

SECOND AMENDED AND RESTATED MEMORANDUM OF UNDERSTANDING
REGARDING LOAN GUARANTEE CONSULTATIONS
PURSUANT TO TITLE XVII OF THE ENERGY POLICY ACT OF 2005, AS AMENDED

This Second Amended and Restated Memorandum of Understanding Regarding Loan Guarantee Consultations Pursuant to Title XVII of the Energy Policy Act of 2005 (“**MOU**”), dated as of August 23, 2022, is made between the United States Department of the Treasury (“**Treasury**”) and the United States Department of Energy (“**DOE**”), and recites and provides as follows:

RECITALS

A. Title XVII of the Energy Policy Act of 2005, as amended through December 26, 2020¹ (“**Prior Title XVII**”), and the regulations implementing Prior Title XVII through January 14, 2021 (“**Prior Title XVII Regulations**”), require that DOE consult with Treasury with respect to:

(1) the terms and conditions of loan guarantees to be issued by DOE (42 U.S.C. §16512(a))(current through Pub. L. 117-80)(12/27/2021)¹ (a “**Terms and Conditions Consultation**”); and

(2) deviations under the Prior Title XVII Regulations (10 C.F.R. §609.16(a)(3))(81 FR 90703, Dec. 15, 2016)² affecting the terms and conditions of a loan guarantee (a “**Rule Deviation Consultation**”).

B. The process for such consultations is governed by that *Amended and Restated Memorandum of Understanding* between DOE and Treasury dated January 17, 2017 (the “**Prior MOU**”).

C. On December 27, 2020, the 2020 Energy Act was enacted (as Division Z of the FY 2021 Consolidated Appropriations Act)(Pub.L. 116-260) (the “**2020 Energy Act**”). The 2020 Energy Act amended Prior Title XVII (as amended, “**Title XVII**”). Such amendment required that DOE and Treasury engage in consultations and that Treasury deliver certain materials to DOE (such consultations are in addition to the Terms and Conditions Consultation and the Rule Deviation Consultation). Specifically, under the 2020 Energy Act:

(1) the Secretary of the Treasury is required to provide the Secretary of Energy with a written analysis of the financial terms and conditions of a proposed loan guarantee (the “**Terms and Conditions Analysis**”) not later than thirty days after receiving information on the proposed guarantee from the Secretary of Energy (Pub.L. 116-260, Div. Z, Title IX, § 9010(a), Dec. 27, 2020)(42 U.S.C. §16512(m)(2)(current through Pub. L. 117-80)(12/27/2021)). The Secretary of Energy is prohibited from making a loan guarantee under the 2020 Energy Act until the Secretary of the Treasury delivers to the

¹ 42 U.S.C §16512(a) provides that “the Secretary [of Energy] shall make [loan] guarantees under this or any other Act for projects on such terms and conditions as the Secretary of Energy determines, after consultation with the Secretary of the Treasury, only in accordance with this section [16512].,”

10 C.F.R. §609.7(b) provides that “[p]rior to or on the closing date of a Loan Guarantee Agreement, DOE will ensure that: ... (4) [t]he Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement...”.

² 10 C.F.R. §609.16(a) provides that “Whenever permitted by applicable law, the Secretary may authorize deviations from the requirements of this part upon: ... (3) [i]f the waiver would constitute a substantial change in the financial terms of the Loan Guarantee Agreement and related documents, DOE shall consult with ... the Secretary of the Treasury.”

Secretary of Energy, and the Secretary of Energy has taken into consideration, the Terms and Conditions Analysis ([Pub.L. 116-260](#), Div. Z, Title IX, § 9010(a), Dec. 27, 2020)(42 U.S.C. §16512(m)(1) (current through Pub. L. 117-80(12/27/2021)); and

(2) the Secretary of Energy and the Secretary of the Treasury are required to consult with respect to material restructurings of the terms and conditions of loan guarantees made under the Title XVII ([Pub.L. 116-260](#), Div. Z, Title IX, § 9010(a), Dec. 27, 2020)(42 U.S.C. §16512(l) (current through Pub. L. 117-80(12/27/2021))³ (a “**Restructuring Consultation**”).

