

PART 4279 - GUARANTEED LOANMAKING

Subpart A - General

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PART 4279 - GUARANTEED LOANMAKING

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 complied with.

(c) Copies of all forms, regulations, and Instructions referenced in this subpart are available in any Agency office. Whenever a form is designated in this subpart, that designation includes predecessor and successor forms, if applicable, as specified by the field or National Office. *Any portion of this Instruction appearing in italicized type is considered by the Agency to be administrative procedure and has not been published as part of the regulation in the Federal Register.*

§ 4279.2 Definitions and abbreviations. (Revised 07-26-06, PN 400.)

(a) Definitions.

Adjusted tangible net worth. Tangible balance sheet equity plus allowed tangible asset appreciation and subordinated owner debt.

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

Allowed tangible asset appreciation. The difference between the current net book value recorded on the financial statements (original cost less cumulative depreciation) of real property assets and the lesser of their current market value or original cost, where current market value is determined using an appraisal satisfactory to the Agency.

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 transferor at the time of the transaction.

Assignment Guarantee Agreement (Business and Industry). Form RD 4279-6, the signed agreement among the Agency, the lender, and the holder containing the terms and conditions of an assignment of a guaranteed portion of a loan, using the single note system.

Biogas. Biomass converted to gaseous fuel.

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

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

Conditional Commitment (Business and Industry). Form RD 4279-3, the Agency's notice to the lender that the loan guarantee it has requested is approved subject to the completion of all conditions and requirements set forth by the Agency.

Commercially available. Energy projects utilizing technology that has a proven operating history, and for which there is an established industry for the design, installation, and service (including spare parts) of the equipment.

Deficiency balance. The balance remaining on a loan after all collateral has been liquidated.

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

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

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.

§ 4279.2 (Con.)

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

Farmers Home Administration (FmHA). The former agency of 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 located in St. Louis, Missouri.

High-impact business. A business that offers specialized products and services that permit high prices for the products produced, may have a strong presence in international market sales, may provide a market for existing local business products and services, and which is locally owned and managed.

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 RD 4279-6 or predecessor form.

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 (Business and Industry). Form RD 4279-4 or predecessor form, between the Agency and the lender setting forth the lender's loan responsibilities when the Loan Note Guarantee is issued.

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

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

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

Natural resource value-added product. Any naturally occurring product that is processed to add value to the product. For example, straw is processed into particle board.

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 pro rata basis.

Participation. Sale of an interest in a loan by the lender 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. Evidence of debt. "Note" or "Promissory Note" shall also be construed to include "Bond" or other evidence of debt where appropriate.

Qualified Intellectual Property. Trademarks, patents or copyrights included on current (within one year) audited balance sheets for which an audit opinion has been received that states the financial reports fairly represent the values therein and the reported value has been arrived at in accordance with GAAP standards for valuing intellectual property. The supporting work papers must be satisfactory to the Administrator.

Refinancing loan. A loan, all of the proceeds of which are applied to extinguish the entire balance of an outstanding debt.

Rural Development. The Under Secretary for Rural Development has policy and operational oversight responsibilities for RHS, RBS, and 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.

Subordinated owner debt. Debt owed by the borrower to one or more of the owner(s) that is subordinated to debt owed by the borrower to the Agency or guaranteed by the Agency (aggregate B&I loan exposure) pursuant to a subordination agreement satisfactory to the Agency. The debt must have been issued in exchange for cash loaned to the borrower for the benefit of the borrower's business. The terms of the subordination agreement must provide that repayment will not commence until the earlier of the date all aggregate B&I loan exposure has been repaid or when a period of three consecutive years has passed during which the borrower has met all loan covenants and evidenced operating profit sufficient to commence partial repayment of this subordinated debt after giving effect to the annual debt service requirements of the aggregate B&I loan exposure. The partial repayment schedule in the case of the latter scenario is subject to annual Agency concurrence and may not be more accelerated than the rate of the debt repayment schedule in effect for the Agency's aggregate B&I loan exposure.

