

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## DEPARTMENT OF AGRICULTURE

### Rural Housing Service

### Rural Business-Cooperative Service

### Rural Utilities Service

### Farm Service Agency

### 7 CFR Part 1980

### Rural Business-Cooperative Service

### Rural Utilities Service

### 7 CFR Parts 4279 and 4287

RIN 0570-AA09

### Business and Industrial Loan Program

**AGENCIES:** Rural Housing Service, Rural Business-Cooperative Service, Rural Utilities Service, and Farm Service Agency, USDA.

**ACTION:** Proposed rule.

**SUMMARY:** The Rural Business-Cooperative Service (RBS) is the successor to the Rural Business and Cooperative Development Service, which was the successor to the Rural Development Administration (RDA), which was the successor to the Farmers Home Administration (FmHA).

RBS is issuing new Business and Industry Guaranteed Loan Program regulations to replace the FmHA regulations for the program. This action is needed to streamline and update the program. The intended effect is to shorten, simplify, and clarify the regulation, shift some responsibility for loan documentation and analysis from the Government to the lenders, make the program more responsive to the needs of lenders and businesses, and provide for smoother and faster processing of applications.

**DATES:** Written comments must be received on or before April 2, 1996.

**ADDRESSES:** Submit written comments in duplicate to the Chief, Regulations, Analysis, and Control Branch, Rural Economic and Community Development, U.S. Department of

Agriculture, Ag Box 0743, 14th and Independence SW., Washington, DC 20250-0743. All written comments will be available for public inspection during regular work hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** M. Wayne Stansbery, Business and Industry Senior Loan Specialist, RBS, U.S. Department of Agriculture, Ag-Box 3221, 14th & Independence Avenue SW., Washington, DC 20250-3221, Telephone (202) 720-6819.

### SUPPLEMENTARY INFORMATION:

#### Classification

This proposed rule has been determined to be a "significant regulatory action" and was reviewed by OMB under Executive Order 12866.

#### Programs Affected

The Catalog of Federal Domestic Assistance program impacted by this action is: 10.768, Business and Industrial Loans.

#### Intergovernmental Review

As set forth in the final rule and related Notice to 7 CFR part 3015, subpart V, 48 FR 29112, June 24, 1983, Business and Industrial Loans are subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with state and local officials. RBS conducts intergovernmental consultation in the manner delineated in FmHA Instruction 1940-J, "Intergovernmental Review of Farmers Home Administration Programs and Activities."

#### Civil Justice Reform

The proposed rule has been reviewed under Executive Order 12778, Civil Justice Reform. In accordance with this rule: (1) All state and local laws and regulations that are in conflict with this rule will be preempted; (2) no retroactive effect will be given to this rule; and (3) administrative proceedings in accordance with the regulations of the agency at 7 CFR part 1900, subpart B or those regulations published by the Department of Agriculture to implement the provisions of the National Appeals Division as mandated by the Department of Agriculture Reorganization Act of 1994 must be exhausted before bringing suit in court challenging action taken under this rule.

### Environmental Impact Statement

The action has been reviewed in accordance with 7 CFR part 1940, subpart G, "Environmental Program." RBS has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment, and in accordance with the National Environmental Policy Act of 1969, Public Law 91-190, an Environmental Impact Statement is not required.

### Discussion of the Proposed Rule

This action replaces the Business and Industrial loan program administered under 7 CFR part 1980 with a program to be administered under 7 CFR parts 4279 and 4287 which significantly departs from the previous program of loan guarantees for businesses in rural areas. The new Business and Industrial Guaranteed Loan Program will be more flexible and will place more reliance on lenders. There are fewer specific requirements for lenders and businesses. Eligible loan purposes are broader. The lender has added responsibility for analyzing credit quality, and for making, securing, and servicing the loan and monitoring construction. The priority system will give increased priority to underserved communities. Application processing procedures will be more efficient, less burdensome for borrowers, lenders, and RBS staff, and will provide for more rapid decisions.

The Business and Industry (B&I) guaranteed loan program was authorized by the Rural Development Act of 1972. The loans are made by private lenders to rural businesses for the purpose of creating new businesses, expanding existing businesses, and for other purposes that create employment opportunities in rural areas. Eligibility for this program includes businesses located in cities of up to 50,000 population, but priority is given to areas outside cities of 25,000 or more population.

Since 1974, more than 5,120 businesses have received loans totaling nearly \$5 billion guaranteed through the B&I program. These loans have helped to create or save over 460,000 jobs. The program level peaked in 1979 at just over \$1 billion, then was reduced to \$100 million annually through much of the 1980's. The program level for FY 1994 was about \$249 million and for FY

1995 it was about \$500 million. The FY 1996 budget is approximately \$700 million, which required only \$6.5 million in budget authority to be appropriated by Congress.

Loans can be made for a variety of purposes including business acquisition, expansion, or improvement; purchase of land, easements, or buildings; purchase of equipment, machinery, or supplies; repair and modernization; pollution control; transportation services; start up and working capital; and feasibility studies. The rate and term of the loan is negotiated between the business and the lender.

The Rural Business-Cooperative Service proposes to replace the regulations for the B&I program with a complete set of new regulations. This is a high priority effort to streamline the administration and operation of the program, responding to the requests of users of the program and the field staff administering the program. The revised regulations are shorter, simpler, clearer, and more logically organized. The volume of material in the new regulations is about one-half that of the current regulation.

The revisions are not required by statute. However, the senate report on the FY 1995 Appropriations Act did contain a directive for the department to streamline the B&I regulations and application procedures, reduce loan application processing time by relying on in-state resources, allow more management flexibility and decision making capacity at the state office level, and expand eligible loan purposes to include recreation and tourism.

Recognizing the need to streamline the regulations, the Agency established a task force of State Directors and B&I program chiefs from state offices to examine changes that needed to be made in the program to attract additional lenders and to make the program more user friendly and customer oriented. Task force recommendations and drafts have been further developed by national office staff. In addition, the Department's Office of Inspector General (OIG) agreed to work in conjunction with the Agency in competing an evaluation of the program and to assist the agency in determining areas that could be changed to assist in making the program more effective and more efficiently administered. The OIG evaluation determined that (1) RBS needs to better promote the program and encourage lender and borrower participation, (2) lenders have little experience with the B&I program, (3) some of the requirements of the program are too

costly to be attractive to borrowers wanting a relatively small loan, and (4) RBS needs to employ its resources more efficiently by relying more on lenders to analyze and monitor smaller loans. OIG surveyed 800 lenders and, based on the responses to the survey, projected that only 5.2 percent of the universe of lenders have had any experience with the program, but of those that did the experience was favorable. Further, the Agency determined that of the lenders participating in the program, the average number of times they did participate was 1.2. In a few states, the program has been used more frequently by lenders, but according to task force members and others familiar with the program this has been true only because Agency officials in those states took the time and effort to make the program more widely known.

OIG also determined that smaller borrowers refused to participate in the program because they feel that meeting some of the requirements is too costly to make a loan feasible. For example, the requirement to submit annual audited financial statements is believed to be too costly and OIG found that private lenders do not always request audited financial statements from smaller commercial borrowers. The General Accounting Office, in a 1992 report, also found that the cost of feasibility studies and the annual audit requirements coupled with appraisal fees and credit reports may impede participation.

Presently State office personnel analyze financial information provided by the lenders and the borrowers regardless of the size of the loan and regardless of the fact the lender has performed an analysis of the borrower's financial condition. In order to increase the level of lending activity as called for in the 1996 and 1997 budgets, and improve the effectiveness of the program and the efficiency with which it is delivered, RBS must rely more on the capabilities of the lending community to deliver the program.

Based on the recommendations of the task force and other reviews, the Agency has proposed these revisions to make the program more usable by the lenders and the borrowers. More importantly, the Agency recognizes the changes are necessary to make the program more effective in creating jobs and stimulating economic activity, particularly in chronically low income rural areas. Under the proposed new B&I regulations, the material that must be submitted to and reviewed by the Agency before approval of the guarantee is reduced and responsibilities for credit analysis and application processing

tasks will be shifted from the Agency national office to field offices and from the Agency to the lender where feasible. Following is a discussion of some of the most significant policy revisions included in the proposed new regulations.

Currently, most lenders participating in the B&I program are commercial banks and eligibility to be a lender under the program is limited to certain types of organizations. This proposal allows the Agency to approve additional lenders when determined by the Administrator to have sufficient legal authority, lending expertise, and financial strength.

The Agency proposes to reduce the loan guarantee fee if it is determined that the business seeking the guarantee provides high-impact business development and is located in a community experiencing long-term population decline and job deterioration, a community that has remained persistently poor over the past 60 years, or a community experiencing economic trauma due to natural disaster or fundamental economic structural change. The intent of this provision is to encourage businesses to locate in areas with persistent economic problems.

Presently, individual borrowers must be citizens of the United States or reside in the United States after being legally admitted for permanent residence and organization borrowers must be at least 51 percent owned by citizens or persons legally admitted. The proposed regulations would allow guaranteed loans to businesses that do not meet that requirement if the facility being financed will create or save jobs for rural United States residents, adequate management is available, and loan funds are used only for fixed assets that will remain in the United States. The intent of this provision is to have the flexibility to create jobs in rural areas even if the company is owned by foreign interests. The Agency has experienced requests for guarantees in such situations in border states.

Presently, agricultural production loans are not eligible for B&I guarantees. RBS proposes to provide guarantees for agricultural production, but limit eligibility to integrated businesses involved in both production and processing.

Current regulations will not allow a lender to bring loans it has previously made under a guarantee through refinancing unless the percentage of guarantee is adjusted to maintain the previous unguaranteed exposure. The new regulations will allow the previous exposure to be guaranteed, provided the

refinancing is a secondary part of the loan and will allow the lender to restructure the rates and terms.

The Agency is particularly interested in public comments on a new priority system, designed to target loan guarantees to locations of greatest need and businesses that will have the most impact. High impact considers factors that effect such things as job quality, potential to stimulate the local economy other than just through the direct jobs provided, and potential for long term presence in the community and future expansion. For example, businesses in industries in the top half of the industrial life cycle are likely to be successful for a longer period of time than those in an industry that is declining. Businesses tied in some way to the community are less likely to move on in a few years to a more favorable location outside the community. A business in an industry new to the community provides economic diversification. Businesses that will need new suppliers or customers are likely to have a ripple effect, causing other new businesses to be formed nearby. Priority points are also given for lenders that will structure the loan at favorable rates to the borrower or less risk for the Government.

Eligible loan purposes would be expanded to include hotels, motels, and other tourism and recreational facilities, which have been ineligible for the past several years. Loans for such facilities would be evaluated on the merits and financial feasibility of each proposal, except for racetracks, golf courses, and gambling facilities, which would remain ineligible. The Agency is particularly requesting comments on whether there is a significant need for loan guarantees for tourism and recreation businesses and whether offering loan guarantees for such businesses will significantly increase the risk to the Government and satisfy otherwise unmet needs for financing of such businesses.

Current regulations limit the size of loans considered for guarantee to \$10 million. The proposed regulations would give the Administrator the authority to approve exceptions for high priority projects of up to \$25 million.

The proposed regulations limit the guarantee percentage to 80 percent for loans of \$5 million or less and 70 percent for loans exceeding \$5 million, but provide authority for the Administrator to approve exceptions up to 90 percent when the higher percentage is necessary to allow a high priority project to proceed.

In conjunction with implementation of the new regulations, the Agency intends to provide a new application

form that will serve the function of 10 forms now in use. The application form will, of course, be supplemented by additional information provided by the lender.

The proposed regulations also provide for experienced lenders to apply for status as certified lenders. Certified lenders will submit about one-half as much application material for agency review as regular lenders. Consideration was given to creating another classification of lender determined to be very reliable and familiar with the program that would be able to obtain guarantees with little or no review of individual projects by the Agency. However, it was determined that the Agency does not have sufficient legal authority to implement that alternative.

Agency staff will be authorized to rely on a written credit analysis prepared by the lender rather than the Agency completing its own complete credit analysis.

For the most part, the lender will determine the frequency of financial statements to be required from the business after the loan is closed and whether or not the statements must be audited.

The lender and its legal counsel will be responsible for loan closing, without a required review by the Office of General Counsel.

Loan servicing will also be simplified and shifted toward the lender. Loans will be classified by the lender. Lenders will be able to release collateral with a cumulative value of up to 20 percent of the loan if the proceeds will be used to reduce the loan or buy replacement collateral. Lenders may make protective advances of up to \$5,000 without prior agency approval. If unsecured personal or corporate guarantees cannot be settled promptly, a final loss report may be filed and paid and the guarantees treated as future recovery.

RBS believes the streamlining of the regulations for this program will enhance the use of the program in improving the future prosperity of rural residents through targeted investments that enhance rural competitiveness, facilitate industrial conversion, and enable rural residents to profit from private sector activity. The proposed revisions are consistent with the Administration's efforts to streamline government functions, improve efficiency and the effectiveness of government activities, and be more customer friendly. The changes proposed will enable the Agency to deliver a larger program with less staff resources, and simultaneously meet the objectives of the National Performance review regarding improved customer

service, less regulation and streamlined Agency operations.

Incorporation of the proposed changes will provide more flexibility for both lenders and agency staff. Many errors will be reduced because the guidelines and requirements are much more clear and items are more easily found in a reduced and better organized volume of regulations. Lenders will be more interested in using the program because the procedures are more simple and direct. The ultimate benefit to be realized is increased lending activity resulting in the expansion of business opportunities and the creation of more jobs in rural areas, particularly in those areas that have experienced historical economic distress.

#### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the Rural Business-Cooperative Service (RBS) announces its intention to seek OMB approval of the reporting/recordkeeping requirements contained in these new regulations.

The purpose of the B&I loan program is to improve, develop, or finance business, industry, and employment and improve the economic and environmental climate in rural communities. This purpose is achieved by bolstering the existing private credit structure through the guarantee of loans which will provide lasting community benefits. Loans to rural businesses are made by private lenders, primarily commercial banks, and guaranteed by RBS. These proposed regulations include various requirements for information from the lenders and borrowers. The information requested is vital for RBS to be able to process applications for loan guarantees in a responsible manner, make prudent credit and program decisions, and effectively monitor the lenders' servicing activities to protect the Government's financial interest. It includes information to identify the lender and borrower, describe the business and use of loan funds, indicate the rates and terms of the loan, allow for credit quality analysis, and other information necessary for prudent program and credit decisions. The lender or borrower may need to provide information regarding some special assistance or consideration, such as when a lender requests a change in specific conditions cited by the Agency for approval of a guarantee. Additional information is necessary to ensure a loan is adequately serviced and continues to perform as expected, or, if necessary, properly liquidated.