D. On January 15, 2021, the Prior Title XVII Regulations were amended ([86 FR 3750](#), Jan. 15, 2021)(as amended, the “**Title XVII Regulations**”). The Title XVII Regulations provide that a Rule Deviation could be issued at any time in the lending process.⁴ (10 C.F.R. §609.4(k)(Jan. 15, 2021).

E. Treasury and DOE now desire to amend and restate the Prior MOU to: (1) establish a process for the consultations required under Title XVII; and (2) ensure that all consultations are undertaken in an efficient and expeditious manner, and leverage the expertise, information and analysis of each of DOE and Treasury.

AGREEMENT

NOW, THEREFORE, Treasury and DOE hereby enter into this MOU to set forth the process that Treasury and DOE will follow for the Consultations.

ARTICLE I -- DEFINITIONS

Section 1.1 – Definitions.

As used in this MOU, the following capitalized terms shall have the respective meanings specified in this Section 1.1:

“**Applicant**” has the meaning given that term in the Title XVII Regulations.

“**Conditional Commitment**” has the meaning given that term in the Title XVII Regulations.

“**Consultations**” means any of a Terms and Conditions Consultation, a Rule Deviation Consultation, or a Restructuring Consultation.

“**Consultation Package**” means the following:

³ 42 U.S.C.A. §16512(l) provides “[t]he Secretary [of Energy] shall consult with the Secretary of the Treasury regarding any restructuring of the terms or conditions of a guarantee issued pursuant to this title, including with respect to any deviations from the financial terms of the guarantee.”

10 C.F.R. §609.13(k) provides that “[t]he Holder [of a Guaranteed Obligation] and the Secretary [of Energy] may agree to a formal or informal plan of reorganization in respect of the Borrower, to include a restructuring of the Guaranteed Obligation and other applicable debt of the Borrower on such terms and conditions as the Secretary [of Energy] determines are in the best interest of the United States”.

⁴ 10 C.F.R. §609.4(k)) provides that “[a]t any time in the lending process, the Secretary [of Energy] may exercise his deviation authority under §609.16 to make such deviations from this part as he may deem to be in the best interests of DOE, where such deviation supports program objectives and the special circumstances stated in any deviation request are clearly in the best interests of the Government.”

(a) For a Terms and Conditions Consultation:

(1) documents and analyses substantively similar to the documents and analysis that the LPO submits to the DOE Credit Review Board in connection with the board's consideration of a prospective loan guarantee. Such documents and analyses may include a summary of the proposed transaction, a credit paper, a draft Term Sheet, third-party advisor reports, and other analyses, documents and information as determined by DOE; provided, however, that the foregoing list is not a list of required documents and analyses; and

(2) DOE's analysis with respect to the appropriateness of the interest rate on obligations to be guaranteed by DOE and the materials relied on by DOE with respect to such analysis.⁵

(b) For a Rule Deviation Consultation:

(1) documents and analyses substantively similar to the documents and analysis that the LPO submits to the DOE Credit Review Board or the Secretary of Energy in connection with their consideration of a Rule Deviation;

(2) if the Rule Deviation is requested by an Applicant, the written request submitted to DOE by the Applicant for the proposed Rule Deviation together with the Applicant's justification therefore (together with all accompanying materials); and

(3) an initial finding by the Secretary that the Rule Deviation supports program objectives and the special circumstances stated in the request make such deviation clearly in the best interest of the Government.

(c) For a Restructuring Consultation, documents and analyses substantively similar to the documents and analysis that the LPO submits to the Risk and Portfolio Monitoring Committee and the DOE Credit Review Board. Such documents and analyses may include a draft of the restructuring term sheet, a credit paper, third-part advisor reports, and other analyses, documents and information as determined by DOE; provided, however, that the foregoing list is not a list of required documents and analyses.

"DOE Credit Review Board" means the DOE-chartered body that makes recommendations to the Secretary of Energy regarding the offer of a Term Sheet and certain other matters as set forth in its charter.

"FFB" has the meaning given that term in the Title XVII Regulations.

"Guarantee" has the meaning given that term in the Title XVII Regulations.

"Guaranteed Obligation" has the meaning given that term in the Title XVII Regulations.

"Loan Guarantee Agreement" has the meaning given that term in the Title XVII Regulations.

