely upon one another for loan repayment, they must be co-borrowers, unless waived by the Agency in writing when the Agency determines that adequate justification exists to not require the entities to be co-borrowers. Both co-borrowers must meet all requirements in this part. If the operating entity is truly independent and not reliant on another operation to remain viable or repay the debt, the Agency will allow one entity to be the sole borrower.

(b) CF loan guarantees. To be eligible for a loan guarantee under CF, a borrower must meet the requirements identified in paragraphs (b)(1) through (4) of this section.

(1) Borrower type. Be a public body, including Indian tribes on Federal and State reservations and other federally-recognized Indian tribes, or non-profit organization.

(i) Borrowers organized under the applicable State or Tribal for-profit corporation laws may be eligible if they will be operated on a not-for-profit basis for the duration of the guaranteed loan;

(ii) Single member not-for-profit corporations or not-for-profit corporations owned or substantially controlled by other corporations or associations are eligible if the member organization has significant ties with the project service area and provides a payment guarantee.

(2) Significant ties. Have significant ties with the project service area (not applicable to public bodies and federally recognized Tribes) as evidenced by the following:

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

(ii) Broadly based membership and controlled primarily by members residing in the project service area. Membership must be open without regard to race, color, religion, national origin, sex, age, disability, sexual orientation, or marital or familial status.

(3) 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. *The results of the Agency determination of availability of other credit must be documented in the official file to support the loan guarantee made the credit available when private financial sources would not otherwise do so, or the loan guarantee provided more favorable terms to the borrower than would otherwise be granted. Documentation may include information such as rates and terms from other lenders and why they are not available without a guarantee or are not reasonable and/or affordable. Blanket statements of "other credit is not available" are not acceptable.*

(4) Evidence of significant community support. In accordance with 7 U.S.C. 2009h, the evidence shall be in the form of a certification of support for the project from each affected local government. The certification of support should include sufficient information to determine that the essential community facility will provide needed services to the community or

communities and will have no adverse impact on other community facilities providing similar services.

(c) WWD loan guarantees. To be eligible for a loan guarantee under WWD, a borrower must meet the requirements identified in paragraphs (c)(1) through (3) of this section.

(1) Borrower type. Be a public body, including Indian tribes on Federal and State reservations and other Federally recognized Indian tribes, or non-profit organization.

(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. The processing office must maintain a current list of commercial lenders who are interested in financing the type of water and waste projects funded by the Agency including commercial lenders for direct loans as well as for guaranteed loans. If the processing official's review of the lenders analysis shows the borrower may be able to afford commercial credit at reasonable rates and terms without the guarantee, and documentation is insufficient, the processing official may inquire to the lender as to why the loan needs the guarantee. The fact that a commercial lender's rates are higher than current WEP interest rates does not necessarily mean that the commercial rate is not reasonable if the proposed rate is not materially higher than other commercial lenders for the same type of loan. The same philosophy applies to a shorter term on the loan than that which is allowable in accordance with the regulations if the reason is properly documented. This determination by the processing official must be reflected in the case file in such a manner that a knowledgeable person could read it and fully understand how the decision was made that credit from commercial sources is reasonable with the guarantee. Blanket statements of "other credit is not available" are not acceptable.*

(3) Evidence of significant community support. In accordance with 7 U.S.C. 2009h, the evidence shall be in the form of a certification of support for the project from each affected local government.

(d) B&I loan guarantees. To be eligible for a loan guarantee under B&I, a borrower must meet the requirements specified in paragraphs (d)(1) through (4), as applicable, of this section.

(1) The borrower must be:

(i) A cooperative, corporation, partnership, or other legal entity organized and operated on a profit or nonprofit basis;

(ii) An Indian Tribe

(iii) A Public Body; or

(iv) An individual.

(2) The borrower must be engaged in or proposing to engage in a business. A business may include manufacturing, wholesaling, retailing, providing services, or other activities that will provide employment or improve the economic or environmental climate in rural communities.

(3) A borrower who is an individual must:

(i) Be a citizen of the United States;

(ii) Reside in the United States after being legally admitted for permanent residence and must provide a permanent green card as evidence of eligibility; or

(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, and the Republic of the Marshall Islands. *Applications may neither be approved, nor a Conditional Commitment issued subject to meeting the citizenship requirement.*

(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 U.S., loans must be collateralized with fixed assets that remain in the U.S.*

(e) REAP loan guarantees. To be eligible for a loan guarantee under REAP, a borrower must meet the requirements specified in paragraphs (e)(1) through (4) of this section.

(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 must *at the time of application or no later than guaranteed loan closing and for the term of the guaranteed loan*:

(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.

(3) Revenues and expenses. The borrower must have available or be able to demonstrate, at the time of application, satisfactory sources of revenue in an amount sufficient to provide for the operation, management, maintenance, and any debt service of the project for the term of the loan. In addition, the borrower must control the revenues and expenses of the project, including its operation and maintenance. The borrower may employ a qualified consultant under contract to manage revenues and expenses of the project and its operation and/or maintenance.

(4) Matching funds. The borrower must demonstrate evidence of injection of matching funds in the project of not less than 25 percent of total eligible project costs. Passive third-party contributions are acceptable as matching funds for RES projects, including those raised from the sale of Federal tax credits.

§ 5001.127 Borrower ineligibility conditions.

A potential borrower is ineligible for a guaranteed loan under this part as identified in paragraphs (a) through (g) of this section. The borrower remains ineligible until the condition causing ineligibility is resolved.

(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.

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

(2) Delinquency on the payment of Federal income taxes.

(3) Delinquency on a Federal Debt.

(4) Debarment or suspension from receiving Federal assistance.

(b) An entity is ineligible if it derives more than 15 percent of its annual gross revenue (including any lease income from space or machines) from gambling activity, excluding State-authorized lottery proceeds or Tribal-authorized gaming proceeds, as approved by the Agency, conducted for the purpose of raising funds for the approved project.

(c) An entity is ineligible if it derives income from activities of a prurient sexual nature.

(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 since marijuana is a controlled substance under federal law and subject to federal prosecution under the Controlled Substances Act (21 USC 81).*

(e) An entity is ineligible under B&I projects if it is a charitable or fraternal organization. For purposes of this section, an organization that derives more than 10 percent of its annual gross revenue from tax deductible charitable donations, based on historical financial statements, is considered a charitable organization. Fees for services rendered or that are otherwise ineligible for deduction under the Internal Revenue Code are not considered tax deductible charitable donations. *To determine if the business is an organization subject to the 10 percent charitable donation maximum, you should either review the organization's Articles of Incorporation/Organization to see if they are a 501(c)(3) charitable organization or check to see if the organization is listed as a charitable organization on IRS's website:*
http://apps.irs.gov/app/eos/mainSearch.do?mainSearchChoice=pub78&dispatchMethod=selectSearch

(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%* must be recused from any decision-making process associated with the guaranteed loan.

(g) A borrower is ineligible if it is a lending institution, investment institution, or insurance company with exception of REAP or projects for a fund that invests primarily in cooperatives in accordance with § 5001.140, and NMTC projects in accordance with § 5001.141.

§§ 5001.128 – 5001-129 [Reserved]

§ 5001.130 Lender eligibility requirements.

To become a lender under this part, the lending entity must meet the requirements specified in paragraphs (a) through (d) of this section, as applicable, and become an approved participant in the Agency's electronic system. Paragraph (e) of this section contains provisions associated with lenders that have already been approved by the Agency under one of the guaranteed loan programs identified in § 5001.1 of this part. If not yet an Agency-approved lender, the lending entity must include with the application a request for lender approval in accordance with this section.

(a) General. The lending entity must:

(1) Be domiciled in a State;

(2) Not be debarred or suspended by the Federal Government or be an affiliated person of such entity that was suspended or debarred;

(3) Inform the Agency if it is under a consent order, or similar constraint, from a Federal or State agency. The Agency will evaluate the lending entity's eligibility on a case-by-case basis, and assess the risk of loss posed by the consent order or similar constraint, as applicable;

(4) Maintain written standards of conduct covering conflicts of interest; and

(5) Maintain internal audit and management control systems to evaluate and monitor the overall quality of its loan origination and servicing activities.

(b) Regulated lending entities. Regulated lending entities identified in paragraphs (b)(1) through (10) of this section are eligible to receive a loan guarantee under this part without documentation to the Agency provided they are subject to supervision and credit examination by the applicable agency of the United States or a state, or were created specifically by state statute and operate under the direct supervision of a state government authority.

(1) Federal and State chartered banks.

(2) Farm Credit Bank of the Federal Land Bank and other Farm Credit System institutions with direct lending authority to make loans of the type guaranteed under this part.

(3) Bank for Cooperatives.

(4) Savings and Loan Associations.

(5) Savings banks.

(6) Mortgage companies that are part of a bank-holding company.

(7) The National Rural Utilities Cooperative Finance Corporation.

(8) Credit unions.

(9) State Bond Banks or State Bond Pools.

(10) Other lending entities not specified in (1) through (9) above that meet the requirements as specified in § 5001.130(b).

(c) Non-regulated lending entities. The Agency may approve a lending entity that does not meet the criteria of paragraph (b) of this section to become a lender for a period up to five years. Non-regulated lending entity eligibility will expire on January 31 of the fifth year after the date of Agency approval.

(1) Conditions. When the lending entity is a multi-tiered entity, the Agency will consider the lending entity in its entirety. In order to be approved as a lender, a non-regulated lending entity must:

(i) Have the legal authority to operate a lending program;

(ii) Be a financially sound institution that has a record of successfully originating at least five commercial loans annually totaling at least $1 million for each of the last three years, with the lending entity's

commercial loan portfolio in last five years not exceeding:

(A) Six percent average delinquency of all commercial loans, and

(B) Three percent in commercial loan losses (based on the original principal loan amount);

(iii) Have and agree to maintain balance sheet equity in accordance with Section 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;

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

(v) Agree to establish and maintain an Agency-approved loan loss reserve equal to one percent reserve of the unguaranteed portion of all guaranteed loans plus an amount equal to the identified anticipated losses.

(vi) Have written policies and procedures to ensure that internal credit controls provide adequate loan making and servicing guidance that adheres to Federal and State fair lending practices;

(vii) Document and assure to the Agency that the lending entity has the capacity to fulfill the lender functions and responsibilities identified in this part, including, but not limited to §§ 5001.201, 5001.202, 5001.207, and 5001.501.

(2) Written request. A non-regulated lending entity that seeks to become a lender must submit a written request to the Agency including the following information: *Lenders may submit their requests directly to the national office or through the state office who will submit the request to the national office. Requests and documentation can be submitted via CloudVault at* https://new.cloudvault.usda.gov/index.php/s/tmCebnmgJgdwqq7 *by the lender or State Office. The national office will notify and request input from the state office when receiving a direct request. Example request letter is available on OneRD Guarantee Loan Initiative InfoHub.*

(i) The request must clearly define the multiple-entity organizational and control structure with a listing of each entity under its control, including any Community Development Entity (CDE) that may request guaranteed loans under § 5001.141. In addition, the non-regulated lending entity must include each such sub-entity in their audited

financial statements, commercial loan portfolio, and commercial loan performance statistics

(ii) Bylaws

(iii) Audited financial statements for the most recent fiscal year that evidences the required balance sheet equity and that the lending entity has available resources to successfully meet its responsibilities;

(iv) Auditor's most recent management letter and management's response;

(v) An interim financial statement dated within 90 days of the written request, if applicable;

(vi) A copy of any license, charter, State statute, or other third-party evidence of authority to engage in the proposed guaranteed loan making and servicing activities. If licensing by the State is not required, an attorney's opinion stating that licensing is not required and that the lending entity has the legal authority to engage in the proposed guaranteed loan making and servicing activities must be submitted;

(vii) The lender's loan classification scale including their loan classification criteria;

(viii) Information on lending experience, including—

(A) Length of time in the lending business;

(B) Range and volume of lending and servicing activities for the last five years, including a list of the industries for which it has provided financing;

(C) Status of its loan portfolio, including a summary of loans in the portfolio by current loan classification code, a list of any loans restructured or charged off in the previous five years, and the calculated delinquency and loss rates as outlined in paragraph (c)(1)(ii) of this section;

(D) Lending experience of management and loan officers, including staff organizational chart, including names and titles for senior staff;

(E) Largest sources of funds for the last five years and source of

funds for the proposed guaranteed loans;

(F) Office location(s) and proposed lending area(s);

(G) An estimate of the number, size, and type of applications the lending entity will develop over the next six months; and

(H) Proposed Interest rate structure and loan fees, including any loan origination, loan preparation, and servicing fees.

(ix) Description of programs, financial, and non-financial products and services.

(x) Its lending policies including underwriting standards, credit analysis policies and procedures, and its problem credit management policies and procedures.

(xi) A third-party external loan origination, lending portfolio, and management review acceptable to the Agency conducted in the previous two years, or a copy of a credit examination less than two years old conducted under an approved credit examination criterion such as CAMELS. *CAMELS is a rating system used by the FDIC to assess a regulated ba*nk*'s strength, and stands for capital adequacy, asset quality, management, earnings, liquidity and sensitivity to market risk. CAMEL ratings are not made public, but each regulated lender will be provided their CAMEL rating by the FDIC after their examination.*

(3) Approval or disapproval. The Agency will notify the non-regulated lending entity whether its request to become a lender is approved or rejected. If the Agency rejects the request, the Agency will include in the notification the reason(s) for the rejection. *Requests for approval as a non-regulated lending entity will be reviewed at the national office who will make a determination of lender eligibility and track Lender Agreements in a centralized tracking system. This system will be available from the OneRD InfoHub.*

(4) Renewals. To maintain its status as an approved lender, the non-regulated lending entity must submit a request to the Agency for renewal of its approved lender status at least 60 calendar days prior to the expiration of the existing lender's agreement to be assured of a timely renewal. *Lender renewal requests will be processed at the national office. Upon receipt of a lender's renewal request, the national office should, within 15 days, request from the lender any additional information needed to process a renewal*

request. A review of the lender's performance will be completed to determine whether the lender has continually met the eligibility criteria described in paragraph (c) and (d) of this section. The national office will also consider the lender's activity in the program and its delinquency/default rate 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 section 5001.132, will be considered cause for denying the renewal of eligible status. The national office should notify the lender in writing within 30 days of receipt of a request for renewal that the request is approved, reasons for denial, or any conditions the lender must meet for approval. Lenders must be advised of their appeal rights in accordance with Departmental appeal regulations. The national office will update the centralized tracking system of lender agreements once a determination is made available from the OneRD InfoHub. Example of a renewal request letter is available on OneRD Guarantee Loan Initiative InfoHub. The lender must provide in this written request the information specified in paragraphs (c)(2)(i) and (iii) through (v) of this section; and

(i) A written update of any change in the persons designated to process and service Agency guaranteed loans or change in the operating methods used in the processing and servicing of loans since the original or last renewal date of lender status.

(ii) A description of how the lender is complying with each of the required criteria described in (c)(1) of this section and § 5001.501.

(iii) A new executed lender's agreement.

(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 should be reviewed to determine the cause of the loss, including whether the lender's analysis or servicing processes were insufficient.*

(d) Non-regulated lending entities serving tribal trust lands. The Agency may approve a lending entity serving tribal trust lands that does not meet the criteria of paragraph (b) or (c) of this section to become a lender for a five-year period. A non-regulated lending entity approved to originate and service guaranteed loans for

projects located only on tribal trust lands is restricted to such areas. To make and service guaranteed loans not on tribal trust lands, the lending entity must meet the criteria of paragraph (b) or (c) of this section. When the lending entity is a multi-tiered entity, the Agency will consider the lending entity in its entirety for approval.

(1) Conditions. To be approved as a lender, a non-regulated lending entity serving only tribal trust lands must—

(i) Have the legal authority necessary to operate a lending program to borrowers located on tribal trust lands.

(ii) Meet the requirements of paragraph (c)(1) of this section, and prove to be a financially sound institution, as determined by the Agency, on a case by case basis, based on the Agency's risk assessment of the lending entity's capital, adequate liquidity, management capabilities, repayment ability, credit underwriting, balance sheet equity and other financial factors as determined appropriate. On a case-by-case basis, the Agency may reduce the loan origination requirements of paragraph (c)(1)(ii) of this section for lenders serving only projects located on tribal trust lands. *For example, tribal lenders may have commercial lending experience but may not have generated over $1 million of loan volume in each of the past 3 years. The Agency should also review the cause of losses or delinquencies if they exceed the thresholds of paragraph (c)(1)(ii) to determine any impact from insufficient analysis or servicing by the lender.*

(2) Written request. A non-regulated lending entity serving tribal trust lands must submit a written request to the Agency that includes the following information: *Lenders may submit their requests directly to the national office or through the state office who will submit the request to the national office. The national office will notify and request input from the state office when receiving a direct request. Requests and documentation can be submitted via CloudVault at* https://new.cloudvault.usda.gov/index.php/s/tmCebnmgJgdwqq7 *by the lender or State Office.. Example request letter is available on OneRD Guarantee Loan Initiative InfoHub.*

(i) Documentation required by paragraph (c)(2) of this section;

(ii) Written certification that the lender intends to only originate guaranteed loans under the regulation for projects located in certain (or specified) tribal lands held in trust for tribes and for tribal members not in such tribal lands but are in their service area;

(iii) Bylaws; and

(iv) Lending experience of management and loan officers, including staff organizational chart, including names and titles for senior staff.

(3) Approval or disapproval. The Agency will notify the non-regulated lending entity serving tribal trust lands whether its request to become a lender is approved or rejected. If the Agency rejects the request, the Agency will include in the notification the reason(s) for the rejection. *Requests for approval as a non-regulated lending entity serving tribal trust lands will be reviewed at the national office who will make a determination of lender eligibility and track Lender's Agreements in the centralized tracking system.*

(4) Renewals. To maintain its status as an approved lender, the non-regulated lending entity serving tribal trust land must submit a request to the Agency for renewal of its approved lender status at least 60 calendar days prior to the expiration of the existing lender's agreement to be assured of a timely renewal. *Lender renewal requests will be processed at the national office. Upon receipt of a lender's renewal request, the national office should, within 15 days, request from the lender any additional information needed to process a renewal request. A review of the lender's performance will be completed to determine whether the lender has continually met the eligibility criteria described in paragraph (c) and (d) of this section. The national office will also consider the lender's activity in the program and its delinquency/default rate 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 section 5001.132, will be considered cause for denying the renewal of eligible status. The national office should notify the lender in writing within 30 days of receipt of a request for renewal that the request is approved, reasons for denial, or any conditions the lender must meet for approval. Lenders must be advised of their appeal rights in accordance with Departmental appeal regulations. The national office will update the centralized tracking system of lender agreements once a determination is made available from the OneRD InfoHub. Example of a renewal request letter is available on OneRD Guarantee Loan Initiative InfoHub.* The lender must provide in this written request the information specified in paragraphs (c)(2) (i) and (iii) through (v) of this section; and

(i) A written update of any change in the persons designated to process and service Agency guaranteed loans or change in the operating methods used in the processing and servicing of loans since the original or last renewal date of lender status.

(ii) A description of how the lender is complying with each of the required criteria described in (c)(1) of this section and § 5001.501.

(iii) A new executed lender's agreement.

(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 information required by paragraph (c)(2) of this section.

(e) Previously approved lenders. Lenders that have been previously approved by the Agency under one of the guaranteed loan programs identified in § 5001.1(b)(1) through (4) of this part cannot originate new guaranteed loans after the effective date of this rule unless the lender is approved under the applicable conditions of paragraphs (a) through (d), as applicable, of this section.

§ 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 5 years from the date of the original execution of a Lender's Agreement as specified in Section 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. The master list of Lender's Agreements, available from the national office on RD InfoHub, should be checked prior to issuance of any Lender's Agreement. 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.*

§ 5001.132 Maintenance of approved lender status.

Continuation of approved lender status under this part is not automatic. Lenders may lose their approved lender status as described in paragraph (a) of this section. The Agency may also revoke a lender's status as an approved lender or debar the approved lender, as described in paragraph (b) of this section. *State offices must report problems with a lender's eligibility based on a cease and desist order or other lending restrictions implemented by its regulator to the national office.*

(a) Loss of approved lender status. A lender will lose its approved status if it—

(1) Fails to conform with the provisions of this part or the applicable guaranteed loan program identified in § 5001.1 of this part;

(2) Has no outstanding guaranteed loans with the Agency for five consecutive years;

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

(4) A non-regulated lending entity fails to renew its approval status 5 years from the date the Agency executes 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. *National office concurrence is required to revoke a lender's eligible status. The state director will provide a recommendation to the national office via the OneRD Guarantee Loan Initiative Project Manager, for consideration or the national office may make its own decision to revoke a lender's approved status without a recommendation from the state director. 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. The national office will monitor this action and update the centralized tracking system of lender agreements on the OneRD InfoHub.* Cause for revoking lender status includes, but is not necessarily limited to, the circumstances identified in paragraphs (b)(1) through (14) of this section.

(1) Guaranteed loans originated by the lender cause substantial financial loss to the Agency.

(2) Failure to maintain status as an approved lender under the applicable regulations in effect when the lender obtained approved lender status. For lenders approved under this part, this means maintaining compliance with the requirements set forth in § 5001.130.

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

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

(5) Negligent loan origination.

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

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

(8) Failure to provide for adequate construction planning and monitoring in connection with any guaranteed loan to ensure that the project will be completed with the available funds.

(9) Negligent loan servicing.

(10) Failure to obtain and maintain the required collateral for any guaranteed loan.

(11) Using guaranteed loan funds for purposes other than those specifically approved by the Agency in the conditional commitment or amendment thereof.

(12) Violation of any term of the lender's agreement.

(13) Failure to submit reports required by the Agency in a timely manner.

(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 https://www.usda.gov/non-discrimination-statement. In addition to revoking the Lender's status, the Agency may debar a 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.

§§ 5001.133 – 5001.139 [Reserved]

§ 5001.140 Cooperative stock/cooperative equity.

Loan guarantees described in paragraphs (a) through (d) of this section *5001.140* are only available under B&I guaranteed loans.

(a) Cooperative stock purchase program. The Agency may guarantee loans for the purchase of cooperative stock by individual farmers or ranchers in a farmer or rancher cooperative established for the purpose of processing an agricultural commodity. The cooperative may contract for services to process agricultural commodities or otherwise process value-added agricultural products during the five -year period beginning on the operation startup date of the cooperative in order to provide adequate time for the planning and construction of the processing facility of the cooperative.

(1) The proceeds from the stock sale may be used to recapitalize, to develop a new processing facility or product line, or to expand an existing production facility. Guaranteed loan funds must remain in the cooperative from which stock was purchased, and the cooperative must not reinvest those funds into another entity.

(2) The maximum guaranteed loan amount is $600,000 and all applications will be processed in accordance with §§ 5001.301 through 5001.303, 5001.306, 5001.315, and 5001.318 of this part, as applicable.

(3) The maximum term of the guaranteed loan is seven years when the proceeds from the stock sale are used by the cooperative to recapitalize or are used for working capital. The maximum term allowable for final guaranteed loan maturity is limited to the justified useful life of the assets the cooperative purchases with the proceeds of the stock sale not to exceed 40 years or applicable State statutory limitations, whichever is less.

(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. *In the event of default, the stock may not be sufficient to satisfy the debt. The borrower and lender must understand that the borrower is fully liable for the entire debt, regardless of the success or failure of the cooperative. The lender will be 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.

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

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

(7) A feasibility study of the cooperative is required for startup cooperatives and may be required by the Agency for existing cooperatives when the cooperative's operations will be significantly affected by the proceeds that were generated from the stock sale. *State directors are not authorized to approve or make any commitment on any application to purchase cooperative stock before the national office has reviewed the feasibility study of the cooperative and authorized processing of cooperative stock purchase loans. The state director should submit feasibility studies to the national office with an analysis and recommendation.*

(8) The Agency will conduct an appropriate environmental review on the processing facility and will not process individual applications for the purchase of stock until the environmental review on the cooperative processing facility is completed. *The state office where the processing facility is located will be responsible for completing the environmental assessment in accordance with 7 CFR part 1970, "Environmental Policies and Procedures." The assessment must consider and document the potential cumulative impacts created by an increase in production necessary to meet the demand for supply by the cooperative. If the project requires a supply of raw materials from multiple states, information from each state office must be considered in the overall assessment of the project. This includes, but is not limited to, public reaction to any substantial increase in production. An environmental consultant or other qualified professional may be required to complete the environmental analysis on a case-by-case basis.*

(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. *In the event of default, the stock may not be sufficient to satisfy the debt. The borrower and lender must understand that the borrower is fully liable for the entire debt, regardless of the success or failure of*

the cooperative. The lender will be expected to maximize recovery on the loan, including collection of personal, partnership and corporate guarantees. In addition, provisions of the Debt Collection Improvement Act (DCIA) may impose significant restrictions on delinquent federal debtors, including eligibility for other federal programs.

(1) The maximum loan amount is $600,000 and all applications will be processed in accordance with §§ 5001.301 through 5001.303, 5001.306, 5001.315, and 5001.318 of this part, as applicable.

(2) The maximum term of the loan is seven years.

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

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

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

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

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

(3) The principal amount of the guaranteed loan cannot exceed $10 million.