Currently, the regulations for the B&I Loan Program are contained in 7 CFR 1980, subpart E. The information collection associated with 7 CFR 1980-E has been previously approved by the Office of Management and Budget (OMB) and assigned control number 0575-0029. RBS is now proposing new regulations for the B&I program to replace 7 CFR 1980-E. RBS's primary reason for proposing new regulations is to simplify the requirements and streamline the application and loanmaking process. The total public reporting burden under these regulations is expected to be significantly reduced, as compared to the burden contained in the current regulation. The average public reporting burden for the collections of information contained in these regulations is expected to range from .75 to 54 hours per response. Lending institutions and rural businesses are the primary respondents for this data collection. The number of respondents for the various collections of information contained in these regulations is expected to range from 15 to 1240 per year. The number of annual responses per respondent is expected to range from less than 1 to 4 per year. Total annual burden on respondents is estimated at 67,456 hours. This is based on an estimated volume of activity of 500 preapplications, 425 applications, and 360 new loan guarantees. The estimated total annual burden for 7 CFR 1980, subpart E, was 78,318 hours. However, the larger estimated burden for 7 CFR 1980, subpart E, was based on a lower estimated volume of activity of only 350 preapplications, 275 applications, and 220 new loan guarantees.

In conjunction with implementation of the proposed new regulations, RBS plans to initiate use of a new application form. The new form should not be more difficult or time consuming to complete than the current application but it will facilitate the elimination of 10 other forms currently in use. Some items of information required by the agency have been made easier to provide, such as the material incorporated into the new application. Some has been eliminated by changing program requirements and providing more flexibility to lenders. An example of this is the documentation regarding refinancing required by 7 CFR 1980, section 1980.452 Administrative C (1). Under the proposed rule there are less restrictions on refinancing so there is no need for the specific documentation. Some information will be collected less frequently, as in the case of feasibility

studies. Feasibility studies will be required for new businesses at the discretion of the loan approval official, rather than for all new businesses. Financial statements will still be required at least annually, but whether they are required more often than annually and whether they must be audited statements will be decided by the lender.

Some new items of burden have also been created. For the most part, however, these are the result of new options being made available. For example, requesting status as a certified lender is a burden upon the lenders that choose to make a request. That burden has not existed previously because there were no certified lenders. To become certified a lender must submit an executed Lender's Agreement (if it does not already have a valid Lender's Agreement), a new form called "Certified Lender, Business and Industry," and a written request summarizing its history of commercial lending activity with information on delinquencies and losses. Loan officers of certified lenders must receive training from RBS on the B&I program. The burden for completing a request for certification has been estimated at 2.5 hours.

Certified lenders will submit less material for agency review for each individual loan application proposed for guarantee. A complete application for guarantee from a certified lender will include the application form, a Form FmHA 1940-20, "Request for Environmental Information," the lender's written financial analysis with spreadsheets, a proposed Loan Agreement or list of conditions for a Loan agreement, and intergovernmental review comments. A complete application for guarantee from an eligible lender that is not certified will include all of those items plus the business's historical and projected financial statements, financial statements of personal or corporate guarantors, personal credit reports on the principals, appraisals, commercial credit report on the business, and a business plan or feasibility study.

Although it is not reflected in the proposed rule or the estimates of burden, RBS is also working on a project to automate forms. It is intended that most of the forms used in connection with an application will be made available on computer disk so the form can be brought up on a screen, the appropriate information typed in, and the entire completed form printed. When completed, the appropriate disks will be made available to the public as well as to Agency staff.

The complete text of the subject regulations is published herein for public review and comment. Additional copies of the proposed regulations or copies of the referenced forms may be obtained from Jack Holston, Agency Information Collection Coordinator, at (202) 720-9736.

Send comments regarding the accuracy of the burden estimate, ways to minimize the burden, including through the use of automated collection techniques or other forms of information technology, or any other aspects of this collection of information, to: Jack Holston, Agency Information Collection Coordinator, U.S. Department of Agriculture, RECD, Ag. Box 0743, Washington, DC 20250. These comments must be received on or before April 2, 1996 to be assured of consideration. All responses to this notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

#### List of Subjects

##### *7 CFR Part 1980*

Loan programs—Agriculture, Loan programs—Business and industry—Rural development assistance, Loan programs—Housing and community development, Loan programs—Community programs—Rural development assistance, Rural areas.

##### *7 CFR Part 4279*

Loan programs—Business and industry—Rural development assistance, Rural areas.

##### *7 CFR Part 4287*

Loan programs—Business and industry—Rural development assistance, Rural areas.

Accordingly, chapters XVIII and XLII, title 7 of the Code of Federal Regulations are proposed to be amended as follows:

#### **CHAPTER XVIII—RURAL HOUSING SERVICE, RURAL BUSINESS-COOPERATIVE SERVICE, RURAL UTILITIES SERVICE, AND FARM SERVICE AGENCY, DEPARTMENT OF AGRICULTURE**

##### **PART 1980—GENERAL**

1. The authority citation for part 1980 is revised to read as follows:

Authority: 7 U.S.C. 301; 7 U.S.C. 1989; 42 U.S.C. 1480.

##### **Subpart A—General**

2. Section 1980.6(a) is amended by removing the definitions for "Borrower," "Disaster Assistance for Rural Business Enterprises," and

“Drought and Disaster Guaranteed loans;” in the heading for the definition of “Assignment Guarantee Agreement,” removing “, 1980-70 or 1980-73;” revising the definition of “Guaranteed loan,” to read as set forth below; in the third sentence of the definition of “Holder,” removing the parenthetical phrase “(or 1980-70 or 1980-73);” in the heading for the definition of “Lender’s Agreement,” removing the comma and adding the word “or” in its place immediately following “449-35” and removing “, 1980-68, or 1980-71” immediately following “1980-38;” in the heading for the definition of “Loan Note Guarantee,” removing the parenthetical phrase “(or 1980-69 or 1980-72)”.

#### § 1980.6 Definitions and abbreviations.

(a) \* \* \*

*Guaranteed loan.* A loan made and serviced by a lender for which FmHA or its successor agency under Public Law 103-354 has entered into a Form FmHA 449-35 or Form FmHA 1980-38, “Lender’s Agreement,” and for which FmHA or its successor agency under Public Law 103-354 has issued a Form FmHA 449-34, “Loan Note Guarantee.”

3. Section 1980.6 (b) is amended by removing the entries for “B&I,” “DARBE,” and “D&D” from the list of abbreviations.

#### § 1980.13 [Amended]

4-5. Section 1980.13 is amended in the second sentence of paragraph (a) introductory text by revising the reference “paragraphs (a) (1), (2) and (3)” to read “paragraphs (a) (1) and (2);” in paragraph (a)(2) by removing “;or” and adding a period at the end of the paragraph; by removing paragraph (a)(3); and in paragraph (c) by removing the parenthetical phrase “(See subpart E of this part.)”.

#### § 1980.20 [Amended]

6. Section 1980.20 is amended in paragraph (a) introductory text by removing the third and fourth sentences in their entirety; in the fifth sentence, by removing the words “for all other loans covered by this section;” and in the sixth sentence by removing the words “except in regards to D&D and DARBE guaranteed loans (see Subpart E of this part.)”.

#### § 1980.41 [Amended]

7. Section 1980.41 is amended in the first sentence of paragraph (b)(3)(iii)(A) by removing the parenthetical phrase “(State Director for B&I)”.

#### § 1980.46 [Amended]

8. Section 1980.46 is amended in paragraph (a)(2) by removing the parenthetical phrase “(State Director for B&I)” at the end of the paragraph.

#### § 1980.47 [Amended]

9. Section 1980.47 is amended in the first sentence of paragraph (d) by removing the words “and Business”.

10. Section 1980.60 is amended by revising paragraph (a) (2) to read as follows:

#### § 1980.60 Conditions precedent to issuance of the Loan Note Guarantee or Contract of Guarantee.

(a) \* \* \*  
(1) \* \* \*

(2) All planned property acquisition has been completed and all development has been substantially completed in accordance with plans and specifications. All costs have not exceeded the amounts approved by the lender and FmHA or its successor agency under Public Law 103-354.

\* \* \* \* \*

#### § 1980.61 [Amended]

11. Section 1980.61 is amended in the first sentence of paragraph (b)(3) by revising “Forms FmHA or its successor agency under Public Law 103-354 449-35,” to read “Form FmHA 449-35” and removing “FmHA or its successor agency under Public Law 103-354 1980-68, and FmHA or its successor agency under Public Law 103-354 1980-71;” in paragraph (b)(4) by revising the word “request” to read “requests,” revising “Forms FmHA or its successor agency under Public Law 103-354 449-35,” to read “Form FmHA 449-35” removing, “FmHA or its successor agency under Public Law 103-354 1980-68, and FmHA or its successor agency under Public Law 103-354 1980-71,” and removing the parenthetical phrase “(State Director for B&I);” and in paragraph (h) by removing the words “,except for B&I where the State Director and State B&I or C&BP Chief will execute these forms.”

#### § 1980.63 [Amended]

12. Section 1980.63 is amended in paragraph (b) by removing the parenthetical phrase “(State Director for B&I)” from the second and fourth sentences and removing the parenthetical phrase “(except for B&I)” from the third sentence.

#### § 1980.67 [Amended]

13. Section 1980.67 is amended in the first sentence of paragraph (a) by removing the reference “E,”.

#### § 1980.68 [Amended]

14. Section 1980.68 is amended by revising the reference “paragraph 5” to read “paragraph 6” in the second sentence and removing the parenthetical phrase “(State Director for B&I)” from the third and fourth sentences.

#### § 1980.83 [Amended]

15. Section 1980.83 is amended in the table of forms in paragraph (b) by removing the entries beginning with “1980-68,” “1980-69,” “1980-70,” “1980-71,” “1980-72,” and “1980-73.”

#### Subpart E—Business and Industrial Loan Program

16. Section 1980.401 is amended by revising paragraph (a) to read as follows:

#### § 1980.401 Introduction.

(a) This subpart contains the regulations for direct Business and Industrial (B&I) loans disbursed by the Agency. All references to guaranteed loan processing or servicing are not applicable. B&I loan guarantees are to be processed and serviced under the provisions of subparts A and B of part 4279 of this title and subpart B of part 4287 of this title. Any processing or servicing activity conducted pursuant to this subpart involving authorized assistance to relatives, or business or close personal associates, is subject to the provisions of subpart D of part 1900 of this chapter. Applicants for this assistance are required to identify any known relationship or association with any Agency employee.

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

17. A new part 4279 is added to chapter XLII to read as follows:

#### PART 4279—GUARANTEED LOANMAKING

##### Subpart A—General

Sec.

- 4279.1 Purpose.
- 4279.2 Definitions.
- 4279.3-4279.14 [Reserved]
- 4279.15 Exception authority.
- 4279.16 Appeals.
- 4279.17-4279.28 [Reserved]
- 4279.29 Eligible lenders.
- 4279.30 Lenders’ functions and responsibilities.
- 4279.31-4279.42 [Reserved]
- 4279.43 Certified Lender Program.
- 4279.44 Access to records.
- 4279.45-4279.57 [Reserved]
- 4279.58 Equal Credit Opportunity Act.
- 4279.59-4279.70 [Reserved]
- 4279.71 Public bodies and nonprofit corporations.

- 4279.72 Conditions of guarantee.  
 4279.73-4279.74 [Reserved]  
 4279.75 Sale or assignment of guaranteed loan.  
 4279.76 Participation.  
 4279.77 Minimum retention.  
 4279.78 Repurchase from holder.  
 4279.79-4279.83 [Reserved]  
 4279.84 Replacement of document.  
 4279.85-4279.100 [Reserved]

#### Subpart B—Business and Industry Loans

- 4279.101 Introduction.  
 4279.102 Definitions.  
 4279.103-4279.106 [Reserved]  
 4279.107 Guarantee fee.  
 4279.108 Eligible borrowers.  
 4279.109-4279.112 [Reserved]  
 4279.113 Eligible loan purposes.  
 4279.114 Ineligible purposes.  
 4279.115 Prohibition under Agency programs.  
 4279.116-4279.118 [Reserved]  
 4279.119 Loan guarantee limits.  
 4279.120 Fees and charges.  
 4279.121-4279.124 [Reserved]  
 4279.125 Interest rates.  
 4279.126 Loan terms.  
 4279.127-4279.130 [Reserved]  
 4279.131 Credit quality.  
 4279.132-4279.136 [Reserved]  
 4279.137 Financial statements.  
 4279.138-4279.142 [Reserved]  
 4279.143 Insurance.  
 4279.144 Appraisals.  
 4279.145-4279.148 [Reserved]  
 4279.149 Personal and corporate guarantees.  
 4279.150 Feasibility studies.  
 4279.151-4279.154 [Reserved]  
 4279.155 Loan priorities.  
 4279.156 Planning and performing development.  
 4279.157-4279.160 [Reserved]  
 4279.161 Filing preapplications and applications.  
 4279.162-4279.164 [Reserved]  
 4279.165 Evaluation of application.  
 4279.166-4279.172 [Reserved]  
 4279.173 Loan approval and obligating funds.  
 4279.174 Transfer of lenders.  
 4279.175-4279.179 [Reserved]  
 4279.180 Changes in borrower.  
 4279.181 Conditions precedent to issuance of Loan Note Guarantee.  
 4279.182-4279.185 [Reserved]  
 4279.186 Issuance of the guarantee.  
 4279.187 Refusal to execute Loan Note Guarantee.  
 4279.188-4279.200 [Reserved]  
 Authority: 5 U.S.C. 301; 7 U.S.C. 1989.

#### Subpart A—General

##### § 4279.1 Purpose.

- (a) This subpart contains general regulations for making and servicing Business and Industry (B&I) loans guaranteed by the Agency and applies to lenders, holders, borrowers and other parties involved in making, guaranteeing, holding, servicing, or liquidating such loans.  
 (b) It is the responsibility of the lender to ascertain that all requirements for

making, securing, servicing, and collecting the loan are met.

(c) Copies of all forms, regulations, and instructions referenced in this subpart are available in any state or district office or the National office.

##### § 4279.2 Definitions.

*Agency.* The Federal agency within the United States Department of Agriculture (USDA) with responsibility assigned by the Secretary of Agriculture to administer the B&I program.

*Arm's-length transaction.* The sale, release, or disposition of assets in which the title to the property passes to a ready, willing, and able disinterested third party that is not affiliated with or related to and has no security, monetary or stockholder interest in the borrower or transferee at the time of the transaction.

*Assignment Guarantee Agreement.* The signed agreement among the Agency, the lender, and the holder setting forth the terms and conditions of an assignment of a guaranteed portion of a loan, using the single note system. Such agreement will be documented using Form RECD 4279-6, "Assignment Guarantee Agreement."

*Borrower.* All parties liable for the loan except for guarantors.

*Conditional Commitment.* Agency's notice to the lender that the loan guarantee it has requested is approved subject to the completion of all conditions and requirements set forth by the Agency. The commitment will be documented on Form RECD 4279-3, "Conditional Commitment."

*Deficiency balance.* The balance remaining on a loan after all collateral, including the personal guarantees, has been liquidated.

*Deficiency judgment.* A money judgment rendered by a court of competent jurisdiction after foreclosure and liquidation of all collateral securing the loan.