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.

§ 4279.2 (Con.)

Tangible balance sheet equity. Total equity less the value of intangible assets recorded on the financial statements, as determined from balance sheets prepared in accordance with generally accepted accounting principles (GAAP), plus qualified intellectual property.

Veteran. For the purposes of assigning priority points, a veteran is a person who is a veteran of any war, as defined in § 101(12) of title 38, United States Code.

(b) Abbreviations.

B&I - Business and Industry
CF - Community Facilities
CLP - Certified Lender Program
FSA - Farm Service Agency
FMI - Forms Manual Insert
NAD - National Appeals Division
OGC - Office of the General Counsel
RBS - Rural Business-Cooperative Service
RHS - Rural Housing Service
RUS - Rural Utilities Service
SBA - Small Business Administration
USDA - United States Department of Agriculture

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

§§ 4279.3 - 4279.14 [Reserved]

§ 4279.15 Exception authority.

The Administrator may, in individual cases, grant an exception to any requirement or provision of this subpart which is not inconsistent with any applicable law provided, the Administrator determines that application of the requirement or provision would adversely affect USDA's interest. Requests for exceptions must be in writing by the State Director and supported with documentation to explain the adverse effect on USDA's interest, propose alternative courses of action, and show how the adverse effect will be eliminated or minimized if the exception is granted. All requests for exceptions being considered by the Administrator will be reviewed by the National Office Executive Loan (NOEL) Committee to determine consistency with applicable regulations and to document the recommendations of the B&I staff and NOEL Committee. Reasons for granting the exception will be clearly documented, and an Informational Memorandum outlining the need for the exception, recommendations of the State Director and the NOEL Committee, and reasons for granting the exception will be provided to OGC and the Under Secretary. The Administrator will fully and clearly address any concerns raised by the State Director, NOEL Committee, OGC, or the Under Secretary prior to issuing the exception. (Revised 03-23-05, PN 384.)

§ 4279.16 Appeals.

Only the borrower, lender, or holder can appeal an Agency decision made under this subpart. 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 7 CFR, part 11. Any party adversely affected by an Agency decision under this subpart may request a determination of appealability from the Director, National Appeals Division, USDA, within 30 days of the adverse decision.

§§ 4279.17 - 4279.28 [Reserved]

§ 4279.29 Eligible lenders.

(a) Traditional lenders. 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) Other lenders. 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 annually 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, or when the proposed lender can demonstrate that it has personnel with equivalent previous experience and where the commercial loan portfolio was of a similar quantity and quality; and

(ii) Have tangible balance sheet equity of at least seven 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 eligible 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 State Office will review the request and forward the request, with the State Director's recommendations, to the National Office for consideration. The National Office will make such investigation as it deems necessary and 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. The lender's written request must include:*

§ 4279.29 (b) (2) (Con.)

(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 servicing activities. 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; 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

§ 4279(b)(2)(iii) (Con.)

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 make, secure, service, and collect B&I loans.

§ 4279.30 Lenders' functions and responsibilities.

(a) General.

(1) Lenders have the primary responsibility for the successful delivery of the B&I loan program. *In your initial contact with lending officers, make sure that they are well aware of this responsibility and the fact that the Agency will enforce the requirements of the Conditional Commitment and the Lender's Agreement in this regard.* All lenders obtaining or requesting a B&I loan guarantee are responsible for:

- (i) Processing applications for guaranteed loans,
- (ii) Developing and maintaining adequately documented loan files,
- (iii) Recommending only loan proposals that are eligible and financially feasible,
- (iv) Obtaining valid evidence of debt and collateral in accordance with sound lending practices,
- (v) Supervising construction,
- (vi) Distribution of loan funds,
- (vii) Servicing guaranteed loans in a prudent manner, including liquidation if necessary,
- (viii) Following Agency regulations, and
- (ix) Obtaining Agency approvals or concurrence as required.