(4) The maximum term of the guaranteed loan is seven years when the proceeds are used by the cooperative for working capital and;

(i) In all other cases the maximum term of the guaranteed loan is equal to the lesser of the following but not exceeding 40 years:

(ii) The justified useful life of the funded project assets,

(iii) The maximum term under any applicable State statute; or

(iv) The specified holding period for redemption as stated by the stock offering.

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

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

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

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

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

(10) Guaranteed loans for the purchase of preferred stock must be prepaid in the event a cooperative that issued the stock exercises an early redemption. If the cooperative enters into bankruptcy, to the extent the cooperative can redeem the preferred stock, the Borrower is required to repay the guaranteed loan from the redemption of the stock.

(d) Employee ownership succession. The Agency may guarantee loans for conversions of businesses to either cooperatives or ESOP within five years from the date of initial transfer of stock.

(1) The maximum loan amount is $600,000 and all applications will be processed in accordance with §§ 5001.301 through 5001.303, 5001.306, 5001.315, and 5001.318 of this part, as applicable.

(2) The maximum term is 10 years.

(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. *In the event of default, the stock may not be sufficient to satisfy the debt. The borrower and lender must understand that the borrower is fully liable for the entire debt, regardless of the success or failure of the cooperative or ESOP. The lender will be 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.*

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

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

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

§ 5001.141 New markets tax credits.

The New Markets Tax Credit (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 (CDEs) across the United States to make Qualified Equity Investments (QEIs) in low-income communities. NMTC related definitions and terms in

this section are governed by section 45(D) of the Internal Revenue Code (26 USC 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.*

(a) Guaranteed Loans Directly to Qualified Active Low-Income Community Businesses (QALICB).

(1) A lender that is CDE or sub-CDE under the direct control of a regulated lender or an approved non-regulated lender does not need to separately meet the requirements of § 5001.130 to make a guaranteed loan directly to a qualified active low-income community business (QALICB).

(2) The provisions of § 5001.121(c)(2) notwithstanding, a lender that is a CDE or sub-CDE may have an ownership interest in the borrower provided that each condition specified in paragraphs (a)(2)(i) through (iii) of this section is met.

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

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

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

(3) Notwithstanding § 5001.115(f), a lender that is a CDE or sub-CDE taking an ownership interest in the borrower does not constitute a conflict of interest. The Agency will mitigate the potential for a conflict of interest by requiring appropriate loan covenants establishing, at a minimum, limitations on dividends and distributions of earnings in the loan agreement between the lender and borrower. The Agency will also ensure that the lender limits any

waivers of loan covenants and future modifications of loan documents in compliance with this part.

(4) Guaranteed loans made by a lender directly to a QALICB must meet all other program and project eligibility requirements as specified in this part.

(5) For purposes of calculating borrower equity in compliance with § 5001.105(d)(1), the CDE (or sub-CDE's) amount of the principal balance of the loan from NMTC investor funds that is subordinated to the guaranteed loan may be considered as equity.

(b) Guaranteed loans to a NMTC leveraged equity structure. Tax benefits to a NMTC investor are based on the total amount of funds utilized in the project. The tax benefit calculation includes the sum of the investor's cash investment plus loan proceeds from a leveraged lender into a NMTC investor fund entity. The investor fund entity is generally a new entity established to make a qualified equity investment (QEI) into one or more CDEs or sub-CDEs to support a qualified low-income community investment (QLICI) to a QALICB. The investor fund entity, through its investment, has ownership rights in the sub-CDE that will be making secured QLICI loans to the QALICB. The provisions of § 5001.127(g) notwithstanding, either a leveraged lender entity lending to an investor fund entity, or an investor fund entity such as an investor partnership or investor limited liability corporation, may be an eligible borrower for a specific NMTC project as specified in paragraph (b)(1) of this section. For purposes of this section only, the stated term "borrower" in paragraphs (b)(1) through (13) of this section applies to both a leveraged lender entity or an investor fund entity as the guaranteed loan borrower in the NMTC project. Paragraphs (b)(2) through (13) of this section identify modifications *to this part* that apply when the eligible borrower is a leveraged lender entity or investor fund entity in a NMTC project.

(1) To be an eligible borrower using the leveraged equity structure of a NMTC project each condition identified in paragraphs (b)(1)(i) through (v) of this section must be met.

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

(ii) The lender is not an affiliate of the borrower.

(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 IRS, 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.

(iv) The QALICB must meet the requirements of an eligible borrower as found in § 5001.126.

(v) The sub-CDE operating agreement with the QALICB must include a provision that the guaranteed lender has approval rights with respect to any substantial loan servicing actions that may be taken by the sub-CDE regarding the collateral or repayment terms of their QLICI loans to the QALICB.

(2) The guaranteed loan amount and percentage of guarantee provisions found in §§ 5001.406 and 5001.407 of this part, respectively, apply to the QALICB and not to the investor fund entity or leveraged lender entity, who would actually be the borrower as defined under this part.

(3) For purposes of calculating borrower equity in compliance with § 5001.105(d)(1), the leveraged lender entity's note *receivable* from the investor fund may be considered a tangible asset and when the lien associated with the sub CDE's loan is subordinated, the principal balance of the sub-CDE's loan made to the QALICB from NMTC investor funds may be considered as equity.

(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 term, or the full amount may be funded at loan closing.*

(5) Except for the collateral provisions, § 5001.202(b)(4), §5001.202(b) of this part applies to both the lender's guaranteed loan to the borrower and the sub-CDE's loan to the QALICB. The collateral provisions found in § 5001.202(b)(4) of this part apply only to the sub-CDE's loan to the QALICB.

(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 section 5001.204.*

(7) The insurance provisions of § 5001.205(d) *of this part* apply only to the QALICB and the sub-CDE's secured loan to the QALICB.

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

(9) The application requirements found in subpart D to this part, as applicable, apply to both the borrower and the QALICB, including the application analysis and evaluation components of § 5001.303. The Agency also requires submission of the loan terms and documents between the sub-CDE and QALICB. As part of the application completed by the lender, the documentation must include comparable industry information and a summary of the NMTC project's funding path and an explanation of the relationships between all parties in the NMTC transaction (an accompanying schematic is encouraged for complicated transactions).

(10) The environmental responsibilities specified in § 5001.207 of this part apply to the NMTC project.

(11) For any application that the Agency assigns a priority score, when assigning the priority score to a NMTC loan application, the Agency will score the project based on the entire NMTC structure and the QALICB's project as the ultimate use of guaranteed loan funds.

(12) The lender is responsible for ensuring that the NMTC project complies with the planning, performing, development and project monitoring provisions in § 5001.205 of this part and the lender is also responsible for ensuring the NMTC project complies with all applicable Treasury NMTC requirements.

(13) Sections 5001.401 through 5001.408 of this part apply to both the borrower and the QALICB in a NMTC transaction.

(14) National office concurrence of the NMTC structure is required on all projects leveraging the NMTC program. The state office will first make a determination that the applicant and project are eligible. After this determination has been made, the state office will provide the following information to the national office, the OneRD Guarantee Loan Initiative Project Manager, for review:

(i) The NMTC diagram;

(ii) A project summary to include at a minimum a project description, source and use of funds, proposed security and any special circumstances;

(iii) A summary of benefits provided to the applicant, QALICB, community, Agency, and affiliate organizations when applicable; and

(iv) Verification the CDE/sub-CDE is active and has received certification.

The national office will review the NMTC financing structure and issue a written concurrence or non-concurrence to the state office.

§§ 5001.142 – 5001.200 [Reserved]

SUBPART C – Origination Provisions

§ 5001.201 General origination requirements.

The lender is responsible for originating a guaranteed loan in accordance with the

requirements of this part and in accordance with its internal origination policies and procedures to the extent they do not conflict with the requirements of this part. For each application, the lender must prepare a credit evaluation that is consistent with Agency standards found in this part. The Agency reserves the right to review the lender's credit evaluation and request additional information. Lender approval does not constitute Agency approval.

§ 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 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 our 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) Credit factors. In performing its credit evaluation, the lender must analyze all credit factors associated with each proposed guaranteed loan and apply its professional judgment to determine that the credit factors and guaranteed loan terms and conditions, considered in combination, ensure guaranteed loan repayment. Credit factors to be analyzed include, but are not necessarily limited

to, those areas identified and defined in paragraphs (b)(1) through (5) of this section.

(1) Character. Those qualities that generally impel the borrower to meet its obligations as demonstrated by its credit history, including project and borrower debt structure and debt repayment ability. When applicable, an evaluation may include the character of persons with management control or a 20 percent or more ownership interest in the borrower. When the borrower's credit history or character is negative, the lender will provide satisfactory explanations to indicate that any problems are unlikely to recur. The ownership or membership structure of the project and borrower (including membership, sponsors, other equity investors), and the historical performance and experience of ownership and management specific to the project and industry. The historical performance and experience of any entities providing management or administrative services pursuant to contract should also be evaluated. For CF projects the commitment of the rural community or rural area to be served by the project should be evaluated. Borrower's management, and its for-profit, non-profit or governing board, as applicable, will be evaluated to ensure key management personnel are adequately trained and experienced.

(2) Capacity. A borrower's ability to produce sufficient cash to repay the guaranteed loan as agreed, including the feasibility and likelihood of the project and borrower to produce sufficient revenues to service the project's debt obligations over the life of the guaranteed loan and, when applicable, result in sufficient returns to investors to ensure successful repayment of the guaranteed loan. The lender shall address any economic safeguards of the project, including capital expenditure budgeting or reserve funds and other contingency reserve funds such as maintenance reserve funds or debt service reserve funds, intended to protect and safeguard the Agency and lender in the event of default. The lender must make all efforts to:

(i) Ensure that the borrower has adequate working capital, operating capital and reserves for capital expenditures, debt service, and maintenance as applicable; and

(ii) Structure or restructure debt so the borrower has adequate debt coverage, documenting as applicable the necessity of any debt refinancing. The evaluation will be supported by a cash flow analysis.

(3) Capital. The borrower must have the resources to adequately capitalize the project and demonstrate the ability to generate and maintain sufficient cash flow for its operations. The extent to which project costs are funded by the borrower in relation to project costs funded by the guaranteed loan or

other Federal and non-Federal governmental assistance such as grants, tax credits, or other loans must be analyzed.

(4) Collateral. This criterion refers to the security pledged for the guaranteed loan. The lender is responsible for obtaining and maintaining proper and adequate collateral for the guaranteed loan. All collateral must secure the entire guaranteed loan. The lender is prohibited from taking separate collateral for the guaranteed and unguaranteed portions of the guaranteed loan or requiring compensating balances or certificates of deposit as a means of eliminating the lender's exposure on the unguaranteed portion of the guaranteed loan. Collateral can include, but is not limited to: general obligation bonds; revenue bonds; pledges of taxes or assessments; assignments of facility revenue and byproduct revenue, as well as other assets such as land, easements, rights-of-way, water rights, buildings, machinery, equipment, inventory; accounts receivable, other accounts, contracts, cash, assignments of leases and leasehold interests. Intangible assets may serve as collateral, provided they do not serve as primary collateral. For purposes of determining compliance with this requirement, leasehold improvements such as buildings and other structures on leased property are considered tangible assets and can serve as primary collateral. It is the lender's responsibility to obtain, document, file, record and take all actions necessary to properly perfect and maintain adequate collateral to protect the interests of the lender and the Agency.

(i) The lender must determine the market value of collateral as established by an appraisal in accordance with § 5001.203. *Equipment can be valued by its cost (if newly acquired and supported by a bill of sale) or by an appraisal that establishes a market value.*

(ii) The lender should discount collateral consistent with sound loan-to-discounted value practices which must be adequate to secure the guaranteed loan in accordance with this section. *Examples include:*

(A) A newly purchased piece of equipment would likely receive less of a discount versus used equipment, given the new equipment has a longer useful life and resale value versus aged used equipment;

(B) Specialized equipment, such as a horizontal drilling machine, which could not be used by a wide variety of borrowers and therefore has less marketability, would receive a higher discount versus a piece of equipment, such as a skid loader, which could be used by a variety of businesses and therefore could be easily marketed;

(C) If using a project finance approach and there is a long-term, predictable revenue stream that is not interrupted by typical business cycles or market variables, the risk allocation and credit support may be derived principally from contracts, such as the power purchase agreement and the long term lease, along with a lien on all project assets and business assets of the special purpose entity. Therefore, an assignment on those contracts holds weight in the overall loan to value analysis even there is no value being contributed to the calculation.

The lender must provide satisfactory justification of the discounts being used. Only under exceptional circumstances for WWD projects with a loan guarantee under the provisions of § 5001.126(c) will the Agency guarantee a loan where the guaranteed loan amount is greater than the market value of the collateral.

(5) Conditions. This factor 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 below and when applicable the lender should submit supporting documentation (e.g., feasibility study, market study, preliminary architectural or engineering reports, etc.):

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

(ii) Analysis of current and future market potential and off-take agreements, competition, type of project (service, product, or commodity based),

(iii) Energy infrastructure, availability and dependability, transportation and other infrastructure, and environmental considerations;

(iv) Technical feasibility including demonstrated performance of the technology and integrated processing equipment and systems, developer system performance guarantees, or technology insurance;

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

(vi) Contracts and intellectual property rights, licenses, permits, and

state and local regulations;

(vii) Creditworthiness of any counterparties, as applicable;

(viii) Industry-related public policy issues; and

(ix) Other criteria that the lender or Agency deems relevant to the project.

(6) Content. The credit evaluation must be sufficiently detailed to describe the proposed loan, business and project scenario and document that the proposed loan is sound. *A checklist to assist in collecting and reviewing all documents is available on OneRD Guarantee Loan Initiative InfoHub*. The credit evaluation must include:

(i) A written evaluation of each credit factor listed in paragraphs (b)(1) through (5) of this section and any additional factors as appropriate; and

(ii) A written evaluation of the feasibility study, business plan, technical report, and engineering and architectural reports, as applicable; and

(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. *The analyst should comment on the business' performance trends and how they compare to the industry averages. Downward trends of revenues, cash flow and profitability should be examined closely as they may be an indicator of operational or regional industry weakness. Steps taken or proposed to address any financial or industry weakness must be reasonable and adequately addressed in the lender's analysis.*

(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 lender's analysis.*

(v) Projected operational cash flow analysis on a quarterly basis for borrowers with seasonal cyclical cash flow.

(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 completion. Their projected cash flow needs should mirror their 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.*

§ 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 agency *as determined by the loan approval official*. *Appraisals will not be required to be reviewed by Agency appraisal staff. 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 term "contributory value of business enterprise" is often used.*

(a) Newly-acquired chattel. A bill of sale may be submitted to support the value of newly-acquired chattel.

(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 $500,000 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.

(1) For construction projects, the lender must:

(i) 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, or

(ii) Obtain an income-based appraisal as of the date of completion to determine the value of revenues to be generated by the real estate. *Generally, a satisfactory appraisal will be one that uses the cost approach, the sales comparison approach, and the income approach to arrive at a reconciled market value. The appraiser should note any potential effects from a release of hazardous substances or petroleum products or other environmental hazards that may impact the market value. 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. For Agency-specific guidance, see RD Instruction 1970-J, Environmental Risk Management.*

(d) Appraisal standards.

(1) Each real estate appraisal must be conducted by an independent qualified appraiser in accordance with the USPAP or successor standards. 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 and be performed by a State Certified General Appraiser licensed in the state in which the real estate is located.

(2) Chattel appraisals must be conducted by an independent qualified appraiser and must be based on industry recognized standards and reflect the age, condition, and remaining useful life of the equipment.

(e) Interagency appraisal and evaluations guidelines. Notwithstanding any exemption that may exist for transactions guaranteed by a Federal Government agency, all appraisals obtained by the lender under this part must conform to the interagency appraisal and evaluations guidelines established by the lender's primary Federal or State regulator, if applicable.

(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.

(g) Appraisal review report. The lender must submit its complete technical review of the appraisal in an appraisal review report prepared in compliance with USPAP Standards 3 and 4 to the Agency before guaranteed loan closing.

(1) Appraisals must not be more than one year old. However, the Agency may request a more recent appraisal in order to reflect more current market conditions.

(2) The lender must provide documentation that, in addition to the other requirements of this section pertaining to appraisers, the appraiser has the necessary experience and competency to appraise collateral.

(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, but the Agency does pay half the cost of the appraisal fee for a servicing action such as a liquidation as outlined in Section 5001.517(c)(6)(iii).*

§ 5001.204 Personal, partnership, and corporate guarantees.

The provisions of this section do not apply to passive investors. *Consideration regarding whether a guarantee should be obtained includes the level of the owner's involvement in the business operations and the Agency's assessment of its overall financial risk by obtaining, or not obtaining, a guarantee.*

(a) Except as provided in paragraph (c) of this section, Agency-approved, unsecured personal, partnership, and corporate guarantees for the full term of the guaranteed loan and at least equal to the guarantor's percent interest or membership in the borrower times the guaranteed loan amount are required from any person or entity owning a 20-percent or greater interest or membership in the borrower. In the event a portion of the borrower's ownership interest stock is sold or transferred, the Agency reserves the right to require personal or corporate guarantees from the new owners of a 20-percent or more interest in the borrower.

(b) When warranted by an Agency assessment of potential financial risk to the Government in accordance with the Federal Credit Reform Act of 1990 (FCRA), the Agency may require the following:

(1) Guarantees to be secured;

(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.

(c) Exceptions to the requirement for personal, partnership or corporate guarantees may be requested by the lender. The lender must document, to the Agency's satisfaction, that collateral, equity, cash flow, and profitability indicate an above-average ability of the borrower to repay the loan. The Agency will evaluate these requests on a case-by-case basis. *Exceptions must be approved by the Agency loan approval official on a case-by-case basis. Closely review collateral, equity, cash flow, and profitability before approving any exception to the guarantee requirement. Unsecured personal and corporate guarantees are not considered in determining whether a loan is adequately secured.*

(d) Each guarantor must execute an Agency-approved guarantee form in addition to any guarantee form required by the lender.

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

§ 5001.205 General project monitoring requirements.

In complying with the requirements of this section, the lender may rely on written materials and other reports provided by an independent engineer and other qualified consultants.

(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; and

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

(b) Rights-of-ways, easements, and property rights. The lender is responsible for ensuring that the borrower has:

(1) Obtained valid, continuous, and adequate rights-of-way and easements needed for the construction, operation, and maintenance of a project; and

(2) Obtained and recorded such releases, consents, or subordinations to such property rights from holders of outstanding liens or other instruments as may be necessary for the construction, operation, and maintenance of the project and to provide the required security.

(c) Permits, agreements, and licenses. It is the lender's responsibility to ensure the borrower obtains all permits, agreements, and licenses that are applicable to the project.

(d) Insurance. It is the lender's responsibility to ensure the borrower obtains and maintains borrower and project insurance in substance and amount similar to that ordinarily required by lenders in the industry.

(e) Construction monitoring requirements. The lender, or its designated agent, will monitor the progress of construction of the project and undertake the reviews and inspections necessary to ensure that construction conforms to applicable Federal, Tribal, State, and local code requirements and that construction proceeds in accordance with the plans, specifications, and contract documents. *Lenders may want the Agency to take an active role in job meetings and inspections. Do not do this. You must avoid putting the Agency in a situation where it becomes responsible for decisions on such topics. Always make it clear that your presence is only for the Agency's benefit, not the lender's or borrower's. Use discretion to make sure that Agency involvement during the construction processes does not lead to the lender's abandonment of its responsibilities; however, if complex environmental issues surface, you may request that the state environmental coordinator meet with the lender. On complicated construction projects, you may wish to consult with the state engineer or architect; however, they will not provide technical review or comments on the specific project. Staff are not required to attend construction inspections.*

(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.

(i) 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) Issuance of loan note guarantee prior to completion of the project. Except for projects utilizing non-proven technologies, the lender may request that the loan note guarantee be issued prior to construction or completion of a project. An additional fee for issuance of the loan note guarantee prior to completion of the project will be assessed in accordance with § 5001.454(c) in subpart E. *When warranted, the Agency may issue the loan note guarantee prior to completion of construction; however, there are added risks to the Agency and these risks must be considered. These risks are partially mitigated by the additional guarantee fee, but a holistic review of the project and the lender in addition to the financial strength and abilities of the contractor to provide a completed project as designed and within the estimated time frame and budget must be undertaken.* The lender must verify and include evidence of the following in its request:

(i) The promissory note specifying the full term of the note and containing the terms and conditions of each draw period;

(ii) The borrower and lender have entered into a contract with an independent disbursement and monitoring firm with a construction monitoring plan acceptable to and approved by the Agency;

(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 *that the budget is adequate for the planned development; 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.*

(v) Evidence the lender has properly vetted the financial feasibility and past performance of the contractor to show they are able to complete the project or that the lender has mitigated risk in the event the project

is never completed, such as requiring a 100-percent performance/payment bond on the borrower's contractor to be maintained until the contractor is released from its obligation. The bonding agent must be listed on Treasury Circular 570; *There is an increased risk to the Agency if the project is not satisfactorily completed with available funds, which could result in the need for additional loans or equity to complete the project or the possible failure of the business and a loss to the Agency.*

(vi) Evidence, which the Agency at its sole discretion determines is satisfactory, that the lender has completed the due diligence necessary to confirm that the contractor is able to complete the project based on information including but not limited to the financial statements and past performance of the contractor;

(vii) When applicable, the borrower has entered into a contract with an independent technology development firm guaranteeing the following: 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, renewable energy systems, 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 then comes in and takes charge of 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 spec 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 with 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 fir, 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. Some of these systems can get complex and thus should be approved and verified by an independent technology firm for performance integrity and operability.

(E) Hydrogen: Depending on the project, hydrogen can be produced in various ways. Some methods such as electrolysis are more pronounced and commercially available while other processes such as gasification are a bit more intricate. These types of projects should be approved and verified by an independent technology firm for integrated performance integrity.

(F) Geothermal: Geothermal systems can be complex but they are usually straightforward with not too many processes in between collection and end-product. Depending on how complex the system is and if it has multiple processes, we would like to see the project 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.

(H) Solar PV or Wind: We do not foresee this provision to be applicable for a grid tied solar pv farm or grid tied wind farm installation projects. and;

(viii) Evidence, in form and substance satisfactory to the Agency, that there is sufficient contingency funding in place to handle unforeseen cost overruns without seeking additional guaranteed assistance.

(f) Reporting during construction. Regardless of when the loan note guarantee is issued, all lenders must report any problems in project development to the Agency within 15 calendar days of identifying the problem. If the loan note guarantee has been issued prior to construction or completion of the project, the lender must provide monthly construction reports that contain:

(1) Certifications for each draw request as follows:

(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

(ii) Certification by the borrower and independent engineer or qualified consultant that the guaranteed loan funds of the prior draw have been applied to eligible project costs in accordance with the draw request and that the contractors have delivered mechanics lien waivers in connection with such draw;

(2) List of invoices;

(3) Details regarding the borrower's equity, other funds, and guaranteed loan funds disbursed to date;

(4) Status of construction and inspection reports;

(5) Inspection reports; and

(6) Concerns, potential problems, cost overruns, etc.

(g) Use of guaranteed loan funds. The lender must ensure that:

(1) All borrower funds are utilized prior to guaranteed loan funds;

(2) Guaranteed loan funds are only used for eligible project costs in accordance with the purposes approved by the Agency in the conditional commitment and in accordance with the plans, specifications, and contract documents; and

(3) The project will be completed within the approved budget.

(h) Project completion. Once construction of the project is completed, the lender must obtain and have on file all mechanics lien waivers or releases from all contractors and materialmen. The lender will provide to the Agency:

(1) A copy of the notice of completion or similar document issued by the relevant jurisdiction;

(2) Certification that all funds were used for authorized purposes; and

(3) A written certification that the project will be used for its intended purpose and will meet the borrower's needs and guaranteed loan purposes in accordance with the application approved by the Agency.

(4) RES or EEI projects and projects that utilize integrated processing systems and equipment, such as biorefineries, renewable energy systems, and chemical manufacturing facilities, unless utilizing the provisions of paragraph (e)(2) of this section, must be constructed, installed, and operated as described in the technical report or on the vendor certification prior to disbursement of guaranteed loan funds. For RES, the system must be operating at the steady state operating level described in the technical report or on the vendor certification for a period of not less than 30 calendar days, unless this requirement is modified by the Agency, prior to disbursement of funds. *Preliminary engineering report documents may contain language used to document portions of steady state operating level.*

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

(a) Departmental regulations. All projects receiving a loan guarantee under this part are subject to the provisions of USDA's Departmental Regulations, as applicable.

(b) Other Federal laws. Lenders and borrowers must comply with other applicable Federal laws including, but not limited to, Equal Employment Opportunities,

Americans with Disabilities Act, Equal Credit Opportunity Act, and the Fair Housing Act. *When a federally funded project requires the acquisition of real property, including easements and rights-of-way, or will displace people from their homes, businesses or farms the borrower must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA). While occasions are few, if relocation assistance compensation is required under URA, it may have a significant financial impact on the project and borrower. More information on the URA can be found at 49 CFR Part 24.*

§ 5001.207 Environmental responsibilities.

Actions taken under this part must comply with 7 CFR part 1970. The Agency is responsible for ensuring that the requirements of the National Environmental Policy Act of 1969 (under 40 CFR part 1500) and related compliance actions, such as Section 106 of the National Historic Preservation Act (under 36 CFR part 800) and section 7 of the Endangered Species Act, are met. The Agency will complete the appropriate level of environmental review in accordance with 7 CFR part 1970, *"Environmental Policies and Procedures."*

(a) Borrower and lender responsibilities. Both the borrower and lender must take into consideration the potential environmental impacts of the project at the earliest planning stages. The Agency recommends that the lender contact the Agency to determine environmental requirements as soon as practicable after deciding to apply for a guarantee under this part.