*Existing lender debt.* A debt not guaranteed by the Agency, but owed by a borrower to the same lender that is applying for or has received the Agency guarantee.

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

*Farmers Home Administration ("FmHA").* The former agency of the United States Department of Agriculture ("USDA") that previously administered the programs of this Agency. Many Instructions and forms of FmHA are still applicable to Agency programs.

*Finance office.* The office which maintains the Agency financial accounting records and is located at 1520 Market Street, St. Louis, Missouri 63103.

*Holder.* A person or entity, other than the lender, who owns all or part of the guaranteed portion of the loan with no servicing responsibilities. When the single note option is used and the lender assigns a part of the guaranteed note to an assignee, the assignee becomes a holder only when the Agency receives notice and the transaction is completed through use of Form RECD 4279-6, "Assignment Guarantee Agreement."

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

*Lender.* The organization making, servicing, and collecting the loan which is guaranteed under the provisions of the appropriate subpart.

*Lender's Agreement.* The agreement between the Agency and the lender setting forth the lender's loan responsibilities when the Loan Note Guarantee is issued. The agreement is Form RECD 4279-4, "Lender's Agreement."

*Loan Agreement.* The agreement between the borrower and lender setting out the terms and conditions of the loan and the responsibilities of the borrower and lender.

*Loan Note Guarantee.* The signed instrument issued by the Agency setting out the terms and conditions of the guarantee. The guarantee is Form RECD 4279-5, "Loan Note Guarantee."

*Loan-to-value.* The ratio of the dollar amount of a loan to the dollar value of the collateral for the loan.

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

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

*Participation.* Sale of an interest by the lender in a loan wherein the lender retains the note, collateral securing the

note, and all responsibility for loan servicing and liquidation.

*Poor.* A community or area is considered poor if, based on the most recent decennial census data, either the county, city, or census tract where the community or area is located has a median household income at or below the poverty line for a family of four; has a median household income below the nonmetropolitan median household income for the state; or has a population of which 25 percent or more have income at or below the poverty line.

*Promissory Note.* An evidence of debt. "Note" or "Promissory Note" shall also be construed to include "Bond" or other evidence of debt where appropriate.

*RECD.* The Under Secretary for Rural Economic and Community Development ("RECD") has policy and operational oversight responsibilities for the Rural Housing Service ("RHCDs"), Rural Business-Cooperative Service ("RBS"), and the Rural Utilities Service ("RUS").

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

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

*Subordination.* An agreement between the lender and borrower whereby lien priorities on certain assets pledged to secure payment of the guaranteed loan will be reduced to a position junior to, or on parity with, the lien position of another loan in order for the Agency borrower to obtain additional financing, not guaranteed by the Agency, from the lender or a third party.

*Veteran.* For the purposes of assigning priority points, a veteran is a person who has been discharged or released from the active forces of the United States Army, Navy, Air Force, Marine Corps, or Coast Guard under conditions other than dishonorable and who served on active duty in such forces:

- (1) During the period of April 6, 1917, through March 31, 1921;
- (2) During the period of December 7, 1941, through December 31, 1946;
- (3) During the period of June 27, 1950, through January 31, 1955; or

(4) For a period of more than 180 days, any part of which occurred after January 31, 1955; but on or before May 17, 1975.

**§§ 4279.3–4279.14 [Reserved]**

**§ 4279.15 Exception authority.**

The Administrator may, in individual cases, grant an exception to any requirement or provision of this part or part 4287 which is not inconsistent with any applicable law; provided that: the Administrator determines that application of the requirement or provision would adversely affect the Government's financial interest.

**§ 4279.16 Appeals.**

Only the borrower, lender, or holder can appeal an Agency decision made under this part or part 4287. Except as set forth in this section, the borrower and lender must jointly execute the written request for review or appeal of an adverse decision made by the Agency. In cases where the Agency has denied or reduced the amount of final loss payment to the lender, the adverse decision may be appealed by the lender only. An adverse decision that only impacts the holder may be appealed by the holder only. A decision by a lender adverse to the interest of the borrower is not a decision by the Agency, whether or not concurred in by the Agency. Appeals will be handled in accordance with the departmental appeal regulations.

**§§ 4279.17–4279.28 [Reserved]**

**§ 4279.29 Eligible lenders.**

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

(b) Rural Utilities Service borrowers and other lenders not meeting the criteria of paragraph (a) of this section may be considered by the Agency for eligibility to become a guaranteed

lender provided the Agency determines that they have the legal authority to operate a lending program and sufficient lending expertise and financial strength to operate a successful lending program.

(1) Such a lender must:

(i) Have a record of successfully making at least three commercial loans for at least the most recent 3 years, with delinquent loans not exceeding 10 percent of loans outstanding and historic losses not exceeding 10 percent of dollars loaned; and

(ii) Have tangible balance sheet equity of at least 7 percent of tangible assets and sufficient funds available to disburse the guaranteed loans it proposes to approve within the first 6 months of being approved as a guaranteed lender.

(2) A lender not covered under paragraph (a) of this section that wishes consideration to become a guaranteed lender must submit a request in writing to the state office for the state where the lender's lending and servicing activity takes place. The National office will notify the prospective lender, through the state director, whether the lender's request for eligibility is approved or rejected. If rejected, the reasons for the rejection will be indicated to the prospective lender in writing, and appeal rights will be provided in accordance with departmental appeal regulations. The lender's written request must include:

(i) Evidence showing that the lender has the necessary capital and resources to successfully meet its responsibilities.

(ii) Copy of any license, charter, or other evidence of authority to engage in the proposed loanmaking and loan servicing activity. If licensing by the state is not required, an attorney's opinion to this effect must be submitted.

(iii) Information on lending experience, including length of time in the lending business, range and volume of lending and servicing activity, and status of loan portfolio including delinquency rate, loss rate as a percentage of loan amounts, and other measures of success; experience of management and loan officers; audited financial statements not more than 1 year old; sources of funds for the proposed loans; office location and proposed lending area; and proposed rates and fees, including loan origination, loan preparation, and servicing fees. Such fees must not be greater than those charged by similarly located commercial lenders in the ordinary course of business.

(iv) An estimate of the number and size of guaranteed loan applications the lender will develop.

(c) Expertise. Loan guarantees will only be approved for lenders with adequate experience and expertise to adequately make, secure, service, and collect B&I loans.

**§ 4279.30 Lenders' functions and responsibilities.**

(a) *General.* Lenders have the primary responsibility for the successful delivery of the B&I loan program. All lenders obtaining or requesting a B&I loan guarantee are responsible for processing applications for guaranteed loans, developing and maintaining adequately documented loan files, recommending only loan proposals that are eligible and financially feasible, obtaining valid evidence of debt and collateral in accordance with sound lending practices, supervising construction and distribution of loan funds, servicing guaranteed loans in a prudent manner, including liquidation if necessary, following Agency regulations, and obtaining Agency approvals or concurrence as required. This subpart, along with subpart B of this part and subpart B of part 4287 sets out the regulations for this program, including the lenders' responsibilities.

(b) *Credit evaluation.* This is a key function of all lenders during the loan processing phase. The lender must analyze all credit factors associated with each proposed loan and apply their professional judgment to determine that the credit factors, considered in combination, ensure loan repayment. The lender should have an adequate underwriting process to ensure that loans are reviewed by other than the originating officer. There must be good credit documentation procedures.

(c) *Environmental assessment.* All lenders should alert the Agency to any controversial environmental issues related to a proposed project or items that may require extensive environmental review. Lenders should help the borrower prepare Form FmHA 1940-20, "Request for Environmental Information," and attachments when required by FmHA Instruction 1940-G.

(d) *Loan closing.* The lender will conduct loan closings at its discretion.

**§§ 4279.31-4279.42 [Reserved]**

**§ 4279.43 Certified Lender Program.**

(a) *General.* This section provides policies and procedures for the Certified Lender Program ("CLP") for loans guaranteed under this part. The objectives are to expedite loan approval for those lenders with a proven ability, in accordance with paragraph (b) of this section, to process, service, and collect loans.

(b) *CLP eligibility criteria.* The lender must meet established eligibility criteria prior to being considered for CLP status as follows:

(1) Be an "eligible lender" as defined in § 4279.29 and authorized to do business in the state in which CLP status is desired.

(2) Demonstrate to the Agency's satisfaction that it has a thorough knowledge of commercial lending. The lender will demonstrate such knowledge by providing a summary of its guaranteed and unguaranteed business lending activity. At a minimum, the summary should include the dollar amount and number of loans in the lender's portfolio, unguaranteed and guaranteed by any Federal agency, with information on delinquencies and losses and, if applicable, the performance of the lender as an SBA certified or preferred lender. A certified lender should be recognized throughout the state as a commercial lender and have a track record of successfully making at least five commercial loans per year for at least the most recent 5 years, with delinquent loans not exceeding 6 percent of loans outstanding and historic losses not exceeding 6 percent of dollars loaned. The lender will provide a written certification to this effect along with a statistical analysis of its loan portfolio for the last 3 of its fiscal years.

(3) If a bank or savings and loan, have a financial strength rating in the upper half of possible ratings as reported by a lender rating service selected by the Administrator.

(4) Possess loan officers and other appropriate personnel who have received training conducted by the Agency. Additional training may be required if the lender's contact person changes or if the Agency feels further instruction is needed.

(5) Have committed no action within the most recent 2 years prior to requesting CLP status which would be considered cause for revoking CLP status under § 4279.43(e).

(c) *CLP approval.* The Agency may grant CLP status for a period not to exceed 5 years by executing Form RECD 4279-8, "Certified Lender, Business and Industry Program," with the lender. The Form RECD 4279-8 will not apply to branches or suboffices of the lender unless so specified in the agreement. Such branches or suboffices may submit loans as regular lenders or apply for their own CLP status. Any lender who desires CLP status must prepare a written request to the state director for the state in which it desires status. The request should address each of the required criteria outlined in paragraph

(b) of this section except for paragraph (b)(3) and may be accompanied by any other information the lender believes will be helpful. The request will also include Form RECD 4279-8 completed and executed by the lender and an executed Lender's Agreement, if it does not already have a valid Lender's Agreement on file with the Agency. Loans made by the lender and guaranteed by the Agency prior to the lender receiving CLP status shall continue to be governed by the forms and agreements executed between the lender and the Agency for those loans.

(d) *Renewal of CLP status.* Renewal of CLP status is not automatic. CLP status will lapse upon the expiration date of Form RECD 4279-8 unless the lender obtains a renewal. A lender whose CLP status has lapsed may continue to submit loan guarantee requests, but only as a regular lender. The lender must provide a new Form RECD 4279-8 completed and executed by the lender, along with a written update of the eligibility criteria required in this section for CLP approval. This information should be supplied at least 60 days prior to the expiration of the existing agreement to be processed for uninterrupted status. The information should address how the lender is complying with each of the required criteria described in paragraph (b) of this section. It should include any proposed changes in the designated persons for processing guaranteed loans or operating methods used in processing and servicing Agency guaranteed loans.

(e) *Revocation of CLP status.* The lender's CLP status may be revoked at any time for cause. The debarment of a lender is an additional alternative the Agency may consider. A lender which has lost its CLP status, but has not been debarred and still meets the requirements of § 4279.29 may continue to submit loan guarantee requests as a regular lender. Cause for revoking CLP status includes:

(1) Failure to maintain status as an eligible lender as set forth in § 4279.29.

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

(3) Making an Agency guaranteed loan with deficiencies which may cause losses under the Loan Note Guarantee not to be covered by the Loan Note Guarantee.

(4) Conviction for acts in connection with any loan transaction, regardless of whether the loan was guaranteed by the Agency.

(5) Violation of usury laws in connection with any loan guaranteed by the Agency.

(6) Failure to obtain the required security for any loan guaranteed by the Agency.

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

(8) Violation of any terms of the Lender's Agreement.

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

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

(11) Failure to process Agency guaranteed loans in a reasonably prudent manner.

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

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

(14) Repetitive recommendations for servicing actions that do not comply with Agency requirements.

(15) Negligent servicing.

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

(f) *General loan processing and servicing guidelines.* All requests for guaranteed loans will be processed and serviced under subparts A and B of this part and subpart B of part 4287 except as modified by this section. When determining whether or not to request a guarantee for a proposed loan, lenders must consider the priorities set forth in § 4279.155.

(1) Prior to processing an application, the CLP lender may give written notice to the state director of its intention to submit an application. Upon receipt of such written notice, the Agency will notify the CLP lender whether or not there is sufficient guarantee authority for the loan. Such guarantee authority will be held for 30 days pending receipt of the application. If a complete application for which guarantee authority is being held is not received within 30 days of the notice of intent to file, or is rejected, the guarantee authority for this application will no longer be held in reserve.

(2) Refinancing of existing lender debt in accordance with § 4279.113(q) will

not be permitted without prior Agency approval.

(3) CLP lenders will process all guaranteed loans as a "complete application" by obtaining and completing all items required by § 4279.161(b). The CLP lender must maintain all information required by § 4279.161(b) in its loan file, and determine that such material complies with all requirements.

(4) CLP lenders will make all material relating to any guarantee application available to the Agency upon request.

(5) At the time of the Agency's issuance of the Loan Note Guarantee, the CLP lender will provide the Agency with copies of the following documents:

(i) Executed Loan Agreement.

(ii) Executed Promissory Notes.

(iii) Executed copies of security documents including personal and corporate guarantees.

(g) *Unique characteristics of the CLP.* A proposed loan by a CLP lender requires only a review by the Agency of the information submitted by the lender. The Agency may rely on the lender's credit analysis.

(1) The following will constitute a complete application submitted by a CLP lender:

(i) Form RECD 4279-1, "Application for Loan Guarantee (Business and Industry)," (marked with the letters "CLP" at the top) completed in its entirety and executed by the borrower and CLP lender.

(ii) Copy of the proposed Loan Agreement or a list of proposed requirements.

(iii) Form FmHA 1940-20, completed and signed, with attachments.

(iv) The lender's complete written analysis of the proposal, including spreadsheets of the balance sheets and income statements for the 3 previous years (for existing businesses), pro forma balance sheet at startup, and 2 years projected yearend balance sheets and income statements, with appropriate ratios and comparisons with industry standards (such as Dun & Bradstreet or Robert Morris Associates). All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales. The lender's credit analysis must address the borrower's management, repayment ability, history of debt repayment, necessity of any debt refinancing, and the credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary.

(v) Intergovernmental consultation comments in accordance with 7 CFR part 3015, subpart V.

(vi) If the loan will exceed \$1 million and will increase direct employment by more than 50 employees, Form RECD 4279-2, "Certification of Non-Relocation and Market Capacity Information Report," must be completed by the lender. For such loans, the Agency will submit Form RECD 4279-2 to the Department of Labor and obtain clearance before a Conditional Commitment may be issued.

(2) The Agency will make the final credit decision based primarily on a review of the credit analysis submitted by the lender except that refinancing of existing lender debt in accordance with § 4279.113(q) will not be approved without review of the borrower's complete financial statements and complete credit analysis by the Agency. The Agency may request additional information to clarify or complete the submission.

