Activities,” and in 7 CFR part 3015, subpart V. The Very Low to Moderate Income Housing Loans Program, Number 10.410, is not subject to the provisions of Executive Order 12372, which requires intergovernmental consultation with State and local officials. An intergovernmental review for this revision is not required or applicable.

Paperwork Reduction Act
There are no new reporting and recordkeeping requirements associated with this rule.

E-Government Act Compliance
The Agency is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes. (If appropriate—For information pertinent to E-GOV compliance related to this proposed rule, please contact Michel Mitias, 202–720–9653.

Background
The quality of construction, age, and condition of an existing dwelling financed through the Agency’s single family housing programs may have a significant impact on the unit's thermal performance. The Agency should consider the thermal performance of a home as part of its overall condition, rather than a separate factor.

Newer residences, or older residences currently in average or good condition, generally can be accepted as being representative of their community, and are likely to have average thermal efficiency for the market in which they are located. These homes represent a typical residence in terms of overall design, construction, and appeal in the marketplace, and can be presumed to have reasonable, overall thermal performance.

Aging residences, particularly those with significant deficiencies, or those designated as being in only fair condition or less, could represent a higher risk to the borrower and the Agency. Homes with older effective ages or in fair condition may be financed in some circumstances with certain upgrades, but should be thoroughly and carefully inspected to insure the overall soundness of the collateral, including thermal components. These homes may require thermal and insulation upgrades in order to ensure reasonable (average) heating and cooling costs for borrowers. The Agency’s existing thermal standards, or similar standard, may serve as a guide for an energy efficient home, however we recognize that incremental improvements to existing homes to reach this standard may not always be cost effective. The Agency should look at homes to be financed based on their overall condition. When a home needs improvement in order to be acceptable for our financing, the focus should be on reducing the effective age by improving the existing overall condition as well as increasing energy efficiency.

A combination of Uniform Residential Appraisal Report (URAR) designations for “quality of construction” and “condition”, as well as “age” and “effective age” may be used to judge the overall condition of a home, and whether additional analysis needs to be undertaken to ensure the dwelling will be reasonably thermally efficient for the market in which it is located. In addition, an on-site inspection by an Agency representative or designee may provide further information on the thermal performance of a home. Hence, the Agency has determined that it is no longer necessary to impose thermal standards for existing single family housing.

This change will not be subject to Section 509(a) of the Housing Act of 1949 because it pertains only to existing single family housing. All new single family housing construction must comply with the Minimum Property Standards (MPS) adopted by the Department of Housing and Urban Development (HUD), as well as national model codes adopted by the applicable jurisdiction, locality, or state.

List of Subjects in 7 CFR Part 1924
Agriculture, Construction management, Construction and repair, Energy conservation, Housing. Loan programs—Agriculture, Low and moderate income housing.

For the reasons set forth in the preamble, Chapter XVIII, Title 7, of the Code of Federal Regulations is amended as follows:

PART 1924—CONSTRUCTION AND REPAIR

1. The authority citation for part 1924 continues to read as follows:


Subpart A—Planning and Performing Construction and Other Development

2. Exhibit D of subpart A is amended by:

A. Removing the last sentence in paragraph II;

B. Removing and reserving paragraph IV B;

C. Revising the words “paragraphs IV A and IV B” in paragraph IV C 1 to read “paragraph IV A”;

D. Revising the words “paragraphs IV A and B” in paragraph IV C 2 to read “paragraph IV A”;

E. Revising the words “paragraphs IV A or IV B” in the first and last sentences of paragraph IV C 2b, and in paragraphs IV C 3 introductory text, IV C 3a and IV C 3b to read “paragraph IV A”;

F. Removing the words “or B” in paragraphs IV C introductory text and IV C 3c.


Russell T. Davis,
Administrator, Rural Housing Service.
[FR Doc. 07–2366 Filed 5–15–07; 8:45 am]
BILLING CODE 3410–XV–P

DEPARTMENT OF ENERGY

10 CFR Part 609
RIN 1901–AB21

Loan Guarantees for Projects that Employ Innovative Technologies

AGENCY: Office of the Chief Financial Officer, Department of Energy.

ACTION: Notice of proposed rulemaking and opportunity for comment.

SUMMARY: The Department of Energy (DOE or Department) today proposes policies and procedures applicable to DOE’s loan guarantee program authorized by Title XVII of the Energy Policy Act of 2005. Today’s proposed rule, when final, also will further the President’s Advanced Energy Initiative. Title XVII authorizes the Secretary of Energy to make loan guarantees for projects that “avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.” Title XVII also identifies ten categories of technologies that, if employed in commercial projects, are potentially eligible for a loan guarantee. A principal goal of Title XVII is to encourage commercial use in the United States of new or significantly improved energy-related technologies. DOE believes that accelerated commercial use of new and improved technologies will help sustain economic growth, yield environmental benefits, and produce a more stable and secure energy supply and economy for the United States.
DATES: Public comment on this proposed rule will be accepted until July 2, 2007. A public meeting on the proposed rule will be held on Friday, June 15, 2007, from 9 a.m. to 4:30 p.m. in Washington, DC. Interested persons who wish to speak at the public meeting must telephone the DOE Loan Guarantee Program Office at (202) 586–8336 during the period Friday, June 1, through Tuesday, June 12, 2007, between the hours of 9 a.m. and 4:30 p.m. Interested persons also may request to speak by writing to Mr. Howard G. Borgstrom at the address given in the ADDRESSES section of this notice, or by sending an e-mail to lgprogram@hq.doe.gov. Such requests must be received by 4:30 p.m. on Tuesday, June 12, 2007. The Department also requests that persons wishing to speak submit a copy of their prepared statement to Mr. Borgstrom by 4:30 p.m. on June 12, 2007. See section III. of this notice for details concerning public comment procedures.

ADDRESSES: You may submit comments, identified by RIN 1901–AB21, by any of the following methods:
2. E-mail to lgprogram@hq.doe.gov. Include RIN 1901–AB21 in the subject line of the e-mail. Please include the full body of your comments in the text of the message or as an attachment.

Due to potential delays in DOE’s receipt and processing of mail sent through the U.S. Postal Service, we encourage respondents to submit comments electronically to ensure timely receipt.

The public meeting for this rulemaking will be held in Washington, DC at the Forrestal Building in Room GE-086 (Main Auditorium), 1000 Independence Avenue, SW., Washington, DC.

This Notice of Proposed Rulemaking, the public meeting transcript, and any comments that DOE receives are being made available on the Web site at: http://www.lgprogram.energy.gov/.

FOR FURTHER INFORMATION CONTACT: The DOE Loan Guarantee Program Office, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–8336, e-mail: lgprogram@hq.doe.gov; or Warren Belmar, Deputy General Counsel for Energy Policy, Office of the General Counsel, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–6758, e-mail: warren.belmar@hq.doe.gov; or Lawrence R. Oliver, Assistant General Counsel for Fossil Energy and Energy Efficiency, Office of the General Counsel, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9521, e-mail: lawrence.oliver@hq.doe.gov.

SUPPLEMENTARY INFORMATION:

I. Introduction and Background

II. Discussion of Proposed Rule

A. Technologies

B. Project Costs

C. Solicitation

D. Payment of the Credit Subsidy Cost

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A. Executive Order 12866

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I. Treasury and General Government Appropriations Act, 2001

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I. Introduction and Background

Title XVII of the Energy Policy Act of 2005 (Title XVII or the Act) (42 U.S.C. 16511–16514) authorizes the Secretary of Energy (Secretary or DOE), after consultation with the Secretary of the Treasury, to make loan guarantees for projects that “avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.” Commercial technology is defined as “a technology in general use in the commercial marketplace” and “does not include a technology solely by use of the technology in a demonstration project funded by DOE.” The following ten categories of projects are, by law, specifically made eligible for Title XVII loan guarantees:

1. Renewable energy systems;

2. Advanced fossil energy technology (including coal gasification meeting the criteria in paragraph 1703(d) of the Act);

3. Hydrogen fuel cell technology for residential, industrial, or transportation applications;

4. Advanced nuclear energy facilities;

5. Carbon capture and sequestration practices and technologies, including agricultural and forestry practices that store and sequester carbon;

6. Efficient electrical generation, transmission, and distribution technologies;

7. Efficient end-use energy technologies;

8. Production facilities for fuel efficient vehicles, including hybrid and advanced diesel vehicles;

9. Pollution control equipment; and

10. Refineries, meaning facilities at which crude oil is refined into gasoline.

This list of ten types of projects is a nonexclusive list of the types of projects that are eligible for Title XVII guarantees.

Today, DOE proposes regulations to establish generally applicable policies, procedures and requirements for the Title XVII loan guarantee program. These proposed regulations were referenced in the Guidelines for the program that DOE published on August 14, 2006 (Guidelines) (71 FR 46451). The Guidelines stated that they would only apply to the first Title XVII solicitation, which was issued contemporaneously with the Guidelines, and that all subsequent solicitations would be governed by regulations to be adopted by DOE at a later date.

In the first solicitation for Pre-Applications for “Federal Loan Guarantees for Projects that Employ Innovative Technologies in support of the Advanced Energy Initiative,” DOE focused on technologies that would advance the President’s Advanced Energy Initiative. Although this meant the first solicitation did not cover all types of projects that potentially may be eligible for loan guarantees under Title XVII, there is nothing in Title XVII that requires all solicitations implementing that program to open to every project arguably eligible for a guarantee under the statute. DOE has the ability to tailor specific solicitations to certain types of projects, based on programmatic objectives, loan guarantee authority that is available, and the availability of funds to implement the program, among other relevant criteria. DOE will seek to have a broad portfolio of large and small projects, for a wide variety of technologies. For example, the Administration’s 2008 Budget proposes that DOE may guarantee up to $4 billion in loans for central power generation facilities (for example, nuclear facilities or carbon sequestration optimized coal power plants); $4 billion in loans for projects that promote biofuels and clean transportation fuels; and $1 billion in
loans for projects using new technologies for electric transmission facilities or renewable power generation systems. Precisely how any authorized loan guarantee authority would be allocated, however, ultimately would depend on the merits and benefits of particular project proposals and their compliance with statutory and regulatory requirements. The deadline for submission of Pre-Applications in response to the first solicitation was December 31, 2006, and DOE received 143 Pre-Applications.

On February 15, 2007, President Bush signed into law Public Law 110–5, the Revised Continuing Appropriations Resolution, 2007 (CR, or Pub. L. 110–5) which authorizes DOE to issue guarantees under the Title XVII program for loans in the “total principal amount, any part of which is to be guaranteed, of $4,000,000,000.” This authorization provides DOE sufficient authority, under Title XVII and the Federal Credit Reform Act of 1990 (FCRA) (2 U.S.C. 661(a) et seq) to issue loan guarantees. Section 20320(b) of the CR further provides that no loan guarantees may be issued under the Title XVII program until DOE promulgates final regulations that include “programmatic, technical, and financial factors the Secretary of Energy will use to select projects for loan guarantees,” “policies and procedures for selecting and monitoring lenders and loan performance,” and “any other policies, procedures, or information necessary to implement Title XVII of the Energy Policy Act of 2005.”