(1) Lender. 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.

(2) The lender must ensure that the borrower has—

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

(ii) Not taken any actions or incurred any obligations with respect to the project that would either limit the range of alternatives to be considered during the Agency's environmental review process or which would have an adverse impact on the environment, such as the initiation of construction. Taking any such actions or incurring any

such obligations could result in project ineligibility; and

(iii) Complied with any environmental mitigation measures required by the Agency. *Tribal permits may also be needed. Additional surveys beyond those initially submitted may be required during the environmental review process.*

(b) Environmental reviews. The Agency must complete all required environmental reviews, identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects on minority populations and low-income populations, in accordance with 7 CFR part 1970. *Use the Civil rights impact analysis form to document said review.*

(1) The Agency may schedule a site visit if the Agency determines one is necessary in order to determine the scope of the environmental review.

(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.

§ 5001.208 Conflicts of interest.

The lender must report all conflicts of interests, in writing, to the Agency.

§§ 5001.209 – 5001.300 [Reserved]

SUBPART D – Guarantee Application Provisions

§ 5001.301 Beginning the application process.

(a) The lender must file applications and related documents through the Agency online application system located at https://www.rd.usda.gov/onerdguarantee. *Lenders without access to the internet or with bandwidth limitations may submit an application in paper form to the state office.*

(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.

§ 5001.302 Preliminary eligibility review.

(a) Contents. Except as otherwise indicated, each request for a preliminary eligibility review must contain the material identified in paragraphs (a)(1) through (3) of this section. This information may be submitted in a narrative format or utilizing the lender's preliminary lender's analysis or preliminary credit memo. *The purpose of the preliminary review is to advise the lender as soon as possible when eligibility problems are likely or when there are concerns about whether the project meets the intent of the program. This early communication can prevent unnecessary expense and frustration in the preparation of a full application. Credit quality and collateral should be scrutinized closely early in the process. All issues and concerns should be openly addressed with the lender, as soon as possible, to avoid any unnecessary time and expense if the concerns cannot be resolved. The lender and Agency should initiate the environmental review process early in the planning stage and should be alert for projects that may have a significant impact on the environment. A checklist to assist in assuring all necessary information is received is available on OneRD Guarantee Loan Initiative InfoHub.*

(1) Regardless of format, the lenders must provide the following information:

(i) Name of the proposed borrower and co-borrower(s) as applicable, organization type, address, contact person, email address, and telephone number;

(ii) Name of the proposed lender, address, telephone number, contact person, email address;

(iii) Amount of the guaranteed loan request; and if known, the percentage of guarantee requested; the proposed rates and terms of the guaranteed loan; and the source(s) of other funding;

(iv) If known, a description of collateral to be offered with estimated value(s), identity of guarantors, and the amount and source of equity, other capital, and matching funds to be contributed to the project; and

(v) A brief description of the project, its location, products or services provided, service area, and, as applicable, availability of raw materials and supplies.

(2) Sufficient information and documentation to enable the Agency to assess borrower, lender, and project eligibility, including summaries or spreadsheets of financial statements or audits, relationships and identity of any affiliates; and copies of organizational documents, organizational charts, and existing debt instruments.

(3) For REAP projects:

(i) Borrower information as outlined in §5001.307 (a) and (b), and project information as outlined in §5001.307 (c).

(ii) For REAP RES projects where a residence is located at or is closely associated with and shares an energy metering device with a rural small business or agricultural operation, demonstration that 50 percent or greater of the energy to be generated by the RES will benefit the rural small business or agricultural operation.

(b) Assessment. Based on the information submitted for the preliminary eligibility review, the Agency will make an informal assessment of the types of guarantee funding applicable to the request, and the eligibility of the borrower, project, and lender. The Agency will provide written informal comments. The assessment may change based on subsequently submitted information, is solely advisory in nature, does not obligate the Agency to approve a guarantee request, and is not considered a favorable or adverse decision by the Agency. *Written informal comments may be provided to the lender electronically. The comments must not indicate approval of applicant or project eligibility. The state office's written response should advise the lender of any items at § 5001.303(c)(1) – (17) that will be required with a complete application based on the proposed type of project. The following disclosure statement will be provided to the lender: "This correspondence is not an eligibility determination, commitment of guarantee funds or a representation as to the availability of guarantee funds. The Agency will determine applicant and project eligibility and approval of the loan guarantee request only after receipt of a complete application in accordance with 7 CFR 5001.303.".*

§ 5001.303 Applications for loan guarantee.

The Agency will accept applications on a continuous basis. For each loan guarantee request, the lender must submit to the Agency a complete application that is in conformance with this section, and §§ 5001.304 through 5001.307, as applicable.

(a) Complete applications. Lenders must submit complete applications in order to be considered for loan guarantees. Lenders are encouraged to submit a complete application in a single package; however, the Agency may accept the environmental information required by the Agency and initiate and complete its environmental reviews in advance of receiving a complete application. If an application is incomplete, the Agency will notify the lender in writing of the items necessary to address the incomplete application. Upon receipt of a complete application, the Agency will complete its evaluation. *A checklist to assist in*

assuring all needed information is received is available on OneRD Guarantee Loan Initiative InfoHub.

(b) Content. Lenders must provide an analysis of the scope of the project in relation to the borrower's overall operations. The application and lender's analysis should be supported by adequate documentation as applicable to the project and as listed in paragraph (c) of this section. The Agency reserves the right to request additional documentation to support the funding request. All complete applications must contain at a minimum:

(1) Agency-approved application form or system that includes all items noted in *paragraph (a) of* this section;

(2) Credit evaluation (conforming to § 5001.202).

(3) Environmental information required by the Agency to conduct its environmental reviews (as specified in § 5001.207(a)(2)(i)).

(4) Required financial statements including:

(i) Current Agency-acceptable balance sheet and year-to-date income statements of the borrower, and any guarantor(s) dated within 90 days of submission of the complete application. *Acceptable financial statements are outlined in Section 5001.9*;

(ii) Agency-acceptable historical balance sheet, income statements, and cash flow statements of the borrower, and any guarantor(s) for the lesser of the last three fiscal years or all years of operation. *Acceptable financial statements are outlined in Section 5001.9*; and

(iii) Projected balance sheets, income statements, and cash flow statements or a financial model starting from the current financial statements through a minimum of two years of the project performing at full operational capacity or stable operations. Based on the type of project or at the discretion of the Agency, financial projections or models may be required from current financial statements up to the end of the term of the guaranteed loan *(e.g. renewable energy system projects where system generated income received over the term of the loan will repay the debt).* Financial projections must be supported by a list of assumptions showing the basis for the projections. Projected financial statements must include a pro forma balance sheet projected for guaranteed loan closing.

(iv) The Agency may request additional financial statements, financial

models, cash flow information, updated financial statements, and other related financial information to determine the financial feasibility of a project and evaluate the credit underwriting of the borrower, its affiliates, and any guarantors.

(5) For all applications of $600,000 or greater, a draft loan agreement for the guaranteed loan that addresses the following: *Loan amounts less than $600,000 are generally for projects without a complex financing structure and the lender may not require numerous loan covenants to monitor borrower performance. The Agency may still request a draft loan agreement for loans less than $600,000, but it is not required. All loan clauses that USDA needs included are listed in a document on OneRD Guarantee Loan Initiative InfoHub.*

(i) Repayment term and amortization provisions of the guaranteed loan;

(ii) Description of real property collateral, list of other collateral and identification of the lender's lien priority in the collateral;

(iii) A list of persons and entities guaranteeing payment of the guaranteed loan and their percentage of guarantee;

(iv) Type and frequency of borrower and guarantor financial statements to be required for the duration of the guaranteed loan (guarantor statements must be updated at least annually);

(v) Prohibition against borrower assuming liabilities or obligations of others;

(vi) Limitations on borrower dividend payments and compensation of officers, owners and members of borrower;

(vii) Limitations on the purchase and sale of equipment and other fixed assets;

(viii) Restrictions concerning mergers, consolidations, or other circumstances including significant management changes and a limitation on selling the business, project, or guarantee loan collateral without the concurrence of the lender;

(ix) Maximum debt-to-net worth ratio, when required by the lender or by this part;

(x) Minimum debt service coverage ratio, when required by the lender or by this part. *See 5001.102(d)(4) and (5) for Agency required minimum debt service coverage ratios when refinancing.*;

(xi) A reserved section for any requirements imposed by the Agency in its conditional commitment;

(xii) A reserved section for any Agency environmental requirements; and

(xiii) A provision for the lender and the Agency to have reasonable access to the project and its performance information during the term of the guaranteed loan including the periodic inspection of the project by a representative of the lender or the Agency.

(6) Identify whether or not the borrower has a known relationship or association with an Agency employee. If there is a known relationship, identify each Agency employee with whom the borrower has a known relationship. *An Agency employee is anyone who works for Rural Development.*

(7) At the time of the loan application, the lender must submit its loan classification and credit risk rating classification scale. *The lender's loan classification system is not the Agency's loan classification system. For example, a lender may classify their loan as a "4" within their system. Their risk rating classification scale will explain the perceived credit risk that a number '4' coding represents. The Agency must convert the lender's classification of credit risk to the Agency's loan classification code and then enter that code into GLS or CLSS.*

(c) Provisional content. The following items may also be required based on the type of project being financed or if deficiencies exist in the credit evaluation and more information is needed to adequately determine risk. *If the lender submits a preliminary eligibility review the state office's written response, in accordance with § 5001.302(b), should advise the lender of any items (1) – (17) of this paragraph that will be required with a complete application. Otherwise, when the state office receives an application in accordance with this section, it should immediately review the application for completeness and inform the lender in writing of any missing information. Or, if at any time during the state office's review of the lender's application materials it finds an item to be deficient, the state office will notify the lender in writing of the additional information required in accordance with this paragraph*:

(1) Appraisals in accordance with § 5001.203.

(2) Current credit reports or the equivalent on the borrower, any payment guarantors and any person or entity owning greater than a 20 percent or more interest in the borrower or controls the borrower, except for passive investors and those corporations listed on a major stock exchange. A credit report or its equivalent are not required for elected and appointed officials when the borrower is a public body, or Indian Tribe, or for members of a non-profit organization. Credit reports must be submitted to the Agency for all applications for guaranteed loans in the amount of $200,000 or more. For lenders that are submitting smaller requests, the lender must keep the credit report on file with the lender's application.

(3) Feasibility study. If the Agency is unable to determine a basis for successful repayment of a guaranteed loan based on the documentation and analysis of the five feasibility study components provided in the lender's analysis, borrower's business plan, or other project information, or if the proposed project will have significant impacts on existing operations, the Agency may require an independent feasibility study. *The lender's analysis should provide enough market and cash flow information to make an educated risk assessment of the guaranteed loan project and its likelihood of repayment. If the Agency has concerns regarding the quality or validity of information or cash flow projections in the lender's analysis, it should discuss those concerns with the lender. If the Agency's concerns are still unresolved, an independent feasibility study would provide more detail of the market, conditions, technical and management capacity, plus a projected viability of the project.* The elements of an acceptable feasibility study may vary by project scope and should be prepared by a qualified, independent third party using applicable elements of the project, including but not limited to those outlined in appendix A to subpart D of this part. *Lender's applying for a CF guarantee will meet the financial feasibility requirements of Section 5001.304 in which case the requirements of this paragraph do not apply.*

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

(5) Engineering documentation.

(6) Architectural reports.

(7) Energy audits or energy assessments in accordance with § 5001.107.

(8) Energy efficient equipment and systems data in accordance with § 5001.108.

(9) Business plan. Unless the information is contained in the feasibility study or in the credit evaluation, a business plan should be submitted to show how the project will operate and remain viable. This requirement may be omitted when guaranteed loan funds are used exclusively for debt refinancing.

(10) If the application is for five or more residential units, including nursing homes and assisted-living centers, an Affirmative Fair Housing Marketing Plan that is in conformance with 7 CFR 1901.203(c)(3). *The conditional commitment may be issued subject to receipt of an adequate Affirmative Fair Housing Marketing Plan but must be received prior to issuance of the loan note guarantee. An Affirmative Fair Housing Marketing Plan and an appraisal are the only items required for a complete application that may be conditionalized in the conditional commitment for later receipt.*

(11) If the application is for financing of health care facilities, a certificate of need, if required by Federal or State law.

(12) Department of Labor form as noted in § 5001.306(a)(1).

(13) Pro-forma balance sheet for closing as noted in § 5001.306(a)(2).

(14) *Securities and Exchange Commission* (SEC) Form 10-K, *"Annual Report Pursuant to Sections 13 or 15(d) of the Securities Exchange Act of 1934,"* as noted in § 5001.306(a)(4).

(15) Technical reports in accordance with § 5001.307(e).

(16) Certification regarding credit elsewhere in accordance with § 5001.126(b)(3) and (c)(2).

(17) Certification of significant community support in accordance with §5001.126(b)(4) and (c)(3).

(18) Copies of organizational documents if not already provided with a preliminary eligibility review in accordance with § 5001.302.

(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. *Agency action, approval or denial, on all complete guaranteed loan applications*

should be completed within 30 calendar days. Examples of application modifications that would change the Agency's submission date of record include significant changes to the project, borrower, equity, or collateral.

§ 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 renewable energy systems 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) Financial feasibility analysis. The financial feasibility analysis will be prepared by a qualified firm or individual who may be the lender. Financial feasibility analysis requirements are outlined in appendix B to subpart D of this part. The lender's credit evaluation may serve as the financial feasibility analysis provided it includes the items outlined in appendix B to subpart D of this part. A financial feasibility analysis will be required if any of the following circumstances exist:

(1) Guaranteed loans of $5 million or less;

(2) Guaranteed loans secured by a general obligation bond, or other tax supported income sufficient to pay the debt service for the life of the loan; or

(3) Borrowers with audited financial statements, if the last three years indicate the ability to pay all existing and new debt service.

(b) Financial feasibility study with examination opinion. The report must be prepared in accordance with the standards of attestation of the American Institute of Certified Public Accountants, and the preparer must have the requisite professional liability insurance in place. A financial feasibility study with examination opinion will be required for all guaranteed loans that do not meet the requirements for a financial feasibility analysis outlined in paragraph (a) of this section. The financial feasibility study with examination opinion will typically include the items outlined in appendix B to subpart D of this part.

(c) The goal of a financial feasibility report is to address the likelihood the project will provide sufficient revenues during the life of the loan for operating and maintenance expenses; reserve account requirements; and debt service. The report is an important tool for the borrower's decision making process especially when taking on significant debt. A well prepared financial feasibility report will address economic, market, technical, financial and management feasibility; and the report preparer will address which outcomes are most feasible. The state office should review financial feasibility reports critically and consider the qualifications of the preparer. In addition, the review should include an analysis of the sensitivity scenarios and identify if the preparer addressed any vulnerabilities in the borrower or the market. If there are inaccuracies in the report or missing information, they should be addressed in writing to the lender and resolved to the satisfaction of the state office. When possible, arrange a conference with the lender prior to the report's preparation to discuss expectations. The state office's assessment and conclusions of the financial feasibility report will be documented in the project summary, credit analysis or successor Agency form or automated system.

§ 5001.305 Specific application requirements for WWD projects.

In addition to the requirements specified in § 5001.303, a lender seeking a loan guarantee for a WWD project must submit the documents specified in paragraphs (a) through (c) of this section.

(a) Engineering documentation.

(1) Engineering documentation must meet the level of detail the lender would typically require for a standard commercial loan, and include, at a minimum, a description of the proposed project, a cost estimate, the number of residential and non-residential connections, and the population served. The lender may request assistance to clarify the Agency's requirements and regulations; however, the Agency does not provide technical oversight or

recommendations as to the technical feasibility of the project. *As the Agency is not completing a review of the project, a preliminary engineering report completed in accordance with Agency guidance is not required.*

(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 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.

(b) Feasibility considerations. All projects financed under this part 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, any reserves required by the lender, and debt payment. The lender's financial credit analysis must take into consideration any interest rate adjustment that may be instituted under the terms of the loan note guarantee.

(c) Credit analysis requirements. In addition to the requirements of § 5001.202, if the majority user of the system is a business and the financial success of the system is dependent on that business, then the economic viability of that business must be assessed.

(d) American Iron and Steel (AIS). Guarantee loans must comply with AIS requirements. Compliance must be certified to prior to the issuance of the loan note guarantee; however, the lender and borrower must be briefed as early in the design process as possible to ensure that any additional costs associated with compliance are included in the total project cost and that any modifications to construction contract documents are completed. 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. RUS Bulletin 1780-35 contains AIS requirements for guarantee loans. The conditional commitment must contain the language found at Section 17a of RUS Bulletin 1780-35 and the lender must include required language in the loan agreement and other appropriate loan documents.

Lenders do have flexibility to ensure and demonstrate their compliance with AIS in a manner that works within their existing programs and must make a risk management decision to determine how to ensure and demonstrate compliance. At a minimum, the lender must include the language found at Section 17a of RUS Bulletin 1780-35 in its loan agreement with the borrower. Lenders may consider additional steps to ensure and demonstrate compliance, including any of the following:

(1) Utilize the example consulting engineer, general contractor, and manufacturers' certification letters (Exhibit B, C, & D of RUS Bulletin 1780-35);

(2) Require the use of Engineers Joint Contract Documents Committee documents and insert the contract provisions outlined in Section 16 of RUS Bulletin 1780-35; and/or

(3) Hire an independent consulting engineer to perform an AIS site visit utilizing the AIS Checklist (Exhibit J of RUS Bulletin 1780-35).

§ 5001.306 Specific application requirements for B&I projects.

In addition to the requirements specified in § 5001.303, as applicable, a lender requesting a B&I loan guarantee must submit the information specified in paragraph (a) of this section if the guaranteed loan amount is more than $600,000, or in (b) of this section if the guaranteed loan amount is $600,000 or less.

(a) Applications requesting a guaranteed loan in an amount greater than $600,000.

(1) The Agency is required to submit project information to the United States Department of Labor for their concurrence if the proposed guaranteed loan is in excess of $1,000,000.00 and will increase direct employment by more than 50 employees. The lender must provide sufficient project and demographic information to the Agency for completion of a Department of Labor review. *States should immediately send information to the national office Program Processing Division to begin the Department of Labor clearance process. This includes the correct business NAICS Code and tax identification numbers. You should discuss this issue with the lender to ensure the business information and employment projections are accurate and realistic to avoid delays in loan processing as a result of unnecessary Department of Labor clearances.*

(2) A pro forma balance sheet projected for loan closing.

(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. *A feasibility study may clarify issues that the lender's credit evaluation did not clearly address or substantiate. A partial feasibility report for the market and financial feasibility of a project may be adequate for a successful existing business expanding into a new market area.*

(i) For guaranteed loans greater than $1,000,000.00 to a new business, a feasibility study prepared by an independent qualified consultant acceptable to the Agency is required. The scope of the feasibility study will be determined by the Agency and is dependent on the complexity of the project and the borrower.

(ii) For loans of $1,000,000.00 or less to new and existing businesses, the Agency may require a feasibility study when the lender's analysis or other borrower information is not sufficient to determine the technical feasibility or economic viability of the project, or if the project will significantly affect the operations of a borrower who is an existing business and its historic cash flow.

(iii) A technical report is required for RES identified in § 5001.307(e) and for projects utilizing other integrated processing equipment and systems. The contents of the technical report must be consistent with the requirements of § 5001.307(e)(1) and must provide sufficient detail to enable the Agency to determine technical merit. The report can be provided in the technical feasibility section of a feasibility study or in a separate technical report.

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

(5) Current financial statements of affiliates.

(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.

(1) Lenders submitting applications under this paragraph (b) must include the following information:

(i) Narrative description of the project including the history of the borrower and adequacy of cash flow and borrower equity;

(ii) Required financial statements including a current Agency-acceptable balance sheet and year-to-date income statements;

(iii) Security available for the guaranteed loan including collateral and payment guarantees;

(iv) Strengths and weaknesses of the guaranteed loan and the Lender's need for the loan guarantee to mitigate specific risks.

(2) The lender may elect to not submit the following application documentation to the Agency, but must have the information available in its file for review:

(i) Narrative description of management capabilities and corporate structure of the borrower;

(ii) Environmental information for the project and any environmental reviews;

(iii) Agency-acceptable historical balance sheets and income statements of the borrower and its affiliates;

(iv) Financial statements of any personal, partnership, or corporate guarantors.

§ 5001.307 Specific application requirements for REAP projects.

In addition to the requirements specified in § 5001.303, a lender seeking a loan guarantee for a REAP project must submit the information identified below based on total project costs,

(a) Borrower eligibility information.

(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.

(1) Describe how the borrower meets the ownership and control requirements as identified in § 5001.126(e)(2).

(2) For each entity(ies) the borrower controls or entity(ies) it is controlled by, provide a list of the individual owners with their contact information. Describe the relationship between the borrower and the other entity(ies), including percentage of ownership and control, management, passive investor ownership, and any products exchanged. Organizational charts to demonstrate the structure of the borrower should be submitted when available.

(3) Identify the ethnicity, race, and gender of the borrower. Identify if the borrower is a veteran. This information is optional and is not required for a complete application but may be used by the Agency to award priority points.

(c) Project information. Provide information concerning the project as a whole and its relationship to the borrower's operations, including:

(1) Identification as to whether the project is an RES, EEI, or EEE project. Include a description and the location of the project;

(2) Description *(or indication)* of how the project will have a positive effect on resource conservation, public health, and the environment;

(3) Identification of the amount of funds and the source(s) of funds the borrower is proposing to use for the project. Provide written commitments for funds at the time the application is submitted to receive points under this scoring criterion.

(i) For project funding provided by the borrower, documentation may include bank statements that demonstrates availability of funds.

(ii) For project funding that comes from a third party, a commitment letter signed by an authorized official of the third party. The letter must be specific to the project and must identify the dollar amount of any loan or other funding and any applicable rates and terms. If the third-party commitment is for a loan, the commitment must be firm; a letter-of-intent or pre-qualification letter subject to underwriting requirements or contingencies is not acceptable.

(d) Feasibility study. For RES projects only, when deemed necessary by the lender or Agency, an analysis conducted in conformance with the definition of feasibility study found in § 5001.3 and with applicable content in appendix A to subpart D of this part.

(e) Technical report. All eligible projects must have technical merit and provide information as identified in § 5001.106(e), § 5001.107(d), or § 5001.108(d) and (e)(1) through (3) of this section. *More guidance on these reports are available on OneRD Guarantee Loan Initiative InfoHub*.

(1) Level of detail. Information provided must be in sufficient detail to enable the Agency to determine the technical merit of the project. Design drawings and process flowcharts are encouraged as exhibits. The technical report requirements can be provided in the technical feasibility section of a feasibility study, instead of completing a separate technical report.

(i) Sufficient information to enable the calculation of simple payback as defined in § 5001.3;

(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

(iii) Demonstrate that the RES, EEI, or EEE project will operate or perform over the project's useful life in a reliable, safe, and a cost-effective manner, which may include but is not limited to addressing project design, installation, operation, maintenance, and warranties.

(iv) In addition, the following technologies *as listed in (A) through (H)*, must provide a technical report in accordance with paragraphs (e)(1)(v) through (viii) of this section, as applicable:

(A) Hydrogen;

(B) Ocean energy;

(C) Geothermal electric generation;

(D) Anaerobic digesters and biogas;

(E) Biomass;

(F) Hybrid applications;

(G) Renewable energy systems with storage components; and

(H) Energy efficiency improvements

(v) For total project costs in the amount of $80,000 or less, a technical report, as identified in § 5001.303(c)(15), prepared in accordance with the following paragraphs, as applicable:

(A) EEI technical reports. Each EEI technical report submitted under this section must provide:

(1) A description of the proposed EEI, including its intended purpose;

(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;

(4) Certification by vendor/installer that they are qualified to complete the project as intended;

(5) Vendor/installer certification that the EEI system will operate and perform over the project's useful life in a reliable and cost-effective manner; and

(6) An estimate of simple payback, including all

calculations, documentation, and any assumptions.

(B) RES technical reports. Each RES technical report submitted under this section must provide:

(1) A description of the proposed RES project, including its intended purpose;

(*2*) Vendor/Installer certified projections on energy to be replaced and/or generated, including the quality and availability of the renewable resource to the project; if there is a residence closely associated with the RES project, the historical amount of energy used by the residence and the historical amount of energy used by the agricultural operation or rural small business, as applicable, to satisfactorily demonstrate 50 percent or more of proposed generation will benefit the agricultural operation or rural small business;

(3) Vendor/Installer certification that the RES project uses commercially available technology;

(4) Certification that the vendor/installer is qualified to complete the project as intended;

(5) Certification that the project will perform over its useful life in a reliable and cost-effective manner; and

(6) The projected financial performance of the project. The description must address total project costs, revenues accrued from the sale or crediting of energy, quantity and value of energy offset, and revenue from byproducts. Include applicable investment and other production incentives and indicate if they are one time or reoccurring incentives. Provide an estimate of simple payback, including all calculations, documentation, and any assumptions.