⁵ 42 U.S.C.A. §16512(e) provides that "an obligation shall bear interest at a rate that does not exceed a level that the Secretary [of Energy] determines appropriate, taking into account the prevailing rate of interest in the private sector for similar loans and risks.", and 10 C.F.R. §609.11(c) provides that "In order to encourage and supplement private lending activity DOE may collect from Borrowers for deposit in the United States Treasury a non-refundable Risk-Based Charge [further defined at 10 C.F.R. §609.2(a)] which, together with the interest rate on the Guaranteed Obligation that LPO determines to be appropriate, will take into account the prevailing rate of interest in the private sector for similar loans and risks".

“Loan Programs Office” or **“LPO”** means the Loan Programs Office of DOE.

“Risk and Portfolio Monitoring Committee” means the committee established by the Director of the LPO and the Chair of the DOE Credit Review Board to assist the Director, the Director of LPO’s Portfolio Management Division, the DOE Credit Review Board and the Secretary of Energy in the oversight of the management of the LPO’s portfolio of projects.

“Risk-Based Charge” has the meaning given that term in the Title XVII Regulations.

“Rule Deviation” means a deviation from the Title XVII Regulations as provided for in 10 CFR § 609.

“Term Sheet” has the meaning given that term in the Title XVII Regulations.

ARTICLE II -- CONSULTATION PROCESSES DEFINED

Section 2.1 - Actions to be Undertaken by DOE and Treasury

(a) Treasury and DOE will each designate one staff member to serve as the primary liaison to the other agency for the Consultations (each, a **“Coordinator”**), and provide the other with the contact information for its Coordinator. Each Coordinator will coordinate his/her agency’s satisfaction of the requirements regarding the completion of the Consultations.

(b) The DOE Coordinator will notify the Treasury Coordinator of DOE’s intention to offer a Term Sheet, offer a restructuring term sheet, or approve a Rule Deviation (each a **“Consultation Action”**), and the date that DOE anticipates delivery to Treasury of a Consultation Package in respect of the Consultation Action (such date shall be the commencement date of the Consultation). Such notice shall be given not less than thirty (30) days prior to the date that DOE anticipates delivery to Treasury of the Consultation Package unless otherwise agreed by the Coordinators. At the time of such notice of a pending Consultative Action, or as soon as possible thereafter, DOE shall provide Treasury an anonymized transaction summary, to assist Treasury with its review. Treasury recognizes these materials are preliminary and may change substantively prior to the formal delivery of Consultative materials (as prescribed in 2.3 below)

(c) Treasury acknowledges that prior to commencing the applicable Consultation, DOE will have negotiated with a potential borrower or borrower non-binding terms and conditions related to a Consultation Action. A Consultation shall be completed prior to DOE’s offer of a Term Sheet, a restructuring term sheet or approval of a Rule Deviation; and upon completion of a Consultation, no further Consultation shall be required prior to the Secretary of Energy’s issuance of a loan guarantee, execution of a Loan Guarantee Agreement or approval of a Rule Deviation; provided that such agreements are consistent with the materials previously reviewed by Treasury. Notwithstanding the foregoing, if the terms and conditions of the guarantee, Loan Guarantee Agreement or Rule Deviation are materially different from those considered by Treasury during the Consultations, then DOE and Treasury shall engage in additional Consultations with respect to such materially changed terms and conditions prior to the Secretary of Energy’s issuance of a loan guarantee, execution of a Loan Guarantee Agreement or approval of a Rule Deviation.

Section 2.2 – Scope of Consultations of DOE and Treasury

Treasury will consult with the Secretary of Energy on the terms and conditions of each transaction. Treasury will consider the extent to which such terms and conditions present undue risk or cost to the Federal Government. The Treasury consultation may include, but is not limited to, feedback on the financing structure of the transaction, risk allocation among project participants and the Federal

Government, and the terms and conditions of the transaction. Treasury will not underwrite or approve projects, review projects for program eligibility, or determine the terms and conditions of the loan guarantee.