(h) *Lender loan servicing responsibilities.* CLP lenders will be fully responsible for all aspects of loan servicing and, if necessary, liquidation as described in subpart B of part 4287.

#### § 4279.44 Access to records.

The lender will permit representatives of the Agency (or other agencies of the United States) to inspect and make copies of any records of the lender pertaining to the Agency guaranteed loans during regular office hours of the lender or at any other time upon agreement between the lender and the Agency.

#### §§ 4279.45-4279.57 [Reserved]

#### § 4279.58 Equal Credit Opportunity Act.

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

**§§ 4279.59–4279.70 [Reserved]****§ 4279.71 Public bodies and nonprofit corporations.**

Any public body or nonprofit corporation that receives a guaranteed loan that meets the thresholds established by Office of Management and Budget (OMB) Circulars A–128 or A–133 or successor circulars must provide an audit in accordance with the applicable OMB Circular for the fiscal year (of the borrower) in which the Loan Note Guarantee is issued. If the loan is for development or purchases made in a previous fiscal year through interim financing, an audit will also be provided for the fiscal year in which the development or purchases occurred. Any audit provided by a public body or nonprofit corporation in compliance with OMB Circulars A–128 or A–133 or their successors will be considered adequate to meet the audit requirements of the B&I program for that year.

**§ 4279.72 Conditions of guarantee.**

A loan guarantee under this part will be evidenced by a Loan Note Guarantee issued by the Agency. Each lender will execute a Lender's Agreement. If a valid Lender's Agreement already exists, it is not necessary to execute a new Lender's Agreement with each loan guarantee. The provisions of this subpart, other appropriate subparts of this part, and part 4287 of this chapter will apply to all outstanding guarantees unless directly in conflict with the Loan Note Guarantee or Lender's Agreement issued for the guarantee. In the event of such a conflict, the lender may elect to have the loan serviced in accordance with these regulations. The lender must notify the Agency of such election in writing. Without such written election, the provisions of the Loan Note Guarantee and Lender's Agreement will control.

(a) *Full faith and credit.* A guarantee 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. The guarantee will be unenforceable to the extent that any loss is occasioned by a provision for interest on interest. In addition, the guarantee will be unenforceable by the lender to the extent any loss is occasioned by the violation of usury laws, negligent servicing, or failure to obtain the required security regardless of the time at which the Agency acquires knowledge of the foregoing. Any losses

occasioned will be unenforceable to the extent that loan funds are used for purposes other than those specifically approved by the Agency in its Conditional Commitment. The Agency will guarantee payment as follows:

(1) To any holder, 100 percent of any loss sustained by the holder on the guaranteed portion of the loan and on interest due on such portion.

(2) To the lender, the lesser of:

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

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

(b) *Rights and liabilities.* When a guaranteed portion of a loan is sold to a holder, the holder shall succeed to all rights of the lender under the Loan Note Guarantee to the extent of the portion purchased. The lender will remain bound to all obligations under the Loan Note Guarantee, Lender's Agreement, and the Agency program regulations. A guarantee and right to require purchase will be directly enforceable by a holder notwithstanding any fraud or misrepresentation by the lender or any unenforceability of the guarantee by the lender, except for fraud or misrepresentation of which the holder had actual knowledge at the time it became the holder or in which holder participates or condones. In the event of material fraud, negligence or misrepresentation by the lender or the lender's participation in or condoning of such material fraud, negligence or misrepresentation, the lender will be liable for payments made by the Agency to any holder.

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

**§§ 4279.73–4279.74 [Reserved]****§ 4279.75 Sale or assignment of guaranteed loan.**

The lender may sell all or part of the guaranteed portion of the loan on the secondary market or retain the entire loan. The lender shall not sell or participate any amount of the guaranteed or unguaranteed portion of the loan to the borrower or members of the borrower's immediate families, officers, directors, stockholders, other owners, or a parent, subsidiary or

affiliate. If the lender desires to market all or part of the guaranteed portion of the loan at or subsequent to loan closing, such loan must not be in default. Loans made with the proceeds of any obligation the interest on which is excludable from income under Section 103 of the Internal Revenue Code of 1954, as amended, will not be guaranteed.

(a) *Single note system.* The entire loan is evidenced by one note, and one Loan Note Guarantee is issued. The lender may assign all or part of the guaranteed portion of the loan to one or more holders by using Agency's Assignment Guarantee Agreement. The holder, upon written notice to the lender and the Agency, may reassign the unpaid guaranteed portion of the loan sold under the Assignment Guarantee Agreement. Upon notification and completion of the assignment through the use of Form RECD 4279–6, "Assignment Guarantee Agreement," the assignee shall succeed to all rights and obligations of the holder thereunder. If this option is selected, the lender may not at a later date cause any additional notes to be issued.

(b) *Multinote system.* Under this option the lender may provide one note for the unguaranteed portion of the loan and no more than 10 notes for the guaranteed portion. When this option is selected by the lender, the holder will receive one of the borrower's executed notes and a Loan Note Guarantee. The Agency will issue a Loan Note Guarantee for each note, including the unguaranteed note, to be attached to the note. An Assignment Guarantee Agreement will not be used when the multinote option is utilized.

(c) *After loan closing.* If a loan is closed using the multinote option and at a later date additional notes are desired, the lender may cause a series of new notes, not to exceed the total number provided for in paragraph (b) of this section, to be issued as replacement for previously issued guaranteed notes, provided:

(1) Written approval of the Agency is obtained;

(2) The borrower agrees and executes the new notes;

(3) The interest rate does not exceed the interest rate in effect when the loan was closed;

(4) The maturity of the loan is not changed;

(5) The Agency will not bear or guarantee any expenses that may be incurred in reference to such reissuances of notes;

(6) There is adequate collateral securing the notes;

(7) No intervening liens have arisen or have been perfected and the secured lien priority remains the same; and

(8) All holders agree.

(d) The lender's servicing fee will stop when the Agency purchases the guaranteed portion of the loan from the secondary market. No such servicing fee may be charged to the Agency and all loan payments and collateral proceeds received will be applied first to the guaranteed loan and when applied to the guaranteed loan, will be applied on a pro rata basis.

(e) When the Agency purchases the guaranteed portion, the loan shall not be sold with recourse. The purchased loans may be sold on a nonrecourse basis only, i.e., without a Loan Note Guarantee attached and without recourse.

#### § 4279.76 Participation.

The lender may obtain participation in the loan under its normal operating procedures; however, the lender must retain title to the notes if any of them are unguaranteed and retain the lender's interest in the collateral.

#### § 4279.77 Minimum retention.

The lender is required to hold in its own portfolio a minimum of 5 percent of the total loan amount. The amount required to be maintained must be of the unguaranteed portion of the loan and cannot be participated to another. The lender may sell the remaining amount of the unguaranteed portion of the loan only through participation.

#### § 4279.78 Repurchase from holder.

(a) *Repurchase by lender.* A lender has the option to repurchase the unpaid guaranteed portion of the loan from a holder within 30 days of written demand by the holder when the borrower is in default not less than 60 days on principal or interest due on the loan; or the lender has failed to remit to the holder its pro rata share of any payment made by the borrower within 30 days of its receipt thereof. The repurchase by the lender will be for an amount equal to the unpaid guaranteed portion of principal and accrued interest less the lender's servicing fee. The holder will concurrently send a copy of the demand letter to the Agency. The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the demand letter to the lender requesting the repurchase. The lender will accept an assignment without recourse from the holder upon repurchase. The lender is encouraged to repurchase the loan to facilitate the accounting of funds, resolve the

problem, and permit the default, where and when reasonable. The lender will notify the holder and the Agency of its decision.

(b) *Agency purchase.* (1) If the lender does not repurchase as provided in paragraph (a) of this section, the Agency will purchase from the holder the unpaid principal balance of the guaranteed portion together with accrued interest to date of repurchase, less the lender's servicing fee, within 30 days after written demand to the Agency from the holder. (This is in addition to the copy of the written demand on the lender.) The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the original demand letter of the holder to the lender requesting the repurchase.

(2) The holder's demand to the Agency must include a copy of the written demand made upon the lender. The holder must also include evidence of its right to require payment from the Agency. Such evidence will consist of either the original of the Loan Note Guarantee properly endorsed to the Agency or the original of the Assignment Guarantee Agreement properly assigned to the Agency without recourse including all rights, title, and interest in the loan. The holder must include in its demand the amount due including unpaid principal, unpaid interest to date of demand, and interest subsequently accruing from date of demand to proposed payment date. The Agency will be subrogated to all rights of the holder.

(3) The Agency will notify the lender of its receipt of the holder's demand for payment. The lender must promptly provide the Agency with the information necessary for the Agency to determine the appropriate amount due the holder. Upon request by the Agency, the lender will furnish a current statement certified by an appropriate authorized officer of the lender of the unpaid principal and interest then owed by the borrower on the loan and the amount then owed to any holder. Any discrepancy between the amount claimed by the holder and the information submitted by the lender must be resolved between the lender and the holder before payment will be approved. Such conflict will suspend the running of the 30-day payment requirement.

(4) Purchase by the Agency neither changes, alters, nor modifies any of the lender's obligations to the Agency arising from the loan or guarantee nor does it waive any of Agency's rights against the lender. The Agency will have the right to set-off against the

lender all rights inuring to the Agency as the holder of the instrument against the Agency's obligation to the lender under the guarantee.

(c) *Purchase for servicing.* If, in the opinion of the lender, repurchase of the guaranteed portion of the loan is necessary to adequately service the loan, the holder must sell the guaranteed portion of the loan to the lender for an amount equal to the unpaid principal and interest on such portion less the lender's servicing fee. The guarantee will not cover the note interest to the holder on the guaranteed loan accruing after 90 days from the date of the demand letter of the lender or the Agency to the holder requesting the holder to tender its guaranteed portion. The lender must not repurchase from the holder for arbitrage or other purposes to further its own financial gain. Any repurchase must only be made after the lender obtains the Agency's written approval. If the lender does not repurchase the portion from the holder, the Agency may, at its option, purchase such guaranteed portion for servicing purposes.

#### §§ 4279.79–4279.83 [Reserved]

#### § 4279.84 Replacement of document.

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

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

(1) A certificate of loss, notarized, which includes:

- (i) Name and address of owner;
- (ii) Name and address of the lender of record;
- (iii) Capacity of person certifying;
- (iv) Full identification of the Loan Note Guarantee or Assignment Guarantee Agreement including the name of the borrower, the Agency's case number, date of the Loan Note Guarantee or Assignment Guarantee Agreement, face amount of the evidence of debt purchased, date of evidence of debt, present balance of the loan, percentage of guarantee, and, if Assignment Guarantee Agreement, the

original named holder and the percentage of the guaranteed portion of the loan assigned to that holder. Any existing parts of the document to be replaced should be attached to the certificate;

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

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

(2) An indemnity bond acceptable to the Agency shall 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, or the District of Columbia. The bond shall be with surety except when the outstanding principal balance and accrued interest due the present holder is less than \$1 million verified by the lender in writing in a letter of certification of balance due. The surety shall be a qualified surety company holding a certificate of authority from the Secretary of the Treasury and listed in Treasury Department Circular 580.

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

(4) In those cases where the guaranteed loan was closed under the provision of the multinote system, the Agency will not attempt to obtain, or participate in the obtaining of, replacement notes from the borrower. It will be the responsibility of the holder to bear costs of note replacement if the borrower agrees to issue a replacement instrument. Should such note be replaced, the terms of the note cannot be changed. If the evidence of debt has been lost, stolen, destroyed, mutilated or defaced, such evidence of debt must be replaced before the Agency will replace any instruments.

#### §§ 4279.85–4279.100 [Reserved]

### Subpart B—Business and Industry Loans

#### § 4279.101 Introduction.

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

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

(c) Documents. Copies of all forms, regulations, and Instructions referenced in this subpart are available in any state or district office or the National office.

#### § 4279.102 Definitions.

The definitions in § 4279.2 of subpart A of this part also apply to this subpart.

#### §§ 4279.103–4279.106 [Reserved]

#### § 4279.107 Guarantee fee.

The guarantee fee will be paid to the Agency by the lender and is nonrefundable. The fee may be passed on to the borrower. Except as provided in this section, the guarantee fee will be 2 percent multiplied by the principal loan amount multiplied by the percent of guarantee and will be paid one time only at the time the Loan Note Guarantee is issued.

(a) The guarantee fee may be reduced to 1 percent if the Agency determines that the business meets the following criteria:

(1) High-impact business development investment (It is the goal of this program to encourage high-impact business investment in rural areas. The weight given to business investments will be in accordance with § 4279.155(b)(5)); and

(2) The business is located in a community that is experiencing long-term population decline and job deterioration; or

(3) The business is located in rural community that has remained persistently poor over the last 60 years or more; or

(4) The business is located in a rural community that is experiencing trauma as a result of natural disaster or that is experiencing fundamental structural changes in its economic base.

(b) Each fiscal year, the Agency shall establish a limit on the maximum portion of guarantee authority available for that fiscal year that may be used to guarantee loans with a guarantee fee of 1 percent. The limit will be announced by publishing a notice in the Federal Register. Once the limit has been reached, the guarantee fee for all additional loans guaranteed during the remainder of that fiscal year will be 2 percent.

#### § 4279.108 Eligible borrowers.

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

- (1) Provide employment;
- (2) Improve the economic or environmental climate;
- (3) Promote the conservation, development, and use of water for aquaculture; or
- (4) Reduce reliance on nonrenewable energy resources by encouraging the development and construction of solar energy system.

(b) *Citizenship.* Borrowers must meet one of the following sets of conditions:

(1) Individual borrowers must be citizens of the United States or reside in the United States after being legally admitted for permanent residence. Corporations or other nonpublic body organization-type borrowers must be at least 51 percent owned by persons who are either citizens of the United States or reside in the United States after being legally admitted for permanent residence; or,

(2) The borrower does not meet the requirements of paragraph (1) of this section; but,

(i) The facility financed will create or save jobs for U.S. residents in a rural area, and

(ii) The principals or other capable management are present and able to remain in the U.S. and will remain in the U.S. to continue the operation of the company; and,

(iii) The loan funds will only be used to finance fixed assets that will be located in the U.S.

(c) *Rural area.* The business financed with a B&I Guaranteed Loan must be located in a rural area. Loans to borrowers with facilities located in both urban and rural areas will be limited to the amount necessary to finance the facility located in the eligible rural area.

(1) Rural areas include all territory of a state that is:

(i) Not within the outer boundary of any city having a population of 50,000 or more; and,

(ii) Not within an area that:

(A) Is urbanized or urbanizing as defined in this section; and,

(B) Has a population density of more than 100 persons per square mile, according to the latest decennial census of the United States. All density determinations will be made on the basis of minor civil divisions or census county divisions as used by the Bureau of the Census. In making the density calculations, large nonresidential tracts devoted to urban land uses such as railroad yards, airports, industrial sites, parks, golf courses, cemeteries, office parks, shopping malls, or land set aside for such purposes will be excluded.