(C) EEE technical reports. Each EEE technical report submitted under this section, regardless of total project costs, must provide:

(1) A description of the proposed EEE and its intended purpose, including baseline data, specifications, and efficiency data;

(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;

(4) Certification by vendor/installer that they are qualified to complete the project as intended;

(5) Vendor/installer certification that the EEE system will operate and perform over the project's useful life in a reliable and cost-effective manner; and

(6) An estimate of simple payback, including all calculations, documentation, and any assumptions.

(vi) For EEI guaranteed loan projects with total project costs greater than $80,000, the technical report identified in paragraph (e)(1)(v)(A) of this section applies, except that appendix C to subpart D of this part is to be followed to prepare the report.

(vii) For RES guaranteed loan projects with total project costs greater than $80,000 and up to but not including $200,000, the technical report identified in paragraph (e)(1)(v)(B) of this section applies, except that appendix D to subpart D of this part is to be followed to prepare the report.

(viii) For RES guaranteed loan projects with estimated total project costs of $200,000 or greater, the technical report identified in paragraph (e)(1)(v)(B) of this section applies, except that appendix E to subpart D of this part is to be followed to prepare the report.

(2) Modifications. If the technical report is prepared prior to the borrower's selection of a final design, equipment vendor, or contractor, or other significant decision, the borrower may modify the report and resubmit it to the Agency, provided that the overall scope of the project is not materially changed as determined by the Agency. Changes in the technical report may require additional environmental documentation in accordance with 7 CFR part 1970.

(3) Hybrid projects. If the application is for a hybrid project, technical reports must be prepared for each technology that comprises the hybrid project.

§§ 5001.308 – 5001.314 [Reserved]

§ 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:

(1) The type and complexity of the financing (e.g., asset-based financing, cash flow financing, and bond financing); and

(2) Loans to borrowers engaged in industries where the lender has little or no origination and/or servicing experience.

(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. *State directors have the authority to approve or deny an application if the loan amount is within the state's delegated lending authority in accordance with RD Instruction 1901-A. To determine if the loan amount requested is within the state's delegated lending authority, the total principal balance of all outstanding loans plus the application loan amount are considered, whether direct or guaranteed. If that total amount (aggregate) is above the direct or guarantee authority given to the state office, then it is above their lending authority and must go to the national office. Loan requests in excess of the state's lending authority must be forwarded to the national office OneRD Guarantee Loan Initiative Project Manager to obtain concurrence of the state's approval or denial recommendation. A graphic of this process is available on the OneRD InfoHub. In the event a loan proposal includes the funding of multiple project sites in more than one state, the state where the borrower is headquartered will be the lead processing state and should coordinate with the other states involved. The state directors where the project sites are located and where the loan proceeds are to be funded for fixed asset acquisitions have the authority to process a guaranteed loan request for those funds that are intended to be utilized in their respective states. For loan proposals where funds are to be used exclusively for working capital or debt refinancing in more than one*

state, the state director where the applicant's headquarters is located has the authority to process the loan request and to service the loan. Exceptions to this policy may be granted on a case-by-case basis by the national office.

(1) If the Agency's evaluation and determination in accordance with this paragraph (b) is favorable, the Agency will proceed in accordance with paragraph (c) of this section.

(2) If the Agency's evaluation and determination in accordance with this paragraph (b) is unfavorable, the Agency will notify the lender, in writing, as applicable, identifying the reason(s) for determining ineligibility and any applicable appeal or review rights. No further processing of the application will occur. *Template letters to lender notifying them of in-eligibility (appealable or non-appealable) and attachment are available on OneRD Guarantee Loan Initiative InfoHub.*

(3) After the loan specialist has reviewed all of the information and is ready to submit the package to the deciding body (committee or official), the OneRD Project Evaluation Form should be filled in to capture all relevant information and analysis. This document focuses on the loan specialists analysis of the lender's analysis, not just on the facts and numbers of the underlying loan. This document will then go to the deciding body, either the state or national office committee or individual. A graphic of this process is available on the OneRD Guarantee Loan Initiative InfoHub.

(c) Priority score. The Agency will score each eligible application based on the point system for the respective program identified in §§ 5001.316 through 5001.319.

(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. *This may include competition for state allocations or a national pooling of funds, whichever remains available.*

(d) Funding selected applications. Each program identified in § 5001.1 will consider applications for funding in the order they are received by the Agency. If the Agency approves the application and guaranteed funds are available, the Agency will issue a conditional commitment to the lender in accordance with § 5001.451 *of subpart E*. In the event total loan requests exceed the amount of funding available the applications will be ranked for priority by each program. As applications are funded, the remaining guaranteed loan funding authority may be insufficient to fund the next highest scoring application or applications (where two or more applications receive the same priority score). The Agency will use the procedures described in paragraphs (d)(1) and (2) of this section as often as necessary to consider all applications as appropriate. *If the state office has exhausted all state allocated funds and a national office reserve of funds is available, the State Office can submit a request for reserved funds in accordance with RD Instruction 1940-L or as directed by the national office program area.*

(1) If the remaining funds are insufficient to fund the next highest scoring application completely, the Agency will notify the lender and offer the lender the opportunity to accept the remaining funds. If the lender does not accept the offer, the Agency will process the next highest scoring application.

(2) If the remaining funds are insufficient to fund each application that receives the same priority score, the Agency will notify each lender and offer the lenders the opportunity to accept a prorated share of the remaining funds.

(3) Any lender offered less than the full amount requested under either paragraph (d)(1) or (2) of this section can either accept the funds available or request to compete in the next funding cycle. There is no assurance that the application(s) will be funded in a subsequent funding cycle.

(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) Handling of ranked applications not funded. The Agency will withdraw from consideration ranked applications that have not received funding as follows:

(1) If an unfunded application has a priority score equal to or greater than any applicable minimum score, the Agency will retain the application for consideration in subsequent funding cycles. If the unfunded application is not selected for funding after 12 months, including the first month in which the application was considered, the Agency will withdraw the application from further funding consideration. *The 12 months does not take into*

consideration months where Agency funding is not available. The GLS status code for the application must be changed to 130, "Suspense (Lack of Funds)," until the application is again considered for funding.

(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 withdraw the application from further funding consideration. *For applications that do not meet the minimum priority score, the applicant must be notified in writing that sufficient funds are not available for their request and the application will no longer be processed. This is not an adverse decision by the Agency. The GLS status code for the application must be changed to 151, "Withdrawn," and Agency comments added to GLS regarding the reason for withdrawal.*

(f) Commencement of the project. The borrower assumes all risks if the borrower purchases real property or equipment or starts construction of the project to be financed by a guaranteed loan after the complete application has been received by the Agency, but prior to the Agency's issuance of the conditional commitment and the lender and borrower's acceptance of the conditional commitment.

(g) Application withdrawal. During the period between the submission of an application and prior to issuance of the conditional commitment, the lender must notify the Agency, in writing, if the project is no longer viable or the borrower no longer is requesting financial assistance for the project. When the lender notifies the Agency, the Agency will rescind the selection and withdraw the application, as applicable. *The GLS status code for the application must be changed to 151, "Withdrawn," and Agency comments added to GLS regarding the reason for withdrawal.*

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

This section applies to CF projects seeking a loan guarantee. Paragraphs (a) through (d) of this section outline the criteria and amount of priority points that may be awarded to an application. The highest possible priority *points* score is 55. Paragraph (e) of this section outlines the reservation of funds for projects located in rural areas of 20,000 population or less.

(a) Population priority. If the project will be located in a rural community having a population of less than 20,000, 15 points *will be awarded*.

(b) Project priority. If the project will construct, enlarge, extend or otherwise improve a public safety, health clinic, early education, primary, or secondary education facility, 10 points *will be awarded*.

(c) Leveraging priority. If the applicant commits other funds to the project in the following percentages:

(1) 50 percent or more, 15 points *will be awarded*.

(2) 20% up to 49%, 10 points *will be awarded*.

(3) 5% up to 19%, 5 points *will be awarded*.

(d) Administrator priority. When guaranteed loan funds are requested from a National Office reserve, the Administrator may assign up to 15 points to address:

(1) Geographic distribution of funds;

(2) Emergency conditions caused by economic problems or natural disasters; or

(3) Initiatives that support the Agency's strategic plan.

(e)(1) Of the funds available each Federal fiscal year, as published on the Agency's website, the following amounts shall be reserved for projects in rural areas with a population of not more than 20,000 inhabitants:

(i) 100 percent of the first $200,000,000 so made available;

(ii) 50 percent of the next $200,000,000 so made available; and

(iii) 25 percent of all amounts exceeding $400,000,000 so made available.

(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.

§ 5001.317 WWD project priority points system.

This section applies to WWD projects seeking a loan guarantee. The highest possible priority point score is 150. *Except for national office priorities, scoring including, if necessary, discussion of why points were awarded, will be completed per*

state operating procedures.

(a) Population priority. If the project will primarily serve a rural area having a population under 10,000, 20 points will be awarded.

(b) Health priorities. If the proposed project is:

(1) Needed to alleviate an emergency situation, correct unanticipated diminution or deterioration of a water supply, or to meet Safe Drinking Water Act requirements which pertain to a water system, 25 points will be awarded;

(2) Required to correct inadequacies of a wastewater disposal system, or to meet health standards which pertain to a wastewater disposal system, 25 points will be awarded; or

(3) Required to meet administrative orders issued to correct local, State, or Federal solid waste violations, 15 points will be awarded.

(c) Service area priorities. An application is eligible to receive points under each of the categories identified in paragraphs (c)(1) through (3) of this section if the service area includes:

(1) An eligible area of long-term population decline according to the last three decennial censuses, 5 points will be awarded.

(2) A rural county that has had 20 percent or more of its population living in poverty, as defined by the United States Census Bureau, for the last 30 years, 5 points will be awarded.

(3) For a city or county with a current unemployment rate, as determined by the Department of Labor, that is 125 percent of the State-wide rate or greater, 5 points will be awarded. For projects located in certain territories that may not have unemployment rates by localities, if the applicant's proposed service area has an unemployment rate exceeding 125 percent of the national unemployment rate, 5 points will be awarded.

(d) Other priorities. Applications are eligible for points under each of the following priorities:

(1) If the proposed project will merge ownership, management, and operation of smaller facilities providing for more efficient management and economical service, 10 points will be awarded.

(2) If the proposed project will enlarge, extend, or otherwise modify existing facilities to provide service to additional rural areas, 10 points will be awarded.

(3) If the applicant is a public body or Indian tribe, 5 points will be awarded;

(4) If the amount funds committed to the project from sources other than Rural Development is:

(i) 50 percent or more, 15 points will be awarded;

(ii) 20 percent to 49 percent, 10 points will be awarded;

(iii) 5 percent to 19 percent, 5 points will be awarded;

(5) If the project will serve Agency identified target areas, 5 points will be awarded;

(6) If the project primarily recycles solid waste products thereby limiting the need for solid waste disposal, 5 points will be awarded; and

(7) If the project will serve an area that has an unreliable quality or supply of drinking water, 10 points will be awarded.

(e) In certain cases, the approval official may award up to 15 points to a project. The points may be awarded to projects in order to improve compatibility and coordination between WWD and other agencies' *including state, federal and tribal* selection systems, to ensure effective RUS fund utilization, and to assist those projects that are the most cost effective. A written justification must be prepared and placed in the project file each time these points are assigned.

(f) National office priorities. The Administrator may assign up to 15 additional points to account for items such as geographic distribution of funds, the highest priority projects within a state, and emergency conditions caused by economic problems or natural disasters. The Administrator may delegate the authority to assign the 15 points to appropriate National Office staff.

§ 5001.318 B & I project priority point system.

This section applies to B&I projects seeking a loan guarantee. When applications on hand have the same priority score, the Agency will give preference to applications involving guaranteed loans from veterans. *The state office will complete the priority score sheet with short justifications clearly documenting why the points are awarded. To award points, a veteran or veterans must own 20 percent or more in interest in the*

borrower and the borrower must sign a certification in its application to indicate that the borrower has veteran status. A maximum of 105 points can be awarded.

(a) Population priority. If the project is located in an unincorporated area or in a city with a population under 25,000, 5 points will be awarded.

(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:

(1) A distressed community in accordance with the Economic Innovation Group distressed community index. The list can be found on the Agency's website at: https://www.rd.usda.gov/onerdguarantee, 5 points will be awarded.

(2) A rural county that has had 20 percent or more of its population living in poverty, as defined by the United States Census Bureau, for the last 30 years, 5 points will be awarded.

(3) For a city or county with a current unemployment rate, as determined by the Department of Labor, 125 percent of the State-wide rate or greater, 5 points will be awarded. For projects located in certain territories that may not have unemployment rates by localities, if the applicant's proposed service area has an unemployment rate exceeding 125 percent of the national unemployment rate, 5 points will be awarded.

(4) The boundaries of a federally recognized Indian Tribe's reservation, within Tribal trust lands, or within land owned by an Alaska Native Regional or Village Corporation as defined by the Alaska Native Claims Settlement Act, 5 points will be awarded.

(c) Guaranteed Loan features. An application is eligible to receive points under each of the categories identified in paragraphs (c)(1) through (4) of this section as follows:

(1) If the lender will price the guaranteed loan at an interest rate equal to or less than the equivalent of the *Wall Street Journal* published Prime Rate plus 1.5 percent, 5 points will be awarded. *The interest rate charged to the borrower must be the equivalent of or less than the WSJ Prime Rate plus 1.5% to receive points. Loans with a floor interest rate in excess of this rate cannot be awarded priority points.*

(2) If the guaranteed loan is less than 60 percent of the total project cost, 5 points will be awarded.

(3) For guaranteed loans not requesting an exception under § 5001.456(c)(2), if the percentage of guarantee is 10 or more percentage points less than the maximum allowable, 5 points will be awarded. *In order to receive these points, a project must be requesting a loan guarantee percentage at least 10 percent below the standard and published guarantee percentage for B&I loans. For example, a loan that would qualify for an 80 percent guarantee must have a 70 percent or less guarantee, or a project that would qualify for a 70 percent guarantee must have a 60 percent or less guarantee.*

(4) If the business is owned by a qualified veteran, 5 points will be awarded.

(d) High impact business development investment priorities. An application is eligible to receive points under each of the categories identified in paragraphs (d)(1) through (7) of this section below:

(1) If the industry is not already present in the local community, 5 points will be awarded. *In order to receive these points, a project must be a new business with no businesses in that same industry already present in the community.*

(2) If the business has 20 percent or more of its sales in international markets, 5 points will be awarded. *Verifiable sales documentation or projections supported by a feasibility study must be provided to support these points.*

(3) If the business is locally owned and managed, 5 points will be awarded. *Locally owned and managed means that the owners and managers reside within the local commuting area, typically 100 miles or less.*

(4) If the business will produce a natural resource value-added product, 5 points will be awarded. *In order to receive these points, the business must manufacture a product from a natural resource. See the definition for a natural resource value-added product in Section 5001.3.*

(5) If the business processes, distributes, aggregates, stores, and/or markets locally or regionally produced agricultural food products to underserved communities in accordance with § 5001.105(b)(15)(ii), 5 points will be awarded.

(6) If the business creates or saves a minimum of five jobs with an average wage exceeding 150 percent of the Federal minimum wage, 5 points will be

awarded. *The federal minimum wage may be found at: http://www.laborlawcenter.com/t-federal-minimum-wage.aspx.*

(7) If the business offers a healthcare benefits package to all employees and pays at least 50 percent of the healthcare premium, 5 points will be awarded. *A copy of Internal Revenue Service/Department of Labor Form 5500 may be used to document the business offers a healthcare benefits package to all employees.*

(e) Administrative points. An application is eligible to receive points under paragraphs (e)(1) through (3) of this section.

(1) For projects awarded under State allocations, the State Director may assign up to 10 additional points to an application to account for state-wide distribution of funds for natural disasters, local economic emergency conditions, community economic development strategies, State strategic plans, fundamental structural changes in a community's economic base, or projects that will fulfill an Agency special initiative. *An explanation and justification of the assigning of these points by the state director will be appended to the priority score calculation.*

(2) For projects requesting funds from the national reserve account, the State Director may request up to 10 administrative points from the Administrator.

(3) If an application is for a loan in excess of 10 million dollars, the Administrator may assign up to an additional 10 points to account for the nationwide geographic distribution of funds, or projects that will fulfill an Agency special initiative. *The state director must request administrator points in a separate correspondence with justification for the awarding of the points. e.g emergency conditions or the project fulfills an Agency initiative.*

§ 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, EEI, 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:

(1) All three impact areas, 5 points will be awarded;

(2) Any two of the three impact areas, 3 points will be awarded; or

(3) Any one of the three impact areas, 1 point will be awarded.

(b) Energy generated, replaced, saved, or percent efficiency. The Agency will award up to 25 points under this criterion. Each application is eligible for points under both paragraphs (b)(1) and (2) of this section.

(1) Quantity of energy generated or saved per RES/EEI loan amount requested, or percent efficiency of EEE project. The Agency will award up to 10 points under this sub-criterion. Points will be awarded for either the amount of renewable energy generation per dollar of loan amount requested, which includes those projects that are replacing energy usage with a renewable source; or the actual annual average energy savings over the most recent 12, 24, 36, 48, or 60 consecutive months of operation per dollar of guaranteed loan amount requested; or the percent efficiency of the EEE project. The Agency will not award points for more than one category.

(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:

(A) 50,000 BTUs or higher average annual energy generated or replaced per dollar of guaranteed loan amount requested or higher, 10 points will be awarded; or

(B) Less than 50,000 BTUs annual energy generated or replaced

per dollar of guaranteed loan amount requested, points will be awarded according to the result of taking the energy generated or replaced per guaranteed loan dollar requested ÷ 50,000 × 10 points. The points awarded are rounded to the nearest hundredth of a point.

(ii) Energy efficiency improvements. The Agency will award up to 10 points under this sub-criterion based on the average annual energy saved per dollar of guaranteed loan amount requested for the EEI project. The Agency will award up to 10 points as determined under paragraph (b)(1)(ii)(A) and (B) of this section.

(A) 50,000 BTUs or higher average annual energy saved per dollar of guaranteed loan amount requested, 10 points will be awarded; or

(B) Less than 50,000 BTUs average annual energy saved per dollar of guaranteed loan amount requested, points will be awarded according to the result of taking the energy generated per loan dollar requested ÷ 50,000 × 10 points. The points awarded are rounded to the nearest hundredth of a point.

(iii) Energy efficient equipment and systems. If the increased energy efficiency of the proposed equipment and systems is—

(A) 75 percent or greater, award 10 points;

(B) Less than 75 percent but equal to or greater than 50 percent, award 5 points;

(C) Less than 50 percent but equal to or greater than 25 percent, award 2.5 points; or

(D) Less than 25 percent, award 0 points.

(2) Quantity of energy replaced, generated, or saved, or percentage of energy efficiency. The Agency will award up to 15 points under this sub-criterion. Points will be awarded based on whether the project is for energy replacement, energy generation, or energy savings, or percentage of energy efficiency; points will not be awarded for more than one category.

(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.

(B) Calculation. Energy replacement is determined by dividing the quantity of renewable energy that the RES project is estimated would have been generated if it were in place over the most recent 12-month period by the quantity of energy actually consumed over the same period by the applicable energy process(es) that is(are) consuming energy.

(C) Awarding of points. Using the results from paragraph (b)(2)(ii)(B) of this section, if the percentage of energy replacement is—

(1) Greater than 50 percent, 15 points will be awarded;

(2) Greater than 25 percent, but equal to or less than 50 percent, 10 points will be awarded; or

(3) Equal to or less than 25 percent, 5 points will be awarded.

(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 criteria. 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—

(A) 50 percent or greater, 15 points will be awarded;

(B) 35 percent up to, but not including 50 percent, 10 points will be awarded;

(C) 20 percent up to, but not including 35 percent, 5 points will be awarded; or

(D) Less than 20 percent, no points will be awarded

(iv) Energy efficiency. If the percentage of energy efficiency is—

(A) Greater than 50 percent, 15 points will be awarded;

(B) Greater than 25 percent, but equal to or less than 50 percent, 10 points will be awarded; or

(C) Equal to or less than 25 percent, 5 points will be awarded.

(c) Commitment of funds. The Agency will award up to 15 points under this criterion based on the percentage of acceptable written commitment a borrower has from its other funding sources that are documented with a complete application.

(1) Calculation. The percentage of written commitment is calculated as follows:
Percentage of written commitment = total amount of funds for which written commitments have been submitted with the application ÷ Total amount of matching funds and other funds required.

(2) Awarding of points. Using the result from paragraph (c)(1) of this section, the Agency will award points as shown in paragraphs (c)(2)(i) through (iii) of this section.

(i) If the percentage of written commitments is 100 percent of the matching funds, 15 points will be awarded.

(ii) If the percentage of written commitments is less than 100 percent, but more than 50 percent, points will be awarded as follows: ((percentage of written commitments − 50 percent) ÷ (50 percent)) × 15 points, where points awarded are rounded to the nearest hundredth of a point.

(iii) If the percentage of written commitments is 50 percent or less, no points will be awarded.

(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. Base the calculation on the fiscal year in which the obligation was made.*

(1) If the borrower has never received and accepted a grant award under 7 CFR part 4280 or a guaranteed loan commitment under either this part or 7 CFR part 4280, 15 points will be awarded.

(2) If the borrower has not received and accepted a grant award under 7 CFR part 4280 or a guaranteed loan commitment under either this part or 7 CFR part 4280 within the previous two federal fiscal years, 10 points will be awarded.

(3) If the borrower has received and accepted a grant award under 7 CFR part 4280 or a guaranteed loan commitment under either this part or 7 CFR

part 4280 within the previous two federal fiscal years, no points will be awarded.

(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. *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. *Includes replacement, generation, and direct-use RES projects.* If the simple payback of the project is:

(i) Less than 10 years, 15 points will be awarded;

(ii) 10 years up to but not including 15 years, 10 points will be awarded;

(iii) 15 years up to and including 25 years, 5 points will be awarded; or

(iv) Longer than 25 years, no points will be awarded.

(2) Energy efficiency improvements. If the simple payback of the project is—

(i) Less than 4 years, 15 points will be awarded;

(ii) 4 years up to but not including 8 years, 10 points will be awarded;

(iii) 8 years up to and including 12 years, 5 points will be awarded; or

(iv) Longer than 12 years, no points will be awarded.

(3) Energy efficient equipment and systems. If the simple payback of the project is—

(i) Less than 4 years, 15 points will be awarded;

(ii) 4 years up to but not including 8 years, 10 points will be awarded;

(iii) 8 years up to and including 12 years, 5 points will be awarded; or

(iv) Longer than 12 years, no points will be awarded.

(g) Administrator priority points. Under this criterion, the Administrator may award up to 10 points to an application based on the conditions specified in paragraphs (g)(1) through (5) of this section. Under no circumstances will an application receive more than 10 points under this criterion.

(1) The application is for an under-represented technology.

(2) Selecting the application helps achieve geographic diversity.

(3) The borrower is a member of an unserved or under-served population.

(i) The borrower is a veteran or veterans own 20 percent or more in interest in the borrower. In order to receive points, the borrower must sign a certification in its application to indicate that the borrower has veteran status; or

(ii) The borrower is a member of a socially disadvantaged group or members of socially disadvantaged group(s) own 20 percent or more in interest in the borrower. Socially disadvantaged groups are groups whose members have been subjected to racial, ethnic, or gender prejudice because of their identity as members of a group without regard to their individual qualities. In order to receive points, the application must include a statement to indicate that borrower is a member of a socially disadvantaged group.

(4) Selecting the application helps further a Presidential initiative or a Secretary of Agriculture priority.

(5) The proposed project is located in a federally declared disaster area. Declarations must be within the last 3 calendar years.

(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.

(h) Unused funding. After each periodic competition, the Agency will roll any remaining guaranteed loan funding authority into the next competition. At the end of each Federal fiscal year, the Agency may elect at its discretion to allow any

remaining multi-year funds to be carried over to the next federal fiscal year rather than selecting a lower scoring application.

§§ 5001.320 – 5001.400 [Reserved]

Appendix A to Subpart D of Part 5001

ELEMENTS OF AN ACCEPTABLE FEASIBILITY STUDY

EXECUTIVE SUMMARY
Provide an overview to describe the nature and scope of the proposed project, including the purpose, project location, design features, capacity, and estimated capital costs. Include a summary of the feasibility determinations made for each applicable component.

	ECONOMIC
What is it?	Cost benefit analysis
What are the factors to consider?	Minimum amount of inputs (labor, infrastructure, utilities, renewable resources, feedstocks) to operate successfully Contracts in place and contracts to be negotiated, including terms and renewals Environmental risks Cost of project relative to the increase in revenues or benefits provided Overall economic impact of project including new markets created and economic development

	MARKET
What is it?	Analysis of the current and future market potential, competition, sales or service estimations including current and prospective buyers or users
What are the factors to consider?	Competition Type of project: service, product or commodity based Target market, new versus established End user analysis, captive versus competitive By-product revenue streams Industry risk

	TECHNICAL
What is it?	Analyzing the reliability of the technology to be used and/or the analysis of the delivery of goods or services, including transportation, business location, and the need for technology, materials, and labor.
What are the factors to consider?	Commercial availability Product and process success record and duplication of results Experience of the service providers Roads, rail, airport infrastructure Need for local transportation Labor market Availability of materials Use, age, and reliability of technology Construction risk

	FINANCIAL
What is it?	Analysis of the operation to achieve sufficient income, credit, and cashflow to financially sustain the project over the long term and meet all debt obligations.