II. Discussion of Proposed Rule

The CR prohibits DOE from issuing any loan guarantees under the Title XVII program until the Department has issued final regulations that address a number of different matters. (Pub. L. 110–5, section 20320(b). However, section 20320 does not state whether or to what extent those final regulations must apply to any matters pursuant to the first solicitation under the Title XVII program, which DOE issued on August 8, 2006, and in response to which Pre-Applications were due by December 31, 2006, several weeks prior to the enactment of Public Law 110–5.

In order to ensure that the Department complies with the CR but does not prejudice Pre-Applicants who responded to the first Title XVII solicitation, DOE proposes to specify, by regulation, that today’s proposed rule, when final, shall not apply to the Pre-Applications, Applications, Conditional Commitment Guarantee Agreements pursuant to the August 2006 solicitation. The only exceptions shall be with respect to the default, recordkeeping and audit requirements in sections 609.15 and 609.17, which Title XVII requires be established by regulation. However, the proposed regulations permit DOE and an Applicant to agree in a Loan Guarantee Agreement entered into pursuant to the first solicitation that additional provisions of the final rule shall apply to the particular project.

However, Pre-Applicants who responded to the first solicitation will not necessarily be permanently exempt from these regulations. If the Department does not accept their Pre-Application and invite them to submit an Application pursuant to that solicitation, then their participation in the program in response to any future solicitation will be fully subject to the requirements of the final regulations. Moreover, to provide clarity, the regulation provides that the exception from applicability of these regulations applies only to those for whom the invitation to submit an Application is extended by the Department to a Pre-Applicant no later than December 31, 2007. The Department anticipates being able to invite selected Pre-Applicants to submit Applications in response to the first solicitation by that deadline, and perhaps well before that deadline. Pre-Applicants who are not being invited to submit an Application also will be notified that they have not been selected, and any further involvement by such Pre-Applicants in the Title XVII program will be subject to all requirements of the final regulations.

The Act authorizes the Secretary to make loan guarantees as an incentive for the use of new or improved technologies. Section 1702 of the Act outlines general terms and conditions for Loan Guarantee Agreements and directs the Secretary to include in Loan Guarantee Agreements “such detailed terms and conditions as the Secretary determines appropriate to—[i] protect the interests of the United States in case of a default [as defined in regulations issued by the Secretary]; and [ii] have available all the patents and technology necessary for any person selected, including the Secretary, to complete and operate the project for which the loan guarantee was obtained.” (42 U.S.C. 16512(g)(2)(c) Section 1702(i) of the Act instructs the Secretary to prescribe regulations outlining record-keeping and audit requirements. This proposed rule sets forth application procedures, outlines terms and conditions for Loan Guarantee Agreements, lists records and documents that project participants must keep. The proposed rule also sets forth other provisions that the CR requires DOE’s regulations to address.

A. Technologies

A principal purpose of the Act’s Title XVII loan guarantee program is to support projects in the United States that “employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.” Such technologies are identified as “innovative technologies.” Section 1701(1) of the Act defines “commercial technology” as “a technology in general use in the commercial marketplace.” Section 1701(1) further states that a technology does not become a “commercial technology” solely because it is used in a demonstration project funded by DOE.

Because section 1702(d)(1) also requires a “reasonable prospect of repayment of the principal and interest” on all loans or other debt obligations issued to finance a debt obligation, the technologies for project proposals must be mature enough to assure dependable commercial operations that generate sufficient revenues to service the project’s debt. Therefore, projects that are solely research, development or demonstration projects (i.e., a project designed exclusively for research and development or to demonstrate feasibility of a technology on any scale) should not be eligible for Title XVII loan guarantees, and DOE is proposing to make such research, development or demonstration projects ineligible for a loan guarantee under Title XVII. DOE believes that accelerated commercial use of new or improved technologies, as distinguished from research, development or demonstrations at any scale of technological feasibility, will help to sustain economic growth, yield environmental benefits, and produce a more stable and secure energy supply, and be able to earn revenues that give the projects a “reasonable prospect of repayment of the principal and interest” on its debt obligations. Accordingly, DOE’s loan guarantee program is not intended for technologies in the research, development or demonstration stages.

Title XVII does not explain or define the phrase “new or significantly improved” in section 1703(a)(2). Nor does the Act explain or define the terms “general use” or “commercial marketplace” in section 1701(1), other than specifying that “commercial technology” does not include a technology merely because it is used in a DOE-funded demonstration project. Therefore, DOE must use its discretion and judgment to define these terms.
DOE believes that the phrase “new or significantly improved technology” is not readily susceptible to precise definition in these regulations. It is not possible to specify in advance precisely what should be considered “new” or what would constitute a “significant improvement” in a particular technology. Nonetheless, DOE does believe it is both possible and prudent to specify, in these regulations, parameters by which that determination will be made in particular cases in the future.

Webster’s II New College Dictionary (1999) defines the term “new” to mean “[h]aving existed or been made for only a short time * * * [n]ever used before * * * [j]ust discovered, found, or learned * * * or somewhat unhelpfully, “[n]ot yet old.” The term “significant” is defined as “meaningful * * * [m]omentous * * * important,” and the term “improve” or “improvement” is defined as “[t]o advance to a better quality or state * * * to increase the productivity or value * * * to make advantageous additions or changes.” For purposes of the Title XVII program, moreover, it is important that a technology be new or significantly improved with respect to energy production, use, efficiency, or transportation, rather than with respect to other attributes. For example, a particular facility might have significantly improved aesthetic appeal in comparison to an older facility, but DOE does not believe that type of improvement alone should qualify a technology as new or for only a limited period of time.

Thus, DOE proposes to define, by regulation, the term “new or significantly improved technologies” to mean technologies concerned with the production, consumption or transportation of energy, and that have either only recently been discovered or learned, or that involve or constitute meaningful and important improvements in the productivity or value of the technology. DOE requests comment on this definition.

Because Title XVII focuses on encouraging and incentivizing innovative technologies, the Title XVII loan guarantee program should only be open to projects that employ a technology that has been used in a very limited number of commercial projects or for only a limited period of time. Indeed, when read together, sections 1701 and 1703 of Title XVII prohibit DOE from issuing loan guarantees for projects that only use commercial technologies that already are in general use in the United States at the time the guarantee is issued. In section 609.2 of the proposed regulations, DOE is proposing two possible ways of interpreting “general use.” First, DOE could interpret the term “general use” to mean that a technology has been ordered for, installed in, or used in a certain number of commercial projects in the United States. So, as one alternative, DOE proposes to state in its regulations that a technology would be considered to be in general use, and therefore not eligible for a Title XVII loan guarantee, if it has been ordered for, installed in, or used in five or more projects in the United States at the time the loan guarantee is issued. Allowing loan guarantees for up to five projects employing the same type of technology would allow use of these guarantees to introduce innovative technologies to the commercial marketplace, but would also ensure that guarantees can only be issued for a limited number of projects before it will be up to the commercial marketplace to decide whether the economic and environmental benefits of a particular technology justify continued investments in it. As a second alternative, DOE proposes to state in its regulations that a technology would be considered to be in general use, and therefore not eligible for a Title XVII loan guarantee, if it has been in operation in a commercial project in the United States for a particular number of years. Under this alternative, there would be no numerical limit on the number of loan guarantees DOE could issue for a particular technology—it might be 50, 10, 5, 1 or even zero. Whether DOE could issue a guarantee would be determined in each case by whether the technology at issue had been in operation in a commercial project in the United States for a particular number of years, which DOE proposes to be five years. The five-year period would begin on the date that the technology is commissioned on the particular commercial project. DOE selected the period of five years because it believes that this period of time will allow a sufficient period for early commercial operation and for proving the viability of a technology in the commercial marketplace.

DOE requests comment on these alternative interpretations and approaches. DOE furthermore requests comment as to whether, regardless of which alternative is adopted in the final rule, the same definition should apply to all types of projects and technologies. For example, if the first alternative described above is adopted, should the relevant number of projects or technologies be the same for renewable energy systems, advanced nuclear energy facilities, pollution control equipment, and all other potentially eligible technologies and projects? Or, should the number specified in DOE’s regulations be different for different types of projects and technologies? Similarly, if the second alternative described above is adopted, should the time period be the same for all types of eligible projects and technologies? And if it should be different, why?

Commenters who wish to express views on any of these issues are requested to supply specific information and data supporting their views.

The Department notes that regardless of the resolution of the issues discussed above, a project may be eligible for a Title XVII loan guarantee if it uses technology that has been used in any number of projects outside the United States and for any period of time outside the United States, so long as the technology is not in “general use” in the United States.

B. Project Costs

Proposed section 609.10, in accordance with section 1702(c) of the Act, provides that any loan guarantee issued by DOE may not exceed 80 percent of total Project Costs. Sections 609.2 and 609.12 of the proposed rule define “Project Costs” as those that are necessary, reasonable, customary, and directly related to the design, engineering, financing, construction, startup, commissioning and shake down of an Eligible Project. Conversely, excluded costs cover initial research and development costs, the credit subsidy cost, any administrative fees paid subsequent to section 1702(h), and operating costs after the facility has been placed in service. These costs are associated with, and a condition of, receiving a federal loan guarantee. Furthermore, if these costs were allowed, in the case of default, these costs would be shifted from the project sponsor to the federal taxpayer. DOE invites public comments on these issues.

C. Solicitation

Section 609.3 of the proposed regulations requires DOE to issue a solicitation to start the process that ultimately would culminate in the Department issuing a loan guarantee. This section also sets forth certain minimum requirements for each solicitation, including the fees that will be required of persons invited to submit Applications and criteria that the Department will use to weigh competing Pre-Applications, when Pre-Applications are requested, and Applications, and to make ultimate selections for loan guarantees.
Generally, DOE plans to solicit Pre-Applications only when Pre-Applications can minimize or reduce the financial burdens on Project Sponsors prior to a determination that a particular technology will likely not be sufficiently developed or mature to satisfy the minimum requirements for successful commercial operations. This approach would also reduce DOE’s administrative costs incurred for detailed review of multiple full Applications in technology areas where most of the projects will likely not be ready for commercial operations.

The proposed regulations permit DOE to start the solicitation process by soliciting Pre-Applications, or by skipping the Pre-Application stage and soliciting Applications, because DOE believes a Pre-Application stage may be appropriate and necessary for some technologies and projects but perhaps not for others. Solicitations for Pre-Applications or Applications issued after promulgation of the final rule must address many important aspects of the application process, including the relevant period of time during which Pre-Applications or Applications for loan guarantees may be filed. Because each project will be unique and each loan guarantee potentially subjects the Federal government to significant financial liability, DOE plans to engage in a rigorous review of a proposed project before determining whether it may be eligible for a Loan Guarantee Agreement and subsequently approving and issuing loan guarantees.

DOE does not intend to substantively review and evaluate Pre-Applications or Applications for any proposals that do not meet the specific requirements of the applicable solicitation. Likewise, only Applications invited by DOE or submitted in response to a solicitation will be considered for a Loan Guarantee Agreement. Consistent with section 20320(b) of Public Law 110–5, the proposed regulations require that programmatic, technical and financial factors to be used by DOE to select projects for loan guarantees. Section 609.7 satisfied this requirement.