(2) An urbanized area is an area immediately adjacent to a city with a population of 50,000 or more, that for general social and economic purposes forms a single community with such a city. An urbanizing area is an area immediately adjacent to a city with a population of 50,000 or more or its urbanized area, which appears likely, based on development and population trends, to become urbanized in the foreseeable future. The corporate status of an urbanized or urbanizing area is not material. An area located in recognizable open country or separated from any city of 50,000 or more population by recognizable open country or by a river, will be assumed to be not urbanized or urbanizing.

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

#### §§ 4279.109–4279.112 [Reserved]

#### § 4279.113 Eligible loan purposes.

Loan purposes must be consistent with the general purpose set forth in § 4279.101. They include but are not limited to the following:

(a) Business and industrial acquisitions when the loan will keep the business from closing, prevent the loss of employment opportunities, or provide expanded job opportunities.

(b) Business conversion, enlargement, repair, modernization, or development.

(c) Purchase and development of land, easements, rights-of-way, buildings, or facilities.

(d) Purchase of equipment, lease-hold improvements, machinery, supplies, or inventory.

(e) Pollution control and abatement.

(f) Transportation services incidental to industrial development.

(g) Startup costs and working capital.

(h) Agricultural production, when not eligible for a Farm Credit Programs loan from the Farm Service Agency and when it is part of an integrated business also involved in the processing of agricultural products.

(1) Examples of potentially eligible 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. Any agricultural production considered for B&I financing must be owned, operated, and maintained by the business receiving the loan for which a guarantee is provided. Independent agricultural production operations, even if not eligible for Farmer Programs loans, are not eligible for the B&I program.

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

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

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

(k) Commercial fishing.

(l) Commercial nurseries engaged in the production of ornamental plants and 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.

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

(n) The growing of mushrooms or hydroponics.

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

(p) Feasibility studies.

(q) To refinance outstanding debt when it is determined that the project is viable and refinancing is necessary to improve cash flow and create new or

save existing jobs. Existing lender debt may be included provided that, at the time of application, the loan has been current for at least the past 12 months (unless such status is achieved by the lender forgiving the borrower's debt), the lender is providing better rates or terms, and the refinancing is a secondary part of the overall loan.

(r) Take out of interim financing. Guaranteeing a loan 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 which proposes such interim financing prior to completing the interim loan. A lender that is considering an interim loan should be advised that the Agency assumes no responsibility or obligation for interim loans advanced prior to the Conditional Commitment being issued.

(s) Fees and charges for professional services and routine lender fees.

(t) Agency guarantee fee.

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

(v) Educational or training facilities.

(w) Community facility projects which are not listed as an ineligible loan purpose.

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

(y) The financing of housing development sites provided that the community demonstrates a need for additional housing to prevent a loss of jobs in the area or to house families moving to the area as a result of new employment opportunities.

(z) Community antenna television services or facilities.

#### § 4279.114 Ineligible purposes.

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

(b) Projects in excess of \$1 million that would likely result in the transfer of jobs from one area to another and increase direct employment by more than 50 employees.

(c) Projects in excess of \$1 million that would increase direct employment by more than 50 employees, if the project would result in an increase in the production of goods for which there is not sufficient demand, or if the availability of services or facilities is insufficient to meet the needs of the business.

(d) Charitable institutions, churches, or church-controlled or fraternal organizations.

(e) Lending and investment institutions and insurance companies.

(f) Assistance to government employees and military personnel who are directors or officers or have a major ownership of 20 percent or more in the business.

(g) Golf courses or race tracks.

(h) Any business that derives more than 10 percent of annual gross revenue from gambling activity.

(i) Any illegal business activity.

(j) Prostitution.

(k) Any line of credit.

(l) The guarantee of lease payments.

(m) The guarantee of loans made by other Federal agencies.

(n) Residential housing except when health care or assisted living is involved.

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

**§ 4279.115 Prohibition under Agency programs.**

No B&I loans guaranteed by the Agency will be conditioned on any requirement that the recipients of such assistance accept or receive electric service from any particular utility, supplier, or cooperative.

**§§ 4279.116–4279.118 [Reserved]**

**§ 4279.119 Loan guarantee limits.**

(a) *Loan amount.* The total amount of Agency loans to one borrower, including the guaranteed and unguaranteed portions, the outstanding principal and interest balance of any existing Agency guaranteed loans, and new loan requests, must not exceed \$10 million except as provided for in this paragraph. The Administrator may, at the Administrator's discretion, grant an exception to the \$10 million limit under the following circumstances:

(1) The project to be financed is a high priority project. Priority will be

determined in accordance with the criteria set forth in § 4279.155;

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

(3) In no circumstances will the total amount of guaranteed loans to one borrower, including the guaranteed and unguaranteed portions, the outstanding principal and interest balance of any existing Agency guaranteed loans, and new loan requests, exceed \$25 million;

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

(5) Any request for a guaranteed loan exceeding the \$10 million limit must be submitted to the Agency in the form of a preapplication. The preapplication must be submitted to the National office for review and concurrence before encouraging a full application.

(b) *Percent of guarantee.* The percentage of guarantee, up to the maximum allowed by this section, is a matter of negotiation between the lender and the Agency. Except as provided in paragraphs (b) (1) through (4) of this section, the maximum percentage of guarantee is 80 percent for loans of \$5 million or less and 70 percent for loans exceeding \$5 million. The Administrator may, at the Administrator's discretion, grant an exception to the guarantee percentage limits under the following circumstances:

(1) The project to be financed is a high priority project. Priority will be determined in accordance with the criteria set forth in § 4279.155;

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

(3) The percentage of guarantee will not exceed 90 percent; and

(4) Each fiscal year, the Agency shall establish a limit on the maximum portion of guarantee authority available for that fiscal year that may be used to guarantee loans with a guarantee percentage exceeding 80 percent. The limit will be announced by publishing a notice in the Federal Register. Once the limit has been reached, the guarantee percentage for all additional loans guaranteed during the remainder of that fiscal year will not exceed 80 percent.

**§ 4279.120 Fees and charges.**

(a) Routine lender fees. The lender may establish charges and fees for the

loan provided they are similar to those normally charged other applicants for the same type of loan in the ordinary course of business.

(b) Professional services. Professional services are those rendered by professionals generally licensed or certified by states or accreditation associations, such as architects, engineers, packagers, accountants, attorneys, or appraisers. The borrower may pay fees for professional services needed for planning and developing a project provided that the amounts are reasonable and customary in the area. Professional fees may be included as an eligible use of loan proceeds.

**§§ 4279.121–4279.124 [Reserved]**

**§ 4279.125 Interest rates.**

The interest rate for the guaranteed loan will be negotiated between the lender and the applicant and may be either fixed or variable as long as it is a legal rate. Interest rates will not be more than those rates customarily charged borrowers in similar circumstances in the ordinary course of business and are subject to Agency review and approval. Lenders are encouraged to utilize the secondary market and pass interest rate savings on to the borrower.

(a) A variable interest rate agreed to by the lender and borrower must be a rate that is tied to a base rate agreed to by the lender and the Agency. The variable interest rate may be adjusted at different intervals during the term of the loan, but the adjustments may not be more often than quarterly and must be specified in the Loan Agreement. The lender must incorporate, within the variable rate Promissory Note at loan closing, the provision for adjustment of payment installments coincident with an interest rate adjustment. The lender will assure that the outstanding principal balance is properly amortized within the prescribed loan maturity to eliminate the possibility of a balloon payment at the end of the loan.

(b) Any change in the interest rate between the date of issuance of the Conditional Commitment and before the issuance of the Loan Note Guarantee must be approved in writing by the Agency approval official. Approval of such a change will be shown as an amendment to the Conditional Commitment.

(c) It is permissible to have one interest rate on the guaranteed portion of the loan and another rate on the unguaranteed portion of the loan provided that the rate on the guaranteed portion does not exceed the rate on the unguaranteed portion.

(d) A combination of fixed and variable rates will be allowed.

**§ 4279.126 Loan terms.**

(a) The maximum repayment for loans on real estate will not exceed 30 years; machinery and equipment repayment will not exceed the useful life of the machinery and equipment purchased with loan funds or 15 years, whichever is less; and working capital repayment will not exceed 7 years. The term for a loan that is being refinanced may be based on the collateral the lender will take to secure the loan.

(b) The first installment of principal and interest will, if possible, be scheduled for payment after the project is operational and has begun to generate income. However, the first full installment must be due and payable within 3 years from the date of the Promissory Note and be paid at least annually thereafter. Interest-only payments will be paid at least annually from the date of the note.

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

(d) A loan's maturity will take into consideration the use of proceeds, the useful life of assets being financed, and the borrower's ability to repay the loan. The lender may apply the maximum guidelines specified above only when the loan cannot be repaid over a shorter term.

**§§ 4279.127–4279.130 [Reserved]**

**§ 4279.131 Credit quality.**

The lender is primarily responsible for determining credit quality and should address all of the elements of credit quality in a written credit analysis including adequacy of equity, cash flow, collateral, history, management, and the current status of the industry for which credit is to be extended.

(a) Cash flow. All efforts will be made to structure or restructure debt so that the business has adequate debt coverage and the ability to accommodate expansion. All loans guaranteed through the B&I program must be sound, with reasonably assured repayment.

(b) Collateral.

(1) Collateral must have documented value sufficient to protect the interest of the lender and the Government and collateral value will normally be at least equal to the loan amount. Lenders will discount collateral consistent with sound loan-to-value policy.

(2) Some businesses are predominantly cash flow oriented, and

where cash flow and profitability is strong, loan-to-value coverage may be less than normal policy. A loan primarily based on cash flow must be supported by a successful and documented financial history.

(c) Industry. Current status of the industry will be considered and businesses in areas of decline will be required to provide strong business plans which outline how they differ from the current trends. The regulatory environment surrounding the particular business or industry will be considered.

(d) Equity. The equity amount will indicate a significant investment by the owners, sufficient to provide reasonable protection to creditors, and an ability to maintain a positive equity position through a normal economic downturn.

(e) Lien priorities. The entire loan will be secured by the same security with equal lien priority for the guaranteed and unguaranteed portions of the loan. The unguaranteed portion of the loan will neither be paid first nor given any preference or priority over the guaranteed portion. A parity or junior position may be considered provided discounted collateral values are adequate to secure the loan in accordance with paragraph (b) of this section after considering prior liens.

(f) Management. A thorough review of key management personnel will be completed to assure that the business has adequately trained and experienced managers.

**§§ 4279.132–4279.136 [Reserved]**

**§ 4279.137 Financial statements.**

(a) The lender will determine the type and frequency of submission of financial statements by the borrower. At a minimum, annual financial statements prepared by an accountant in accordance with Generally Accepted Accounting Principles will be required.

(b) If specific circumstances warrant and the proposed guaranteed loan will exceed \$3 million, the Agency may require annual audited financial statements. For example, the need for audited financial statements will be carefully considered in connection with loans that depend heavily on inventory and accounts receivable for collateral.

**§§ 4279.138–4279.142 [Reserved]**

**§ 4279.143 Insurance.**

(a) Hazard. Hazard insurance with a standard mortgage clause naming the lender as beneficiary will be required on every loan in an amount that is at least the lesser of the depreciated replacement value of the collateral or the amount of the loan. Hazard insurance includes fire, windstorm,

lightning, hail, explosion, riot, civil commotion, aircraft, vehicle, marine, smoke, builder's risk during construction by the business, and property damage.

(b) Life. The lender may require life insurance to insure against the risk of death of persons critical to the success of the business. When required, coverage will be in amounts necessary to provide for management succession or to protect the business. The cost of insurance and its effect on the applicant's working capital must be considered as well as the amount of existing insurance which could be assigned without requiring additional expense.

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

(d) Flood. National Flood insurance is required when it is available.

(e) Other. Public liability, business interruption, malpractice and other insurance appropriate to the borrower's particular business and circumstances should be considered and required when needed to protect the interests of the borrower.

**§ 4279.144 Appraisals.**

Lenders will be responsible for assuring that appraisal values adequately reflect the actual value of all collateral. All real property appraisals associated with Agency guaranteed loanmaking and servicing transactions will meet the requirements set forth by the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989 and the appropriate guidelines set forth in Standards 1 and 2 of the Uniform Standards of Professional Appraisal Practices (USPAP). For additional guidance and information concerning the completion of real property appraisals, refer to subpart A of part 1922. Chattels will be evaluated in accordance with normal banking practices and generally accepted methods of determining value.

**§§ 4279.145–4279.148 [Reserved]**

**§ 4279.149 Personal and corporate guarantees.**

(a) Personal and corporate guarantees, when obtained, are part of the collateral for the loan. However, the value of such guarantee is not considered in determining whether a loan is adequately secured for loanmaking purposes.

(b) Personal/corporate guarantees for those owning greater than 20 percent of the borrower or those providing significant revenues or income to the borrower will be required where legally

permissible, except as provided for by this section.

(c) Exceptions to the requirements for personal guarantees must be requested by the lender and concurred in by the Agency approval official on a case-by-case basis. The lender must strongly document that collateral, equity, cash flow, and profitability, or a combination of these, indicates an above average ability to repay the loan.

**§ 4279.150 Feasibility studies.**

A feasibility study by a qualified independent consultant may be required by the Agency for startup businesses or existing businesses when the project will significantly affect the borrower's operations.

**§§ 4279.151–4279.154 [Reserved]**

**§ 4279.155 Loan priorities.**

Applications and preapplications received by the Agency will be considered in the order received; however, for the purpose of assigning priorities as described in paragraph (b) of this section, the Agency will compare an application to other pending applications.

(a) When applications on hand otherwise have equal priority, applications from qualified veterans will have preference.

(b) Priorities will be assigned by the Agency to eligible applications on the basis of a point system as set forth in this section. The application and supporting information will be used to determine an eligible proposed project's priority for available guarantee authority. All lenders, including CLP lenders, will consider Agency priorities when choosing projects for guarantee. The lender will provide necessary information related to determining the score, as requested.

(1) *Population priority.* The priority score for population will be the total score for the following categories:

(i) Located in an unincorporated area or in a city with under 25,000 population (10 points).

(ii) Located in a county defined as nonadjacent to a metropolitan area, according to the latest definition provided by the Economic Research Service of the Department of Agriculture (5 points).

(2) *Community priority.* The priority score for community will be the total score for the following categories:

(i) Located in an eligible area of long term population decline and job deterioration based on reliable statistical data (5 points).

(ii) Located in a rural community that has remained persistently poor over the last 60 years or more (5 points).

(iii) Located in a rural community that is experiencing trauma as a result of natural disaster or experiencing fundamental structural changes in its economic base (5 points).

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

(3) *Empowerment Zone/Enterprise Community (EZ/EC).*

(i) Located in an EZ/EC selected or designated area (10 points).

(ii) Located in a EZ/EC applicant community which was not selected or designated as EZ/EC. (5 points).

(4) *Loan features.* The priority score for loan features will be the total score for the following categories except that the total score for loan features cannot exceed 15 points:

(i) Lender will price the loan at secondary market rate plus 1.5 percent or less (5 points).