Section 2.3 – Terms and Conditions Consultation Process

In order to ensure Treasury’s satisfaction of its obligation pursuant to 42 U.S.C. §16512(m)(2) to deliver the Terms and Conditions Analysis to DOE not later than thirty (30) days after the date of DOE’s electronic delivery to the Treasury Coordinator of a complete Consultation Package (the “**Consultation Start Date**”), DOE and Treasury agree to complete each step of the consultation process set forth in this Section 2.3 within the timeframe (or by the deadline) specified for each step. DOE or Treasury each agree to contact the other if a step is not completed within a timeline (or by a deadline) and discuss a revised schedule to ensure that the Consultation is timely completed. In furtherance of the foregoing, DOE and Treasury agree to use best efforts to complete each step of the Consultation as promptly as possible.

(a) Terms and Conditions Analysis

1. The DOE Coordinator will electronically deliver to the Treasury Coordinator a complete Consultation Package.

2. Treasury will use its best efforts to electronically deliver the following to the DOE Coordinator within seven (7) business days after the Consultation Date; provided, however, that Treasury shall only deliver the following to DOE to the extent that Treasury reasonably determines such items are necessary or appropriate for the completion of the Consultation:

(a) a list of the Treasury staff’s questions, concerns, and/or comments regarding the Consultation Package (the “**Treasury Question List**”). The Treasury Question List will be consistent with the provisions of Section 2.2;

(b) a request for other documents reasonably determined by Treasury to be necessary to complete the Consultation; and

(c) if desired by Treasury, a request for a briefing from DOE staff to Treasury staff (the “**Treasury Briefing**”).

3. If Treasury requests a Treasury Briefing, Treasury and DOE shall use best efforts to conduct such briefing not later than five (5) calendar days after Treasury’s request. DOE will use its best efforts to include representatives from the Office of Management and Budget (“**OMB**”) in the Treasury Briefing. If DOE briefs OMB on the terms and conditions of a transaction without Treasury’s participation in such briefing, DOE shall notify Treasury of such briefing.

4. DOE may request informal staff-level meeting(s) between Treasury and DOE to (a) facilitate DOE’s development of its written response to the Treasury Question List and (b) orally respond to questions from the Treasury Question List that DOE and Treasury have determined do not require a written response. DOE shall request such meeting no later than three (3) calendar days after the DOE Coordinator’s receipt of the Treasury Question List or, if requested, the Treasury Briefing, and such informal meeting(s) will conclude no later than three (3) calendar days following the DOE Coordinator’s request for such meeting(s).

5. The DOE Coordinator will electronically deliver to the Treasury Coordinator the DOE response to the questions on the Treasury Question List (the “**DOE Response**”) not later than three (3) calendar days after the last of (a) the DOE Coordinator’s receipt of the Treasury

Question List, (b) the Treasury Briefing, if requested, or (c) the conclusion of the informal meetings, if requested.

6. If requested by a Coordinator upon his or her determination that a discussion of the DOE Response would facilitate the Consultation, the Coordinators will arrange and hold a meeting for staff from Treasury and DOE to discuss the DOE Response no later than three (3) calendar days after delivery of the DOE Response.

7. The Treasury Coordinator will electronically deliver a preliminary Terms and Conditions Analysis to the DOE Coordinator not later than five (5) business days after the date of his or her receipt of the DOE Response or, if requested, the date of the meeting to discuss the DOE Response. The preliminary Terms and Conditions Analysis may include whatever analysis Treasury deems appropriate; but should highlight terms and conditions that Treasury believes present undue risk or cost to the Federal Government.

8. The DOE Coordinator will deliver to the Treasury Coordinator a list of the DOE staff's questions, concerns, and/or comments (the "**DOE Consultation Question List**") not later than three (3) calendar days after DOE's receipt of the Terms and Conditions Analysis.

9. After DOE's delivery to Treasury of the DOE Consultation Question List until the date of Treasury's delivery to DOE of Treasury's final Terms and Conditions Analysis, the Coordinators may hold meetings and include members of their respective agency's staff as each Coordinator determines is reasonably necessary or appropriate to facilitate resolution of outstanding issues.

10. The Treasury Coordinator will electronically deliver to the DOE Coordinator Treasury's final Terms and Conditions Analysis not later than the thirtieth (30th) day after the Consultation Start Date, unless previously agreed to by all parties as may be necessary.

(b) Actions Subsequent to Terms and Conditions Analysis and Prior to Execution of a Loan Guarantee Agreement.