What are the factors to consider?	Commercial or project underwriting Management's assumptions Accounting policies Source of repayment Dependency on other entities Equity contribution Market demand forecast Peer industry comparison Cost-accounting system Availability of short-term credit Adequacy of raw materials and supplies Sensitivity analysis

	MANAGEMENT
What is it?	Analysis of the legal structure of the business or operation; ownership, board and management analysis.
What are the factors to consider?	History of the business or organization Professional and educational background Experience Skills Qualifications necessary to implement the project

RECOMMENDATION
Conclude with an opinion and recommendation presented by the consultant

QUALIFICATIONS
Provide a resume or statement of qualifications of the author of the feasibility study, including prior experience.

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Appendix B to Subpart D of Part 5001
ELEMENTS OF FINANCIAL FEASIBILITY REPORTS

FINANCIAL FEASIBILITY ANALYSIS	
The following is a guide of the minimum items to be addressed in the preparation of the financial feasibility analysis. The level of effort required to prepare the report and the depth of analysis within the report are proportional to the size and complexity of the proposed project. The preparer is expected to fully disclose and analyze all significant factors that may have favorable or adverse effect on the financial success of the proposed facility.	
Existing facility	Explain current capacities; rates or usage; activities; suitability for continued use; alternate usage; deficiencies in servicing; staffing or physical conditions; and any other pertinent information.
Proposed facility	Description of construction and renovation by component parts including capacity of each component part and physical limiting factors.
Need for facility	Explain and document the need for the facility. Include comments regarding: • Service area • Population trends • Similar facilities and services in the area • Usage trends • Community support • Regulatory agency approval • Economy in the service area • Analysis of staff and consultants
Financial information	Explain all assumptions, underlying and expected demand, use, and projections of financial data, such as: • Changes in usage • All income and expenses • Rate structure • Allowance for collectible accounts • Depreciation life and method • Description of long-term debts
Financial statements	The following financial statements must be prepared reflecting 5 years' projections: • Balance sheet for all funds • Statement of income and expense • Statement of cash flow (cash receipts and disbursements) • Comparison data for facilities in similar industry or service (most recent year only)
Qualifications	Provide a resume or statement of qualifications of the preparer of the financial feasibility analysis

FINANCIAL FEASIBILITY STUDY WITH EXAMINATION OPINION
The financial feasibility study with examination opinion is the examination of the prospective financial information provided by the borrower ("management") culminating in an examination opinion on the reliability of the borrower's financial statements and management's underlying assumptions. The examination opinion provides a high level of assurance. The examination opinion will be prepared by a CPA with the necessary expertise to perform the study and backed by their professional liability insurance. Following are the items typically included in a financial feasibility study with examination opinion.
• Signed and dated opinion letter • 5 years historic and 5 years forecasted financial statements • Schedule of ratios pertinent to the industry • Summary of significant financial forecast assumptions and accounting policies • Summary of significant demand forecast assumptions • Sensitivity analysis • Other information deemed appropriate by the preparer

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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 a 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.

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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.

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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 anerobic 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 renewable energy system 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 so as 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.

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SUBPART E – Loan and Guarantee Provisions

Loan Provisions

§ 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 can 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.*

(a) Different rates on guaranteed and unguaranteed portion of the guaranteed loan. It is permissible to have different interest rates on the guaranteed and unguaranteed portions of the loan.

(b) Variable interest rates. A variable interest rate must be an interest rate that is tied to a *published* base rate, as published in a national or regional financial publication, and is agreed to by the Agency.

(1) The variable interest base rate must be specified in the promissory note along with any interest factors (e.g., National Prime plus 1.0 percent).

(2) The lender may adjust the variable interest rate at different intervals during the term of the loan, but not more often than quarterly.

(3) The lender must incorporate, within the variable rate promissory note, a provision for adjustment of payment installments to fully amortize the loan by its maturity date.

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

(d) Interest rate changes. Any change in the base rate or fixed interest rate between issuance of the conditional commitment and the issuance of the loan note guarantee must be approved by the Agency. Approval of such a change must be shown as an amendment to the conditional commitment and must be reflected on

the guaranteed loan closing report form. *Any interest rate change that causes an increase must be approved by the appropriate Agency approval official.*

§5001.402 Term length, loan schedule, and repayment.

(a) Term length. The lender, with Agency concurrence, will establish and justify the guaranteed loan term based on the use of guaranteed loan funds, the useful economic life of the assets being financed and those used as collateral, and the borrower's repayment ability. The maximum term allowable for final guaranteed loan maturity is limited to the justified useful life of the project or assets used as collateral but may not exceed 40 years or limitations in the applicable State Statute, whichever is less. *The Agency does not have to accept the lender's requested loan term and must closely examine the project to ensure that the loan's maturity is reasonable based on the borrower's ability to repay, and that the approved loan term does exceed the useful operating life of the collateral or state statute.*

(b) Guaranteed loan schedule and repayment. The lender must structure repayment in consideration of the borrower's cash flow and in accordance with the provisions of this section and the loan agreement. Scheduled guaranteed loan payments shall be made no less frequently than annually. In addition:

(1) Both the guaranteed and unguaranteed portions of the loan must be amortized over the same term.

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

(3) If the promissory note provides for an interest-only period, interest must be paid at least annually starting on a date that is no more than one year from the date of the promissory note. The first full payment on the guaranteed loan including principal and interest must be due and payable within three years from the date of the promissory note or as soon as the project is operational and has begun to generate income, whichever occurs first. *The only exception to this payment requirement is if the project meets the New Markets Tax Credit payment provisions of* § *5001.141(b)(4).*

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

§ 5001.403 Lender fees.

(a) The lender may charge the borrower reasonable, routine, and customary charges and fees for the guaranteed loan provided they are similar to those charges the lender assesses other borrowers for the same type of loan not subject to a loan guarantee. The lender must document such fees in the application. The lender may also charge routine and customary prepayment penalties and late payment fees for the guaranteed loan, which must be stated in the guaranteed loan documents.

(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.

§§ 5001.404 – 5001.405 [Reserved]

§ 5001.406 Guaranteed loan amounts.

Applicable guaranteed loan amounts depend on the type of project and the source of its funding.

(a) CF projects. The maximum amount of a CF guaranteed loan that may be made to a borrower, including the guaranteed and unguaranteed portions of any CF guaranteed loans, the outstanding principal and interest balance of any existing CF guaranteed loans, and any new CF guaranteed loan that is the subject of an application must not exceed $100 million.

(b) WWD projects. The maximum amount of a WWD guaranteed loan that may be made to a borrower, including the guaranteed and unguaranteed portions of any WWD guaranteed loans, the outstanding principal and interest balance of any existing WWD guaranteed loans, and any new WWD guaranteed loan that is the subject of an application must not exceed $50 million.

(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 outstandin*g 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).

(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. Federal grant funds may be used as the financial contribution.*

(1) The maximum total amount of REAP guaranteed loans made to a borrower, including the guaranteed and unguaranteed portions of all REAP guaranteed loans, the outstanding principal and interest balance of any existing REAP guaranteed loans and the new REAP guaranteed loan that is the subject of an application, must not exceed $25 million.

(2) The total amount of funds available to agricultural producers for energy efficient equipment and systems will not exceed 15 percent of annual funds available to the program.

§ 5001.407 Percentage of loan guarantee.

The percent of loan guaranteed may vary from program to program. The maximum guarantee is 90 percent of eligible guaranteed loan loss, *However Federal credit policies outlined in OMB/Treasury joint Circular A-129 stipulate that private lenders who extend credit that is guaranteed by the Government should bear at least 20 percent of the loss from a default.* The Agency will set annually a guarantee percentage by program that will apply to loans guaranteed within each program. The annual guarantee percentage will take current Federal credit policy into consideration and may be set at or below the maximum allowed authorized by statute. The Agency will announce annual guarantee percentages each fiscal year by publishing a document in the Federal Register in accordance with § 5001.10. *The maximum guarantee percentage will be established annually for each guaranteed loan program and may be different between programs in the same fiscal year. Guarantee percentages will be set at the time of obligation.*

§ 5001.408 Participation or assignment of guaranteed loan.

(a) General. The lender may obtain participation in the loan or assign all or part of the guaranteed portion of the guaranteed loan on the secondary market subject to the conditions specified in paragraphs (a)(1) through (5) of this section or retain the entire guaranteed loan..

(1) Participation. The lender may obtain participation in the loan under its normal operating procedures; however, the lender must retain title to and

possession of the promissory note(s) and retain the lender's interest in the collateral. *In a participation, the lender may sell or participate both the guaranteed and unguaranteed portion of a loan through participation to another lender subject to the minimum retention requirements of paragraph (3).*

(2) Assignment. Any assignment by the lender of the guaranteed portion of the loan must be accomplished in accordance with the conditions in the lender's agreement and the provisions of this section. The holders and the borrower have no rights or obligations to one another

(3) Minimum retention by the lender. Minimum retention at all times must be from the unguaranteed portion of the loan and cannot be participated to another person.

(i) The lender must hold a minimum of 7.5 percent of the total loan amount.

(ii) The lender must retain its security interest in the collateral and retain the servicing responsibilities for the guaranteed loan.

(iii) The Agency can approve a reduction of the minimum retention requirement below the applicable percentage on a case-by-case basis when the lender establishes to the Agency's satisfaction that reduction of the minimum retention percentage is necessary to meet compliance with the lender's regulatory authority. *Upon documentation from the lender's regulatory authority, this may be approved by the approval official for the maximum percentage that maintains the lender's compliance with its regulatory authority.*

(4) Prohibition. The lender must not assign or participate any amount of the guaranteed or non-guaranteed portion of the loan to the borrower, borrower's officers, directors, stockholders, other owners, or to members of their immediate families, or to a parent company, an affiliate, or a subsidiary of the borrower.

(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.*

(b) Lender's servicing fee to holder. The assignment guarantee agreement must clearly state the guarantee portion of loan as a percentage and corresponding dollar amount of the guaranteed portion of the guaranteed loan it represents and the lender's servicing fee. The lender must maintain a minimum servicing fee of 50 basis points from any holder. The lender cannot charge the Agency a servicing fee and servicing fees are not eligible expenses for loss claim.

(c) Distribution of proceeds. The lender must apply all loan payments and collateral proceeds received, after payment of liquidation expenses, to the guaranteed and unguaranteed portions of the loan on a pro rata basis.

(d) Promissory note(s). A loan note guarantee is issued to the lender for a specific promissory note(s) executed between the lender and the borrower. The lender must retain title to and possession of the guaranteed promissory note(s), retain the lender's interest in the collateral, and retain the servicing responsibilities for the guaranteed loan. The lender is prohibited from issuing any additional promissory notes at a later date for the same guaranteed loan.

(1) The lender may assign all or part of the guaranteed portion of the loan, including interest strips, to one or more holders by using an assignment guarantee agreement for each holder. The lender must complete and execute the assignment guarantee agreement and return it to the Agency for execution prior to holder execution.

(2) The lender or holder may request a certificate of incumbency and signature from the Agency.

(3) A holder, upon written notice to the lender and the Agency, may reassign the unpaid guaranteed portion of the loan, in full, assigned under the assignment guarantee agreement. Holders can only reassign the complete block they have received and cannot subdivide or further split their interest in the guaranteed portion of a loan or retain an interest strip.

(4) Upon notification and completion of the assignment through the use of the assignment guarantee agreement, the assignee succeeds to all rights and obligations of the holder thereunder. Subsequent assignments require notice to the lender and Agency using any format, including that used by the Securities Industry and Financial Markets Association (formerly known as the Bond Market Association), together with the transfer of the original assignment guarantee agreement.

(5) The Agency will not execute a new assignment guarantee agreement to affect a subsequent reassignment.

(6) The Agency will not reissue a duplicate assignment guarantee agreement unless:

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

(ii) The reissue is made in accordance with §5001.459.

(e) Rights and liabilities. When a guaranteed portion of a loan is assigned to a holder using an assignment guarantee agreement, the holder succeeds to all rights of the lender under the loan note guarantee to the extent of the portion purchased. . The full, legal interest in the promissory note must remain with the lender, and the lender remains bound to all obligations under the loan note guarantee, lender's agreement, and Agency regulations applicable to the guarantee.

(1) A guarantee and right to require purchase in accordance with § 5001.511 will be directly enforceable by a h\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.

(2) The lender must not represent a conditional commitment of guarantee as a loan guarantee.

(3) The lender must reimburse the Agency for any payments the Agency makes to a holder on the lender's behalf under the loan note guarantee, given the lender would not be entitled to the payments had they retained the entire interest in the loan.

§§ 5001.409 – 5001.449 [Reserved]

Guarantee Provisions

§ 5001.450 General.

(a) Full faith and credit. A loan note guarantee issued under this part constitutes an obligation supported by the full faith and credit of the United States and is incontestable except for fraud or misrepresentation of which a lender or holder has actual knowledge at the time it becomes such lender or holder, or which a lender or holder participates in or condones.

(b) Conditions of guarantee. A guaranteed loan under this part will be evidenced by a loan note guarantee issued by the Agency.

(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 Section 5001.140.*

(2) The lender must remain mortgagee and secured party of record notwithstanding the fact that another party may hold a portion of the guaranteed loan.

(3) The lender will receive all payments of principal and interest on account of the entire guaranteed loan and must promptly remit to each holder and participant, if any, its pro rata share of any payment within 30 days of the lender's receipt thereof from the borrower. Holder or participant payments are determined according to their respective interest in the guaranteed loan, less only the lender's servicing fee.

(4) Any claim against a loan note guarantee or assignment guarantee agreement that is attached to, or relating to, a promissory note that provides for payment of interest-on-interest, default charges, penalty interest, or late payment fees will be reduced to remove such interest, fees and charges.

(5) The loan note guarantee is unenforceable by the lender to the extent that any loss is occasioned by:

(i) The violation of usury laws;

(ii) Use of guaranteed loan funds for unauthorized loan purposes in accordance with § 5001.122 or to the extent that those funds are used for purposes other than those specifically approved by the Agency in its conditional commitment or amendment thereof;

(iii) Failure to obtain, perfect, document, and or maintain the required collateral or security position regardless of the time at which the Agency acquires knowledge thereof; and

(iv) Negligent loan origination or negligent loan servicing as determined and documented by the Agency.

(6) The Agency will guarantee payment as follows:

(i) To any holder, 100 percent of any loss sustained by the holder on

the guaranteed portion of the guaranteed loan it owns and on interest due (as determined under paragraph (g) of this section) on such portion less any outstanding servicing fee.

(ii) To the lender: Any loss sustained by the lender on the guaranteed portion of the guaranteed loan, including principal and interest (as determined under paragraph (c) of this section) evidenced by the promissory note(s) or assumption agreements entered into in connection with an Agency approved transfer and assumption, and secured advances for protection and preservation of collateral made with the Agency's authorization if applicable.

(c) Accrued interest payments. If a loan has been guaranteed by the Agency prior to October 1, 2020, the Agency will guarantee the lender and any holders accrued interest in accordance with the applicable regulations in effect for the respective program at the time the loan was guaranteed. For all guaranteed loans closed on or after October 1, 2020, the Agency will guarantee accrued interest in accordance with paragraph (c)(1) or (2), as applicable, of this section.

(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, *The Agency must ensure that an interest termination letter is issued not later than 60 days from the date of the most recent delinquency effective date to ensure that not more than 90 days of interest is paid. The lender should issue the interest termination letter to any holder and provide the Agency with a copy. An example of this letter is available on the OneRD InfoHub. In the event the lender cannot or will not issue the letter, the Agency will issue the letter to the holder(s) with an interest termination date and provide the lender with a copy.* and up to a total of 180 days, only if:

(i) The lender, and not the Agency, has repurchased all holder interests in the guaranteed loan in accordance with § 5001.511;

(ii) The lender is actively engaged in a credit resolution with the borrower to bring the account current or fully liquidate the collateral under the terms of a liquidation plan approved by the Agency; and

(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. 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. 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 in-adequate.

§ 5001.451 Conditional commitment.

(a) Issuance. Upon selection of an application *for funding* in accordance with § 5001.315 in subpart *D*, the Agency will issue a conditional commitment to the lender, to be accepted by the lender and the borrower, containing conditions under which the Agency will issue a loan note guarantee. *Lenders must be advised to provide sufficient time between issuance of the Conditional Commitment and loan closing for both the borrower and lender to review and accept the Conditional Commitment terms and conditions.*

(1) Upon acceptance of the conditional commitment, the lender agrees not to modify the scope of the project, overall facility concept, project purpose, use of guaranteed loan funds, or other terms and conditions without Agency written concurrence in accordance with paragraph (c) of this section.

(2) If the lender decides at any time after receiving a conditional commitment that it no longer wants a loan guarantee, the lender must immediately advise the Agency of the cancellation in writing. Upon written notification from the lender, the Agency will de-obligate the funds associated with the conditional commitment. *The Agency should inform the lender of the ability to request changes to the Conditional Commitment in accordance with paragraph (c) of this section prior to de-obligating the funds.*

(b) Content. The conditional commitment will address information required for issuing a loan note guarantee, including but not limited to:

(1) Approved use of guaranteed loan funds (source and use of funds);

(2) Rates and terms of the loan;

(3) Loan agreement requirements;

(4) Loan closing requirements;

(5) Lender and borrower certifications;

(6) Collateral and lien position requirements; and

(7) Other requirements necessary to protect the Agency, *including but not limited to mitigation measures identified in the environmental review, guarantee retention fees, and other items specific to the guarantee request.*

(8) An example conditional commitment with all attachment language possible is available on the OneRD Guarantee Loan Initiative InfoHub. An example of an associated cover letter with the conditional commitment is also on the OneRD Guarantee Loan Initiative InfoHub.

(c) Change requests. The lender can request, in writing, changes to the conditional commitment with justification. The Agency can deny, solely at its discretion, changes to the conditional commitment even if the changes are otherwise in compliance with this part. All changes to the conditional commitment must be documented by written amendment to the conditional commitment executed by all parties. *Change requests should be reviewed to ensure that they do not impair the repayment ability of the borrower or negatively impact the guaranteed loan project.*

(d) Acceptance or withdrawal of conditional commitment. The lender and borrower must complete and sign the conditional commitment and return a copy to the Agency within 60 days. If the conditional commitment is not accepted by both the lender and borrower within 60 days, the conditional commitment becomes null and void and the Agency will withdraw the conditional commitment and de-obligate the associated funds.

(e) Modification, and expiration of conditional commitment. The conditional commitment issued by the Agency will be effective for a period of 1 year or sufficient time to complete the guaranteed loan project prior to loan closing. The lender must submit a written request to the Agency to extend the conditional commitment at least 30 days prior to its expiration date and obtain Agency approval for the extension. The Agency will consider this request only if no major changes have been made in the Lender's loan conditions and requirements and no material adverse changes in the borrower or the borrower's financial condition have occurred since issuance of the conditional commitment. *The state office may request additional documentation from the lender to assist in determining no adverse change in the borrower's financial condition, such as current financial statements with the lender's analysis. If the conditional commitment is close to expiring and the state office does not have adequate time to perform its due diligence to grant an extension, the state office may extend the conditional commitment for an additional month to allow time for a thorough review.* If a conditional commitment expires, the Agency will notify the lender in writing and may de-obligate the funds. Any additions or modifications to conditions stated in

the original conditional commitment must be agreed upon between the lender, the borrower and the Agency.

§ 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. *Use the Conditional Commitment as a checklist to ensure that all conditions have been met. If, at a later date, it is discovered that all conditions have not been met, the lender should be advised in writing that full enforceability of the guarantee by the lender may be compromised if the deficiencies are not corrected.*

(b) Simultaneously with or immediately after the guaranteed loan closing, the lender must provide to the Agency the guarantee fee, any secondary market assignment documents, and the following forms and documents:

(1) An Agency-approved, "Guaranteed Loan Closing Report";

(2) A copy of each executed promissory note and collateral security documents; *A copy of unrecorded security documents is sufficient to meet the terms of the Conditional Commitment as it is the lender's responsibility to perfect their security interests and receipt of a recorded mortgage or security agreement filing may take several weeks.*

(3) A copy of the executed final loan agreement, which must include any additional requirements imposed by the Agency in the conditional commitment;

(4) The original, executed Agency-approved guarantee form(s) for any required personal, partnership or corporate guarantees. *Electronic signatures are acceptable.*

(5) The borrower's loan closing balance sheet, if required;

(6) For loans to public bodies, an opinion from recognized bond counsel regarding the adequacy of the preparation, issuance, and enforceability of the debt instruments;

(7) Any other documents required to comply with applicable law or required by this part, the conditional commitment or the Agency; and

(8) When requesting issuance of a loan note guarantee, the lender must certify to each condition identified in paragraphs (b)(8)(iii)(A) through (V) of this section as applicable.

(i) In making its certification, the lender can rely on certain written materials (e.g., certifications, evaluations, appraisals, financial statements, and other reports) provided by the borrower or other qualified third parties (e.g., independent engineers, appraisers, accountants, attorneys, consultants, or other experts).

(ii) If the lender is unable to provide any of the certifications required under this section, the lender must provide an explanation satisfactory to the Agency.

(iii) The lender may request the loan note guarantee prior to construction in accordance with this part; however, the lender must still certify to all applicable conditions of this paragraph (b)(8)(iii).

(A) All requirements of the conditional commitment have been met.

(B) The financial criteria specified in § 5001.303(b)(4) of this part and any financial criteria contained in the conditional commitment were:

(1) Determined in accordance with any applicable requirements in § 5001.9 of this part, and

(2) Have been maintained through the issuance of the loan note guarantee. Failure to maintain or attain the minimum financial criteria will result in the Agency not issuing a loan note guarantee.

(C) No major changes have been made in the applicant, project or lender's loan conditions and requirements since the issuance of the conditional commitment, unless such changes have been approved by the Agency.

(D) There has been neither any material adverse change in the borrower's financial condition nor any other material adverse change in the borrower during the period of time from the Agency's issuance of the conditional commitment to issuance of the loan note guarantee regardless of the cause or causes of the change and whether or not the change or causes of the change were within the lender's or borrower's control.

(1) The borrower is a legal entity in good standing with its regulator (as applicable) and is operating in accordance

with the laws of the State(s) or Tribe where the borrower was organized or has a place of business.

(2) The borrower meets the eligibility requirements as outlined in § 5001.126(a) and (b) through (e), as applicable.

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

(F) The guaranteed loan has been properly closed, and the required security instruments have been properly executed and all security interests obtained by the lender have been or will be properly perfected in accordance with applicable law.

(G) All planned property acquisition has been or will be completed; all development has been or will be substantially completed in accordance with plans and specifications and conforms to applicable Federal, State, and local codes; all equipment required for the project is available, can be procured and delivered within the project development schedule, and will be installed in conformance with manufacturer's specifications and design requirements; and costs have not exceeded the amount approved by the lender and the Agency.

(H) The proposed project complies with all current Federal, State, and local laws and regulatory rules that affect the project, the borrower, and lender activities, including, but not limited to, equal opportunity and Fair Housing Act requirements and design and construction requirements.

(I) Lender-required insurances are in effect.

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

(K) The borrower has marketable title to the collateral then owned by the borrower, subject to the rights of the guaranteed loan and to any other exceptions approved in writing by the Agency.

(L) Where required, necessary or prudent, the borrower has obtained — *Legal opinions are highly encouraged.*

(1) A legal opinion relative to the title and accessibility to

any rights-of-way and easements; and

(2) A title opinion or title insurance showing the borrower has good and marketable title to real property and other collateral and all mortgages or other lien defects, restrictions, or encumbrances, if any.

(M) All project funds have been or will be disbursed for purposes and in amounts consistent with the conditional commitment (or Agency-approved amendment thereof) and the application submitted to the Agency. Appropriate lender controls were used to ensure that all funds were properly disbursed, including funds for working capital. A copy of a settlement statement by the lender detailing the use of loan and matching/equity funds must be attached to support this certification.

(N) When applicable, the entire amount of the loan for working capital or initial operating expenses have been disbursed to the borrower, except in cases where the Agency has approved disbursement over an extended period of time and funds are escrowed so that the settlement statement reflects the full amount to be disbursed.

(O) When required, personal, *partnership*, and/or corporate guarantees have been obtained in accordance with § 5001.204 of this part.

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

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

(R) The loan agreement includes all borrower compliance measures identified in the Agency's environmental review for avoiding or reducing adverse environmental impacts of the project's construction or operation.

(S) The lender will comply with the requirements of the Debt Collection Improvement Act *implemented under 7 CFR part 3*.

(T) The lender has executed and delivered the lender's agreement *in accordance with § 5001.131 subpart B*, completed registration in the Agency's electronic reporting system, and electronically submitted the *guaranteed* closing report for the guaranteed loan along with the appropriate guarantee fee.

(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.

(V) For CF and WWD projects, the lender must also certify that the lender would not make the loan without an Agency loan guarantee.

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

(c) For RES projects where applicable, the lender must provide to the Agency a copy of the executed power purchase agreement. *A permission to operate letter from the energy off-taker should also be requested as applicable.*

(d)(1) For all CF projects before the Agency will issue a loan note guarantee on a guaranteed loan to a borrower other than a public body, the articles of incorporation or other organizing documents of the borrower or the loan agreement must include a condition similar to the following:

(2) If the corporation dissolves or ceases to perform the community facility objectives and functions, the board of directors shall distribute all business property and assets to one or more nonprofit corporations or public bodies. This distribution must be approved by 75 percent of the users or members and must serve the public welfare of the community. The assets may not be distributed to any members, directors, stockholders, or others having a financial or managerial interest in the corporation. Nothing herein shall prohibit the corporation from paying its debts.