(ii) Lender will price the loan at secondary market rate plus 1 percent or less (5 points).

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

(iv) Percentage of guarantee is 10 or more percentage points less than the maximum allowable for a loan of its size (5 points).

(5) *High impact Business Investment Priorities.* The priority score for high impact business investment will be the total score for the following three categories:

(i) Industry. The priority score for industry will be the total score for the following, except that the total score for industry cannot exceed 10 points.

(A) Industry that ranks among the leading-edge industries for industrial growth potential, as measured by being in the top half of industries in terms of industrial life cycle (3 points).

(B) Industry whose basis for competitiveness results from effective use of the local natural resource base, rural location, or special assets or contributions from the community, and not from extraordinary tax abatements or other industrial attractions (3 points).

(C) Industry that has potential to achieve 20 percent or more of its sales in international markets (3 points).

(D) Industry that is not already present in the community and therefore represents a diversification of the local economy and reduces overall community vulnerability to cyclical changes in the fortunes of the predominant local industries (3 points).

(ii) Business. The priority score for business will be the total score for the following, except that the total score for business cannot exceed 10 points.

(A) Business that offers high value, specialized products and services that

command high prices because of uniqueness, high quality, or niche marketing strategies and which displays the capacity for innovativeness and rapid response in capitalizing on market opportunities (3 points).

(B) Business that has a significant potential to stimulate the development of a broader complex of business activities that provide inputs to or serve as the markets for the initial business (3 points).

(C) Business that is locally owned and managed (3 points).

(D) Business that is a cooperative form of enterprise (3 points).

(iii) Job quality. The priority score for job quality will be the total score for the following, except that the total score for job quality cannot exceed 10 points.

(A) Business that provides jobs with career and earnings growth opportunities within the local plant and does not require employees to move away from the community in order to achieve career advancement (4 points).

(B) Business in which the average wage for project jobs exceeds 150 percent of the Federal minimum wage (4 points).

(C) Business in which the average wage for project jobs exceeds 200 percent of the Federal minimum wage (an additional 4 points).

(6) *Administrative points.* The state director may assign up to 10 additional points to an application to account for such factors as statewide distribution of funds, natural or economic emergency conditions, area economic development strategies, or other factors the state director believes are not adequately covered elsewhere in the scoring system. An explanation of the assigning of these points by the state director will be appended to the calculation of the project score maintained in the case file. If an application is considered in the National office, the Administrator may also assign up to an additional 10 points. The Administrator may assign the additional points to an application to account for items such as geographic distribution of funds and emergency conditions caused by economic problems or natural disasters or other factors the Administrator believes are not adequately covered elsewhere in the scoring system.

**§ 4279.156 Planning and performing development.**

(a) *Design policy.* All project facilities must be designed utilizing accepted architectural and engineering practices and must conform to applicable Federal, state, and local codes and requirements. The lender must ensure that the planned project will be completed

within the available funds and, once completed, will be suitable for the borrower's needs.

(b) *Project control.* The lender will monitor the progress of construction and undertake the reviews and inspections necessary to ensure that construction proceeds are used in accordance with the approved plans, specifications, and contract documents and that funds are used for eligible project costs.

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

(d) *Americans with Disabilities Act (ADA).* B&I Guaranteed Loans which involve the construction of or addition to facilities that accommodate the public and commercial facilities, as defined by the ADA, must comply with the ADA. The lender and borrower are responsible for compliance.

#### §§ 4279.157–4279.160 [Reserved]

#### § 4279.161 Filing preapplications and applications.

Borrowers and lenders are encouraged to file preapplications and obtain Agency comments before completing an application. However, if they prefer, they may file a complete application as the first contact with the Agency. Neither preapplications nor applications will be accepted or processed unless a lender has agreed to finance the proposal.

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

(1) A letter signed by the borrower and lender containing the following:

(i) Borrower's name, organization type, address, contact person, and federal tax identification and telephone numbers.

(ii) Amount of the loan request, percent of guarantee requested, and the proposed rates and terms.

(iii) Name of proposed lender, address, telephone number, contact person, and lender's Internal Revenue Service (IRS) identification number.

(iv) Brief description of the project, products, and services provided, and availability of raw materials and supplies.

(v) Type and number of jobs created or saved.

(vi) Amount of borrower's equity and a description of collateral, with estimated values, to be offered as security for the loan.

(vii) If a corporate borrower, the names and addresses of the borrower's parent, affiliates, and/or subsidiary firms, if any, and a description of the relationship.

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

(3) For existing businesses, a current balance sheet and a profit and loss statement not more than 90 days old and financial statements for the borrower and any parent, affiliates, and subsidiaries for at least the 3 most recent years.

(4) For startup businesses, a preliminary business plan must be provided as part of the preapplication.

(b) *Applications.* Except for CLP lenders, applications will be filed with the Agency by submitting the following information: (CLP applications will be completed in accordance with § 4279.43(g)(1) but CLP lenders must have the material listed in this paragraph in their files.)

(1) A completed Form RECD 4279–1, "Application for Loan Guarantee (Business and Industry)."

(2) The information required for filing a preapplication, as listed above, if not previously filed or if the information has changed.

(3) Form FmHA 1940–20, "Request for Environmental Information," and attachments, unless the project is categorically excluded under Agency environmental regulations. If a Phase I site assessment has been completed, a copy must be provided.

(4) A personal credit report from an acceptable credit reporting company for a proprietor (owner), each partner, officer, director, key employee, and stockholder owning 20 percent or more interest in the applicant, except for those corporations listed on a major stock exchange. Credit reports are not required for elected and appointed officials when the applicant is a public body.

(5) Intergovernmental consultation comments in accordance with 7 CFR part 3015, subpart V.

(6) Appraisals, if available. (Agency approval in the form of a Conditional Commitment may be issued subject to receipt of adequate appraisals.)

(7) For all businesses, a current (not more than 90 days old) balance sheet, a pro forma balance sheet at startup, and

projected balance sheets, income and expense statements, and cash flow statements for the next 2 years. Projections should be supported by a list of assumptions showing the basis for the projections.

(8) Lender's complete written analysis, including spreadsheets of the balance sheets and income statements for the 3 previous years (for existing businesses), pro forma balance sheet at startup, and 2 years projected yearend balance sheets and income statements, with appropriate ratios and comparisons with industrial standards (such as Dun & Bradstreet or Robert Morris Associates). All data must be shown in total dollars and also in common size form, obtained by expressing all balance sheet items as a percentage of assets and all income and expense items as a percentage of sales. The lender's credit analysis must address the borrower's management, repayment ability, history of debt repayment, necessity of any debt refinancing, and the credit reports of the borrower, its principals, and any parent, affiliate, or subsidiary.

(9) Commercial credit reports obtained by the lender on the borrower and any parent, affiliate, and subsidiary firms.

(10) Current personal and corporate financial statements of any guarantors.

(11) A proposed Loan Agreement or a sample Loan Agreement with an attached list of the proposed loan agreement provisions for the loan. The final Loan Agreement must be executed by the lender and borrower before the Agency issues a Loan Note Guarantee. The following requirements must be addressed in the Loan Agreement:

(i) Prohibition against assuming liabilities or obligations of others.

(ii) Restriction on dividend payments.

(iii) Limitation on purchase or sale of equipment and fixed assets.

(iv) Limitation on compensation of officers and owners.

(v) Minimum working capital or current ratio requirement.

(vi) Maximum debt to net worth ratio.

(vii) Restrictions concerning consolidations, mergers, or other circumstances.

(viii) Limitations on selling the business without the concurrence of the lender.

(ix) Repayment and amortization of the loan.

(x) List of collateral and lien priority for the loan including a list of persons and corporations guaranteeing the loan with a schedule for providing the lender with personal and corporate financial statements. Financial statements on the corporate and personal guarantors must be updated no less than annually.

(xi) Type and frequency of financial statements to be required for the duration of the loan.

(xii) The final Loan Agreement between the lender and borrower will contain any additional requirements imposed by the Agency in its Conditional Commitment.

(12) A business plan, which includes at a minimum a description of the business and project, management experience, products and services, proposed use of funds, availability of labor, raw materials and supplies, and the names of any corporate parent, affiliates, and subsidiaries with a description of the relationship. This may be omitted if the information is included in a feasibility study.

(13) Independent feasibility study, if required.

(14) For companies listed on a major stock exchange and/or subject to the Securities and Exchange Commission (SEC) regulations, a copy of SEC Form 10-K, "Annual Report Pursuant to Section 13 or 15D of the Act of 1934."

(15) For health care facilities, a certificate of need, if required by state law.

(16) A certification by the lender that it has completed a comprehensive analysis of the proposal, the applicant is eligible, the loan is for authorized purposes, and there is reasonable assurance of repayment ability based on the borrower's history, projections and equity, and the collateral to be obtained.

(17) Any additional information required by the Agency.

**§§ 4279.162–4279.164 [Reserved]**

**§ 4279.165 Evaluation of application.**

(a) *General review.* If the Agency determines it is unable to guarantee the loan, the lender will be informed in writing. Such notification will include the reasons for denial of the guarantee. Review of CLP applications will be modified in accordance with § 4279.43(g).

(b) *Environment.* Before loan approval, the proposed project must comply with environmental requirements.

**§§ 4279.166–4279.172 [Reserved]**

**§ 4279.173 Loan approval and obligating funds.**

(a) Upon approval of a loan guarantee, the Agency will issue a Conditional Commitment to the lender to set forth conditions under which a Loan Note Guarantee will be issued. The Conditional Commitment must be accepted by the lender and borrower in writing.

(b) If certain conditions of the Conditional Commitment cannot be met, the lender and applicant may propose alternate conditions. Within the requirements of the applicable regulations and instructions and prudent lending practices, the Agency may negotiate with the lender and the applicant regarding any proposed changes to the Conditional Commitment.

**§ 4279.174 Transfer of lenders.**

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

(b) The new lender's servicing capability, eligibility, and experience will be analyzed by the Agency prior to approval of the substitution. The original lender will provide the Agency with a letter stating the reasons it no longer desires to be a lender for the project. The substituted lender must execute a new Part B of Form RECD 4279-1.

**§§ 4279.175–4279.179 [Reserved]**

**§ 4279.180 Changes in borrower.**

Any changes in borrower ownership or organization prior to the issuance of the Loan Note Guarantee must be approved by the Agency loan approval official.

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

The Loan Note Guarantee will not be issued until the lender, including a CLP lender, certifies to the following:

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

(b) All planned property acquisition has been completed, all development has been substantially completed in accordance with plans and specifications, and costs have not exceeded the amount approved by the lender and the Agency.

(c) Required hazard, flood, liability, worker's compensation, and personal life insurance, when required, are in effect.

(d) Truth in lending requirements have been met.

(e) All equal credit opportunity requirements have been met.

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

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

(h) When required, the entire amount of the loan for working capital has been disbursed except in cases where the Agency has approved disbursement over an extended period of time.

(i) When required, personal, partnership, or corporate guarantees have been obtained.

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

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

(l) The loan proceeds have been disbursed for purposes and in amounts consistent with the Conditional Commitment and Form RECD 4279-1. A copy of the detailed loan settlement of the lender must be attached to support this certification.

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

(n) None of the lender's officers, directors, stockholders, or other owners (except stockholders in an institution that has normal stockshare requirements for participation) has a substantial financial interest in the borrower and neither the borrower nor its officers, directors, stockholders, or other owners has a substantial financial interest in the lender. If the borrower is a member of the board of directors or an officer of a

Farm Credit System (FCS) institution that is the lender, the lender will certify that an FCS institution on the next highest level will independently process the loan request and act as the lender's agent in servicing the account.

**§§ 4279.182–4279.185 [Reserved]**

**§ 4279.186 Issuance of the guarantee.**

(a) When loan closing plans are established, the lender will notify the Agency. Coincident with, or immediately after loan closing, the lender will provide the following to the Agency:

(1) Lender's certifications as outlined in § 4279.181.

(2) Executed Lender's Agreement.

(3) Form FmHA 1980–19, "Guaranteed Loan Closing Report," and appropriate guarantee fee.

(b) When the Agency is satisfied that all conditions for the guarantee have been met, the Loan Note Guarantees and the following documents, as appropriate, will be issued:

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

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

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

(d) There may be instances when not all of the working capital has been disbursed, and it appears practical to disburse the balance over a period of time. The state director, after review of a disbursement plan, may amend the Conditional Commitment in accordance with the disbursement plan and issue the guarantee.

**§ 4279.187 Refusal to execute Loan Note Guarantee.**

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

time allowed, the guarantee will be issued.

**§§ 4279.188–4279.200 [Reserved]**

18. A new part 4287, is added to chapter XLII to read as follows:

**PART 4287—SERVICING**

**Subpart A—[Reserved]**

**Subpart B—Servicing Business and Industry (B&I) Guaranteed Loans**

Sec.

4287.101 Introduction.

4287.102 Definitions.

4287.103–4287.105 [Reserved]

4287.106 Routine servicing.

4287.107–4287.111 [Reserved]

4287.112 Interest rate adjustments.

4287.113 Release of collateral.

4287.114–4287.122 [Reserved]

4287.123 Subordination of lien position.

4287.124 Alterations of loan instruments.

4287.125–4287.133 [Reserved]

4287.134 Transfer and assumption.

4287.135 Substitution of lender.

4287.136–4287.144 [Reserved]

4287.145 Default by borrower.

4287.146–4287.155 [Reserved]

4287.156 Protective advances.

4287.157 Liquidation.

4287.158 Determination of loss and payment.

4287.159–4287.168 [Reserved]

4287.169 Future recovery.

4287.170 Bankruptcy.

4287.171–4287.179 [Reserved]

4287.180 Termination of guarantee.

4287.181–4287.200 [Reserved]

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

**Subpart A—[Reserved]**

**Subpart B—Servicing Business and Industry Guaranteed Loans**

**§ 4287.101 Introduction.**

(a) This subpart supplements subparts A and B of part 4279 by providing additional requirements and instructions for servicing and liquidating all Business and Industry (B&I) Guaranteed Loans. This includes Drought and Disaster (D&D), Disaster Assistance for Rural Business Enterprises (DARBE), and Business and Industry Disaster (BID) loans.

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

(c) Copies of all forms, regulations, and instructions referenced in this

subpart are available in any state or district office or the National office.

**§ 4287.102 Definitions.**

The definitions contained in § 4279.2 apply to this subpart.

**§§ 4287.103–4287.105 [Reserved]**

**§ 4287.106 Routine servicing.**

The lender is responsible for servicing the entire loan and for taking all servicing actions that a prudent lender would perform in servicing its own portfolio of loans that are not guaranteed. The Loan Note Guarantee is unenforceable by the lender to the extent any loss is occasioned by violation of usury laws, use of loan funds for unauthorized purposes, negligent servicing, or failure to obtain the required security regardless of the time at which the Agency acquires knowledge of the foregoing. This responsibility includes but is not limited to the collection of payments, obtaining compliance with the covenants and provisions in the Loan Agreement, obtaining and analyzing financial statements, checking on payment of taxes and insurance premiums, and maintaining liens on collateral.