§ 4279.30(a) (Con.)

(2) This subpart, along with subpart B of this part and subpart B of part 4287, contain 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 its professional judgment to determine that the credit factors, considered in combination, ensure loan repayment. The lender must have an adequate underwriting process to ensure that loans are reviewed by other than the originating officer. There must be good credit documentation procedures.

(c) Environmental responsibilities. Lenders have a responsibility to become familiar with Federal environmental requirements; to consider, in consultation with the prospective borrower, the potential environmental impacts of their proposals at the earliest planning stages; and to develop proposals that minimize the potential to adversely impact the environment. Lenders must alert the Agency to any controversial environmental issues related to a proposed project or items that may require extensive environmental review. Lenders must help the borrower prepare Form RD 1940-20, "Request for Environmental Information" (when required by subpart G of part 1940); assist in the collection of additional data when the Agency needs such data to complete its environmental review of the proposal; and assist in the resolution of environmental problems. *Technical advice and information on environmental requirements, including copies of RD Instruction 1940-G and the State's Natural Resource Management Guide, are available from the State Environmental Coordinator.*

(d) Loan closing. The lender will conduct loan closings. *No prior or postreview by the Agency is required by this Instruction.*

§§ 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, making, and servicing.

(b) CLP eligibility criteria. The lender must meet established eligibility criteria as follows:

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

§ 4279.43(b) (Con.)

(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 must 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 a Small Business Administration (SBA) certified or preferred lender. A certified lender must 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 commercial loans outstanding not exceeding 6 percent of commercial loans outstanding and historic losses not exceeding 6 percent of dollars loaned or it must demonstrate that it has personnel with equivalent previous experience where the commercial loan portfolio was of a similar quantity and quality. The lender will provide a written certification to this effect along with a statistical analysis of its commercial loan portfolio for the last 3 of its fiscal years.

(3) The percentage of guarantee will not exceed 80 percent.

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

(5) 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 determines further instruction is needed.

(6) 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 paragraph (e) of this section.

(c) CLP approval. The Agency may grant CLP status for a period not to exceed 5 years by executing Form 4279-8, "Certified Lender (Business and Industry Program)," with the lender. CLP status 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.

(1) Lender responsibilities. Any lender who desires CLP status must prepare a written request to the State Director where it desires CLP status. The request must address each of the required criteria outlined in paragraph (b) of this section, except for paragraph (b) (3), and should be accompanied by any other information the lender believes will be helpful. The request will also include Form 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.

(2) Agency responsibilities. Any Rural Development office will provide a copy of subparts A and B of this part and subpart B of part 4287 to any lender that desires CLP status. The State Director will determine whether the lender meets the required criteria and will notify the lender in writing within 30 days of receipt that the request is approved, reasons for denial, or any conditions the lender must meet for approval. Lenders whose requests are denied will be advised of their appeal rights in accordance with Departmental appeal regulations.

(d) Renewal of CLP status. Renewal of CLP status is not automatic. CLP status will lapse upon the expiration date of Form 4279-8 unless the lender obtains a renewal. A lender whose CLP status has lapsed may continue to submit loan guarantee requests as a regular lender.

(1) Lender responsibilities. A new Form 4279-8 completed and executed by the lender must be provided, along with a written update of the eligibility criteria required by this section for CLP approval. This information must be supplied at least 60 days prior to the expiration of the existing agreement to be assured of uninterrupted status. The information must address how the lender is complying with each of the required criteria described in paragraph (b) of this section. It must include any proposed changes in the designated persons for processing guaranteed loans or operating methods used in processing and servicing Agency guaranteed loans.

§ 4279.43(d) (Con.)