D. Payment of the Credit Subsidy Cost

Section 1702(b) of the Act states that: “No guarantee shall be made unless (1) an appropriation for the cost has been made; or (2) the Secretary has received from the borrower a payment in full for the cost of the obligation and deposited the payment into the Treasury.” (42 U.S.C. 16512) Therefore, either Congress must appropriate funds to cover the Credit Subsidy Cost of the Loan Guarantee or the Borrower must make payment to DOE of this cost. DOE has neither requested nor received appropriations to make partial or full payment of the Credit Subsidy Cost. However, section 20320(a) of Pub. L. 110–5 authorized DOE to accept Credit Subsidy Cost payments from Borrowers to pay the full subsidy costs of loan guarantees, and DOE’s current intent is to implement the Title XVII program only through the self-pay authority of section 1702(b)(2) of the Act. Furthermore, DOE interprets section 1702(b) as not allowing for partial payment of the Credit Subsidy Cost by Borrower with the remainder covered by a Congressional appropriation; section 1702(b) authorizes either an appropriation or payment of this cost in full by the Borrower. DOE proposes to memorialize this interpretation of section 1702(b) of the Act in section 609.9 of the regulations.

E. Assessment of Fees

In addition to the Credit Subsidy Cost, section 1702(b) also requires DOE to “charge and collect fees for guarantees” to cover the Administrative Cost of Issuing a Loan Guarantee. Proposed §§ 609.6, 609.8 and 609.10 provide that DOE shall collect fees for administrative expenses to cover all phases of an Eligible Project. As defined in proposed § 609.2, fees consist of the administrative expenses that DOE incurs during:

1. Knowledge of the Pre-Application, if a Pre-Application is requested in a solicitation, and an Application for a loan guarantee; and

2. The offering of a Term Sheet, executing the Conditional Commitment, negotiation, and closing of a Loan Guarantee Agreement; and

3. The servicing and monitoring of the Loan Guarantee Agreement, including during construction, start-up, commissioning, shakedown, and the operational phases of an Eligible Project.

The Act, and section 1702(b) in particular, affords DOE discretion with respect to the fees it imposes to cover applicable administrative costs. For the first solicitation issued by DOE in August 2006, DOE elected not to impose fees in connection with the Pre-Application stage and reserved the right to charge an Application fee as part of the invitation to submit an Application. DOE proceeded in this manner so as not to unduly discourage potential project sponsors from submitting Pre-Applications. In the proposed regulations, DOE is requiring that the payment of administrative fees start with the submission of an Application. If implemented in the final rule, this would mean that Project Sponsors who submit Pre-Applications and are denied further consideration will not be charged any fees for expenses incurred by DOE in reviewing their Pre-Application materials. In addition, Pre-Applicants that are invited to submit Applications but decline to do so will also not be charged a fee. DOE does anticipate incurring significant administrative expenses as part of its review of Pre-Applications, and Applications which, in the absence of Pre-Application and Application fees, would not be fully recouped by DOE. Under the proposed rule, the fees assessed to Borrowers who submit Applications and enter into Conditional Commitments will only cover the expenses attendant to that Borrower’s project proposal and will not cover the costs incurred by DOE for reviewing other Pre-Applications that were denied further consideration. As stated above, section 1702(b) requires that DOE “charge and collect fees for guarantees sufficient to cover applicable administrative expenses.” DOE interprets this requirement as allowing it to charge and collect fees from the Applicant/Borrower to cover DOE’s administrative expenses in connection with that particular Applicant/ Borrower’s project, or to charge and collect fees from Applicant/ Borrower to cover a proportionate share of DOE’s administrative expenses for the entire loan guarantee program. In its proposed regulations, DOE adopts the former approach.

Proposed section 609.6 provides that the Applicant must pay a filing fee with the submission of an Application (First Fee). This First Fee must be in an amount sufficient to cover DOE’s administrative expenses in connection with DOE’s review and evaluation of a Pre-Application, if any, and the Application. A Second Fee (Second Fee) will be collected when DOE and the Applicant execute a Term Sheet which constitutes a Conditional Commitment. This Second Fee must be in an amount sufficient to cover DOE’s administrative expenses during the Term Sheet through the closing phase.

At the closing and subsequent thereto, DOE will collect fees, as specified in the Conditional Commitment, for DOE’s servicing and monitoring expenses throughout the term of the guaranteed loan (Third Fee). The Third Fee may be assessed and collected quarterly, annually, or more or less frequently, as determined by the Secretary, including one lump sum payment at the closing. The Third Fee may be a percentage of the amount of Guaranteed Obligations outstanding from time to time or specific dollar amounts based on DOE’s
DOE expressed a preference in the August 2006 Guidelines for guaranteeing no more than 80 percent of the total face amount of any single debt instrument. The Guidelines further provided that under no circumstances would DOE guarantee 100 percent of a loan or other debt obligation.

In today’s rule, DOE is proposing to guarantee up to 90 percent of a particular debt instrument or loan obligation for an Eligible Project that can be guaranteed by a Title XVII loan guarantee, so long as DOE’s guarantees do not account for more than 80 percent of Project Costs. Furthermore, in connection with any loan guaranteed by DOE that may be participated, syndicated, traded, or otherwise sold on the secondary market, DOE is proposing to require that the guaranteed portion and the non-guaranteed portion of the debt instrument or loan be sold on a pro-rata basis. The guaranteed portion of the debt may not be “striped” from the non-guaranteed portion, i.e., sold separately as an instrument fully guaranteed by the Federal government. DOE invites public comment on the 90 percent loan guarantee limitation and the prohibition on “stripping.”

The primary purpose of the Title XVII loan guarantee program is to support projects using or employing “new or significantly improved technologies.” These new technologies, by definition, have not been proven in commercial projects in the United States and therefore may present significant risks for Title XVII loan guarantees. DOE believes that the requirements of Title XVII requirements suggest that a guarantee of up to 90% of the face value of a loan may be required to achieve program goals.

DOE intends to gain valuable experience from the first round of proposals submitted under the Guidelines, where some Pre-Applicants sought loan guarantees for 80% or less of their proposed debt instruments. In developing final regulations, DOE will take into account, among other things, the comments on this proposal, DOE’s experience with the first round of proposals, and whether there are other methods of assuring that Eligible Lenders bear some of the financial risk exist while at the same time assuring that the objectives of the Title XVII program are accomplished. DOE requests public comment on the proposal to allow up to a 90 percent loan guarantee, the technology or circumstance that might warrant providing this level of guarantee, whether DOE will perform adequate due diligence in the absence of assuming some amount of risk, the applicability of practices employed by other Federal agencies to DOE’s loan guarantee program, and whether DOE’s proposal will facilitate the goal of offering loan guarantees to encourage early commercial use of innovative technologies.

DOE also will consider whether Project Sponsors have a significant financial commitment to the project. The Act does not mandate a specific equity contribution, but DOE is proposing to require that the Project Sponsors have a significant equity stake in a project. DOE solicits comments on the merits of adopting a minimum equity percentage requirement for projects.

In addition, DOE intends to consider whether a Project Sponsor will rely upon other government assistance (e.g., grants, tax credits, other loan guarantees) to support financing, construction or operation. DOE will manage the loan guarantee program in a manner that seeks to minimize support of projects that rely on multiple forms of significant Federal financial assistance; in general, DOE believes it is desirable that each project receive only one form of such assistance. Therefore, if an applicant is or will be receiving multiple forms of significant Federal financial assistance, that fact generally will be a negative factor when DOE evaluates loan guarantee applications. Nonetheless, the receipt of other forms of assistance will not disqualify a project from being eligible for a DOE loan guarantee, and DOE furthermore recognizes that in some situations—such as, for example, with respect to the first new nuclear generating facilities, which may be eligible for risk insurance agreements, loan guarantees and tax credits—multiple forms of federal assistance to the same project could advance important national energy policy priorities.

Finally, DOE is proposing to require with submission of Applications, a credit assessment for the project without a loan guarantee from a nationally recognized rating agency, where the size and estimated cost of the project justify such an assessment. Additionally, DOE is proposing to require not later than 30 days prior to closing, that Applicants provide a credit rating from a nationally recognized rating agency reflecting the Final Term Sheet for the project without a Federal guarantee. The Department requests comment as to whether it should establish a project size (dollar) threshold below which the Department would have authority to waive this credit rating requirement.
G. Eligible Lenders

In further support of DOE's objective to ensure full repayment of debt, consistent with section 20320(b)(2) of the CR, participating Eligible Lenders or other servicers must meet certain eligibility, monitoring, and performance requirements. These requirements, set forth in sections 609.2 and 609.11 of the proposed regulations, are intended to ensure that the Eligible Lender or other servicer has the financial wherewithal and appropriate experience and expertise to meet its fiduciary obligations in connection with the debt guaranteed by DOE. As provided in proposed section 609.11, Eligible Lenders or other servicers must exercise a high level of care and diligence in the review and evaluation of a project, and in enforcing the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement, and related documents, throughout the term of the Guaranteed Obligation. Moreover, as provided in proposed section 609.11, DOE also expects each Eligible Lender or other servicer to diligently perform its duties in the servicing and collection of the loan or other debt obligation as well as in ensuring that the collateral package securing the loan remains uncompromised. Proposed section 609.11 requires the Eligible Lender or other servicer to provide to DOE regular, periodic financial reports on the status and condition of the loan or other debt obligation, consistent with the terms of the Loan Guarantee Agreement. The Eligible Lender or other servicer is required to notify DOE promptly if it becomes aware of any problems or irregularities concerning the project or the ability of the Borrower to make payment on the loan or other debt obligations.

H. FCRA

The Federal Credit Reform Act of 1990 (FCRA) provides that for any federal credit program, new direct loans and loan guarantees may not be made unless authority has been provided in appropriations Acts(s). See 2 U.S.C. 661c(b). Title XVII only authorizes future appropriations action. The Department does not understand section 1702(b) of the Act as constituting either budget authority or other authority to make any individual loan guarantee, as is required by FCRA. Thus, the Department reads the Act and FCRA in harmony, which means that while Title XVII authorizes DOE to carry out the loan guarantee program, the Department may not issue guarantees until it receives new budget authority or is otherwise provided authority to make guarantees in an appropriations Act. While DOE notes that the Government Accountability Office has expressed disagreement with this interpretation, the Department intends to follow its own interpretation of Title XVII and FCRA in carrying out this program.

On February 15, 2007, President Bush signed the CR into law. The CR provides DOE with the necessary authority, consistent with FCRA and Title XVII section 1702, to guarantee, in the aggregate, up to $4 billion in loans for Title XVII projects. The authority to issue guarantees, however, was limited to Borrowers who pay the applicable Credit Subsidy Costs.

I. Default and Audit Provisions

Title XVII, sections 1702(g) and 1702(i), specifically require that DOE promulgate regulations to address default and audit requirements. (42 U.S.C. 16512(g), (i)) Sections 609.15 and 609.17, respectively, address these requirements. These provisions will apply to all loan guarantees issued under the Title XVII program, including those in response to the August 2006 Solicitation.