(a) *Lender reports*. The lender must report the outstanding principal and interest balance on each guaranteed loan semiannually using Form FmHA 1980–41, "Guaranteed Loan Status Report."

(b) *Loan classification*. Within 90 days of receipt of the Loan Note Guarantee, the lender must notify the Agency of the loan's classification or rating under its regulatory standards. Should the classification be changed at a future time, the Agency must be notified immediately.

(c) *Agency/lender conference*. The lender will meet with the Agency at the Agency's request to ascertain how the guaranteed loan is being serviced and that the conditions and covenants of the Loan Agreement are being enforced.

(d) *Financial reports*. The lender must obtain the financial statements required by the Loan Agreement, and these statements must be forwarded to the Agency. The lender is required to submit annual statements to the Agency within 120 days of the borrower's fiscal yearend. The lender must analyze the financial statements and provide the Agency with a written summary of its analysis and conclusions, including trends, strengths, weaknesses, extraordinary transactions, and other indications of the financial condition of the borrower. Spreadsheets of the new financial statements and previous financial statements must also be included.

(e) *Additional expenditures.* The lender will not make additional loans to the borrower without first obtaining the prior written approval of the Agency, even though such loans will not be guaranteed.

**§§ 4287.107–4287.111 [Reserved]**

**§ 4287.112 Interest rate adjustments.**

(a) *Reductions.* The borrower, lender, and holder (if any) may collectively initiate a permanent or temporary reduction in the interest rate of the guaranteed loan at any time during the life of the loan upon written agreement among these parties. The Agency must be notified by the lender, in writing, within 10 calendar days of the change. If the guaranteed portion has been purchased by the Agency, then the Agency will affirm or reject interest rate change proposals in writing. When the Agency holds any portion of the loan, it will concur in such interest rate changes only when it is demonstrated to the Agency that the change is a more viable alternative than initiating or proceeding with liquidation of the loan or continuing with the loan in its present state. The Government's financial interests must not be adversely affected by the reduction of the interest rate.

(1) Factors which will be considered in making such determinations include:

(i) Whether the proposed interest rate will be below the Government's cost of borrowing money;

(ii) Whether continuing with the loan would realistically promote or enhance rural development and employment in rural areas;

(iii) Whether recovery is maximized and the monetary recovery would be increased by proceeding immediately to liquidation (if applicable) or allowing the borrower to continue at a reduced interest rate; and

(iv) Whether an in-depth financial analysis by the lender reasonably indicates that the business would be successful at a lower interest rate and reasonably indicates that the borrower could make the reduced payment and pay off amounts in arrears, if any.

(2) Fixed rates can be changed to variable rates to reduce the interest rate to the borrower only when the variable rate has a ceiling which is less than or equal to the original fixed rate.

(3) Variable rates can be changed to a fixed rate, which is at or below the current variable rate.

(4) The interest rates, after adjustments, must comply with the requirements for interest rates on new loans, as established by § 4279.125.

(5) The lender is responsible for the legal documentation of interest rate

changes by an endorsement or any other legally effective amendment to the promissory note; however, no new notes may be issued. Copies of all legal instruments should be provided to the Agency for its records.

(b) *Increases.* No increases in interest rates will be permitted except the normal fluctuations in approved variable interest rates.

**§ 4287.113 Release of collateral.**

(a) All releases of collateral must be supported by a current appraisal on the remaining collateral. The appraisal will be at the expense of the borrower and must meet the requirements of § 4279.144. The Agency must not be adversely affected by the release, and the remaining collateral must be sufficient to provide for repayment of the Agency's guaranteed loan. Sale or release of collateral must be based on an arm's-length transaction. There must be adequate consideration for the release. Adequate consideration for release of collateral may include, but is not limited to:

(1) Application of the net proceeds from the sale of collateral to the borrower's debts in order of lien priority (Application of sale proceeds to the Agency guaranteed debt must be in inverse order of maturity);

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

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

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

(b) Within the parameters of paragraph (a) of this section, lenders may release collateral (other than personal and corporate guarantees) with a cumulative value up to 20 percent of the original loan amount without Agency concurrence if the proceeds will be used to reduce the guaranteed loan or to buy replacement collateral.

(c) Within the parameters of paragraph (a) of this section, release of collateral with a cumulative value in excess of 20 percent of the original loan or when the proceeds will not be used

to reduce the guaranteed loan or to buy replacement collateral must be requested in writing by the lender and concurred in by the Agency in writing in advance of the release. A written evaluation will be done by the lender to justify the release.

**§§ 4287.114–4287.122 [Reserved]**

**§ 4287.123 Subordination of lien position.**

A subordination of the lender's lien position must be requested in writing by the lender and concurred in by the Agency in writing in advance of the subordination. The subordination must enhance the borrower's business, and the Agency's interest in and lien position on the collateral, after the subordination, must be adequate to secure the loan. The lien to which the guaranteed loan is subordinated must be for a fixed dollar limit and fixed or limited term, after which the guaranteed loan lien priority will be restored. Generally, subordination to a revolving line of credit will not exceed 1 year. There must be adequate consideration for the subordination.

**§ 4287.124 Alterations of loan instruments.**

The lender shall neither alter nor approve any alterations of any loan instruments without the prior written approval of the Agency.

**§§ 4287.125–4287.133 [Reserved]**

**§ 4287.134 Transfer and assumption.**

(a) *Documentation of request.* All transfers and assumptions must be approved in writing by the Agency and must be to eligible applicants in accordance with subpart B of part 4279. An individual credit report must be provided for transferee proprietors, partners, officers, directors, and stockholders with 20 percent or more interest in the business, along with such other documentation as the Agency may request to determine eligibility.

(b) *Terms.* Loan terms must not be changed unless the change is approved in writing by the Agency with the concurrence of any holder and of the transferor (including guarantors) if they have not been or will not be released from liability. Any new loan terms must be within the terms authorized by § 4279.126. The lender's request for approval of new loan terms will be supported by an explanation of the reasons for the proposed change in loan terms.

(c) *Release of liability.* The transferor, including any guarantor, may be released from liability only with prior Agency written concurrence and only when the value of the collateral being transferred is at least equal to the

amount of the loan being assumed, supported by a current appraisal and a current financial statement where applicable. The Agency will not pay for the appraisal. If the transfer is for less than the entire debt, the lender must demonstrate to the Agency that the transferor and any guarantors have no reasonable debt-paying ability considering their assets and income at the time of transfer.

(d) *Proceeds*. Any proceeds received from the sale of collateral before a transfer and assumption will be credited to the transferor's guaranteed loan debt in inverse order of maturity before the transfer and assumption are closed.

(e) *Additional loans*. Loans to provide additional funds in connection with a transfer and assumption must be considered as a new loan application under subpart B of part 4279.

(f) *Credit quality*. In all cases, the lender must make a complete credit analysis, subject to Agency review and approval.

(g) *Documents*. Prior to Agency approval, the lender must advise the Agency, in writing, that the transaction can be properly and legally transferred, and the conveyance instruments will be filed, registered, or recorded as appropriate.

(1) The assumption will be done on the lender's form of assumption agreement and will contain the Agency case number of the transferor and transferee. The lender will provide the Agency with a copy of the transfer and assumption agreement. It is the lender's responsibility to ensure that all transfers and assumptions are noted on all original Loan Note Guarantees.

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

(3) The lender will provide to the Agency a written certification that the transfer and assumption are valid, enforceable, and comply with all Agency regulations.

(h) *Loss resulting from transfer*. If a loss should occur upon consummation of a complete transfer and assumption for less than the full amount of the debt and the transferor (including personal guarantors) is released from liability, the lender, if it holds the guaranteed portion, may file an estimated report of loss to recover its pro rata share of the actual loss. In completing the report of loss, the amount of the debt assumed will be entered as net collateral (recovery). Approved protective advances and accrued interest thereon

made during the arrangement of a transfer and assumption, if not assumed by the transferee, will be included in the calculations.

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

(j) *Payment requests*. Requests for a loan guarantee to provide equity for a transfer and assumption must be considered as a new loan under subpart B of part 4279.

(k) *Cash downpayment*. When the transferee will be making a cash downpayment as part of the transfer and assumption:

(1) The lender should have an appropriate appraiser, acceptable to both the transferee and transferor and currently authorized to perform appraisals, to determine the value of the collateral securing the loan. The appraisal fee and any other costs will not be paid by the Agency.

(2) The market value of the collateral, plus any additional property the transferee proposes to offer as collateral, must be adequate to secure the balance of the guaranteed loans.

(3) Cash downpayments may be paid directly to the transferor provided:

(i) The lender recommends that the cash be released and the Agency concurs prior to the transaction being completed. The lender may wish to 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;

(ii) 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;

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

(iv) The transferor agrees not to take any action against the transferee in connection with the assumption without prior written approval of the lender and the Agency.

(4) The Agency will not consider a purchase money mortgage or contract for purchase as an option to maximize recovery.

#### **§ 4287.135 Substitution of lender.**

After the issuance of a Loan Note Guarantee, the lender shall not sell or transfer the entire loan without the prior written approval of the Agency. The Agency will not pay any loss or share in any costs (i.e., appraisal fees,

environmental studies, or other costs associated with servicing or liquidating the loan) with a new lender unless a relationship is established through a substitution of lender in accordance with paragraph (a) of this section. This includes cases where the lender has failed and been taken over by a regulatory agency such as the Federal Deposit Insurance Corporation (FDIC) and the loan subsequently sold to another lender.

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

(1) The proposed substitute lender:

(i) Is an eligible lender in accordance with § 4279.29;

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

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

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

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

#### **§§ 4287.136–4287.144 [Reserved]**

#### **§ 4287.145 Default by borrower.**

(a) The lender must notify the Agency when a borrower is 30 days past due on a payment or is otherwise in default of the Loan Agreement. Form FmHA 1980–44, "Guaranteed Loan Borrower Default Status," will be used and the lender will continue to complete this form bimonthly until such time as the loan is no longer in default. If a monetary default exceeds 60 days, the lender will arrange a meeting with the Agency and the borrower to resolve the problem.

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

(1) Temporary curative actions include but are not limited to:

(i) Deferment of principal (subject to rights of any holder);

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

(iii) Reamortization of or rescheduling the payments on the loan (subject to rights of any holder);

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

(v) Reorganization;

(vi) Liquidation;  
 (vii) Subsequent loans guarantees; and  
 (viii) Changes in interest rates with the Agency's, the lender's, and holder's approval, provided such interest rate is adjusted proportionally between the guaranteed and unguaranteed portion of the loan and the type of rate remains the same.

(2) In the event a deferment, rescheduling, reamortization, or moratorium is accomplished, it will be limited to the remaining life of the collateral or limits as set out in § 4279.126, whichever is less.

#### §§ 4286.146–4287.155 [Reserved]

#### § 4287.156 Protective advances.

Protective advances are advances made by the lender for the purpose of preserving and protecting the collateral where the debtor has failed to, will not, or cannot meet its obligations. Sound judgment must be exercised in determining that the protective advance preserves collateral and recovery is actually enhanced by making the advance. Protective advances will not be made in lieu of additional loans.

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

(b) Protective advances and interest thereon at the note rate will be guaranteed at the same percentage of loss as provided in the Loan Note Guarantee notwithstanding the guaranteed portion of the loan is held by another.

(c) Protective advances must constitute an indebtedness of the borrower to the lender and be secured by the security instruments. Agency written authorization is required when cumulative protective advances exceed \$5,000.

#### § 4287.157 Liquidation.

In the event of one or more incidents of default or third party actions that the borrower cannot or will not cure or eliminate within a reasonable period of time, liquidation may be considered. If the lender concludes that liquidation is necessary, it must request the Agency's concurrence. The lender will liquidate the loan unless the Agency, at its option, carries out liquidation. When the decision to liquidate is made, if the loan has not already been repurchased, provisions will be made for repurchase in accordance with § 4279.78.

(a) *Decision to liquidate.* A decision to liquidate shall be made when it is determined that the default cannot be cured through actions listed in

§ 4287.145 or it has been determined that it is in the best interest of the Government and the lender to liquidate because such actions would only delay liquidation and liquidating early would enhance the possibility of a maximum recovery. Therefore, the decision to liquidate or continue with the borrower must be made as soon as possible when any of the following exist:

(1) A loan has been delinquent 90 days and the lender and borrower have not been able to cure the delinquency through one of the actions listed in § 4287.145.

(2) It has been determined that delaying liquidation will jeopardize or eliminate the possibility of full recovery on the loan.

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

(b) *Submission of liquidation plan.* The lender will, within 30 days after a decision to liquidate, submit to the Agency in writing its proposed detailed method of liquidation. Upon approval by the Agency of the liquidation plan, the lender will commence liquidation. State directors have no authority to exercise the option to liquidate by the Agency without National office approval. When the Agency liquidates, reasonable liquidation expenses will be assessed against the proceeds derived from the sale of the collateral. Form FmHA 1980–45, "Notice of Liquidation Responsibility," will be forwarded to the Finance office when the Agency liquidates.

(c) *Lender's liquidation plan.* The liquidation plan must include, but is not limited to, the following:

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

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

(3) The recommended liquidation methods for making the maximum collection possible on the indebtedness and the justification for such methods, including:

(i) Recommended action for acquiring and disposing of all collateral; and

(ii) Recommended action to collect from guarantors.

(4) Necessary steps for preservation of the collateral.

(5) Copies of borrower's latest available financial statements.

(6) Copies of guarantor's latest available financial statements.

(7) An itemized list of estimated liquidation expenses expected to be incurred and justification for each expense.

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

(9) Estimated protective advance amounts with justification.

(10) Proposed protective bid amounts on collateral to be sold at auction and a breakdown on how the amounts were determined.

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

(12) Legal opinions, if needed.

(13) If the outstanding balance of principal and accrued interest is less than \$200,000, the lender will obtain an estimate of fair market and potential liquidation value of the collateral. If the outstanding balance of principal and accrued interest is \$200,000 or more, the lender will obtain an independent appraisal report on all collateral securing the loan which will reflect the fair market value and potential liquidation value. The independent appraiser's fee will be shared equally by the Agency and the lender.

(14) The Agency must concur in advance regarding the need for and scope of an environmental site assessment. If an environmental site assessment is needed to evaluate potential risks associated with the acquisition of real estate serving as collateral, the lender will arrange for a qualified, independent environmental assessment of the property. The cost of the assessment will be shared equally by the Agency and the lender.

(d) *Approval of liquidation plan.* The Agency will inform the lender in writing whether it concurs in the lender's liquidation plan. Should the Agency and the lender not agree on the liquidation plan, negotiations will take place between the Agency and the lender to resolve the disagreement. When the liquidation plan is approved by the Agency, the lender will proceed expeditiously with liquidation.

(1) A transfer and assumption of the borrower's operation can be accomplished before or after the loan goes into liquidation. However, if the collateral has been purchased through foreclosure or the borrower has conveyed title to the lender, no transfer and assumption is permitted.