(e) For all B&I projects a borrower whose project involves locally or regionally produced agricultural food products and is not located in a rural area must include in an appropriate agreement with retail and institutional facilities to which the

borrower sells locally or regionally produced agricultural food products a requirement to inform consumers of the retail or institutional facilities that the consumers are purchasing or consuming locally or regionally produced agricultural food products.

§ 5001.453 Issuance of the loan note guarantee.

The Agency, at its sole discretion, will determine if the conditions specified in the conditional commitment have been met and whether to issue the loan note guarantee.

(a) Issuance. When the Agency is satisfied that all of the conditions specified in the conditional commitment have been met and it receives all the required fees plus the executed lender's agreement from the lender *in accordance with § 5001.131*, the Agency will issue the documents identified in paragraphs (a)(1) through (3) of this section, as appropriate. *An example letter to the lender is available on the OneRD Guarantee Loan Initiative InfoHub*.

(1) Loan note guarantee. The Agency will provide the lender the original loan note guarantee document which the lender must attach to the promissory note. If the lender elected to use the multi-note system, the Agency will issue one loan note guarantee for the set of promissory notes.

(2) Assignment guarantee agreement. If the lender assigns any guaranteed portion of a guaranteed loan to a holder, the lender, holder, and the Agency will execute an assignment guarantee agreement for each assignment.

(3) Certificate of incumbency and signature. The Agency will provide the holder an executed certificate of incumbency form to verify the signature and title of the Agency official who signed the assignment guarantee agreement.

(b) Agency review of closing. The Agency will review the closing documents submitted by the lender for completeness and if all conditions have been met, and all documents have been provided the Agency will issue the loan note guarantee. If the Agency determines that it cannot issue the loan note guarantee, the Agency will notify the lender, in writing, of the reasons and give the lender a reasonable period within which to satisfy the objections. If the lender satisfies the objections within the time allowed, the Agency will issue the loan note guarantee.

(c) Cancellation of obligation. A lender can submit a written request to the Agency for a partial cancellation. The lender must include in this request the reason for the partial cancellation, the effective date, and the portion to be canceled. If the Agency conditions for issuance of the loan note guarantee are rejected, cannot be met or funds are, in whole or in part, no longer needed, the Agency will cancel the obligation.

§ 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 guarantee loan is obligated.* The lender may pass the guarantee fee on to the borrower.

(a) Guarantee fee calculation. The one-time guarantee fee is calculated by multiplying the total loan amount by the percentage of guarantee by the guarantee fee rate, which may vary by program.

(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:

Table 1 to § 5001.454(b) - Guarantee fee

	Maximum Guarantee Fee
Community Facilities	4%
Water and Waste Disposal	3%
Business and Industry	5%
Rural Energy for America Program	3%

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) Loan note guarantee prior to completion. If the loan note guarantee is issued prior to completion of the project's construction under § 5001.205(e)(2), an additional guarantee fee of 0.50 percent will be added. This additional 0.50 percent fee may not be passed on to the borrower.

(d) Reduced fee. Subject to annual limits set by the Agency and published in an annual Federal Register document, the Agency may charge a reduced guarantee fee if requested by the lender when the borrower's project meets any one of the

following criteria: *The borrower and project must meet only one of the following criterion to be eligible for a reduced guarantee fee.*

(1) Is located in a rural community that—

(i) Is a distressed community in accordance with the Economic Innovation Group distressed community index. *The list can be found on the Agency's website at: https://www.rd.usda.gov/onerdguarantee;* or

(ii) Is experiencing long-term population decline according to the last three decennial censuses; *This information can be found at: https://usdagcc.sharepoint.com/:f:/r/sites/rd_ic/DAD1/CensusHub/Shared%20Documents/Census%20Data?csf=1&web=1&e=9nHWrqv.* or

(iii) Is in a persistent poverty county. A persistent poverty county is any county that has had 20 percent or more of its population living in poverty over the past 30 years, as measured by the 1990 and 2000 decennial census and 2007-2011 American Community Survey 5-year average, or any territory or possession of the United States; *This information can be found at: https://usdagcc.sharepoint.com/:f:/r/sites/rd_ic/DAD1/CensusHub/Shared%20Documents/Census%20Resources?csf=1&web=1&e=AoT6KDD. or*

(iv) Is in a presidentially declared *major* disaster area, declared within the 24 months preceding the date of the application, and is experiencing trauma as a result of natural disaster; *This information can be found at: https://www.fema.gov/disasters/year.* or

(v) Is located in a city, county, or state with an unemployment rate, as determined by the Department of Labor, 125 percent or greater of the current national rate; or *This information can be found at: https://www.bls.gov/charts/employment-situation/civilian-unemployment-rate.htm and https://www.bls.gov/lau/tables.htm.*

(vi) Is located within the boundaries of a federally recognized Indian tribe's reservation or within Tribal trust lands or within land owned by an Alaska Native Regional or Village Corporation as defined by the Alaska Native Claims Settlement Act. *This information can be found at: https://biamaps.doi.gov/. Once at the site open the Map U. S. Domestic Sovereign Nations: Land Areas of Federally-Recognized Tribes. or*

(2) Processes, distributes, aggregates, stores, and/or markets locally or regionally produced agricultural food products and promotes access to healthy foods; or

(3) Is locally owned and managed, and either

(i) Supports value-added agriculture and provides a market for locally or regionally produced agricultural food product; or *e.g. healthy food initiative;*

(ii) Produces a natural resource value-added product/manufactures a product from a natural resource. *This criterion does not need to be related to a food product and includes further processing of a natural renewable resource to a functional product. An example would be converting trees to wood pellets or furniture.* or

(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 Agricultural Improvement Act of 2018 (Pub. L. 115-334); or *This information on economic development district is at https://eda.gov/edd/ and SECD is at https://www.rd.usda.gov/programs-services/strategic-economic-and-community-development.*

(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.*

§ 5001.455 Periodic guarantee retention fee.

The Agency will collect a periodic guarantee retention fee from the lender for as long as the loan note guarantee is outstanding in accordance with the annual notice published in the Federal Register in accordance with § 5001.10. Payment of the periodic guarantee retention fee is required to maintain the validity of the loan note guarantee. The lender may pass the fee on to the borrower but may not delay payment of the fee to the Agency while collecting the payment from the borrower. The fee rates may differ by program as published annually in a document in the Federal Register in accordance with § 5001.10. The annual Federal Register notification will include the frequency of payment for the fees.

(a) Calculation. The guarantee retention fee is calculated by multiplying the full outstanding principal guaranteed loan balance as of a date(s) as published in the annual Federal Register notification, by the percentage of guarantee, by the fee rate as noted in the guaranteed loan conditional commitment.

(b) Effective fee rate. The effective guarantee retention fee rate that is published in a Federal Register document in accordance with § 5001.10 at the time the guaranteed loan is obligated will be noted in the guarantee loan conditional commitment and the fee will remain in effect for the life of the loan note guarantee.

(c) Payments. The guarantee retention fee payment frequency and related due date provisions will be published in the annual *Federal Register* notification.

(1) Guarantee retention fee payments not received within 60 days after their due date are considered delinquent and, at the Agency's discretion, may result in cancellation of the loan note guarantee to the lender. *The Agency's approval official may concur in maintaining the loan note guarantee past the 60 days if the delinquent guarantee retention fee is the result of circumstances beyond the lender's reasonable control such as an act of God, war, terrorist attack or other similar types of events. The approval official will document the file accordingly.* The Agency will provide the lender 30 calendar days' written notice that the fee is delinquent before canceling the loan note guarantee. Holders' rights will continue in effect as specified in the loan note guarantee and assignment guarantee agreement, unless the holder took possession of an interest in the loan note guarantee knowing guarantee retention fees had not been paid.

(2) Until the loan note guarantee is canceled by the Agency, any delinquent periodic guarantee retention fee will bear interest at the promissory note rate.

(3) When the Agency repurchases 100 percent of the guaranteed portion of the guaranteed loan as prescribed in § 5001.511(c), the Agency will discontinue collection of the periodic guarantee retention fee.

(d) Secondary market prohibition. Lenders are prohibited from selling any portion of the guaranteed loan on the secondary market if there are unpaid periodic guarantee retention fees.

§ 5001.456 Other fees.

The Agency has the authority and may at its discretion charge additional fees in order to maintain adequate levels of program funding. Prior to the Agency charging any additional fees, the Agency will publish a notice of those fees in the *Federal Register* in accordance with § 5001.10. All fees will be disclosed in the conditional commitment

specific to the project as issued to the lender at the time approval.

(a) Until the loan note guarantee is canceled by the Agency, any delinquent fees will bear interest at the promissory note rate.

(b) Lenders are prohibited from selling any portion of the guaranteed loan on the secondary market if there are unpaid fees.

§ 5001.457 Changes prior to loan closing.

(a) Change in borrower prior to closing. Any change in borrower ownership or organization prior to the issuance of the loan note guarantee must meet the applicable guaranteed program's eligibility requirements and must be approved by the Agency.

(b) Transfer to new lender prior to issuance of the loan note guarantee. Prior to issuance of the loan note guarantee, a lender can request a transfer of an outstanding conditional commitment to a new lender by providing the Agency with a letter from the lender, the borrower, and the proposed new lender. The request must include the reason(s) the current lender no longer desires to be the lender for the project.

(1) The Agency may approve the transfer from the current lender to the proposed new lender provided the new proposed lender is an eligible lender (see paragraph (b)(2) of this section) and no material adverse changes have occurred in the:

(i) Ownership, control or legal structure of the borrower; and

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

(2) The Agency will determine if the proposed new lender is eligible in accordance with § 5001.130 of this part prior to approving the transfer of lender. The new lender must execute a new *agency-approved* application form and a lender's agreement (unless the new lender already has a valid lender's agreement with the Agency) and must complete a new credit evaluation in accordance with § 5001.202 of this part. The Agency may require the new lender to provide other updated application items as specified by the Agency.

(3) If the Agency approves the transfer to the new lender, the Agency will issue a letter of amendment to the original conditional commitment reflecting the new lender who must acknowledge acceptance of the amended conditional commitment in writing.

§ 5001.458 Other Federal, State, and local requirements.

Beginning on the date of issuance of the loan note guarantee, lenders and borrowers must—

(a) Coordinate with all appropriate Federal, State, local and Tribal agencies that may have jurisdiction or involvement in each project; and

(b) Comply with all current Federal, State, local, and Tribal laws and rules, as well as applicable regulatory commission rules, that affect the project, the borrower, or lender. Compliance activities include, but are not limited to—

(1) Organization and borrower's authority to design, construct, develop, operate, and maintain the proposed facilities;

(2) Borrowing money, giving security, and raising revenues for repayment;

(3) Land use zoning;

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

(5) Protection of the environment and consumer affairs.

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

If a loan note guarantee or assignment guarantee agreement has been lost, stolen, destroyed, mutilated, or defaced while in the custody of the lender or holder, the Agency may issue a replacement to the lender or holder, as applicable under the conditions described in paragraphs (a) through (c) of this section. The lender is prohibited from altering or modifying or approving any alterations to or modifications of any loan documents without the prior written approval of the Agency.

(a) Replacement requirements. The lender must coordinate the activities of the party who seeks the replacement documents and must submit the required documents to the Agency for processing. The requirements for replacement are as follows:

(1) A written statement of loss which includes:

(i) Legal name and present address of either the lender or the holder who is requesting the replacement forms;

(ii) Legal name and address of the lender of record;

(iii) Capacity of person certifying;

(iv) Full identification of the loan note guarantee or assignment guarantee agreement including the name of the borrower, the Agency's case number, date of the loan note guarantee or assignment guarantee agreement, face amount of the promissory note in which an interest was purchased, date of the promissory note, present balance of the guaranteed loan, percentage of guarantee, and, if an assignment guarantee agreement, the original named holder and the percentage of the guaranteed portion of the guaranteed loan assigned to that holder. Any existing parts of the document to be replaced must be attached to the certificate;

(v) A full statement of circumstances of the loss, theft, destruction, defacement, or mutilation of the loan note guarantee or assignment guarantee agreement; and

(vi) For the holder, evidence demonstrating current ownership of the assignment guarantee agreement. If the present holder is not the same as the original holder, the lender must include a copy of the endorsement of each successive holder in the chain of transfer from the initial holder to present holder. If copies of the endorsement cannot be obtained, the lender must submit the best available records of transfer (e.g., order confirmation, canceled checks, etc.).

(b) Indemnity bond. An indemnity bond acceptable to the Agency must accompany the request for replacement except when the holder is the United States, a Federal Reserve Bank, a Federal Government corporation, a State or territory, the District of Columbia or a federally recognized tribal entity. The indemnity bond must:

(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;

(2) Be issued and payable to the United States of America acting through the Agency;

(3) Be in an amount not less than the unpaid principal and interest; and

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

§§ 5001.460 – 5001.500 [Reserved]

SUBPART F – Servicing Provisions

§ 5001.501 General.

The lender is responsible for servicing the entire loan and taking all servicing actions that a reasonably prudent lender would perform in servicing its own portfolio of loans that are not guaranteed. The lender must certify that it will service the guaranteed loan in accordance with this part, its loan servicing policies and procedures, and the lender's agreement. Where a lender's loan servicing policies and procedures address a corresponding requirement in this part or in the lender's agreement, the lender must comply with the corresponding requirement in this part, unless otherwise approved by the Agency. *See RD Guarantee Loan Initiative InfoHub for a sample welcome letter to lender that includes a summary of lender servicing responsibilities. This letter is recommended for new lenders or lenders with limited guarantee activity in the Agency's guaranteed loan programs. It should be sent after the loan note guarantee is issued.*

(a) A lender's servicing responsibilities include, but are not limited to,

(1) Periodic borrower visits;

(2) Distribution of guaranteed loan funds;

(3) Collecting payments on guaranteed loans;

(4) Ensuring compliance with the covenants and provisions in the loan agreement, security instruments, and other supplemental agreements relating to the guaranteed loan;

(5) Obtaining and analyzing financial statements;

(6) Ensuring payment of taxes and insurance premiums;

(7) Maintaining liens and lien priority on collateral;

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

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

(10) Cooperating fully with all oversight and monitoring efforts of the Agency or its representatives as specified in § 5001.502.

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

(c) The lender must ensure that the borrower has obtained and will maintain all necessary insurance coverage appropriate to the proposed project.

(d) If the Agency determines that the lender is not in compliance with its servicing responsibilities, the Agency reserves the right to take any action the Agency determines necessary to protect the Agency's interests with respect to the guaranteed loan. If the Agency exercises this right, the lender must cooperate with the Agency to rectify the situation.

§ 5001.502 Oversight and monitoring.

The Agency will employ various oversight and monitoring activities in order to ensure compliance with this part. All lenders involved in any manner with any loan note guarantee issued under this part or under a loan note guaranteed previously issued under a guaranteed loan program identified in § 5001.1 of this part must cooperate fully with the Agency in its oversight and monitoring efforts, including, but not necessarily limited to, those identified in paragraphs (a) through (c) of this section.

(a) Reports and notifications. Lenders must submit to the Agency reports and notifications as required by this part. To facilitate the Agency's oversight and monitoring including but not necessarily limited to, those identified in paragraphs (a)(1) through (4), as applicable, of this section.

(1) Status reports. No less than semi-annual status reports as of June 30 and December 31 each year (unless more frequent reports are needed as determined by the Agency to protect the financial interests of the government) regarding the condition of the lender's guaranteed loan portfolio (including borrower status and loan classification) and any material change in the general financial condition of any borrower since the last report was submitted. The lender must submit these reports within 30 calendar days after the reporting period, using the appropriate Agency online reporting system. *When the lender does not utilize online reporting, State Offices are responsible for ensuring status reports are entered into the online reporting system timely and that a report has been entered for all outstanding guaranteed loans in their state. Regardless of how filed, the report information for each borrower will be reviewed for any deficient items, such as a loan with a past due status or where a classification has been*

downgraded. The State Office will follow up with the lender for additional information as necessary.

(2) Default reports. Monthly default reports for each guaranteed loan in monetary default using the appropriate Agency online reporting system are due on the 15th working day of each month. *State Offices will submit a narrative on actions taken by the lender to service and resolve the default, to the National Office, via the OneRD Guarantee Loan Initiative Project Manager, by the end of each month. If the borrower's loan is delinquent but they are in compliance with an Agency approved workout agreement, the loan is to be reported as current. The lender will use code 13 on the Guaranteed Loan Borrower Status report to show "Loan Reinstated and Current" if it was previously reported as delinquent. However, if an estimated loss claim has been paid, the loan will not be coded as "Loan Reinstated and Current" and will instead be coded as "06-Forced Liquidation Pending, Estimated Loss Claim Filed" or "05-Voluntary Liquidation Pending, Estimated Loss Claim Filed".*

(3) Notifications. The lender(s) must notify the Agency by written notification within 15 calendar days of any:

(i) Loan agreement violation by any borrower, including when the borrower is 30 days past due or is otherwise in default of the covenants in the loan agreement;

(ii) Permanent or temporary reduction in the interest rate;

(iii) Downgrade in the lender's loan classification of any guaranteed loan; and

(iv) Protective advances in accordance with § 5001.516.

(4) Collection activities report. If a lender is liquidating the assets of a borrower, the lender must also evaluate and provide a report of collection activities regarding the collectability of personal and corporate guarantees.

(b) Records.

(1) Lenders. Upon request by the Agency, the lender must permit representatives of the Agency (or other authorized persons) to inspect and make copies of any of the records of the lender pertaining to each guaranteed loan issued under this part or previously issued under one of the programs identified in § 5001.1 of this part. Such inspection and copying may be made during regular office hours of the lender or at any other time the lender and the Agency agree upon.

(2) Borrowers. Except as provided by law, upon request by the Agency, the borrower must permit representatives of the lender (or other authorized persons) to inspect and make copies of any of the records relating to the borrower's project. Such inspection and copying may be made during regular office hours of the borrower or at any other time agreed upon between the borrower and the lender.

(c) Agency and lender conference. When requested by the Agency, the lender must consult with the Agency to ascertain how the guaranteed loan is being serviced and that the conditions and covenants of the loan agreement are being enforced. *At any time the State Office becomes concerned with the lender's due diligence in servicing its guaranteed loan(s) or the lender has been negligent in reporting to the Agency, it will request a meeting with the lender to review the requirements of the Lender's Agreement. The results of the meeting will be documented in writing to the lender.*

(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.

§ 5001.503 REAP RES or EEI project completion requirements.

Once a REAP RES or EEI project has been completed, the lender or borrower is required to submit the applicable project performance report as identified in paragraphs (a) and (b) of this section by January 31 each year.

(a) Renewable energy systems. For RES projects, commencing the first full calendar year following the year in which project construction was completed and continuing for three full years, the borrower must provide an outcome project performance certification noting that either the system has or has not performed at the steady state operating level as described in the technical report filed with the REAP guaranteed loan application, and whether projected jobs created or saved have occurred. If it has not performed as intended, a report detailing the circumstances affecting performance must be provided to the Agency along with the actual energy production of the system (in BTUs, kilowatt-hours, or similar energy equivalents) and the actual number of jobs created or saved as a direct result of the RES project for which guaranteed loan funds were used.

(b) Energy efficiency improvements. For EEI projects, commencing the first full calendar year following the year in which project construction was completed and continuing for two full years, the borrower must provide an outcome project performance certification noting that either the energy efficiency improvements have or have not been utilized at or above the projected operating levels as

described in the technical report filed with the REAP guaranteed loan application, and whether projected jobs created or saved have occurred. If it has not performed as intended, a report detailing the circumstances affecting performance must be provided to the Agency along with the actual energy savings of the system and the actual number of jobs created or saved as a direct result of the EEI project for which guaranteed loan funds were used.

§ 5001.504 Financial reports.

(a) The lender must obtain the borrower's and any guarantor's financial statements required by this part and the loan agreement. The Agency may require an annual audited financial statement based on a project's circumstances. States, local government, Indian tribes, institution of higher education, and nonprofit organization borrowers who meet the Federal awards expended threshold established in 2 CFR part 200, subpart F, *"Audit Requirements,"* during their fiscal year must submit an audit conducted in accordance with 2 CFR part 200, subpart F. *If the Agency requests an audited financial statement from an entity subject to 2 CFR 200, and that entity does not meet the federal awards expended threshold established in 2 CFR 200, subpart F, "Audit Requirements", the Agency must arrange for the full cost of such audit in accordance with § 200.503(d).*

(b) The lender must submit financial statements obtained under this section to the Agency within 120 days of the end of the borrower's fiscal year. When the borrower's audit is conducted in accordance with 2 CFR part 200, subpart F, audits must be submitted no later than nine months after the end of the borrower's fiscal year or 30 days after the borrower's receipt of the auditor's report, whichever is earlier. If a lender makes reasonable documented attempts to obtain financial statements but is unable to obtain the borrower's (or guarantor's) cooperation, the failure to obtain financial statements does not impair the validity of the loan note guarantee. *State Offices are responsible for monitoring and following up on the receipt of the borrower's and guarantor's financial statement and the lender's financial analysis within the required timeframe. See OneRD Guarantee Loan Initiative InfoHub for a sample letter to notify the lender when the required items are past due.*

(c) Annual financial statements must be in accordance with accounting practices acceptable to the Agency as prescribed in § 5001.9 for all borrowers with a guaranteed loan balance in excess of $600,000. The lender may determine the type and frequency of financial statements for borrowers with a total guaranteed loan balance below $600,000 upon notification and justification to the Agency. This section does not supersede the borrower financial statement requirements of 2 CFR part 200, subpart F.

(d) The lender must analyze the financial statements obtained under paragraph (a) of this section and provide the Agency with a financial analysis including a credit

evaluation of trends, strength and weaknesses, ratio analysis, and conclusions, plus any extraordinary transactions; borrower violations of loan covenants and covenant waivers proposed by the lender, any routine servicing actions performed; and other indications of the financial condition of the borrower. *State Offices are responsible for reviewing the financial statements and the lender's financial analysis. If any deficiencies are identified in the lender's financial analysis, the State Office will follow-up as necessary with the lender to ensure the lender is taking appropriate action to remedy any deficiencies.*

(e) Following the Agency's review of the lender's financial analysis, the Agency will notify the lender in writing of any concerns. The lender must address each concern identified in the Agency's findings by the due date stated in the correspondence.

(f) The lender should routinely confirm the outstanding principal balance of a guarantee held by a holder to avoid any discrepancy and delay in reconciliation in the event of a lender or Agency repurchase of the guaranteed loan from a holder in accordance with **§** 5001.511.

§ 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.

(b) Release of collateral. The lender must provide written justification for the release and obtain Agency approval before releasing any collateral. The lender is not required to provide justification for the release of collateral when the loan is not in default or liquidation and the collateral being released is a working asset, such as accounts receivable, inventory, and work-in-progress, that are routinely depleted or sold and proceeds used for the normal course of business operations.

(1) Exceptions to prior approval. Lenders are not required to obtain Agency approval prior to releasing collateral when the collateral sale proceeds are used to pay down debt in order of lien priority, pay down the guaranteed loan principal, or to acquire replacement collateral.

(2) Appraisals. Current appraisals are required on all transactions pursuant to the requirements of § 5001.203 of this part. *If proposed sale value will exceed the principal balance owed on the guaranteed loan, the borrower intends to pay in full the loan, and the lender will return the loan note guarantee to the Agency, a current appraisal may be waived.*

(3) Sale or release transaction. The sale or release of collateral must be based on an arm's length transaction, unless otherwise approved by the Agency in writing *when the sale or release of collateral results in paying the guarantee*

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:

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

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

(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

(4) No adverse impact. Any release of collateral must not materially cause an adverse effect to the project's operation or financial condition and the remaining collateral must be sufficient to provide for adequate collateral coverage. Such assurance must be supported by written documentation from the lender and be acceptable to the Agency. If the Agency determines that the project may be adversely affected by a release of collateral, the Agency may, at its discretion, require an appraisal on the remaining collateral in accordance with § 5001.203 of this part.

§ 5001.506 Loan transfers and assumptions.

(a) General. A lender must obtain prior written Agency approval in accordance with paragraph (c) of this section before the lender conducts a transfer and assumption of a guaranteed loan. The transferee will assume a loan amount at least equal to the outstanding loan balance or the present market value of the collateral, whichever is less. If the transferor is to receive a payment for their equity, the total debt must be assumed. The following conditions must be met:

(1) All transfers and assumptions will have a fee as provided by § 5001.509(b).

(2) For each transfer and assumption, the lender must concur in plans for the disposition of funds, if any, in the transferor's debt service, operations and maintenance, or other reserve accounts.

(3) The lender must confirm that the transfer and assumption can be completed in accordance with applicable laws.

(4) The lender must confirm that the conveyance instruments will be filed, registered, and recorded as appropriate and legally permissible. The transfer and assumption must be made on the Lender's form of assumption agreement and contain the Agency case number of the transferor and transferee. The lender must provide the Agency with a copy of the assumption agreement.

(5) The lender may request a transfer and assumption when the total indebtedness, or less than the total indebtedness, of the guaranteed loan is assumed by another borrower. If the assumption is for less than the total indebtedness, the transfer and assumption must be an arm's length transaction and the transfer must be of all loan collateral.