(2) Agency responsibilities. Upon receipt of a lender's renewal request, the State Director should, within 15 days, request from the lender any additional information needed to process a renewal request. A review of the lender's CLP performance will be completed to determine whether the lender has continually met the eligibility criteria described in paragraph (b) of this section. Any action by the lender since it was designated a CLP lender that could be cause for revoking its CLP status, in accordance with paragraph (e) of this section, will also be considered cause for denying the renewal of CLP status. The State Director should notify the lender in writing within 30 days of receipt of a request for renewal that the request is approved, reasons for denial, or any conditions the lender must meet for approval. Lenders will be advised of their appeal rights in accordance with Departmental appeal regulations.

(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 of this subpart 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 of this subpart;
- (2) Knowingly submitting false information when requesting a guarantee or basing a guarantee request on information known to be false or which the lender should have known to be false;
- (3) Making a guaranteed loan with deficiencies which may cause losses not to be covered by the Loan Note Guarantee;
- (4) Conviction for acts in connection with any loan transaction whether or not the loan was guaranteed by the Agency;
- (5) Violation of usury laws in connection with any loan 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 term 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 with 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; or
- (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 of subpart B of this part.

- (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

§ 4279.43(f)(1) (Con.)

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. Notwithstanding the preceding, no guarantee authority will be held in reserve the last 60 days of the Agency's fiscal year.

(2) Refinancing of existing lender debt in accordance with § 4279.113(q) of subpart B of this part 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) of subpart B of this part. 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; and
- (iii) Executed security documents including personal and corporate guarantees.

(g) Unique characteristics of the CLP. A proposed loan by a CLP lender requires a review by the Agency of the information submitted by the lender, plus satisfactory completion of the environmental review process by the Agency. 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 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 RD 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 include the borrower's management, repayment ability including a cash flow analysis, 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 *RD Instruction 1940-J* and 7 CFR part 3015, subpart V; and

(vi) If the loan will exceed \$1 million and will increase direct employment by more than 50 employees, Form 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 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 and approval of the Agency's completed environmental analysis if required, except that refinancing of existing lender debt in accordance with § 4279.113(q) of subpart B of this part will not be approved without a credit analysis by the Agency of the borrower's complete financial statements and completion by the Agency of the environmental analysis. The Agency may request such additional information as it determines is needed to make a decision. *Requests for information in addition to that required by paragraph (g) (1) of this section shall be made only in situations when such information is necessary for the Agency to reach the determinations required by this paragraph or when information is needed for the Agency to complete its environmental review. It will not be necessary for the Agency to complete the project summary portion of Form 4279-1.*

§ 4279.43(g) (Con.)

(3) *The Agency will complete the appropriate level of environmental review in accordance with subpart G of part 1940 prior to the issuance of the Conditional Commitment, loan approval, or obligation of funds, whichever occurs first.*

(4) *Except as provided for in paragraph (g) (1) (vi) of this section and subject to satisfactory completion of the environmental review process as provided for in paragraph (g) (3) of this section, the Agency will normally approve or disapprove complete applications submitted by CLP lenders in accordance with paragraph (g) (1) of this section within 60 days. Proposals which are environmentally complex or controversial may require more than 60 days for satisfactory completion of the environmental review process.*

(5) *The Agency will not issue the Loan Note Guarantee until all conditions of § 4279.181 of subpart B of this part are satisfied.*

(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 of this chapter.

(i) The Agency's monitoring of CLP status. The State Director is responsible for the following CLP management activities:

(1) *Establishing an operational file for each CLP lender in the State, which includes the Lender's Agreement, documentation of the results of reviews of the lender's performance, and any other information relative to the lender's CLP activity in the State.*

(2) *Monitoring CLP lenders' loanmaking and servicing activities to determine compliance with the Lender's Agreement and applicable regulations. This will be accomplished in part by meeting at least annually with each CLP lender in accordance with § 4287.106(c) of subpart B of part 4287.*

(3) *Taking appropriate action against a lender, including revoking its CLP status for the reasons specified in paragraph (e) of this section and initiation of suspension or debarment action in accordance with subpart M of part 1940. The lender must be notified, in writing, of any such action taken.*

(4) *Advising the Director, Business Programs Processing Division, National Office, of CLP lender performance deficiencies upon discovery of significant deficiencies. The State Director will notify the Director of the Processing Division if any significant deficiencies are found in the operations of a CLP lender.*

§ 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 contained in the Federal Reserve Board's Regulation implementing that Act (see 12 CFR part 202). Such compliance will be accomplished prior to loan closing.