After Treasury's delivery of the Terms and Conditions Analysis pursuant to Section 2.3(a), DOE and Treasury agree as follows:

1. Subject to DOE procedures, DOE shall use reasonable efforts to deliver the final Terms and Conditions Analysis to (a) the DOE Credit Review Board concurrently with its delivery to the DOE Credit Review Board of all other documents and analysis in connection with its consideration of a prospective loan guarantee and (b) the Secretary of Energy (prior to his or her offer of a Term Sheet).

2. The DOE Coordinator will inform the Treasury Coordinator, by electronic delivery, of the Secretary of Energy's determination of whether to take a Consultation Action. Treasury will treat such action as confidential unless or until DOE has announced it publicly. DOE shall use its best efforts to notify Treasury of any public announcement by DOE of its offer of a Consultation Action.

3. Prior to the execution of the Loan Guarantee Agreement, DOE will determine whether the terms and conditions in the Loan Guarantee Agreement are materially different from the terms in the Conditional Commitment ("**Materially Different Terms**"). If DOE determines that Materially Different Terms exist, the DOE Coordinator will electronically notify the Treasury Coordinator of such change and the Consultation Process shall commence on the date that the

DOE Coordinator delivers to the Treasury Coordinator a Consultation Package. For purposes of the Consultation contemplated in this paragraph, the Consultation Package shall contain a description of the material change(s) and copies of all materials prepared for the DOE Credit Review Board and/or the Secretary of Energy with respect to the Materially Different Terms.

4. Prior to DOE's issuance of a Guarantee, it shall analyze the financial terms and conditions of the Loan Guarantee Agreement to determine whether they are consistent with the final Terms and Conditions Analysis.

(a) If any such terms and conditions are not consistent with the final Terms and Conditions Analysis ("**Reportable Inconsistencies**"), then DOE shall deliver to Treasury a draft of the Secretary of Energy's explanation of the Reportable Inconsistencies that DOE intends to deliver upon issuance of a Guarantee, pursuant to 42 U.S.C. 16512(m)(3), to the Committee of Energy and Commerce and the Committee on Science, Space and Technology of the House of Representatives, and the Committee on Energy and Natural Resources of the Senate. After DOE's delivery to Treasury of the explanation of Reportable Inconsistencies, the Coordinators may hold meetings and include members of their respective agency's staff as each Coordinator determines is reasonably necessary or appropriate.

(b) If DOE determines that no Reportable Inconsistencies exist, DOE shall notify Treasury of such determination.

5. If DOE issues a Guarantee and Reportable Inconsistencies exist, then DOE shall deliver to Treasury a copy of DOE's explanation of the Reportable Inconsistencies which the Secretary of Energy has delivered, pursuant to 42 U.S.C. 16512(m)(3), to (a) the Committee of Energy and Commerce of the House of Representatives, (b) the Committee on Science, Space and Technology of the House of Representatives, and (c) the Committee on Energy and Natural Resources of the Senate. DOE's delivery to Treasury of such explanation shall be made contemporaneously with its delivery to such committees or, at the discretion of DOE, prior to DOE's delivery to such committees.

Section 2.4 - Substantial Rule Deviation Consultation Process

If DOE desires to waive any of the requirements of Title XVII Regulations and such waiver would constitute a substantial change in the terms and conditions of the Loan Guarantee Agreement and related documents, DOE and Treasury will undertake the consultation process set forth in Section 2.3(a)(1-6). DOE and Treasury shall complete such Consultation not later than twenty (20) calendar days after the DOE Coordinator delivers the Rule Deviation Consultation Package to Treasury (with the timing of each step set forth in Section 2.3(a) to be equitably adjusted); provided, however, that DOE and Treasury shall use their best efforts to complete such Consultation within ten (10) calendar days after DOE's delivery of the Consultation Package for the Rule Deviation Consultation to Treasury.

Section 2.5 - Restructuring Consultation Process

If DOE desires to restructure any of the terms and conditions of a Loan Guarantee Agreement and related documents, DOE and Treasury will undertake the consultation process set forth in Section 2.3(a)(1-6). DOE and Treasury shall complete such Consultation not later than twenty (20) calendar days after the DOE Coordinator delivers the Restructuring Consultation Package to Treasury (with the timing of each step set forth in Section 2.3(a) to be equitably adjusted); provided, however, that DOE and Treasury shall use their best efforts to complete such Consultation within ten (10) calendar days after DOE's delivery of the Consultation Package for the Restructuring Consultation to Treasury.