(2) A protective bid may be made by the lender, with prior Agency written approval, at a foreclosure sale to protect

the lender's and the Agency's interest. The reason for a protective bid is to ensure that the collateral is not sold to other bidders at an unrealistically low price. The protective bid will not exceed the amount of the loan, including expenses of foreclosure, and should be based on the liquidation value less estimated expenses for holding and reselling the property. These expenses include, but are not limited to, expenses for resale, interest accrual, length of time necessary for resale, maintenance, guard service, weatherization, and prior liens.

(e) *Acceleration.* The lender, or the Agency if it liquidates, will proceed to accelerate the indebtedness as expeditiously as possible when acceleration is necessary including giving any notices and taking any other legal actions required. A copy of the acceleration notice or other acceleration document will be sent to the Agency (or lender if the Agency liquidates). The guaranteed loan will be considered in liquidation once the loan has been accelerated and a demand for payment has been made upon the borrower.

(f) *Filing an estimated loss claim.* When the lender is conducting the liquidation and owns any or all of the guaranteed portion of the loan, the lender will file an estimated loss claim once a decision has been made to liquidate if the liquidation will exceed 90 days. The estimated loss payment will be based on the liquidation value of the collateral. For the purpose of reporting and loss claim computation, the lender will discontinue interest accrual on the defaulted loan in accordance with Agency procedures, and the loss claim will be promptly processed in accordance with applicable Agency regulations.

(g) *Accounting and reports.* When the lender conducts liquidation, it will account for funds during the period of liquidation and will provide the Agency with reports at least quarterly on the progress of liquidation including disposition of collateral, resulting costs, and additional procedures necessary for successful completion of the liquidation.

(h) *Transmitting payments and proceeds to the Agency.* When the Agency is the holder of a portion of the guaranteed loan, the lender will transmit to the Agency any payments received from the borrower and pro rata share of liquidation or other proceeds, using Form FmHA 1980-43, "Lender's Guaranteed Loan Payment to FmHA."

(i) *Abandonment of collateral.* There may be instances when the cost of liquidation would exceed the potential recovery value of the collection. The

lender, with proper documentation and the concurrence of the National office, may abandon the collateral in lieu of liquidation. A proposed abandonment will be considered a servicing action requiring the appropriate environmental review by the Agency in accordance with subpart G of part 1940. Examples where abandonment may be considered include but are not limited to:

(1) The cost of liquidation is increased or the value of the collateral is decreased by environmental issues;

(2) The collateral is functionally or economically obsolete;

(3) There are superior liens held by other parties;

(4) The collateral has deteriorated; and

(5) The collateral is specialized and there is little or no demand for it.

(j) *Disposition of personal or corporate guarantees.* The lender should take action to maximize recovery from all collateral, including personal and corporate guarantees. The lender will seek a deficiency judgment when there is a reasonable chance of future collection of the judgment. The lender must make a decision whether or not to seek a deficiency judgment when:

(1) A borrower voluntarily liquidates the collateral, but the sale fails to pay the guaranteed indebtedness;

(2) The collateral is voluntarily conveyed to the lender, but the borrower and personal and corporate guarantors are not released from liability; or

(3) A liquidation plan is being developed for forced liquidation.

(k) *Compromise settlement.* A compromise settlement will normally not take place until all collateral has been sold, a deficiency balance exists, and the deficiency obligation exceeds the debtor's repayment ability.

(1) The lender and the Agency must receive complete financial information on all parties obligated for the loan and must be satisfied that the statements reflect the true and correct financial position of the debtor including all assets. Adequate consideration must be received before a release from liability is issued. Adequate consideration includes money, additional security, or other benefit to the goals and objectives of the Agency.

(2) Before a personal guarantor can be released from liability, the following factors must be considered:

(i) Cash or other consideration offered by the guarantor;

(ii) Age and health of the guarantor;

(iii) Potential income of the guarantor;

(iv) Inheritance prospects of the guarantor;

(v) Availability of the guarantor's assets;

(vi) Possibility that the guarantor's assets have been concealed or improperly transferred; and

(vii) Effect of other guarantors on the loan.

(3) Once the Agency and the lender agree on a reasonable amount that is fair and adequate, the lender can proceed to effect the settlement compromise.

#### **§ 4287.158 Determination of loss and payment.**

In all liquidation cases, final settlement will be made with the lender after the collateral is liquidated, unless otherwise designated as a future recovery or after settlement and compromise of all parties has been completed. The Agency will have the right to recover losses paid under the guarantee from any party which may be liable.

(a) *Report of loss form.* Form FmHA 449-30, "Loan Note Guarantee Report of Loss," will be used for calculations of all estimated and final loss determinations. Estimated loss payments may only be approved by the Agency after the Agency has approved a liquidation plan.

(b) *Estimated loss.* In accordance with the requirements of § 4287.157(f), an estimated loss claim based on liquidation appraisal value will be prepared and submitted by the lender.

(1) The estimated loss payment shall be applied as of the date of such payment. The total amount of the loss payment remitted by the Agency will be applied by the lender on the guaranteed portion of the loan debt. Such application does not release the borrower from liability.

(2) An estimated loss will be applied first to reduce the principal balance on the guaranteed loan and the balance, if any, to accrued interest. Interest accrual on the defaulted loan will be discontinued.

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

(c) *Final loss.* Within 30 days after liquidation of all collateral, except for certain unsecured personal or corporate guarantees as provided for in this section, is completed, a final report of loss must be prepared and submitted by the lender to the Agency. The Agency will not guarantee interest beyond this 30-day period other than for the period of time it takes the Agency to process the loss claim. Before approval by the Agency of any final loss report, the lender must account for all funds during the period of liquidation, disposition of the collateral, all costs incurred, and any other information necessary for the successful completion of liquidation.

Upon receipt of the final accounting and report of loss, the Agency may audit all applicable documentation to determine the final loss. The lender will make its records available and otherwise assist the Agency in making any investigation. The documentation accompanying the report of loss must support the amounts shown on Form FmHA 449-30.

(1) A determination must be made regarding the collectibility of unsecured personal and corporate guarantees. If reasonably possible, such guarantees should be promptly collected or otherwise disposed of in accordance with § 4287.157(j) prior to completion of the final loss report. However, in the event that collection from the guarantors appears unlikely or will require a prolonged period of time, the report of loss will be filed when all other collateral has been liquidated, and unsecured personal or corporate guarantees 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.

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

(3) The lender will show a breakdown of any protective advance amount as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper and that payment was actually made.

(4) The lender will show a breakdown of liquidation expenses as to the payee, purpose of the expenditure, date paid, and evidence that the amount expended was proper and that payment was actually made. Liquidation expenses are recoverable only from collateral proceeds. Attorney fees may be approved as liquidation expenses provided the fees are reasonable and cover legal issues pertaining to the liquidation that could not be properly handled by the lender and its in-house counsel.

(5) Accrued interest will be supported by documentation as to how the amount was accrued. If the interest rate was a variable rate, the lender will include documentation of changes in both the selected base rate and the loan rate.

(6) Loss payments will be paid by the Agency within 60 days after the review of the final loss report and accounting of the collateral.

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

(e) *Rent.* Any net rental or other income that has been received by the

lender from the collateral will be applied on the guaranteed loan debt.

(f) *Liquidation costs.* Liquidation costs will be deducted from the proceeds of the disposition of primary collateral. If changed circumstances after submission of the liquidation plan require a substantial revision of liquidation costs, the lender will procure the Agency's written concurrence prior to proceeding with the proposed changes. No in-house expenses of the lender will be allowed. In-house expenses include, but are not limited to, employee's salaries, staff lawyers, travel, and overhead.

(g) *Payment.* When the Agency finds the final report of loss to be proper in all respects, it will approve Form FmHA 449-30 and proceed as follows:

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

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

(3) If the Agency has conducted the liquidation, it will pay the lender in accordance with the Loan Note Guarantee.

#### §§ 4287.159-4287.168 [Reserved]

#### § 4287.169 Future recovery.

After a loan has been liquidated and a final loss has been paid by the Agency, any future funds which may be recovered by the lender will be prorated between the Agency and the lender based on the original percentage of guarantee.

#### § 4287.170 Bankruptcy.

The lender is responsible for protecting the guaranteed loan and all collateral securing the loan in bankruptcy proceedings.

(a) *Legal expenses during bankruptcy proceedings.* (1) When a bankruptcy proceeding results in a liquidation of the borrower by a trustee, legal expenses will be handled as directed by the court.

(2) When a proceeding under Title 11 of the United States Code (Bankruptcy) results in liquidation by the lender, legal expenses incurred by the lender during the entire bankruptcy proceedings will be considered eligible liquidation costs for payment only from liquidation proceeds.

(b) *Reports of loss during bankruptcy.* When the loan is involved in reorganization proceedings, payment of loss claims may be made as provided in this section. For a liquidation proceeding, only paragraphs (b)(3) and (5) of this section are applicable.

(1) *Estimated loss payments.* (i) If a borrower has filed for protection under Title 11 of the United States Code for a reorganization (but not Chapter 13) and all or a portion of the debt has been discharged, the lender will 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 reorganization. All subsequent claims of the lender during reorganization will be considered revisions to the initial estimated loss. A revised estimated loss payment may be processed by the Agency, at its option, in accordance with any court-approved changes in the reorganization plan. Once the reorganization plan has been completed, the lender is responsible for submitting the documentation necessary for the Agency to review and adjust the estimated loss claim to reflect any actual discharge of principal and interest and to reimburse the lender for any court-ordered interest rate reduction under the terms of the reorganization plan.

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

(iii) Upon completion of a reorganization plan, the lender will complete a Form FmHA 1980-44 and forward this form to the Finance office.

(2) *Interest loss payments.* (i) Interest losses sustained during the period of the reorganization plan will be processed in accordance with paragraph (b)(1) of this section.

(ii) Interest losses sustained after the reorganization plan is completed will be processed annually when the lender sustains a loss as a result of a permanent interest rate reduction which extends beyond the period of the reorganization plan.

(iii) A report of loss will be completed to compensate the lender for the difference in interest rates specified on the Loan Note Guarantee and the rate of interest specified in the plan.

(iv) If an estimated loss claim is paid during the operation of the Chapter 11 reorganization plan and the borrower repays in full the remaining balance without an additional loss sustained by the lender, a final report of loss is not necessary.

(3) *Final loss payments.* Final loss payments will be processed when the loan is liquidated.

(4) *Payment application.* The lender must apply estimated loss payments first to the unsecured principal of the

guaranteed portion of the debt and then to the unsecured interest of the guaranteed portion of the debt. In the event a bankruptcy court attempts to direct the payments to be applied in a different manner, the lender will immediately notify the Agency servicing office.

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

(6) *Protective advances.* If approved protective advances were made prior to the borrower having filed bankruptcy, these protective advances and accrued interest will be considered in the loss calculations.

**§§ 4287.171–4287.179 [Reserved]**

**§ 4287.180 Termination of guarantee.**

A guarantee under this part will terminate automatically:

- (a) upon full payment of the guaranteed loan;
- (b) upon full payment of any loss obligation; or

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

**§§ 4287.181–4287.200 [Reserved]**

Dated: September 12, 1995.

Jill Long Thompson,

*Under Secretary for Rural Economic and Community Development.*

[FR Doc. 96–1576 Filed 2–1–96; 8:45 am]

**BILLING CODE 3410–32–U**

**DEPARTMENT OF ENERGY**

**10 CFR Parts 1035 and 1036 and 48 CFR Part 909**

**RIN 1991–AB24**

**Debarment and Suspension (Procurement) and Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants) and Department of Energy Acquisition Regulation**

**AGENCY:** Department of Energy (DOE).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The Department of Energy (DOE) today is proposing to amend its regulations governing debarment and suspension in procurement and nonprocurement activities. The proposed amendments to the nonprocurement rule only include DOE agency-specific provisions; i.e., none include provisions in the Governmentwide common rule. The proposed rule would establish a common fact-finding process in cases involving a genuine dispute over material facts. The proposed rule removes the Department's procurement debarment and suspension regulations from part 10 of the Code of Federal Regulations (CFR) and recodifies them in the Department of Energy Acquisition Regulations (DEAR), chapter 9 of title 48 of the Code of Federal Regulations.

**DATES:** Written comments (3 copies) must be received on or before April 2, 1996 in order to be assured of consideration.

**ADDRESSES:** Persons wishing to submit comments on this notice of proposed rulemaking should send them to Cynthia Yee, Office of Clearance and Support, Procurement and Assistance Management, HR–52.2, U. S. Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585.

**FOR FURTHER INFORMATION CONTACT:** Mrs. Cynthia Yee, 202–586–1140.

**SUPPLEMENTARY INFORMATION:**

- I. Background
  - A. Discussion.
  - B. Section-by-Section Analysis.
- II. Procedural Requirements.
  - A. Regulatory Review.
  - B. Review under the Regulatory Flexibility Act.
  - C. Review Under the Paperwork Reduction Act.
  - D. Review Under the National Environmental Policy Act.
  - E. Review Under Executive Order 12612.
  - F. Review Under Executive Order 12778.
- III. Public Comments.

I. Background

A. Discussion

President Reagan signed Executive Order 12549 on February 18, 1986, which established governmentwide effect for an agency's nonprocurement debarment and suspension actions. On October 13, 1994, President Clinton signed Public Law 103–355, the Federal Acquisition Streamlining Act of 1994. Section 2455 of that Act provides that the debarment, suspension, or other exclusion of a participant in a procurement activity under the Federal Acquisition Regulation, or in a nonprocurement activity under regulations issued pursuant to 12549, shall be given reciprocal governmentwide effect. This proposed rulemaking furthers those actions by changing various provisions to clarify the DOE procurement suspension and debarment provisions and to ensure consistency between the Federal Acquisition Regulation (FAR) and the DEAR. Additionally, this proposed rule deletes some DOE-specific provisions to provide for uniformity with other Federal agencies.

B. Section-by-Section Analysis

The DOE today is removing the current regulation, at 10 CFR Part 1035, and recodifying the regulation at 48 CFR Part 909. In recodifying the debarment and suspension regulations, DOE has made various changes to clarify the provisions of procurement debarment and suspension and to ensure consistency between the FAR and the DEAR. The rules of procedure for fact-finding conferences in Appendix A of 10 CFR Part 1035 are removed. Under the recodified regulations, the Energy Board of Contract Appeals will conduct fact-finding in disputed suspension or proposed debarments.

This proposed rule also amends 10 CFR Part 1036, which governs debarment and suspension with regard to DOE nonprocurement and grants programs.

The Department of Energy Consolidated List of Debarred, Suspended, Ineligible and Voluntarily Excluded Awardees (DOE List) has been eliminated as unnecessary because the General Services Administration maintains, pursuant to Executive order 12549, a governmentwide list of parties excluded from federal procurement and nonprocurement programs.

The following is a comparison of existing provisions in 10 CFR Part 1035 with provisions proposed for inclusion in 48 CFR Part 909 (DEAR).

Subpart 909.400 is not significantly different from the previous 10 CFR