J. Tax Exempt Debt

Section 103(a) of the Internal Revenue Code (IRC), 26 U.S.C. 103(a), provides that “gross income” does not include interest on any state or local bond, with certain exceptions. Section 149(b) of the IRC, 26 U.S.C. 149(b), however, provides that the section 103(a) exclusion from gross income “shall not apply to a state or local bond if such bond is federally guaranteed.” Section 149(b) in effect converts tax exempt debt to taxable debt when such debt is guaranteed by the Federal government. Accordingly, section 609.10 of today’s proposed regulations prohibits DOE from directly or indirectly guaranteeing tax exempt obligations.

K. Full Faith and Credit

Section 609.14 of the proposed regulations provides that the full faith and credit of the United States is pledged to the payment of all Guaranteed Obligations. It further provides that the guarantee shall be conclusive evidence that it has been properly obtained, that the underlying loan qualified for the guarantee, and that but for fraud or material misrepresentation by the Holder, is presumed to be valid, legal and enforceable. Section 609.14 is consistent with the model provision set forth in OMB Circular A–94, “Policies for Federal Credit Programs and Non-Tax Receivables,” as well as similar provisions in the regulations governing a number of other federal credit programs. The Department maintains a strong interest in ensuring that the debt incurred in order to finance innovative projects eligible for Title XVII loan guarantees can be financed and sold in secondary markets and requests comment on whether the language of section 609.14 needs to be modified in order to accomplish this goal, while at the same time ensuring that the Federal Government is not exposed to undue financial risk because of fraud or misrepresentation.

III. Public Comment Procedures

A. Written Comments

Interested persons are invited to participate in this proceeding by submitting data, views, and arguments. Written comments should be submitted to the addresses, and in the form, indicated in the ADDRESSES section of this Notice of Proposed Rulemaking. To help DOE review the comments, interested persons are asked to refer to specific proposed rule provisions, whenever possible.

If you submit information that you believe to be exempt by law from public disclosure, you should submit one complete copy, as well as one copy from which the information claimed to be exempt by law from public disclosure has been deleted. DOE is responsible for the final determination with regard to disclosure or nondisclosure of the information and for treating it in accordance with the DOE’s Freedom of Information regulations (10 CFR 1004.11). It is DOE’s intention to honor requests for nondisclosure of information by an Applicant or Project Sponsor to the extent permitted under applicable laws.

B. Public Meeting

A public meeting will be held at the time, date, and place indicated in the DATES and ADDRESSES sections of this Notice of Proposed Rulemaking. Any person or representative of a group or class of persons who has an interest in this proposed rule may request an opportunity to make an oral presentation. A person wishing to speak must submit his or her request to make an oral presentation to the person and in the manner specified in the DATES section of this notice by 4:30 p.m. on the date specified for making such requests. The person should provide a daytime phone number where he or she can be reached. Each oral presentation will be limited to 20 minutes, unless the presiding official determines that the number of persons wishing to speak
warrants a different amount of time. Persons making oral presentations are requested to bring 3 copies of their prepared statement to the meeting and submit them to the registration desk. DOE reserves the right to select the persons who will speak. DOE also reserves the right to schedule speakers’ presentations and to establish the procedures for conducting the meeting. A DOE official will be designated to preside at the meeting. The meeting will not be a judicial or evidentiary-type hearing, but will be conducted in accordance with 42 U.S.C. 7191. Any further procedural rules for the conduct of the meeting will be announced by the presiding official.

A transcript of the meeting will be made, and the entire record of this rulemaking will be retained by DOE and made available as provided in the ADDRESSES section of this Notice of Proposed Rulemaking.

IV. Regulatory Review

A. Executive Order 12866

Today’s proposed rule has been determined to be a significant regulatory action under Executive Order 12866, “Regulatory Planning and Review,” 58 FR 51735 (October 4, 1993). Accordingly, this action was subject to review under that Executive Order by the Office of Information and Regulatory Affairs at OMB.

B. National Environmental Policy Act

Through the issuance of this proposed rule, DOE is making no decision relative to the approval of a loan guarantee for a particular proposed project. DOE has, therefore, determined that publication of the proposed rule is covered under the Categorical Exclusion found at paragraph A.6 of Appendix A to Subpart D, 10 CFR Part 1021, which applies to the establishment of procedural rulemakings. Accordingly, neither an environmental assessment nor an environmental impact statement is required at this time. However, appropriate NEPA project review will be conducted prior to execution of a Loan Guarantee Agreement.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking,” 67 FR 53461 (August 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of General Counsel’s Web site: http://www.gc.doe.gov.

DOE is not obliged to prepare a regulatory flexibility analysis for this rulemaking because there is no requirement to publish a general notice of proposed rulemaking for loan guarantee rules under the Administrative Procedure Act (5 U.S.C. 553).

D. Paperwork Reduction Act

Proposed sections 609.4 and 609.6 provide that Pre-Applications and Applications for loan guarantees submitted to DOE in response to a solicitation must contain certain information. This information will be used by DOE to determine if a project sponsor who submits a Pre-Application will be invited to submit an Application for a loan guarantee; to determine if a project is eligible for a loan guarantee; and to evaluate Applications under criteria specified in the proposed rule. Proposed § 609.17 provides that borrowers must submit to DOE annual project performance reports and audited financial statements along with other information. DOE will use this information to evaluate the progress of projects for which loan guarantees are issued. DOE has submitted this collection of information to the Office of Management and Budget for approval pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) and the procedures implementing that Act, 5 CFR 1320.1 et seq.

DOE estimates that the annual reporting and recordkeeping burden for this collection of information will be 13,000 hours per year at a total annual cost of $1,750,000. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a federal agency. An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Interested persons are invited to submit comments to OMB addressed to: Department of Energy Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503. Persons submitting comments to OMB also are requested to send a copy to the DOE contact person at the address given in the ADDRESSES section of this notice. OMB is particularly interested in comments on: (1) The necessity of the proposed information collection requirements, including whether the information will have practical utility; (2) the accuracy of DOE’s estimates of the burden; (3) ways to enhance the quality, utility, and clarity of the information to be maintained; and (4) ways to minimize the burden of the requirements on respondents.

E. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (Act) (2 U.S.C. 1531 et seq.) requires each federal agency, to the extent permitted by law, to prepare a written assessment of the effects of any federal mandate in an agency rule that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. The Act also requires a federal agency to develop an effective process to permit timely input by elected officials of state, tribal, or local governments on a proposed “significant intergovernmental mandate,” and requires an agency plan for giving notice and opportunity to provide timely input to potentially affected small governments before establishing any requirements that might significantly or uniquely affect small governments.

The term “federal mandate” is defined in the Act to mean a federal intergovernmental mandate or a federal private sector mandate (2 U.S.C. 658(6)). Although the rule will impose certain requirements on non-federal governmental and private sector applicants for loan guarantees, the Act’s definitions of the terms “federal intergovernmental mandate” and “federal private sector mandate” exclude, among other things, any provision in legislation, statute, or regulation that is a condition of federal assistance or a duty arising from participation in a voluntary program (2 U.S.C. 658(5) and (7), respectively).

Today’s rule establishes requirements that persons voluntarily seeking loan guarantees for projects that would use certain new and improved energy technologies must satisfy as a condition of a federal loan guarantee. Thus, the rule falls under the exceptions in the definitions of “federal intergovernmental mandate” and “federal private sector mandate” for requirements that are a condition of federal assistance or a duty arising from...
participation in a voluntary program. The Act does not apply to this
rulemaking.

F. Treasury and General Government
Appropriations Act, 1999

Section 654 of the Treasury and
General Government Appropriations
Act, 1999 (Pub. L. 105-277) requires
Federal agencies to issue a Family
Policymaking Assessment for any
proposed rule that may affect family
well being. The proposed rule would
not have any impact on the autonomy
or integrity of the family as an
institution. Accordingly, DOE has
concluded that it is not necessary to
prepare a Family Policymaking
Assessment.

G. Executive Order 13132

Executive Order 13132, “Federalism,”
64 FR 43255 (August 4, 1999) imposes
certain requirements on agencies
formulating and implementing policies
or regulations that preempt State law or
that have federalism implications.

Agencies are required to examine the
constitutional and statutory authority
supporting any action that would limit
the policymaking discretion of the
States and carefully assess the necessity
for such actions. DOE has examined this
proposed rule and has determined that
it would not preempt State law and
would not have a substantial direct
effect on the States, on the relationship
between the national government and
the States, or on the distribution of
power and responsibilities among the
various levels of government. No further
action is required by Executive Order
13132.

H. Executive Order 12988

With respect to the review of existing
regulations and the promulgation of
new regulations, section 3(a) of
Executive Order 12988, “Civil Justice
Reform,” 61 FR 4729 (February 7, 1996),
imposes on Executive agencies the
general duty to adhere to the following
requirements: (1) Eliminate drafting
errors and ambiguity; (2) write
regulations to minimize litigation; and
(3) provide a clear legal standard for
affected conduct rather than a general
standard and promote simplification
and burden reduction. With regard to
the review required by section 3(a),
section 3(b) of Executive Order 12988
specifically requires that Executive
agencies make every reasonable effort
to ensure that the regulation: (1) Clearly
specifies the preemptive effect, if any;
(2) clearly specifies any effect on
existing Federal law or regulation; (3)
provides a clear legal standard for
affected conduct while promoting
simplification and burden reduction; (4)
specifies the retroactive effect, if any; (5)
adequately defines key terms; and (6)
addresses other important issues
affecting clarity and general
draftsmanship under any guidelines
issued by the Attorney General. Section
3(c) of Executive Order 12988 requires
Executive agencies to review regulations
in light of applicable standards in
section 3(a) and section 3(b) to
determine whether they are met or it is
unreasonable to meet one or more of
them. DOE has completed the required
review and determined that, to the
extent permitted by law, the proposed
rule meets the relevant standards of
Executive Order 12988.

I. Treasury and General Government
Appropriations Act, 2001

The Treasury and General
Government Appropriations Act, 2001
(44 U.S.C. 3516 note) provides for
agencies to review most disseminations
of information to the public under
guidelines established by each agency
pursuant to general guidelines issued by
OMB.

OMB’s guidelines were published at
67 FR 8452 (February 22, 2002), and
DOE’s guidelines were published at 67
FR 62446 (October 7, 2002). DOE has
reviewed today’s proposed rule under
the OMB and DOE guidelines and has
concluded that it is consistent with
applicable policies in those guidelines.

J. Executive Order 13211

Executive Order 13211, “Actions
Concerning Regulations That
Significantly Affect Energy Supply,
Distribution, or Use,” 66 FR 28355 (May
22, 2001) requires Federal agencies to
prepare and submit to the OMB, a
Statement of Energy Effects for any
proposed significant energy action. A
“significant energy action” is defined as
any action by an agency that
promulgated or is expected to lead to
promulgation of a final rule, and that:
(1) Is a significant regulatory action
under Executive Order 12866, or any
successor order; and (2) is likely to have
a significant adverse effect on the
supply, distribution, or use of energy, or
(3) is designated by the Administrator of
OIRA as a significant energy action. For
any proposed significant energy action,
the agency must give a detailed
statement of any adverse effects on
energy supply, distribution, or use.
Today’s regulatory action would not
have a significant adverse effect on the
supply, distribution, or use of energy
and is therefore not a significant energy
action. Accordingly, DOE has not
prepared a Statement of Energy Effects.