Section 2.6— Resolution of Differences of Opinion or Consultation Timeline Concerns

If a Coordinator does not believe that DOE and Treasury will be able to complete the Consultation Process within the maximum time permitted herein because of a difference of opinion on any matter required for completion of the Consultation, or due to consultation timeline concerns, the Coordinator shall inform the other Coordinator of such belief, and each Coordinator shall promptly refer and escalate the issue to such Coordinator's leadership. DOE and Treasury will use best efforts to ensure that the referrals made pursuant to this Section 2.6 do not extend the time provided herein for conclusion of any Consultation.

Section 2.7 – No Treasury Approval Imputed or Required

The information, advice and analysis provided by Treasury to DOE through the Consultations (a) does not constitute Treasury approval (or disapproval) of any proposed action by DOE with respect to a transaction), and (b) except with respect to the Secretary of the Treasury's delivery of the Terms and Conditions Analysis and the Consultations, the Secretary of Energy is not obligated to obtain the consent or approval of the Secretary of the Treasury in connection with the execution of a Loan Guarantee Agreement, the issuance of a loan guarantee under Title XVII, or the restructuring of a Guaranteed Obligation (including the execution and delivery of all related agreements or documents).

Section 2.8 – Consultations to Satisfy Statutory Requirements

The completion of the Consultations as provided for in this Article II shall satisfy the requirements under applicable law with respect to obligation of the DOE to consult with Treasury with respect to the following Consultations: (1) a Terms and Conditions Consultation; (2) a Rule Deviation Consultation; and (3) a Restructuring Consultation.

ARTICLE III – INFORMATIONAL BRIEFINGS

3.1 The DOE Coordinator will arrange for a quarterly pipeline meeting with Treasury in which DOE will share an updated pipeline of anticipated programmatic activity. Such list should include the date on which DOE expects to commence any Consultations for Title XVII applications as well as updates on any anticipated deal closing or funding dates that may be available; provided however, Treasury understands that such transactions and dates may change.

ARTICLE IV -- MISCELLANEOUS

Section 4.1 – Amendments

This MOU may be amended, modified, supplemented, discharged, or terminated only by an instrument in writing duly executed by Treasury and DOE.

Section 4.2 - Effective Date

This MOU shall not become effective until it has been executed by both Treasury and DOE. When this MOU has been so executed, it shall become effective as of the date first set forth above.

Section 4.3 - Counterparts

This MOU maybe executed in separate counterparts, each of which when so executed and delivered shall be an original, but all of which together shall constitute but one and the same instrument.

Section 4.4 - Funding

This MOU is neither a fiscal nor a funds obligation document. Nothing in this MOU authorizes or is intended to obligate Treasury or DOE to expend, exchange, or reimburse funds, services, or supplies, or transfer or receive anything of value.

Section 4.5 - Management

This MOU is strictly for internal management purposes for each of the agencies. It is not legally enforceable and shall not be construed to create any legal obligation on the part of either agency. This MOU shall not be construed to provide a private right or cause of action for or by any person or entity.

Section 4.6 - Legal Compliance

All agreements herein are subject to, and will be carried out in compliance with, all applicable laws, regulations, and other legal requirements.

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IN WITNESS WHEREOF, Treasury and DOE have each caused this MOU to be duly executed as of the date first above written.

UNITED STATES DEPARTMENT OF THE TREASURY

By: See Next Page_____

Name: _____

Title: _____

Date: _____

UNITED STATES DEPARTMENT OF ENERGY

By: Jigar H. Shah Digitally signed by Jigar H. Shah
Date: 2022.08.23 15:45:03 -0400_____

Name: Jigar Shah

Title: Director, Loan Programs Office

Date: August 23, 2022

**SIGNATURE PAGE TO
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UNITED STATES DEPARTMENT OF THE TREASURY

By: Gary E. Grippo Digitally signed by Gary E. Grippo
Date: 2022.08.23 16:53:17
+04'00'

Name: Gary Grippo

Title: Deputy Assistant Secretary for Pubic Finance

Date: August 23, 2022

UNITED STATES DEPARTMENT OF ENERGY

By: _____

Name: Jigar Shah

Title: Director, Loan Programs Office

Date: August 23, 2022