§ 4279.59 Environmental requirements.

The Agency is responsible for ensuring that the requirements of the National Environmental Policy Act of 1969 are met and will complete the appropriate level of environmental review in accordance with subpart G of part 1940. Technical advice and guidance is offered through the State Environmental Coordinator and should be obtained as necessary to ensure compliance with mentioned regulations. Since development of the loan application occurs simultaneously with development of the environmental review, applicants, including lenders and borrowers, must be advised against taking any actions or incurring any obligations which would either limit the range of alternatives to be considered in the environmental review or which would have an adverse effect on the environment. Satisfactory completion of the environmental review process must occur prior to the issuance of the Conditional Commitment, loan approval, or obligation of funds, whichever occurs first.

§ 4279.60 Civil Rights Impact Analysis.

The Agency is responsible for ensuring that all requirements of RD Instruction 2006-P, "Civil Rights Impact Analysis" are met and will complete the appropriate level of review in accordance with that Instruction. *Satisfactory completion of this analysis process must occur prior to the issuance of the Conditional Commitment, loan approval, or obligation of funds, whichever occurs first. Technical advice and guidance is offered through the National Office Civil Rights Staff and should be obtained as necessary to ensure compliance with mentioned regulations.*

§§ 4279.61 - 4279.70 [Reserved]

§ 4279.71 Public bodies and nonprofit corporations.

Any public body or nonprofit corporation that receives a guaranteed loan that meets the thresholds established by OMB Circulars A-128 or A-133 or successor regulations or circulars must provide an audit in accordance with the applicable circular or regulation 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. *Original Lender's Agreements should be maintained in an operational file in a fire-resistant cabinet. Each case file should contain a copy of the applicable Lender's Agreement.* The provisions of this part and part 4287 will apply to all outstanding guarantees. In the event of a conflict between the guarantee documents and these regulations as they exist at the time the documents are executed, the regulations will control.

(a) Full faith and credit. A guarantee under this part constitutes an obligation supported by the full faith and credit of the 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 thereof. 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 the Agency's authorization; or

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

(b) Rights and liabilities. When a guaranteed portion of a loan is sold to a holder, the holder 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 the 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.

§ 4279.72 (Con.)

(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 26 U.S.C. § 103 (interest on State and local banks) or any successor section, will not be guaranteed. *Options for sale and structure of the loan are outlined in appendix B of subpart B of this part.*

(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 the 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 4279-6, 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, so that the total number of notes issued does not 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.** *The Agency will issue the appropriate Loan Note Guarantees to be attached to each of the new notes in exchange for the original Loan Note Guarantee which will be canceled by the Agency;*
- (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 date 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) Termination of lender servicing fee. 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) Agency sale of guarantee. *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. For additional guidance, State Offices should contact the National Office.*

§ 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 the lenders 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 must 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 prevent default, where and when reasonable. The lender will notify the holder and the Agency of its decision.

(b) Agency repurchase.

(1) If the lender does not repurchase the unpaid guaranteed portion of the loan as provided in paragraph (a) of this section, the Agency will purchase from the holder the unpaid principal balance of the guaranteed portion together with accrued interest to date of repurchase, less the lender's servicing fee, within 30 days after written demand to the Agency from the holder. (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.

(5) *Upon receipt of the appropriate information, the Agency will review the demand and, after verification, will transmit the request to the Finance Office for issuance of the appropriate check. Upon issuance, the Finance Office will notify the office servicing the borrower and remit the check to the holder.*

§ 4279.78 (Con.)