List of Subjects in 10 CFR Part 609

Administrative practice and
procedure, Energy, Loan programs, and
Reporting and recordkeeping
requirements.

Issued in Washington, DC, on May 10,
2007.

James T. Campbell,
Acting Chief Financial Officer.

For the reasons stated in the
Preamble, DOE proposes to amend
chapter II of title 10 of the Code of
Federal Regulations by adding a new
part 609 as set forth below.

PART 609—LOAN GUARANTEES FOR
PROJECTS THAT EMPLOY
INNOVATIVE TECHNOLOGIES

Sec.

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§ 609.1 Purpose and Scope.

(a) This part sets forth the policies and
procedures that DOE uses for
receiving, evaluating, and, after
consultation with the Department of the
Treasury, approving applications for
loan guarantees to support Eligible
Projects under Title XVII of the Energy

(b) Except as set forth in paragraph (c)
of this section, this part applies to all
Pre-Applications, Applications,
Conditional Commitments and Loan
Guarantee Agreements to support
Eligible Projects under Title XVII of the

(c) This part shall not apply to any
Pre-Applications, Applications,
Conditional Commitments or Loan
Obligations of a Borrower to Eligible Lender or other Holder, pursuant to the Loan Guarantee Agreement. 

Contracting Officer means the Secretary of Energy or a DOE official authorized by the Secretary to enter into, administer and/or terminate contracts on behalf of DOE. 

Credit Subsidy Cost has the same meaning as "cost of a loan guarantee" in section 502(5)(C) of the Federal Credit Reform Act of 1990 (2 U.S.C. 661a(5)(C)), which is the net present value, at the time the Loan Guarantee Agreement is executed, of the following estimated cash flow:

(1) Payments to the Government to cover defaults and delinquencies, interest subsidies, or other payments; less
(2) Payments to the Government including origination and other fees, penalties, and recoveries; including the effects of changes in loan or debt terms resulting from the exercise by the Borrower, Eligible Lender or other Holder of an option included in the Loan Guarantee Agreement Fees paid to DOE pursuant to Section 1702(h) to cover the applicable administrative expenses for the loan guarantee are excluded from the calculation.

DOE means the United States Department of Energy.

Eligible Lender means:
(1) Any person or legal entity formed for the purpose of, or engaged in the business of, lending money, including, but not limited to, commercial banks, savings and loan institutions, insurance companies, factoring companies, venture capital investment companies, trusts, or other entities designated as trustees or agents acting on behalf of bondholders or other lenders; and
(2) Any person or legal entity that meets the requirements of § 609.11 of this part, as determined by DOE.

Eligible Project means a project located in the United States that employs a New or Significantly Improved Technology that is not a commercial technology, and that meets all applicable requirements of section 1703 of the Act (42 U.S.C. 16513), the applicable solicitation and this part.

Guaranteed Obligation means any loan or other debt obligation of the Borrower for an Eligible Project for which DOE guarantees any part of the payment of principal and interest under a Loan Guarantee Agreement entered into pursuant to the Act.

Holder means any person or legal entity that owns a Guaranteed Obligation or has lawfully succeeded in due course to all or part of the rights, title, and interest in a Guaranteed Obligation, including any nominee or trustee empowered to act for the Holder.

Loan Agreement means a written agreement between a Borrower and an Eligible Lender or other Holder containing the terms and conditions under which the Eligible Lender or other Holder will make loans to the Borrower to start and complete an Eligible Project.

Loan Guarantee Agreement means a written agreement that, when entered into by DOE and a Borrower, an Eligible Lender or other Holder, pursuant to the Act, establishes the obligation of DOE to guarantee the payment of principal and interest on specified Guaranteed Obligations of a Borrower to Eligible Lenders or other Holders subject to the terms and conditions specified in the Loan Guarantee Agreement.

New or Significantly Improved Technology means a technology concerned with the production, consumption or transportation of energy, and that has either only recently been discovered or learned, or that involves or constitutes one or more meaningful and important improvements in the productivity or value of the technology.

Pre-Application means a written submission in response to a DOE solicitation that broadly describes the project proposal, including the proposed role of a DOE loan guarantee in the project, and the eligibility of the project to receive a loan guarantee under the Act and this part.

Project Costs means all those costs, including escalation and contingencies, that are to be expended or accrued by
Borrower and are necessary, reasonable, customary and directly related to the design, engineering, financing, construction, startup, commissioning and shakedown of an Eligible Project, as specified in § 609.12 of this part. Project costs do not include costs for the items set forth in § 609.12(c) of this part.

Project Sponsor means any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company or other business entity that assumes substantial responsibility for the development, financing, and structuring of a project eligible for a loan guarantee and, if not the Applicant, owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the proposed Eligible Project, or the Applicant.

Secretary means the Secretary of Energy or a duly authorized designee or successor in interest.

Term Sheet means an offering document issued by DOE that specifies the general terms and conditions under which DOE anticipates that it may guarantee payment of principal and accrued interest on specified loans or other debt obligations of a Borrower in connection with an Eligible Project. A Term Sheet or Loan Guarantee Agreement and imposes no obligation on the Secretary to execute a Loan Guarantee Agreement.

United States means the several states, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa or any territory or possession of the United States of America.

§ 609.3 Solicitations.

(a) DOE may issue solicitations to invite the submission of Pre-Applications or Applications for loan guarantees for Eligible Projects. DOE must issue a solicitation before proceeding with other steps in the loan guarantee process including issuance of a loan guarantee.

(b) Each solicitation must include, at a minimum, the following information:

(1) The dollar amount of loan guarantee authority potentially being made available by DOE in that solicitation;

(2) The place and time for response submission;

(3) The name and address of the DOE representative whom a potential Project Sponsor may contact to receive further information and a copy of the solicitation;

(4) The form, format, and page limits applicable to the response submission;

(5) The amount of the application fee (First Fee), if any, that will be required;

(6) The programmatic, technical, financial and other factors the Secretary will use to evaluate response submissions, and the relative weightings that DOE will use when evaluating those factors; and

(7) Such other information as DOE may deem appropriate.

§ 609.4 Submission of Pre-Applications.

In response to a solicitation requesting the submission of Pre-Applications, either Project Sponsors or Applicants may submit Pre-Applications to DOE. Pre-Applications must meet all requirements specified in the solicitation and this part. Only one Pre-Application may be submitted per project. At a minimum, each Pre-Application must contain all of the following:

(a) A cover page signed by an individual with full authority to bind the Project Sponsor or Applicant that attests to the accuracy of the information in the Pre-Application, and that binds the Project Sponsor(s) or Applicant to the commitments made in the Pre-Application;

(b) An executive summary briefly encapsulating the key project features and attributes of the proposed project;

(c) A business plan which includes an overview of the proposed project, including:

(1) A description of the Project Sponsor, including all entities involved, and its experience in project investment, development, construction, operation and maintenance;

(2) A description of the new or significantly improved technology to be employed in the project, including:

(i) A report detailing its successes and failures during the pilot and demonstration phases;

(ii) The technology’s commercial applications;

(iii) The significance of the technology to energy use or emission control;

(iv) How and why the technology is “new” or “significantly improved” compared to technology already in general use in the commercial marketplace in the United States;

(v) The owners or controllers of the intellectual property incorporated in and utilized by such technologies; and

(vi) The manufacturer(s) and licensee(s), if any, authorized to make the technology available in the United States, the potential for replication of commercial use of the technology in the United States, and whether and how the technology is or will be made available in the United States for further commercial use.

(3) The estimated amount, in reasonable detail, of the total Project Costs;

(4) The timeframe required for construction and commissioning of the project; and

(5) A description of any primary off-take or other revenue-generating agreements that will provide the primary sources of revenues for the project, including repayment of the debt obligations for which loan a guarantee is sought.

(d) A financing plan overview describing:

(1) The amount of equity to be invested and the sources of such equity;

(2) The amount of the total debt obligations to be incurred and the funding sources of all such debt;

(3) The amount of the Guaranteed Obligation as a percentage of total project debt and as a percentage of that total project cost; and

(4) A financial model detailing the investments in and the cash flows generated and anticipated from the project over the project’s expected life-cycle, including a complete explanation of the facts, assumptions, and methodologies in the financial model.

(e) An explanation of what estimated impact the loan guarantee will have on the interest rate, debt term, and overall financial structure of the project;

(f) A copy of a commitment letter from an Eligible Lender or other Holder expressing its commitment to provide the required debt financing necessary to construct and fully commission the project;

(g) A copy of the equity commitment letter(s) from each of the Project Sponsors and a description of the sources for such equity;

(h) An overview of how the project complies with the eligibility requirements in section 1703 of the Act (42 U.S.C. 16513);

(i) An outline of the potential environmental impacts of the project and how these impacts will be mitigated;

(j) A description of the anticipated air pollution and/or anthropogenic greenhouse gas reduction benefits and how these benefits will be measured and validated;

(k) A list of all of the requirements contained in this part and the solicitation and where in the Pre-Application these requirements are addressed; and

(l) A commitment to pay the Application fee (First Fee), if invited to submit an Application.

§ 609.5 Evaluation of Pre-Applications.

(a) Where Pre-Applications are requested in a solicitation, DOE will
conduct an initial review of the Pre-
Application to determine whether:
(1) The proposal is for an Eligible
Project;
(2) The submission contains the
information required by § 609.4 of this
part; and
(3) The submission meets all other
requirements of the applicable
solicitation.

(b) If a Pre-Application fails to meet
the requirements of paragraph (a) of this
section, DOE may deem it non-
responsive and eliminate it from further
review. DOE will notify any Project
Sponsor whose Pre-Application has
been eliminated from further review
under this subsection.

(c) If DOE deems a Pre-Application
responsive, DOE will evaluate the
commercial viability of the proposed
project, the technology to be employed
in the project, relevant experience of the
principal(s) and the financial capability
of the Project Sponsor (including
personal and/or business credit
information of the principal(s)) to
determine if there is sufficient
information in the Pre-Application to
assess the technical and commercial
viability of the proposed project and/or
the financial capability of the Project
Sponsor and to assess other aspects of
the Pre-Application. DOE may ask for
additional information from the Project
Sponsor during the review process and
may request one or more meetings with
the Project Sponsor.

(d) After reviewing a Pre-Application
and other information acquired under
paragraph (c) of this section, DOE may
provide a written response to the Project
Sponsor or Applicant either inviting the
Applicant to submit an Application for
a loan guarantee and specifying the
amount of the Application filing fee or
advising the Project Sponsor that the
project proposal will not receive further
consideration. Neither the Pre-
Application nor any written or other
feedback that DOE may provide in
response to the Pre-Application
eliminates the requirement for an
Application.