(6) In the event of default of the guaranteed loan, a transfer and assumption of the borrower's operation and guaranteed loan can be accomplished before or after the loan goes into liquidation. However, if the collateral has been purchased through foreclosure or the borrower has conveyed title to the lender, no transfer and assumption is permitted.

(7) No transfer and assumption is permitted when the Agency has repurchased any guaranteed portion of the guaranteed portion of the loan.

(8) If the transfer is for less than the total indebtedness, the pro rata share of an eligible loss will be paid to the lender after execution of the transfer and assumption documents.

(b) Documentation. The lender will provide to the Agency documentation to support the transferee's status as an eligible borrower, and such other documentation as the Agency may request to determine eligibility and credit evaluation.

(1) The new borrower must sign an Agency-approved application form.

(2) The Agency will require personal and/or corporate guarantee(s) in accordance with § 5001.204 of this part, as applicable. Any required new personal, partnership or corporate guarantors of the transferred guaranteed loan must sign an Agency approved guarantee form.

(c) Agency approval. The Agency will only approve a transfer and assumption if the transferee will continue the eligible purpose of the guaranteed loan and such transfer and assumption complies with the conditions specified in paragraphs (c)(1) through (3) of this section, as applicable.

(1) Whenever the transferor and transferee are affiliates or related parties, the transfer and assumption must:

(i) Be to an eligible borrower to continue the project for eligible purposes;

(ii) Transfer all the loan collateral; and

(iii) Be for the full amount of the guaranteed loan indebtedness.

(2) A transfer and assumption may be approved when the present borrower is unable or unwilling to accomplish the objectives of the guaranteed loan, and the transfer will be in the best financial interest of the borrower and the Agency.

(3) The Agency prefers to transfer to an eligible borrower subject to the policies and procedures governing the type of guaranteed loan being made, however the Agency will consider approving a transfer of a guaranteed loan to an ineligible borrower only if:

(i) The sale price is greater than it would be if the transfer was to an eligible borrower;

(ii) The transfer to an ineligible borrower is needed as a method for servicing a problem case; or

(iii) When an eligible borrower is not available. All transfers to an ineligible borrower must meet the following requirements:

(A) Transfer fees will be collected, and payments applied, in accordance with § 5001.509(b);

(B) The ineligible borrower agrees to pay the loan balance within the remaining term of the original guaranteed loan in periodic installments that will not result in a balloon payment at the loan's maturity;

(C) Interest rates are at the rate specified in the promissory note of the transferor or at rates customarily charged borrowers in similar circumstances in the ordinary course of business. The rates can be either fixed or variable, and are subject to Agency review and approval;

(D) The ineligible borrower must have the legal authority to enter into the contract and have the ability to repay the loan, as

determined by the lender and the Agency. The ineligible borrower must submit a current balance sheet to the lender. The lender must obtain and analyze the credit history of the ineligible borrower.

(d) Release of liability. The transferor, including any guarantor, can be released from liability only with prior Agency written approval when the transfer and assumption is for the full outstanding balance of the guaranteed loan. If the assumption is for less than the full amount of the loan and the Agency pays a loss to the lender, the transferor, including any guarantor, are specifically subject to the Debt Collection Improvement Act provisions 3 unless other workout arrangements have been made.

(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

(f) Changes in loan terms. When a transfer or assumption is made to an eligible borrower continuing the project for eligible purposes, the loan terms may remain the same or may be changed whether the transfer is for the total indebtedness or less than the total indebtedness. If the loan terms are to be changed, the lender must submit a request in accordance with this paragraph (f). The changed loan terms must be concurred to by the Agency, all holders, and the transferee (including guarantors). If there are changes in loan terms, the lender's request will require the following:

(1) An explanation of the reasons for the proposed change in the loan terms, and

(2) Certification that the lien position securing the guaranteed loan will be maintained or improved, and proper insurances will continue to be in effect.

(g) Loan note guarantee. The lender is responsible for noting each transfer and assumption on all originals of the loan note guarantee.

(h) Proceeds. Before the transfer and assumption is closed, the lender must credit any proceeds received from the sale of collateral to the transferor's guaranteed loan debt in order of lien priority.

(i) Additional loans. Guaranteed loans may be used to provide additional funds in connection with a transfer and assumption. The Agency will consider approving a guaranteed loan to provide additional funds in connection with a transfer and assumption pursuant to the lender's submission of a complete application in accordance with 7 CFR part 5001, subpart D.

(j) Credit quality. The lender must make a complete credit evaluation in accordance with § 5001.202 *of this part* to determine viability of the project (subject to the Agency review and approval) including any requirement for deposits in an escrow account as security to meet the applicable equity requirements for the project.

(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.

(l) Legal opinion. Prior to Agency approval, the lender must provide the Agency a preliminary written legal opinion that the guaranteed loan can be properly and legally transferred and assurance that the conveyance instruments will be appropriately filed, registered, and recorded. Upon execution of the transfer and assumption, the lender must provide the Agency with a final legal opinion that the assumption is completed, valid, and enforceable, and the assumption is consistent with the conditions outlined in the Agency's conditions of approval for the transfer and complies with all Agency regulations.

(m) Promissory notes. The lender must not issue any new promissory notes, release any mortgages and/or deeds of trust on the existing debt being transferred. An allonge may be attached to existing promissory notes as needed.

(n) Loss/repurchase resulting from transfer and assumption.

(1) Any resulting loss must be processed in accordance with § 5001.521.

(2) If a holder owns any of the guaranteed portion of the loan, such portion must be repurchased by the lender or the Agency in accordance with § 5001.511.

(o) Cash down payment. The lender may allow the transferee to make cash down payments directly to the transferor provided:

(1) The transfer and assumption are made for the total indebtedness to an eligible borrower to continue the project for eligible purposes;

(2) The lender recommends that the cash be released, and the Agency concurs prior to the assumption being completed. The lender can require that an amount be retained for a defined period of time as a reserve against future

defaults. Interest on such account may be paid periodically to the transferor or transferee as agreed; and

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

(p) Change in control of borrower. The Agency will deem that a transfer and assumption has occurred whenever there is a significant change in the control of the borrower.

§ 5001.507 Lender transfer.

(a) After the issuance of a loan note guarantee, a lender may sell or transfer the entire loan to a new lender with prior written approval of the Agency. The Agency may approve the sale or transfer to a new lender if the following conditions are met. The new lender:

(1) Is an eligible lender in accordance with § 5001.130 of this part and is approved as such;

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

(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

(4) The transfer to the new lender is requested in writing by the borrower, the proposed new lender, and the original lender of record, if still in existence.

(b) Upon Agency approval, the original lender must transfer to the new lender the:

(1) Original promissory note and loan security documents;

(2) Original loan note guarantee;

(3) Original personal and corporate guarantee(s);

(4) Loan payment history; and

(5) The new lender must agree to accept the current loan terms, including the interest rate, secondary market holder (if any), collateral, loan agreement terms, and guarantors. The new lender can modify the loan terms after

acquisition only by submitting a written request to the Agency and receiving Agency approval.

(6) The new lender must certify to the Agency that the loan transfer has been completed in accordance with applicable laws and all provisions of the original loan remain in full force and effect.

(c) The Agency will not pay any loss or share in any costs (e.g., legal fees, appraisal fees and environmental assessments) for a voluntary transfer of lender. This includes situations where a lender is merged with or acquired by another lender and situations where the lender has failed and been taken over by a Federal regulatory agency such as the Federal Deposit Insurance Corporation (FDIC) and the loan is subsequently sold to another lender. However, in situations where the lender has failed and been taken over by a Federal regulator and the loan is liquidated rather than being sold to another lender, the Agency will pay losses and share in costs as if the Federal regulatory agency were an approved new lender.

(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.

(e) After Agency approval of a transfer of lender, all terms of the original loan note guarantee shall transfer to the benefit of the new lender.

§ 5001.508 Mergers.

Agency approval. All borrower mergers or consolidations (herein referred to as "mergers") require approval by the Agency and the lender. The Agency may approve a merger when—

(a) The resulting organization will be eligible for a guaranteed loan and assumes all the liabilities and acquires all the assets of the merged borrower;

(b) The merger is in the best interest of the government and the merging organization;

(c) The resulting organization can meet all required conditions as contained in specific loan agreements; and

(d) All property can be legally transferred to the resulting organization.

§ 5001.509 Servicing fees.

The lender may pass the servicing fees on to the borrower but may not delay

payment of the fee to the Agency while collecting the payment from the borrower.

(a) Guarantee retention fees. Where the lender is required to pay a periodic guarantee retention fee (see § 5001.455), the fee is due for the entire payment period even if the loan note guarantee is terminated or transferred before the next retention fee payment is due. (*Under no circumstances will Agency refunds be issued.)*

(b) Borrower transfer fee. The Agency will charge the following fees:

(1) A one-time, $1,500 nonrefundable transfer fee at the time of transfer to an eligible borrower.

(2) Payment of a one-time nonrefundable transfer fee of 1 percent of the guaranteed loan balance to ineligible borrowers.

§ 5001.510 Subordination of lien position.

(a) Request for subordination. A lender seeking a subordination of its lien position in collateral must submit a written request to the Agency. The lender must include in the request a financial analysis of the servicing action. The financial analysis must be fully supported by current financial statements, less than 90 calendar days old, of the borrower and guarantors. The lender must receive written Agency approval prior to the subordination. *Subordination will comply with OMB Circular A-129 and the Agency will remain adequately collateralized.*

(b) Agency approval. Agency approval of the subordination request requires that:

(1) The subordination of the lender's lien position enhances the borrower's business and is in the best financial interest of the Agency;

(2) The lien to which the guaranteed loan is subordinated is for a fixed dollar amount or fixed credit limit and for a fixed term, after which the guaranteed loan lien priority will be restored;

(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 *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;

(4) Lien priorities remain for the portion of the loan collateral that was not subordinated;

(5) The subordination of collateral to a line of credit does not extend beyond the term of the line of credit and in no event exceeds more than three years.

(6) Subordination to a tax-exempt obligation is strictly prohibited in compliance with OMB Circular A-129, "Policies for Federal Credit Programs and Non-Tax Receivables."

(7) The outstanding principal balance of the loan will determine the approval authority of the subordination. If approval is required by the national office, the state director will submit to the OneRD Guarantee Loan Initiative Project Manager a written request with recommendation, the lender's written request and credit analysis, and the borrower's current financial statements.

§ 5001.511 Repurchases from holders.

(a) General. A holder can make written demand on either the lender or the Agency to repurchase the unpaid guarantee portion of the loan when the borrower is in monetary default or when the lender has failed to pay the holder its pro-rata share of any payment made by the borrower within 30 days of the lender's receipt thereof from the borrower. When making written demand on the lender, the holder must concurrently send a copy of the demand letter to the Agency. *There is a sample letter to send to the lender when you have been notified of the holder's demand to the lender to repurchase the loan on OneRD InfoHub. A checklist when repurchasing from the holder is also available on the OneRD InfoHub.*

(1) The lender is encouraged to repurchase the guarantee, upon written demand of a holder, to facilitate the accounting of funds, resolve any loan problem, and resolve the monetary default, where and when reasonable. The benefit to the lender is that it may re-assign the guaranteed portion of the loan and then continue collection of its servicing fee, if any, when the monetary default is cured.

(2) When a lender receives a written demand for repurchase from a holder, the lender must notify any other holder and the Agency within 30 calendar days of receipt of the written demand. The lender must inform all parties if the lender will repurchase the unpaid guaranteed portion of the loan from the requesting holder.

(3) Upon repurchase the holder will re-assign the assignment guarantee agreement to the lender without recourse.

(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.

(1) Upon repurchase the holder will assign the assignment agreement to the lender without recourse.

(2) The lender must not repurchase from the holder for arbitrage or other purposes to further its own financial gain.

(3) Any repurchase from a holder may only be made after the lender obtains the Agency's written approval.

(c) Agency repurchase. If the lender does not repurchase the guaranteed portion from the holder, the Agency may, at its option, purchase such guaranteed portion of the loan for loan servicing purposes. A holder can submit a written demand to the Agency for repurchase only if the lender declines to repurchase. If a prior written demand was not made upon the lender, the Agency will notify the lender and allow up to seven calendar days for the lender to exercise their option to repurchase as provided in this section.

(1) Lender does not repurchase. If the lender does not repurchase the unpaid guaranteed portion of a loan as provided in paragraph (a) of this section, the Agency will, within 30 calendar days after written demand to the Agency from the holder, purchase from the holder the unpaid principal balance of the guaranteed portion together with accrued interest to date of repurchase or the interest termination date, whichever is sooner, less the lender's servicing fee. The guarantee will pay accrued interest to the holder on the loan as determined under § 5001.450(c) of this part.

(2) Written demand content. The holder must include in its written demand to the Agency:

(i) A copy of the written demand made upon the lender;

(ii) A copy of the lender's denial to repurchase the unpaid guaranteed portion of the guaranteed loan;

(iii) Evidence of the right to require payment from the Agency as provided by the holder or duly authorized agent. Such evidence must

consist of the original assignment guarantee agreement properly assigned to the Agency without recourse including all rights, title, and interest in the loan;

(iv) The amount due including unpaid principal, unpaid interest to date of demand, and interest subsequently accruing from date of demand to proposed payment date; and

(v) When the initial holder has assigned its interest, the original assignment guarantee agreement and an original of each Agency-approved reassignment document in the chain of ownership, with the latest reassignment being assigned to the Agency without recourse, including all rights, title, and interest in the guarantee.

(3) Payment. Unless otherwise agreed upon, payment will not be later than 30 calendar days from the date of demand.

(i) Upon request by the Agency, the lender must promptly furnish (within 30 calendar days of such request) a current statement, certified by an appropriate authorized officer of the lender, of the unpaid principal and interest then owed by the borrower on the loan and the amount then owed to any holder, along with the information necessary for the Agency to determine the appropriate amount due the holder.

(ii) Any discrepancy between the amount claimed by the holder and the information submitted by the lender must be resolved between the lender and the holder before payment will be approved. The Agency will notify both parties and such conflict will suspend the running of the 30-calendar-day payment requirement.

(iii) If a repurchase of a guaranteed loan includes the capitalization of interest, interest accrued on the capitalized interest will not be paid to the holder.

(4) Subrogation. When the Agency purchases a loan from a holder it assumes all rights that were previously held by the holder.

(5) Servicing fee. When the Agency purchases the guaranteed portion of the loan from a holder, the lender's servicing fee will stop on the date that interest was last paid by the borrower. The lender can neither charge a servicing fee to the Agency nor collect such fee from the Agency.

(6) Accrued interest. If the Agency repurchases 100 percent of the guaranteed portion of a loan and becomes the holder, interest accrual on the

loan will cease until the lender resumes remittance of the pro rata payments to the Agency.

(7) Establishing interest termination date. When a guaranteed loan has been delinquent more than 60 calendar days and no holder comes forward or when the lender has accelerated the account, and subject to the expiration of any forbearance or workout agreement, the lender, or the Agency at its sole discretion, must issue a letter to the holder(s) establishing the interest termination date in accordance with section 5001.450(c)(2).

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

(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 section 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.

§ 5001.512 Additional expenditures and loans.

The lender shall not make additional expenditures on behalf of, or provide new loans to, the borrower without notification to the Agency even though such expenditures or loans will not be guaranteed. The lender shall not approve additional expenditures or new loans where the expenditure or loan will violate, or cause a violation of, any of the loan covenants in the borrower's loan agreement.

§ 5001.513 Interest rate changes.

(a) Interest rate freezes. The guaranteed loan interest rate will freeze at the earliest uncured default date and will remain unchanged until the cancellation of the loan note guarantee in compliance with § 5001.524.

(b) Reductions. The borrower, lender, and holder (if any) may collectively initiate a permanent or temporary reduction in the interest rate of the guaranteed loan at any time during the life of the loan upon written agreement among these parties. After a permanent reduction, the loan note guarantee will only cover losses of interest at the reduced interest rate.

(1) When the Agency is a holder, the lender must obtain Agency approval before implementing the reduction. The lender must provide a copy of the modification agreement to the Agency for approval. The Agency will approve the reduction only when it is demonstrated that the change is more viable than liquidation and that the government's financial interests are not adversely affected.

(2) Factors that the Agency will consider in determining whether to approve the change are the Government's cost of borrowing money; the monetary recovery is greater than the liquidation recovery; and the project's continued viability as demonstrated by a financial feasibility analysis.

(c) Increases. Unless a temporary interest rate reduction occurred, increases in fixed interest rates and increases in variable interest rate structure are prohibited.

(d) Fixed rate to variable rate change. Fixed rates can be changed to variable rates to reduce the borrower's interest rate only when the variable rate has a ceiling that is less than or equal to the original fixed rate.

(e) Variable rate to fixed rate change. Variable rates can be changed to a fixed rate that is lower or equal to the current variable rate.

(f) After adjustments. The interest rates, after adjustments, must comply with the requirements for interest rates on new loans as established by paragraph § 5001.401.

(g) Documentation.

(1) The lender is responsible for the legal documentation of interest rate changes by an endorsement or any other legally effective amendment to the promissory note; however, no new promissory notes can be issued. The lender must provide copies of all such documents to the Agency within 10 calendar days of the change. *The State Office will notify the National*

Finance and Accounting Operations Center (NFAOC) Guaranteed Loan Servicing Branch of any changes in the interest rate along with the effective date.

(2) In a final loss settlement when qualifying interest rate changes are made in compliance with this part, the lender must calculate interest based on the periods the given rates were in effect. The lender must maintain records that adequately document the accrued interest claimed, which must be determined in accordance with § 5001.450(c).

§ 5001.514 Lender failure.

(a) General. In the event a lender fails or ceases to service a guaranteed loan, the Agency will make the successor lending entity aware of the statutory and regulatory requirements and will provide instruction to the successor lending entity on a case-by-case basis. Such instructions may include the Agency's determination that the Agency will service the entire loan or the guaranteed portion of the loan.

(1) Any successor lender must take such action that a reasonable lender would take if it did not have a loan note guarantee to protect the lender and Agency's mutual interest.

(2) A successor entity approved by the Agency as a lender will be afforded the benefits of the loan note guarantee in the sharing of any loss and eligible expenses subject to the limits that are set forth in the regulations governing the loan guarantee.

(b) Non-regulated lender. If the successor lending entity is a non-regulated lender, the lending entity is prohibited from making changes to the lender's agreement and related documents on the guaranteed loan. The successor lending entity must comply with the provisions of this part, including promptly applying to become a lender if not already an eligible lender. If the successor lending entity is not or fails to become a lender as set forth in § 5001.130 of this part within 60 calendar days, the loan note guarantee will not be enforceable.

(c) Regulated lender. Where the failed lending entity is an FDIC regulated lender, the FDIC and the Agency into an Inter-Agency Agreement regarding the FDIC's role as the successor lending entity, and all parties are to abide by this agreement or successor document(s). This agreement sets forth the duties and responsibilities of each Agency when a lender fails. When the FDIC is not the successor to a failed regulated lender, the regulatory agency serving as the successor lending entity and the Agency will abide by terms of the lender's agreement as executed by the originating lender. The Agency reserves the right to request a meeting with the successor lending entity to further define the duties and responsibilities of each

agency when a lender fails. *Upon notification of the failed lending entity being acquired by another lender, the State Office will obtain the "Purchase and Assumption Agreement" from the Failed Bank List on the FDIC website at www.fdic.gov/bank/individual/failed/banklist.html. Select the name of the failed lending entity and scroll down to the Acquiring Institution section to obtain a link to the pdf. This document should be maintained by the Agency as evidence of the new lender. The State Office will verify the new lender is an eligible lender in accordance with 7 CFR 5001.130 and if eligible confirm the new lender has executed a lender's agreement. If the new lender is not an eligible lender, notify the National Office for further instructions.*

(d) No successor entity. In the event no successor lending entity can be determined, the Agency reserves the right to enforce the provisions of the loan documents on behalf of the lender or to purchase the lender's interest in the loan.

§ 5001.515 Default by borrower.

When there is a default by a borrower, the lender must act prudently and expeditiously in working with the borrower to bring the account current or cure the default through restructuring if a realistic plan can be developed, or to accelerate the account and conduct a liquidation in accordance with § 5001.517 and in a manner that will minimize any potential loss.

(a) Default notification and meetings. The lender must notify the Agency within the timeframe as provided in § 5001.502(a)(3)(i).

(1) The lender will provide this notification by submitting the guaranteed loan borrower default status report in the Agency's electronic reporting system. The lender must update the loan's status each month until such time as the loan is no longer in default.

(2) If a monetary default exceeds 30 calendar days, the lender must meet with the borrower and, if necessary, the Agency within 45 calendar days of the date of the default to discuss the situation. The lender must provide the Agency with a written summary of the meeting, including any decisions and actions agreed upon within 10 calendar days of the meeting.

(b) Curative options. In considering curative actions, providing a permanent cure without adversely affecting the risk to the Agency and the lender is the paramount objective. The lender may consider temporary curative actions (e.g., payment deferments or collateral subordination) provided they strengthen the loan and are in the best financial interest of the lender and the Agency. *The State Office is responsible for reporting any changes in payment terms or interest rate adjustments to the National Finance and Accounting Operations Center (NFAOC)*

Guaranteed Loan Servicing Branch along with the effective date and any required supporting documentation.

(1) Curative actions (subject to the rights of any holder and Agency concurrence) include, but are not limited to, the following options: *Concurrence in a curative action where the guaranteed loan outstanding balance exceeds the State Director's loan approval authority in accordance with RD Instruction 1901-A,and all troubled debt restructure requests will be sent to the National Office for review through the OneRD Guarantee Loan Initiative Project Manager.*

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

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

(iii) Re-amortization of or rescheduling the payments on the loan excluding capitalization of accrued interest;

(iv) Transfer and assumption of the loan in accordance with §5001.506;

(v) Reorganization;

(vi) Liquidation;

(vii) Changes in interest rates in accordance with § 5001.513. Any interest payments must be adjusted proportionately between the guaranteed and unguaranteed portion of the loan; and

(viii) Troubled debt restructure.

(2) The term of any deferment, rescheduling, re-amortization, or moratorium cannot exceed the lesser of the remaining useful life of the collateral or remaining term of the loan as set forth in § 5001.402(b) of this part.

(i) During a period of deferment or moratorium on the guaranteed loan, the lender's non-guaranteed loan(s) and any stockholder or affiliate loans must also be under deferment or moratorium.

(ii) Balloon payments are permitted as a loan servicing option as long as there is a reasonable prospect for successful repayment of the guaranteed loan and the remaining life of the collateral supports the action.

§ 5001.516 Protective advances.

Protective advances are allowed only when they are necessary to preserve the value of the collateral. Therefore, a lender must exercise sound judgment in determining that the protective advance preserves collateral and recovery is actually enhanced by making the advance.

(a) Protective advances must be reasonable with respect to the outstanding loan amount and the value of the collateral being preserved.

(b) A lender cannot make protective advances in lieu of additional loans.

(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 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 will be secured by the collateral of the guaranteed loan.*

(e) Notwithstanding § 5001.122(c) of this part, upon Agency approval, protective advances can be used to pay Federal tax liens or other Federal debt.

(f) A Protective advance claim will be paid only at the time of the final payment as indicated in the report of loss. In the event of a final loss, protective advances may accrue interest at the promissory note rate from the date of such advance and will be guaranteed at the same percentage of loss as provided for in the loan note guarantee. The loan note guarantee will not cover interest on the protective advance accruing after the interest termination date.

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

(h) Holders do not have an interest in protective advances.

§ 5001.517 Liquidation.

In the event of one or more incidents of default or third-party actions that the borrower cannot or will not cure or eliminate within a reasonable period of time, the lender, with Agency consent, must provide for liquidation in accordance with paragraphs (a) through (n) of this section. The lender is responsible for initiating actions

immediately and as necessary to assure a prompt, orderly liquidation that will provide maximum recovery. The Agency reserves the right to unilaterally conclude that liquidation is necessary and require the lender to assign the collateral to the Agency and the Agency will then liquidate the loan per paragraph (o) of this section.

(a) Decision to liquidate. A decision to liquidate a loan or proceed otherwise must be made when the lender determines that the default cannot be cured or when the Agency and the lender determine that it is in the best interest of the Agency and the lender to liquidate. The decision to liquidate or proceed otherwise with the borrower must be made as soon as possible when one or more of the following exist:

(1) The loan is 90 calendar days behind on any scheduled payment and the lender and the borrower have not been able to cure the delinquency;

(2) Delaying liquidation will jeopardize full or maximum recovery on the loan; or

(3) The borrower or lender is uncooperative in resolving the problem or the Agency or lender has reason to believe the borrower is not acting in good faith, and immediate liquidation would minimize loss to the Agency.

(b) Repurchase of loan. When the decision to liquidate a loan is made, if any portion of the loan has been sold or assigned under § 5001.408 *of this part* and has not already been repurchased, the lender must make provisions for repurchase in accordance with § 5001.511.