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

(d) *Termination of interest accrual, when the guaranteed portion is held by the Agency, will be for accounting purposes only when it is likely there will be a loss on the loan. This will cover situations including, but not limited to, bankruptcy cramdowns, liquidations, and transfers and assumptions for less than the debt. The Finance Office will manually calculate the accrued interest in the event a full or partial recovery becomes possible.*

§§ 4279.79 - 4279.83 [Reserved]

§ 4279.84 Replacement of document.

(a) The Agency may issue a replacement Loan Note Guarantee or Assignment Guarantee Agreement which was lost, stolen, destroyed, mutilated, or defaced to the lender or holder upon receipt of an acceptable certificate of loss and an indemnity bond. *The Agency will consult with the Regional Office of the General Counsel (OGC) to ensure that all documents are of legal sufficiency before the reissuance of the Loan Note Guarantee or Assignment Guarantee Agreement.*

(b) When a Loan Note Guarantee or Assignment Guarantee Agreement is lost, stolen, destroyed, mutilated, or defaced while in the custody of the lender or holder, the lender 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 and containing a jurat, which includes:

- (i) Name and address of owner;
- (ii) Name and address of the lender of record;
- (iii) Capacity of person certifying;
- (iv) Full identification of the Loan Note Guarantee or Assignment Guarantee Agreement including the name of the borrower, the Agency's case number, date of the Loan Note Guarantee or Assignment Guarantee Agreement, face amount of the evidence of debt purchased, date of evidence of debt, present balance of the loan, percentage of guarantee, and, if an Assignment Guarantee Agreement, the original named holder and the percentage of the guaranteed portion of the loan assigned to that holder. Any existing parts of the document to be replaced must be attached to the certificate;
- (v) A full statement of circumstances of the loss, theft, 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 submitted to 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 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.

§ 4279.84(b) (Con.)

(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.

(5) State Directors will review all documents when presented by the lender to ensure all requirements are met.

(6) The State Director will contact the Regional OGC for assistance to ensure all documents are legally sufficient before new guarantee instruments are issued.

(7) If the decision is to reissue the Loan Note guarantee, Contract of Guarantee, or Assignment Guarantee Agreement, the following procedure will be followed:

(i) If the multinote system was used, a new Loan Note Guarantee will be prepared using the original face amounts and amounts guaranteed (not outstanding loan balance). At the top of the form type "This Loan Note Guarantee is issued to replace the original dated _____ which was lost, stolen, destroyed, defaced or mutilated." Only execute an original for the holder. Copies may be conformed for the lender and the Agency file. If borrower notes are needed, they must be obtained by the holder from the borrower. The indemnity bond must be kept in a locked, fire-resistant cabinet for safekeeping.

(ii) *If the single note system was used, a new Assignment Guarantee Agreement will be prepared using the original amount except the current principal amount of the loan outstanding and should be inserted on the face of the document. At the top of the form type "This Assignment Guarantee Agreement is issued to replace the original dated _____ which was lost, stolen, destroyed, defaced, or mutilated." Only execute an original for the holder. Copies may be conformed for the lender and the Agency. If a surety bond is issued, it must be kept in a locked, fire-resistant cabinet for safekeeping.*

(iii) *The lender must execute the replacement forms prior to the Agency's execution of the same.*

(iv) *Form 4279-7, "Certificates of Incumbency and Signature (Business and Industry)," may be provided.*

§§ 4279.85 - 4279.99 [Reserved]

§ 4279.100 OMB control number.

The information collection requirements contained in this regulation have been approved by OMB and have been assigned OMB control number 0575-0171. Public reporting burden for this collection of information is estimated to vary from 1 hour to 8 hours per response, with an average of 4 hours per response, including time for reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Agriculture, Clearance Officer, OIRM, Stop 7630, Washington, D.C. 20250. You are not required to respond to this collection of information unless it displays a currently valid OMB control number.

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