(e) If no response by DOE to, or
communication by DOE with, a Project
Sponsor, or an Applicant submitting a
Pre-Application or subsequent
Application shall impose any obligation
on DOE to issue a loan guarantee for a
project.

§ 609.6 Submission of Applications.

(a) In response to a solicitation or
written invitation to submit an
Application, an Applicant submitting an
Application must meet all requirements
and provide all information specified in
the solicitation and/or invitation and
this part. There may be only one
Applicant per project.

(b) An Application must include, at
a minimum, the following information
and materials:

(1) A completed Application form
signed by an individual with full
authority to bind the Applicant and the
Project Sponsors;

(2) Payment of the Application filing
fee (First Fee) for the Pre-Application, if
any, and Application phase;

(3) A detailed description of all
material amendments, modifications,
and additions made to the information
and documentation provided in the Pre-
Application, if a Pre-Application was
requested in the solicitation, including
any changes in the proposed project’s
financing structure or terms;

(4) A description of how and to what
measurable extent the project avoids,
reduces, or sequesters air pollutants
and/or anthropogenic emissions of
greenhouse gases, including how to
measure and verify those benefits;

(5) A description of the nature and
scope of the proposed project,
including:

(i) Key milestones;
(ii) Location of the project;
(iii) Identification and commercial
feasibility of the new or significantly
improved technology(ies) to be
employed in the project;

(iv) How the Applicant intends to
employ such technology(ies) in the
project; and

(v) How the Applicant intends to
assure the further commercial
availability of the technology(ies) in the
United States.

(6) A detailed explanation of how the
proposed project qualifies as an Eligible
Project;

(7) A detailed estimate of the
estimated total Project Costs together
with a description of the methodology
and assumptions used;

(8) A detailed description of the
engineering and design contractor(s),
construction contractor(s), equipment
supplier(s), and construction schedules
for the project, including major activity
and cost milestones as well as the
performance guarantees, performance
bonds, liquidated damages provisions,
and equipment warranties to be
provided;

(9) A detailed description of the
operations and maintenance provider(s),
the plant operating plan, estimated
staffing requirements, parts inventory,
major maintenance schedule, estimated
annual downtime, and performance
 guarantees and related liquidated
damage provisions, if any;

(10) A description of the management
plan of operations to be employed in
carrying out the project, and
information concerning the management
experience of each officer or key person
associated with the project;

(11) A detailed description of the
project decommissioning,
deconstruction, and disposal plan, and
the anticipated costs associated
therewith;

(12) An analysis of the market for any
product to be produced by the project,
including relevant economics justifying
the analysis, and copies of any
contractual agreements for the sale of
these products or assurance of the
revenues to be generated from sale of
these products;

(13) A detailed description of the
overall financial plan for the proposed
project, including all sources and uses
of funding, equity, and debt, and the
liability of parties associated with the
project over the term of the Loan
Guarantee Agreement;

(14) A copy of all material
agreements, whether entered into or
proposed, relevant to the investment,
design, engineering, financing,
construction, startup commissioning,
shakedown, operations and
maintenance of the project;

(15) A copy of the financial closing
checklist for the equity and debt;

(16) Applicant’s business plan on
which the project is based and
Applicant’s financial model presenting
project pro forma statements for the
proposed term of the Guaranteed
Obligations including income
statements, balance sheets, and cash
flows. All such information and data
must include assumptions made in their
preparation and the range of revenue,
operating cost, and credit assumptions
considered;

(17) Financial statements for the past
three years, or less if the Applicant has
been in operation less than three years,
that have been audited by an
independent certified public
accountant, including all associated
notes, as well as interim financial
statements and notes for the current
fiscal year, of Applicant and parties
providing Applicant’s financial backing,

(18) A copy of all legal opinions,
and other material reports, analyses, and
reviews related to the project;

(19) An independent engineering
report prepared by an engineer with
experience in the industrial
familiarity with similar projects. The
report should address: The project’s
siting and engineering and design, contractual requirements, environmental compliance, testing and commissioning and operations and maintenance.

(20) Credit history of the Applicant and, if appropriate, any party who owns or controls, by itself and/or through individuals in common or affiliated business entities, a five percent or greater interest in the project or the Applicant:

(21) A credit assessment, for the project without a loan guarantee from a nationally recognized rating agency, where the size and estimated cost of the project justify such an assessment;

(22) A list showing the status of and estimated completion date of Applicant’s required project-related applications or approvals for Federal, state, and local permits and authorizations to site, construct, and operate the project;

(23) A report containing an analysis of the potential environmental impacts of the project that will enable DOE to assess whether the project will comply with all applicable environmental requirements, and that will enable DOE to undertake and complete any necessary reviews under the National Environmental Policy Act of 1969;

(24) A listing and description of assets associated, or to be associated, with the project and any other asset that will serve as collateral for the Guarantee Obligations, including appropriate data as to the value of the assets and the useful life of any physical assets. With respect to real property assets listed, an appraisal that is consistent with the “Uniform Standards of Professional Appraisal Practice,” promulgated by the Appraisal Standards Board of the Appraisal Foundation, and performed by licensed or certified appraisers, is required;

(25) An analysis demonstrating that, at the time of the Application, there is a reasonable prospect that Borrower will be able to repay the Guarantee Obligations (including interest) according to their terms, and a complete description of the operational and financial assumptions and methodologies on which this demonstration is based;

(26) Written affirmation from an officer of the Eligible Lender or other Holder confirming that it is in good standing with DOE’s and other Federal agencies’ loan guarantee programs;

(27) A list of all of the requirements contained in this part and the solicitation and where in the Application these requirements are addressed;

(28) A statement from the Applicant that it believes that there is “reasonable prospect” that the Guaranteed Obligations will be fully paid from project revenue; and

(29) Any other information requested in the invitation to submit an Application or requests from DOE in order to clarify an Application;

(c) DOE will not consider any Application complete unless the Applicant has paid the First Fee and the Application is signed by the appropriate entity or entities with the authority to bind the Applicant to the commitments and representations made in the Application.


(a) In reviewing completed Applications, and in prioritizing and selecting those to whom a Term Sheet should be offered, DOE will apply the criteria set forth in the Act, the applicable solicitation, and this part. Concurrent with its review process, DOE will consult with the Secretary of the Treasury regarding the terms and conditions of the potential loan guarantee. Applications will be denied if:

(1) The project will be built or operated outside the United States;

(2) The project does not avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases;

(3) The project is not ready to be employed commercially in the United States, cannot be replicated, cannot yield a commercially viable product or service in the use proposed in the project, does not have the potential to be employed in other commercial projects in the United States, and is not or will not be available for further commercial use in the United States;

(4) The entity or person issuing the loan or other debt obligations subject to the loan guarantee is not an Eligible Lender or other Holder, as defined in Section 609.11 of this part;

(5) The project is for demonstration, research, or development; or

(6) The applicant will not provide a significant equity contribution.

(b) In evaluating Applications, DOE will consider the following factors:

(1) To what measurable extent the project avoids, reduces, or sequesters air pollutants or anthropogenic emissions of greenhouses gases;

(2) To what extent the new or significantly improved technology used in the project constitutes an important improvement in technology used to avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases, and the Applicant has a plan to advance, or assist in the advancement, of that technology into the commercial marketplace;

(3) To the extent that the new or significantly improved technology used in the project constitutes an important improvement in technology used to avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases, and the Applicant has a plan to advance, or assist in the advancement, of that technology into the commercial marketplace;

(4) The extent to which the requested amount of the loan guarantee, and requested amount of Guaranteed Obligations are reasonable relative to the nature and scope of the project;

(5) The total amount and nature of the Eligible Project Costs and the extent to which Project Costs are funded by Guaranteed Obligations;

(6) The likelihood that the project will be ready for full commercial operations in the timeframe stated in the Applications;

(7) The amount of equity commitment to the project by the Applicant and other principals involved in the project;

(8) Whether there is sufficient evidence that Applicant will diligently pursue the project, including initiating and completing the project in a timely manner;

(9) Whether and to what extent the Applicant will rely upon other Federal and non-Federal governmental assistance such as grants, tax credits, or other loan guarantees to support the financing, construction, and operation of the project and how such assistance will impact the project;

(10) The feasibility of the project and likelihood that the project will produce significant revenues to service the project’s debt obligations subject to the loan guarantee over the life of the loan guarantee and ensure timely repayment of Guaranteed Obligations;

(11) The levels of safeguards provided to the Federal government in the event of default through collateral, warranties, and other assurance of repayment described in the Application;

(12) The Applicant’s capacity and expertise to successfully operate the project, based on factors such as financial soundness, management organization, and the nature and extent of corporate and personal experience;

(13) The ability of the applicant to ensure that the project will comply with all applicable laws and regulations, including all applicable environmental statutes and regulations;
§ 609.8 Term Sheets and Conditional Commitments.

(a) DOE may determine, after review and evaluation of the Application, additional information requested and received by DOE, and information obtained as the result of meeting with the Applicant and the Eligible Lender or other Holder, that it would be appropriate to offer detailed terms and conditions that must be met, including terms and conditions that must be met by the Applicant and the Eligible Lender or other Holder before DOE may enter into a Loan Guarantee Agreement.

(b) The terms and conditions required by DOE will be expressed in a written Term Sheet signed by a Contracting Officer and addressed to the Applicant and the Eligible Lender or other Holder. The Term Sheet will request that the project sponsor and the Eligible Lender or other Holder express agreement with the terms and conditions contained in the Term Sheet by signing the Term Sheet in the designated place. Each person signing the Term Sheet must be a duly authorized official or officer of the Applicant and Eligible Lender or other Holder. The Term Sheet will include an expiration date on which the terms offered will expire unless the Contracting Officer agrees in writing to extend the expiration date.

(c) The Applicant and/or the Eligible Lender may respond to the Term Sheet offer in writing or may request discussions or meetings on the terms and conditions contained in the Term Sheet, including requests for clarifications or revisions. When DOE, the Applicant and the Eligible Lender or other Holder agree on all of the final terms and conditions and all parties sign the Term Sheet, the Term Sheet becomes a Conditional Commitment. When and if all of the terms and conditions specified in the Conditional Commitment have been met, DOE and the Applicant may enter into a Loan Guarantee Agreement, but neither party is legally obligated to do so.

(d) The Applicant is required to pay fees to DOE to cover the Administrative Cost of Issuing a Loan Guarantee for the period of the Term Sheet through the closing of the Loan Guarantee Agreement (Second Fee).

§ 609.9 Closing On the Loan Guarantee Agreement.

(a) Subsequent to entering into a Conditional Commitment with an Applicant, DOE will set a closing date for the Loan Guarantee Agreement.

(b) By the closing date, the Applicant and the Eligible Lender or other Holder must have satisfied all of the detailed terms and conditions contained in the Conditional Commitment and other related documents and any other contractual, statutory, regulatory or other requirements have been met. If the Applicant and the Eligible Lender or other Holder has not satisfied all such terms and conditions by the closing date, the Secretary may, in his sole discretion, set a new closing date or terminate the Conditional Commitment.

(c) In order to enter into a Loan Guarantee Agreement at closing:

(1) DOE must have received authority in an appropriations act for the loan guarantee; and

(2) All other applicable statutory, regulatory, or other requirements must be fulfilled.