(c) Lender's liquidation plan. Within 30 calendar days after the lender decides to liquidate a loan, the lender must submit a written, proposed plan of liquidation to the Agency for approval. The liquidation plan must be detailed and include at least the following information:

(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. *The transaction history for the loan(s) will show the application of interest for each transaction based on when the payment was received. 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. The State Office will verify the rate changes are in accordance with the conditional commitment.*

If any special accommodation was made to the borrower such as payment deferrals or interest only payments, they will be explained and supported with any executed agreements between the lender and borrower;

(3) A full and complete list of all collateral and a listing of all liens held and status of such liens, plus any personal and corporate guarantees. *State Offices will verify the collateral and lien positions held match the requirements of the conditional commitment subject to any Agency approved releases of collateral. The State Office will notify the lender in writing of any discrepancies*;

(4) The recommended liquidation methods for making the maximum collection possible on the indebtedness and the justification for such methods, including recommended action for acquiring and disposing of all collateral and collecting from guarantors. *Justification of a particular method may include cost, time, or the unique nature of the project or situation*;

(5) Necessary steps for preservation of the collateral including any anticipated protective advances. *Preservation of the collateral includes such items as protection from physical damage, theft, or vandalism. There may also be expenses for utilities or continued maintenance to ensure preservation*;

(6) The market value and the potential liquidation value, or estimates thereof, of all the collateral securing the loan.

(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.*

(ii) The procedure used to obtain these values or estimates of the collateral must include an evaluation of the impact of any release of hazardous substances, petroleum products, or other environmental hazards.

(iii) Any independent appraiser's fee, including the cost of the environmental site assessment if necessary, will be shared equally by the Agency and the lender;

(7) Proposed protective bid amounts on collateral to be sold at auction and a description to show how the amounts were determined.

(i) A protective bid can be made by the lender, with prior Agency written approval, at a foreclosure sale to protect the lender's and the Agency's interest.

(ii) The protective bid must not exceed the amount of the loan balance plus applicable foreclosure expenses and must be based on the liquidation value and estimated net recovery considering prior liens and outstanding taxes, expenses of foreclosure, and estimated expenses for holding and reselling the property. Foreclosure expenses include, but are not limited to, expenses for resale, interest accrual, length of time necessary for resale, maintenance, guard service, weatherization, and prior liens;

(8) Copies of the borrower's latest available financial statements;

(9) Copies of each guarantor's latest available financial statements;

(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 our joint interest in bankruptcy or receivership. If bankruptcy or receivership is a consideration, then the Agency should obtain guidance from the Office of General Counsel*;

(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*;

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

(13) Legal opinions, if needed by the lender's legal counsel. *Lenders typically rely on their counsel to initiate foreclosure proceedings and to protect the lender's interest in other legal proceedings. The attorney, in preparation for any legal proceeding will verify lien positions which will*

show the priority of liens and encumbrances against the property. This is often provided in a written legal opinion to the lender; and

(14) A schedule to periodically report to the Agency on the progress of liquidation, not to exceed every 60 days. *The time lapse between payment of the estimated loss claim, foreclosure or transfer, and the submission of the final loss claim is critical. Once the Agency pays an estimated loss claim, the lender must still move forward expeditiously to maximize recovery on the loan. State Offices are responsible for maintaining frequent contact with the lender and working with the lender to amend the liquidation plan, if necessary, due to a change in circumstances.*

(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) Approval of liquidation plan. The lender cannot implement its liquidation plan before obtaining written approval from the Agency. The Agency will approve or disapprove the plan within 30 calendar days of its receipt. In order to ensure prompt action, the lender may submit its liquidation plan with an estimate of collateral value, and the Agency may approve the liquidation plan subject to the results of the final liquidation appraisal. *Liquidation plans will be reviewed by the State Office for compliance with paragraph (c) of this section and if the aggregate loan amount is over their approval authority, must be submitted to the National Office for concurrence. The aggregate amount includes the Agency's guarantee loan(s), protective advances, accrued interest and any other debt in a prior or parity lien position with the Agency's guarantee loan(s). The State Office is responsible for submitting liquidation plans that are complete, including all necessary documentation, and requesting necessary assistance from and providing their recommendation to the National Office, via the OneRD Guarantee Loan Initiative Project Manager.*

(1) If the Agency approves the lender's liquidation plan, the lender must:

(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*;

(ii) Take all legal action necessary to liquidate the loan in accordance with the approved liquidation plan; and

(iii) Update or modify the liquidation plan when conditions warrant, including a change in value based on a liquidation appraisal. *State Offices should review the liquidation plan with the lender every 90 days and amend if necessary.*

(iv) If changed circumstances after submission of the liquidation plan require a revision of liquidation costs, the lender must obtain the Agency's written approval prior to proceeding with the proposed changes if the revised liquidation costs exceed 10 percent of the amount proposed in the liquidation plan approved by the Agency.

(2) If the Agency does not approve the lender's liquidation plan, the Agency will meet with the lender to resolve the concern(s). Until the concerns are resolved, the lender must take such actions that a reasonable lender would take without a guarantee and keep the Agency informed, in writing, of those actions. Once the revised liquidation plan is approved by the Agency, the lender must proceed in accordance with paragraphs (e)(1)(i) through (iii) of this section.

(f) Acceleration. The lender must proceed to accelerate the loan as expeditiously as possible when acceleration is necessary, including giving any notices and taking any other required legal actions. The guaranteed loan will be considered in liquidation once it has been accelerated and a demand for payment has been made upon the borrower.

(1) If the sole basis for acceleration is a non-monetary default, the lender must obtain concurrence from the Agency prior to accelerating the loan. In the case of monetary default, the lender may accelerate the loan without prior approval by the Agency, although Agency concurrence must still be given no later than the time the Agency approves the liquidation plan.

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

(g) Estimated loss claim and payment. If the lender is conducting the liquidation and owns any or all the guaranteed portion of the loan, the lender must file an estimated loss claim once a decision has been made to liquidate if the liquidation will exceed 90 calendar days. The Agency will process the estimated loss claim and will make final loss payments in accordance with § 5001.521.

(h) Liquidation expenses.

(1) The guarantee will not cover liquidation expenses in excess of liquidation proceeds under any circumstances.

(2) When a liquidation is performed by the lender, the Agency must approve, in advance and in writing, the lender's estimated liquidation expenses of collateral.

(3) Liquidation expenses must be reasonable and customary and must provide a demonstrated economic benefit to the lender and the Agency. The lender and Agency will share liquidation expenses equally. To accomplish this, the lender must deduct 50 percent of the liquidation expenses from the collateral sale proceeds.

(i) Accounting and reports. The lender must account for funds during the period of liquidation and must provide the Agency with reports on the progress of liquidation including disposition of collateral and resulting costs. If in the course of implementing the approved liquidation plan the lender determines additional procedures are necessary for the successful completion of the liquidation or otherwise makes any other changes to or deviations from the approved liquidation plan, the lender must identify in the report such procedures, changes, and deviations.

(j) Transmitting payments and proceeds to the Agency. When the Agency is the holder of a portion of the guaranteed loan, the lender must transmit to the Agency within 14 calendar days the Agency's pro rata share of any payments received from the borrower, liquidation, or other proceeds using an Agency approved form.

(k) Disposition of collateral.

(1) Disposition of collateral acquired by the lender must be approved, in writing, by the Agency when—

(i) The lender's cost to acquire the collateral of a borrower exceeds the potential recovery value of the security and the lender proposes abandoning the collateral in lieu of liquidation; or

(ii) The acquired collateral is to be sold to the borrower, affiliates or members of the borrower or to borrower's stockholders or officers, or the lender or lender's stockholders or officers.

(2) A recommendation by the lender for abandonment of collateral is considered a servicing action under 7 CFR 1970.8(e) and a separate NEPA review is not required.

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

(m) Compromise settlement. Compromise settlements must be approved by the lender and the Agency. The lender must provide complete current financial information on all parties obligated for the loan. At a minimum, the compromise settlement must be equivalent to the value and timeliness of that which would be received from attempting to collect on the guarantee. Any guarantor cannot be released from liability until the full amount of the compromise settlement has been received. In determining whether to approve a compromise settlement, the Agency will consider, among other things, whether the compromise is more financially advantageous than collecting on the guarantee.

(n) Liquidation provisions selection.

(1) If a lender has made a loan guaranteed under one of the programs identified in § 5001.1 of this part, the lender has the option to liquidate the loan under the provisions of this part or under the entire provisions of applicable regulation at the time the loan was guaranteed by the Agency.

(2) The lender must notify the Agency in writing within 10 calendar days after its decision to liquidate as to which regulatory provisions it chooses to use. If the lender does not notify the Agency in writing within these 10 calendar days, it must use the liquidation provisions in this part.

(o) Agency liquidation. The Agency will liquidate a guaranteed loan at its option only when it is a holder and there is reason to believe the lender is not likely to undertake liquidation efforts that will result in maximum recovery. When it conducts a liquidation, the Agency will apply proceeds derived from the sale of the collateral first to reasonable liquidation expenses and second to the guaranteed portion of the loan.

§ 5001.518 [Reserved]

§ 5001.519 Bankruptcy.

(a) Lender's responsibilities. The lender is responsible for protecting the guaranteed loan and the collateral securing it in bankruptcy and any related appellate proceedings. These responsibilities include, but are not limited to, the following:

(1) Taking actions that result in greater recoveries and avoiding actions that are likely not to be cost-effective;

(2) Monitoring confirmed bankruptcy plans to determine borrower compliance, and, if the borrower fails to comply, pursuing appropriate relief, including seeking a dismissal of the bankruptcy plan;

(3) Requesting modifications of any proposed bankruptcy plan whenever it appears that the lender could obtain additional recoveries via plan modification;

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

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

(6) Immediately seeking adequate protection of the collateral if it is subject to being used by the trustee in bankruptcy or the debtor in possession;

(7) When appropriate, seeking involuntary conversion of a pending chapter 11 case to a liquidation proceeding or seeking dismissal of the proceedings;

(8) Submitting a default status report within 15 calendar days after the date when the borrower defaults and every 30 calendar days thereafter until the default is resolved or a final loss claim is paid by the Agency; and

(9) Informing the Agency within 10 working days upon notification of the filing of a bankruptcy case and keeping the Agency adequately and regularly informed, in writing, of all aspects of the proceedings, at a minimum, on a bi-monthly basis.

(b) Appraisals. In a Chapter 9 or Chapter 11 reorganization, the lender must obtain an independent appraisal of the collateral if the Agency has determined that an independent appraisal is necessary. With written Agency consent, the lender and Agency will equally share the cost of any independent appraisal fee to protect the guaranteed loan in any bankruptcy proceedings.

(c) Repurchase from the holder. The Agency or the lender, with the approval of the Agency, can initiate the repurchase of the unpaid guaranteed portion of the loan from the holder. If the lender is the holder, an estimated loss payment may be filed at the initiation of a Chapter 7 proceeding or after a Chapter 9 or Chapter 11 proceeding becomes a liquidation proceeding. Any loss payment on loans in bankruptcy must be approved by the Agency.

(d) Reports of loss during bankruptcy. In bankruptcy proceedings, the lender must use the report of loss form for reporting all estimated and final loss determinations. Payment of loss claims will be made as provided in this section.

(1) Estimated loss payments.

(i) If a borrower has filed for bankruptcy and all or a portion of the

debt has been discharged, the lender must request an estimated loss payment of the guaranteed portion of the accrued interest and principal discharged by the court. Only one estimated loss payment is allowed during the bankruptcy and any related appellate proceedings. The Agency will treat all subsequent claims of the lender during bankruptcy and any related appellate proceedings as revisions to the initial estimated loss. At its option, the Agency may process a revised estimated loss payment in accordance with any court-approved changes in the bankruptcy plan. Once the bankruptcy plan has been satisfactorily completed, the lender is responsible for submitting the documentation necessary for the Agency to review and adjust the estimated loss claim to reflect any actual discharge of principal and interest and to reimburse the lender for any court-ordered interest rate reduction under the terms of the bankruptcy plan.

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

(iii) Upon completion of a bankruptcy plan, the lender must—

(A) Enter the data directly into the Agency's electronic system; and

(B) Provide the Agency with the documentation necessary to determine whether the estimated loss paid equals the actual loss sustained. Where the actual loss sustained is different than the estimated loss paid, the difference will be handled in accordance with § 5001.521(h).

(2) Bankruptcy loss payments.

(i) The lender must request a bankruptcy loss payment of the guaranteed portion of the accrued interest and principal discharged by the court for all bankruptcies when all or a portion of the debt has been discharged. Unless 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.

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

(iii) Upon completion of a bankruptcy plan, restructure, or liquidation, the lender must enter the data directly into the Agency's electronic reporting system.

(iv) If an estimated loss claim is paid during a bankruptcy and the borrower repays in full the remaining balance without an additional loss sustained by the lender, a final report of loss will be filed to terminate the loan.

(3) Interest losses as a result of bankruptcy reorganization. Interest losses as a result of bankruptcy reorganization will be paid as described in paragraphs (e)(3)(i) and (ii) of this section, as applicable.

(i) For guaranteed loans closed for which the Agency has not issued an interest termination letter—

(A) The loss of interest income sustained during the period of the bankruptcy plan will be processed in accordance with paragraph (d)(1) of this section;

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

(C) If an estimated loss claim is paid during the operation of the bankruptcy plan and the borrower repays in full the remaining balance without an additional loss sustained by the lender, a final report of loss will be filed to terminate the loan.

(ii) For guaranteed loans closed for which the Agency has issued an interest termination letter, the Agency will not compensate the lender for any difference in the interest rate specified in the loan note guarantee and the rate of interest specified in the bankruptcy plan. *Example interest termination letter is available on the OneRD Guarantee Loan Initiative InfoHub*.

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

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

(6) Protective advances. If approved protective advances, as authorized by § 5001.516, were incurred in connection with the initiation of liquidation action and were required to protect the collateral as result of delays in the case or failure of the borrower to maintain the security prior to the borrower having filed bankruptcy, the protective advances together with accrued interest, as determined under § 5001.450(c) of this part, are payable under the guarantee in the final loss claim.

(e) Liquidation expenses during bankruptcy proceedings.

(1) The liquidation expenses will be in compliance with § 5001.517(h).

(2) Reasonable and customary liquidation expenses in bankruptcy may be deducted from liquidation proceeds of collateral. In the case of Chapter 11 reorganizations or Chapters 11 or 7 liquidation, only expenses authorized by the court can be deducted from the collateral proceeds, unless the liquidation is by the lender.

(3) When a bankruptcy proceeding results in a liquidation of the borrower by a bankruptcy trustee appointed under 11 U.S.C. 701, 702, 703, or 1104, expenses will be handled as directed by the court, and the lender cannot claim liquidation expenses for the sale of the assets.

(4) If the property is abandoned by the bankruptcy trustee and any relief from the stay has been obtained, the lender will conduct the liquidation in accordance with § 5001.517.

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

(6) Legal fees as a result of a bankruptcy are limited by the Agency to an amount not to exceed 3 percent of the current principal balance and are only recoverable from liquidation proceeds. Legal fees in excess of 3 percent of the current principal balance shall be borne by the lender and are not recoverable from liquidation proceeds or any loss claim by the lender.

§ 5001.520 Litigation.

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

(b) Notwithstanding any other provision of this part, the Agency reserves the right to be represented by the U.S. Department of Justice in any litigation where the Agency is named as a party.

§ 5001.521 Loss calculations and payment.

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

(a) Report of loss form. The lender must use the *Agency-approved* report of loss form for all estimated and final loss claim requests.

(b) Estimated loss claim. The lender must submit to the Agency a completed report of loss form for all estimated loss claims. In calculating the estimated loss, the lender must use the estimated or current appraised liquidation value of the collateral.

(c) Estimated loss payment. The Agency will approve estimated loss payments only after it has approved the lender's liquidation plan. For a loan which has been approved by the Agency for a debt write-down (or debt restructure), the maximum amount of loss payment will not exceed the percent of guarantee multiplied by the difference between the outstanding principal and interest balance of the loan before the write-down and the outstanding balance of the loan after the write-down. *The State Office will review the Report of Loss and supporting documentation for accuracy within 30 days of receipt. Once the Report of Loss has been signed by the approving official, it will be submitted to the National Finance and Accounting Operations Center (NFAOC) Guaranteed Loan Servicing Branch for processing. Payment of the estimated loss claim to the lender by NFAOC should be made within 10 business days of receipt of the loss claim.*

(1) The amount of an estimated loss payment must be credited first as a deduction from the principal balance of the loan with any remaining balance to accrued interest.

(2) The estimated loss payment cannot be applied as a payment on the loan for purposes of reducing the unpaid balance owed by the borrower for status reporting or any debt collection actions against the borrower or any guarantors.

(d) Reduction of loss claims payable.

(1) Negligent loan origination and negligent loan servicing will result in a reduction of loss claims payable under the guarantee to the lender if any losses have occurred as the result of such negligence. The Agency will assess against the lender any cost to the Agency associated with actions taken by the Agency necessary to protect the Agency's interests with respect to the loan where a lender is not in compliance with its origination and servicing responsibilities. The extent of the reduction, which could be a total reduction of the loss claims payable, will depend on the extent of the losses incurred as a result of the negligent loan origination or servicing. *Any loss claim reduction due to negligent origination or servicing must be concurred in by the National Office.*

(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 lender must ensure 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.*

(3) Any delinquent fees, including any interest due thereon, will be deducted from any loss payment due the lender.

(e) Final loss claim. Except for certain unsecured personal or corporate guarantees as provided for in this section, the lender must submit a final report of loss to the Agency within 30 calendar days after liquidation of all collateral is completed. The Agency will not guarantee interest beyond the interest termination date or this 30-day period, other than for the period of time it takes the Agency to process the loss claim. The lender must apply the total amount of the loss payment remitted by the Agency to the guaranteed portion of the loan debt. At the time of

final loss settlement, the lender must notify the Borrower that the loss payment has been so applied. Such application does not release the Borrower from liability. Once the lender receives a final loss payment from the Agency, the Agency will collect any outstanding debts owed to the government in accordance with part 3 of this title.

(1) Loss. In the event of a loss, the loan note guarantee will not cover—

(i) Interest to the lender accruing after the interest termination date;

(ii) Any interest accrued as the result of the borrower's default on the guaranteed loan over and above that which would have accrued at the Agency-approved promissory note rate on the guaranteed loan (e.g., default interest rate); or

(iii) Any late fees, penalties, bond fees, interest rate swap charges, liquidation expenses, and other costs unless authorized under paragraph (e)(7) of this section.

(2) Accounting of funds. Before the Agency will approve a final report of loss, the lender must account for all funds during the period of liquidation, disposition of the collateral, all costs incurred, and any other information necessary for the successful completion of liquidation. The lender must document and show that all the collateral has been accounted for and properly liquidated, and that liquidation proceeds have been properly accounted for and applied correctly on the loan.

(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.

(5) Federal debt. Any amounts paid by the Agency on account of liabilities of a borrower constitute a Federal debt owed to the Agency by the borrower. In such case, the Agency can use all remedies available to it to collect the debt from the borrower, including offset in accordance with part 3 of this title.

(i) Any amounts paid by the Agency pursuant to a claim by a lender constitute a Federal debt owed to the Agency by a third-party guarantor of the guaranteed loan, to the extent of the amount of the third-party guarantee. In such case, the Agency can use all remedies available to it to collect the debt from the third-party guarantor including offset in accordance with part 3 of this title.

(ii) The Agency may consider a compromise settlement of a *federal* debt owed to the Agency after it has processed a final report of loss and issued a 60-day due process letter. Any funds collected by the Agency will not be shared with the lender.

(6) Protective advances. In those instances where the lender made authorized protective advances, the lender can claim recovery for the guaranteed portion of any loss of monies advanced as well as interest resulting from such protective advances. These claims must be included in the final report of loss. The lender must provide receipts and a breakdown of protective advances as to the payee, purpose of the expenditure, date paid, evidence that the amount expended was proper, and that the amount was actually paid.

(7) Liquidation expenses. As provided in § 5001.517(e), certain reasonable liquidation expenses are allowed during the liquidation process. The lender cannot claim any liquidation expenses in excess of liquidation proceeds.

(i) Liquidation expenses are recoverable only from liquidation proceeds. The Agency will deduct liquidation expenses from the liquidation proceeds of the collateral unless the costs have been previously determined by the lender (with Agency concurrence) to be protective advances. The lender must provide receipts and a breakdown of liquidation expenses as to the payee, purpose of the expenditure, date paid, evidence that the amount expended was proper, and that the amount was actually paid.

(ii) The Agency may approve legal fees as liquidation expenses provided that the fees are reasonable, require the assistance of attorneys, and cover legal issues pertaining to the liquidation that could not be properly handled by the lender, its employees or in-house

counsel. Approved legal expenses are limited by the Agency to an amount not to exceed 3 percent of the current principal balance and will be shared by the lender and Agency equally. This includes those instances where the lender has incurred such expenses from a trustee conducting the liquidation of assets. Legal fees in excess of 3 percent of the current principal balance shall be borne by the lender and are not recoverable from liquidation proceeds or any loss claim by the lender.

(iii) The lender cannot claim the guarantee fee or the other Agency fees as authorized liquidation expenses, and In-house expenses of the lender are not allowed.

(8) Accrued interest. If the lender holds all or a portion of the guaranteed loan, the Agency will guarantee accrued interest in accordance with § 5001.450(c) of this part.

(i) Accrued interest eligible for payment under the guarantee on a defaulted loan will be discontinued when the estimated loss is paid. Interest will not be paid beyond the interest termination date.

(ii) The lender must support accrued interest by documenting how the amount was accrued, including attaching a copy of both the promissory note and ledger. If the interest rate was a variable rate, the lender must include documentation of changes in both the selected base rate and the loan rate.

(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.

(9) Acquiring property titles. If a lender acquires title to property, any loss will be based on the collateral value at the time the lender obtains title. Alternatively, the lender can calculate the final loss settlement using the net proceeds received at the time of the ultimate disposition of the property if—

(i) The lender has submitted to the Agency a written request to use this option within 15 calendar days of acquiring title; and

(ii) The Agency approves the request prior to the lender submitting any request for estimated loss payment.

(f) Loss limit. The amount payable by the Agency to the lender cannot exceed the limits contained in the loan note guarantee. If the lender conducts the liquidation, loss occasioned by accruing interest will be covered to the interest termination date, provided the lender proceeds expeditiously with the liquidation plan

approved by the Agency. If the Agency conducts the liquidation, loss occasioned by accruing interest will be covered by the guarantee only to the date the Agency accepts this responsibility.

(g) Rent. The lender must apply any net rental or other income that it receives from the collateral to the guaranteed loan debt. *Rent or other income should be applied first to the principal balance of the loan.*

(h) Final loss payment. The Agency will make loss payments after it has reviewed the complete final report of loss, all collateral has been properly liquidated and accounted for, and the Agency has determined that liquidation expenses are reasonable and within approved limits.

(1) Any estimated loss payments made to the lender will be credited against the final loss payment on the guaranteed loan.

(2) Once the Agency approves the report of loss and supporting documents submitted by the lender—

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

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

(iii) If the Agency conducted the liquidation, it will provide an accounting to the lender and will pay the lender in accordance with the loan note guarantee.

§ 5001.522 Future recovery.

After a final loss claim has been paid, the lender must use reasonable efforts to collect from any party still liable for future recovery unless the Agency notifies the lender otherwise. Any net proceeds from future recovery will be split pro-rata between the lender and the Agency based on the percent of the loan guarantee even if the loan note guarantee has been terminated. Once the Agency determines a debt is Federal debt and provides notice to the lender, that Federal debt is excluded from future recovery. The lender must cease all collection efforts against the borrower and any individual or corporate guarantors upon referral of the debts by the Agency for collection in accordance with part 3 of this title. The Agency will not share with the lender any collection of Federal debt made by the Federal Government from any liable party to the guaranteed loan. *If funds are received, the lender sends USDA's share of the recovery to the applicable field/state office. The field/state office sends the check to the lockbox*

along with an Agency approved form. The field/state office prepares and sends a Report of Loss to their servicing accountant.

§ 5001.523 Property acquired by the lender.

(a) Collateral preservation. When a lender acquires title to the collateral and the final loss claim is not paid until final disposition, the lender must proceed as quickly as possible to develop a plan to fully protect the collateral from deterioration (weather, vandalism, etc.). Hazard insurance in an amount necessary to cover the market value of the collateral must be maintained.

(b) Collateral sale.

(1) Upon acquiring the collateral, the lender must prepare and submit without delay to the Agency a plan on the best method for the sale of the collateral, keeping in mind any prospective purchasers. The Agency must approve the plan in writing. If an existing approved liquidation plan addresses the disposition of acquired property, no further review is required unless modification of the plan is needed.

(2) Whenever the conversion of collateral to cash can reasonably be expected to result in a negative net recovery amount, the lender should consider abandonment of the collateral. If the lender seeks to abandon the collateral, the lender must obtain written Agency approval before abandoning the collateral.

(c) Re-title collateral. Any collateral accepted by the lender must not be titled in the Agency's name in whole or in part.

§ 5001.524 Termination of loan note guarantee.

Each loan note guarantee issued under this part or under one of the guaranteed loan programs identified in §5001.1 of this part will terminate automatically when one of the events described in paragraphs (a) through (c) of this section occur. The lender will maintain its guaranteed loan files for at least three years after termination of the loan note guarantee.

(a) The guaranteed loan is paid in full;

(b) Full payment by the Agency of any loss claim or compromised settlement except for future recovery provisions; or

(c) Written request from the lender to the Agency to terminate the guarantee, which will be effective the date the Agency receives the request provided that the lender holds all the guaranteed portion of the loan.

§§ 5001.525 – 5001.600 [Reserved]

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