(d) Prior to, or on, the closing date, DOE will ensure that:

(1) Pursuant to section 1702(b) of the Act, DOE has received payment of the Credit Subsidy Cost of the loan guarantee as defined in § 609.2 of this part from either (but not from a combination) of the following:

(i) A Congressional appropriation of funds; or

(ii) A payment from the Borrower;

(2) Pursuant to section 1702(h) of the Act, DOE has received from the Borrower the First and Second Fees and, if applicable, the Third Fee for the Administrator, the Third Issuing the Loan Guarantee, as specified in the Loan Guarantee Agreement;

(3) OMB has reviewed and approved DOE's calculation of the Credit Subsidy Cost of the loan guarantee;

(4) The Department of the Treasury has been consulted as to the terms and conditions of the Loan Guarantee Agreement;

(5) The Loan Guarantee Agreement and related documents contain all terms and conditions DOE deems reasonable and necessary to protect the interests of the United States; and

(6) All conditions precedent specified in the Conditional Commitment are either satisfied or waived by a Contracting Officer and all other applicable contractual, statutory, and regulatory requirements are satisfied.

(e) Not later than the period approved in writing by the Contracting Officer, which may not be less than 30 days prior to the closing date, the Applicant must provide updated project financing information and a new final Term Sheet must be executed by DOE and the Applicant if the terms and conditions of the financing arrangements changed between execution of the Conditional Commitment and that date (Final Term Sheet).

(f) Not later than 30 days prior to closing, the applicant must provide a credit rating from a nationally recognized rating agency reflecting the Final Term Sheet for the project without a Federal guarantee.

(g) Changes in the terms and conditions of the financing arrangements will affect the credit subsidy cost for the loan guarantee agreement. DOE may postpone the expected closing date pursuant to any changes submitted under paragraph (e) of this section. In addition, DOE may choose to terminate the Conditional Commitment.

§ 609.10 Loan Guarantee Agreement.

(a) Only a Loan Guarantee Agreement executed by a duly authorized DOE Contracting Officer can contractually obligate DOE to guarantee loans or other debt obligations.

(b) DOE is not bound by oral representations made during the Pre-Application, if Pre-Applications were solicited, or Application stage, or during any negotiation process.

(c) Except if explicitly authorized by an Act of Congress, no funds obtained from the Federal Government, or from a loan or other instrument guaranteed by the Federal Government, may be used to pay for Credit Subsidy Costs, administrative fees, or other fees charged by or paid to DOE relating to the Title XVII program or any loan guarantee thereunder.
(d) Prior to the execution by DOE of a Loan Guarantee Agreement, DOE must ensure that the following requirements and conditions, which must be specified in the Loan Guarantee Agreement, are satisfied:

(1) The project qualifies as an Eligible Project under the Act and is not a research, development, or demonstration project or a project that employs commercial technologies that are in “general use” in the United States;

(2) The project will be constructed and operated in the United States, the employment of the new or significantly improved technology in the project has the potential to be replicated in other commercial projects in the United States, and this technology is or is likely to be available in the United States for further commercial application;

(3) The face value of the debt guaranteed by DOE is limited to no more than 80 percent of total Project Costs and the loan guarantee is limited to no more than 90 percent of the total face value of the loan(s) or other debt obligation(s);

(4) The guaranteed portion of a loan, or any portion of the guaranteed portion of a loan, will not be separated from or “striped” from the non-guaranteed portion of the loan, if the loan is participated, syndicated or otherwise resold in the secondary debt market;

(5) The Borrower and other principals involved in the project have made or will make a significant equity investment in the project;

(6) The Borrower is obligated to make full repayment of the principal and interest on the Guaranteed Obligations and other project debt over a period of up to the lesser of 30 years or 90 percent of the projected useful life of the project’s major physical assets, as calculated in accordance with generally accepted accounting principles and practices;

(7) The loan guarantee does not finance, either directly or indirectly, tax-exempt debt obligations;

(8) The amount of the loan guarantee, when combined with other funds committed to the project, will be sufficient to carry out the project, including adequate contingency funds;

(9) There is a reasonable prospect of repayment by Borrower of the principal of and interest on the Guaranteed Obligations and other project debt;

(10) The Borrower has pledged project assets and other collateral or surety, including non-project-related assets, determined by DOE to be necessary to secure the repayment of the Guaranteed Obligations;

(11) The Loan Guarantee Agreement and related documents include detailed terms and conditions necessary and appropriate to protect the interest of the United States in the case of default, including ensuring availability of all the intellectual property rights, technical data including software, and physical assets necessary for any person or entity, including DOE, to complete, operate, convey, and dispose of the defaulted project;

(12) The interest rate on the guaranteed loan is determined by DOE, after consultation with the Treasury Department, to be reasonable, taking into account the range of interest rates prevailing in the private sector for similar obligations of comparable risk guaranteed by the Federal government;

(13) The Guaranteed Obligation is not subordinate to any loan or other debt obligation and is in a first lien position on all assets of the project and all additional collateral pledged as security for the Guaranteed Obligations and other project debt;

(14) There is satisfactory evidence that Borrower and Eligible Lenders are willing, competent, and capable of performing the terms and conditions of the Guaranteed Obligation and other debt obligation and the Loan Guarantee Agreement, and will diligently pursue the project;

(15) The Borrower has made the initial (or total) payment of fees for the Administrative Cost of Issuing a Loan Guarantee for the construction and operational phases of the project (Third Fee), as specified in the Conditional Commitment.

(16) The Eligible Lender, other Holder or servicer has taken and is obligated to continue to take those actions necessary to perfect and maintain liens on assets which are pledged as collateral for the Guaranteed Obligation.

(17) If Borrower is to make payment in full for the Credit Subsidy Cost of the loan guarantee pursuant to section 1702(b)(2) of the Act, such payment must be received by DOE prior to, or at the time of, closing;

(18) DOE or its representatives have access to the project site at all reasonable times in order to monitor the performance of the project;

(19) DOE, the Eligible Lender and Borrower have reached an agreement as to the information that will be made available to DOE and the information that will be made publicly available;

(20) The prospective Borrower has filed applications for or obtained any required regulatory approvals for the project and is in compliance, or promptly will be in compliance, where appropriate, with all Federal, state, and local regulatory requirements;

(21) Borrower has no delinquent Federal debt, including tax liabilities, unless the delinquency has been resolved with the appropriate Federal agency in accordance with the standards of the Debt Collection Improvement Act of 1996.

(22) The Loan Guarantee Agreement contains such other terms and conditions as DOE deems reasonable and necessary to protect the interest of the United States and;

(23) The Lender is an Eligible Lender, as defined in § 609.2 of this part, and meets DOE’s lender eligibility, monitoring and performance criteria in § 609.11 of this part.

(e) The Loan Guarantee Agreement must provide that, in the event of a default by the Borrower:

(1) Interest accrues on the Guaranteed Obligations at the rate stated in the Loan Guarantee Agreement or Loan Agreement until DOE makes full payment of the defaulted Guaranteed Obligations and DOE is not required to pay any premium, default penalties, or prepayment penalties;

(2) Upon payment of the Guaranteed Obligations by DOE, DOE is subrogated to the rights of the Holders of the debt, including all related liens, security, and collateral rights and has superior rights in and to the property acquired from the recipient of the payment as provided in § 609.15 of this part.

(3) The Eligible Lender or other servicer acting on DOE’s behalf is obligated to take those actions necessary to perfect and maintain liens on assets which are pledged as collateral for the Guaranteed Obligations.

(4) The holder of pledged collateral is obligated to take such actions as DOE may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery upon default by Borrower on the Guaranteed Obligations.

(f) The Loan Guarantee Agreement must contain audit provisions which provide, in substance, as follows:

(1) The Eligible Lender or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, must keep such records concerning the project as are necessary to facilitate an effective and accurate audit and performance evaluation of the project as required in section 609.17 of this part.

(2) DOE and the Comptroller General, or their duly authorized representatives, must have access, for the purpose of audit and examination, to any pertinent
books, documents, papers, and records of the Borrower, Eligible Lender or other Holder, or other party servicing the Guaranteed Obligations, as applicable.

Examination of records may be made during the regular business hours of the Borrower, Eligible Lender or other Holder, or other party servicing the Guaranteed Obligations, or at any other time mutually convenient as required in section 609.17 of this part.

(g) The Loan Guarantee Agreement must contain provisions related to the assignment or transfer of Guaranteed Obligations which provide that:

(1) The Eligible Lender must provide written notification to DOE prior to any assignment or transfer of any portion of a Guaranteed Obligation, or any pledge or other use of a Guaranteed Obligation as security, including but not limited to any derivatives transaction.

(2) An Eligible Lender or other Holder may assign or transfer a Guaranteed Obligation covered under the Loan Guarantee Agreement to another Eligible Lender that meets the requirements of §609.11 of this part. Such Eligible Lender to which a Guaranteed Obligation is assigned or transferred, is required to fulfill all servicing, requirements monitoring, and reporting contained in the Loan Guarantee Agreement and these regulations if the transferring Eligible Lender was forming these functions. Any assignment or transfer, however, of the servicing, monitoring, and reporting functions must be approved by DOE.

§609.11 Lender Eligibility, Monitoring and Performance Requirements.

(a) An Eligible Lender shall meet the following requirements:

(1) Be a “qualified institutional buyer,” as defined in 17 CFR 230.144A(a), including a qualified retirement plan, or governmental plan;

(2) Not be debarred or suspended from participation in a Federal government contract (under 48 CFR part 9.4) or participation in a non-procurement activity (under a set of uniform regulations implemented for numerous agencies, such as DOE, at 2 CFR Part 180);

(3) Not be delinquent on any Federal debt or loan;

(4) Be legally authorized to enter into loan guarantee transactions authorized by the Act and these regulations and is in good standing with DOE and other Federal agency loan guarantee programs;

(5) Be able to demonstrate, or has access to, experience in originating and servicing loans for commercial projects similar in size and scope to the project under consideration; and

(6) Be able to demonstrate experience or capability as the lead lender or underwriter by presenting evidence of its participation in other energy-related projects.

(b) When performing its duties to review and evaluate a proposed Eligible Project prior to the submission of a Pre-Application or Application, as appropriate, by the Project Sponsor through the execution of a Loan Guarantee Agreement, and subsequently when performing the loan servicing duties during the term of the Loan Guarantee Agreement, the Eligible Lender or other servicer shall exercise the level of care and diligence that a reasonable and prudent lender would exercise when reviewing, evaluating, disbursing and servicing a loan made by it without a Federal guarantee, including:

(1) During the construction period, enforcing all of the conditions precedent to all loan disbursements, as provided in the Loan Guarantee Agreement, Loan Agreement and related documents;

(2) During the operational phase, monitoring and servicing the Debt Obligations and collection of the outstanding principal and accrued interest as well as ensuring that the collateral package securing the Guaranteed Obligations remains uncompromised; and

(3) As specified by DOE, providing annual or more frequent financial and other reports on the status and condition of the Guaranteed Obligations and the Eligible Project, and promptly notifying DOE if it becomes aware of any problems or irregularities concerning the Eligible Project or the ability of the Borrower to make payment on the Guaranteed Obligations or other debt obligations.

(c) Even though DOE may rely on the Eligible Lender or other servicer to service and monitor the Guaranteed Obligation, DOE will also conduct its own monitoring and review of the Eligible Project.

§609.12 Project Costs.

(a) Before entering into a Loan Guarantee Agreement, DOE shall determine the estimated Project Costs for the project that is the subject of the agreement. To assist the Department in making that determination, the Applicant must estimate, calculate and record all such costs incurred in the design, engineering, financing, construction, startup, commissioning and shakedown of the project in accordance with generally accepted accounting principles and practices. Among other things, the Applicant must calculate the sum of necessary, reasonable and customary costs that it has paid and expects to pay, which are directly related to the project, including costs for escalation and contingencies, to estimate the total Project Costs.

(b) Project Costs include, but are not limited to:

(1) Costs of acquisition, lease, or rental of real property, including engineering fees, surveys, title insurance, recording fees, and legal fees incurred in connection with land acquisition, lease or rental, site improvements, site restoration, access roads, and fencing;

(2) Costs of engineering, architectural, legal and bond fees, and insurance paid in connection with construction of the facility; and materials, labor, services, travel and transportation for facility design, construction, startup, commissioning and shakedown;

(3) Costs of equipment purchases;

(4) Costs to provide equipment, facilities, and services related to safety and environmental protection;

(5) Financial and legal services costs, including other professional services and fees necessary to obtain required licenses and permits and to prepare environmental reports and data;

(6) The cost of issuing project debt, such as fees, transaction and legal costs and other normal charges imposed by Lenders and other Holders;

(7) Costs of necessary and appropriate insurance and bonds of all types;

(8) Costs of design, engineering, startup, commissioning and shakedown;

(9) Costs of obtaining licenses to intellectual property necessary to design, construct, and operate the project;

(10) A reasonable contingency reserve to cover the possibility of cost increases during the processing of the application and during construction; and

(11) Capitalized interest necessary to meet market requirements, reasonably required reserve funds and other carrying costs during construction.

(12) Other necessary and reasonable costs approved by DOE; and

(c) Project Costs do not include:

(1) Fees and commissions charged to Borrower, including finder’s fees, for obtaining Federal or other funds;

(2) Parent corporation or other affiliated entity’s general and administrative expenses, and non-project related parent corporation or affiliated entity assessments, including organizational expenses;

(3) Goodwill, franchise, trade, or brand name costs;

(4) Dividends and profit sharing to stockholders, employees, and officers;

(5) Research, development, and demonstration costs of readying the
innovative energy or environmental technology for employment in a commercial project;

(6) Costs that are excessive or are not directly required to carry out the project, as determined by DOE; and

(7) Borrower-paid Credit Subsidy Costs and the Administrative Cost of Issuing a Loan Guarantee; and

(8) Expenses incurred after startup, commissioning, and shakedown before the facility has been placed in service.

§ 609.13 Principal and Interest Assistance Contract.

With respect to the guaranteed portion of any Guaranteed Obligation, and subject to the availability of appropriations, DOE may enter into a contract to pay Holders, for and on behalf of Borrower, from funds appropriated for that purpose, the principal and interest charges that become due and payable on the unpaid balance of the guaranteed portion of the Guaranteed Obligation, if DOE finds that:

(a) Borrower:

(1) Is unable to meet the payments and is not in default; and

(2) Will, and is financially able to, continue to make the scheduled payments on the remaining portion of the principal and interest due under the non-guaranteed portion of the debt obligation, if any, and other debt obligations of the project, or an agreement, approved by DOE, has otherwise been reached in order to avoid a payment default on non-guaranteed debt.

(b) It is in the public interest to permit Borrower to continue to pursue the purposes of the project;

(c) In paying the principal and interest, the Federal government expects a probable net benefit to the Government will be greater than that which would result in the event of a default;

(d) The payment authorized is no greater than the amount of principal and interest that Borrower is obligated to pay under the terms of the Loan Guarantee Agreement; and

(e) Borrower agrees to reimburse DOE for the payment (including interest) on terms and conditions that are satisfactory to DOE and executes all written contracts required by DOE for such purpose.

§ 609.14 Full Faith and Credit and Incontestability.

The full faith and credit of the United States is pledged to the payment of all Guaranteed Obligations issued in accordance with this part with respect to principal and interest. Such guarantee will be conclusive evidence that it has been properly obtained; that the underlying loan qualified for such guarantee; and that, but for fraud or material misrepresentation by the Holder, such guarantee will be presumed to be valid, legal, and enforceable.

§ 609.15 Default, Demand, Payment, and Collateral Liquidation.

(a) In the event that the Borrower has defaulted in the making of required payments of principal or interest on any portion of a Guaranteed Obligation, and such default has not been cured within the period of grace provided in the Loan Guarantee Agreement and/or the Loan Agreement, the Eligible Lender or other Holder, or nominee or trustee empowered to act for the Eligible Lender or other Holder (referred to in this section collectively as “Holder”), may make written demand upon the Secretary to make payment pursuant to the Loan Guarantee Agreement.

(b) In the event that the Borrower is in default as a result of a breach of one or more of the terms and conditions of the Loan Guarantee Agreement, note, mortgage, Loan Agreement, or other contractual obligations related to the transaction, other than the Borrower’s obligation to pay principal or interest on the Guaranteed Obligation, as provided in paragraph (a) of this section, the Holder will not be entitled to make demand for payment pursuant to the Loan Guarantee Agreement, unless the Secretary agrees in writing that such default has materially affected the rights of the parties, and finds that the Holder should be entitled to receive payment pursuant to the Loan Guarantee Agreement.

(c) In the event that the Borrower has defaulted as described in paragraph (a) of this section and such default is not cured during the grace period provided in the Loan Guarantee Agreement, the Secretary shall notify the U.S. Attorney General and may cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without the need for consent or other action on the part of the Holders of the Guaranteed Obligations). In the event the Borrower is in default as described in paragraph (b) of this section, where the Secretary determines in writing that such a default has materially affected the rights of the parties, the Borrower shall be given the period of grace provided in the Loan Guarantee Agreement to cure such default. If the default is not cured during the period of grace, the Secretary may cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without any need for consent or other action on the part of the Holders of the Guaranteed Obligations).

(d) No provision of this regulation shall be construed to preclude forbearance by the Holder with the consent of the Secretary for the benefit of the Borrower.

(e) Upon the making of demand for payment as provided in paragraph (a) or (b) of this section, the Holder shall provide, in conjunction with such demand or immediately thereafter, at the request of the Secretary, such supporting documentation as may be reasonably required to justify such demand.

(f) Payment as required by the Loan Guarantee Agreement of the Guaranteed Obligation shall be made 60 days after receipt by the Secretary of written demand for payment, provided that the demand complies with the terms of the Loan Guarantee Agreement, applicable law, the Act, and this part. The Loan Guarantee Agreement shall provide that interest shall accrue to the Holder at the rate stated in the Loan Guarantee Agreement until the Guaranteed Obligation has been fully paid by the Federal government.

(g) The Loan Guarantee Agreement shall provide that, upon payment of the Guaranteed Obligations, the Secretary shall be subrogated to the rights of the Holders and shall have superior rights in and to the property acquired from the Holders. The Holder shall transfer and assign to the Secretary all rights held by the Holder of the Guaranteed Obligation. Such assignment shall include all related liens, security, and collateral rights.

(h) Where the Loan Guarantee Agreement so provides, the Eligible Lender or other Holder, or other servicer, as appropriate, and the Secretary may jointly agree to a plan of liquidation of the assets pledged to secure the Guaranteed Obligation.

(i) Where payment of the Guaranteed Obligation has been made and the Eligible Lender or other Holder or other servicer has not undertaken a plan of liquidation, the Secretary in accordance with the rights received through subrogation and acting through the U.S.
§ 609.16 Perfection of Liens and Preservation of Collateral

(a) The Loan Guarantee Agreement and other documents related thereto shall provide that: The Eligible Lender or other Holder or other servicer will take those actions necessary to perfect and maintain liens, as applicable, on assets which are pledged as collateral for the guaranteed portion of the loan; and upon default by the Borrower, the holder of pledged collateral shall take such actions as the Secretary may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery from the pledged assets. The Secretary shall reimburse the holder of collateral for reasonable and appropriate expenses incurred in taking actions required by the Secretary. Except as provided in § 609.15, no party may waive or relinquish, without the consent of the Secretary, any collateral securing the Guaranteed Obligation to which the United States would be subrogated upon payment under the Loan Guarantee Agreement.

(b) In the event of a default, the Secretary may enter into such contracts as the Secretary determines are required to preserve the collateral. The cost of such contracts may be charged to the Borrower.

§ 609.17 Audit and Access to Records

(a) The Loan Guarantee Agreement and related documents shall provide that:

(1) The Eligible Lender or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, shall keep such records concerning the project as is necessary, including the Pre-Application, Application, Term Sheet, Conditional Commitment, Loan Guarantee Agreement, Credit Agreement, mortgage, note disbursement requests and supporting documentation, financial statements, audit reports of independent accounting firms, lists of all project assets and non-project assets pledged as security for the Guaranteed Obligations, all off-take and other revenue producing agreements, documentation for all project indebtedness, income tax returns, technology agreements, documentation for all permits and regulatory approvals and all other documents and records relating to the Eligible Project, as determined by the Secretary, to facilitate an effective audit and performance evaluation of the project; and

(2) The Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers and records of the Borrower, Eligible Lender or other Holder or other party servicing the Guaranteed Obligation, as applicable. Such inspection may be made during regular office hours of the Borrower, Eligible Lender or other Holder, or other party servicing the Eligible Project and the Guaranteed Obligations, as applicable, or at any other time mutually convenient.

(b) The Secretary may from time to time audit any or all items of costs included as Project Costs in statements or certificates submitted to the Secretary or the servicer or otherwise, and may exclude or reduce the amount of any item which the Secretary determines to be unnecessary or excessive, or otherwise not to be an item of Project Costs. The Borrower will make available to the Secretary all books and records and other data available to the Borrower in order to permit the Secretary to carry out such audits. The Secretary should represent that it has within its rights access to all financial and operational records and data relating to Project Costs, and agrees that it will, upon request by the Secretary, exercise such rights in order to make such financial and operational records and data available to the Secretary. In exercising its rights hereunder, the Secretary may utilize employees of other Federal agencies, independent accountants, or other persons.

§ 609.18 Deviations.

To the extent that such requirements are not specified by the Act or other applicable statutes, DOE may authorize deviations on an individual request basis from the requirements of this part (except environmental considerations and requirements) upon a finding that such deviation is essential to program objectives and the special circumstances stated in the request make such deviation clearly in the best interest of the Government. Recommendation for any deviation shall be submitted in writing to DOE. Such recommendations must include a supporting statement, which indicates briefly the nature of the deviation requested and the reasons in support thereof. Any deviation, however, that was not captured in the Credit Subsidy Cost will require either additional fees or discretionary appropriations.

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