Proposed Rules

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

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Parts 761 and 766

RIN 0560–AI05

Loan Servicing; Farm Loan Programs

AGENCY: Farm Service Agency, USDA.

ACTION: Proposed rule.

SUMMARY: The Farm Service Agency (FSA) is proposing to amend the Farm Loan Programs (FLP) direct loan servicing regulations primarily to implement provisions of the Food, Conservation, and Energy Act of 2008 (the 2008 Farm Bill). FSA proposes four amendments to the rules. The first amendment would further emphasize transitioning borrowers to private sources of credit in the shortest timeframe practicable. The second amendment would amend the Homestead Protection lease regulations by extending the right to purchase the leased property to the lessee's immediate family when the lessee is a member of a socially disadvantaged group. The third amendment would amend the account liquidation regulations to suspend certain loan acceleration and foreclosure actions, including suspending interest accrual and offsets, if a borrower has filed a claim of program discrimination that has been accepted as valid by USDA and is at the point of acceleration or foreclosure. The fourth amendment would amend the supervised bank account regulations to be consistent with the recently amended Federal Deposit Insurance Act.

DATES: We will consider comments that we receive by October 6, 2009.

ADDRESSES: We invite you to submit written comments on this proposed rule. In your comment, include the volume, date, and page number of this issue of the **Federal Register.** You may submit comments by any of the following methods:

- *E-mail: mike.cumpton@wdc.usda.gov.*
- *Fax:* (202) 720–5804.
- *Mail:* Director, Loan Servicing and Property Management Division, Farm Service Agency, U.S. Department of Agriculture, 1400 Independence Avenue, SW., Stop 0523, Washington, DC 20250–0523.
- *Hand Delivery or Courier:* Deliver comments to Farm Service Agency, Loan Servicing and Property Management Division, 1250 Maryland Ave., SW., Suite 500, Washington, DC 20024.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.

Comments may be inspected in the Office of the Director, Loan Servicing and Property Management Division (LSPMD), Farm Service Agency, at 1250 Maryland Ave., SW., Suite 500, Washington, DC, between 8 a.m. and 4:30 p.m., except holidays.

FOR FURTHER INFORMATION CONTACT: Michael C. Cumpton, Assistant to the Director, LSPMD, Farm Service Agency; *telephone:* (202) 690–4014; *Facsimile:* (202) 720–5804; *E-mail: mike.cumpton@wdc.usda.gov.* Persons with disabilities or who require alternative means for communications should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

SUPPLEMENTARY INFORMATION:

Background

This proposed rule implements three provisions of the 2008 Farm Bill (Public Law 110–246; June 18, 2008) concerning loan servicing for FSA's direct loan program. This law repealed Public Law 110–234 dated May 22, 2008 that inadvertently omitted Title III (Trade of the 2008 Farm Bill.) FSA loans are a means of providing credit to farmers whose financial risk exceeds a level acceptable to commercial lenders. For two of these amendments, the one that would allow family members of lessees who are members of a socially disadvantaged group to purchase properties under Homestead Protection and the one setting a moratorium on foreclosure actions for borrowers with an accepted program discrimination claim, there is little to no discretion in how to implement the provisions of the 2008 Farm Bill. For the third amendment promoting the goal of transitioning borrowers to private credit, the 2008 Farm Bill provides general guidance. In addition, this proposed rule would implement a conforming amendment to comply with section 136 of the Emergency Economic Stabilization Act of 2008 (Pub. L. 110–343; October 3, 2008), which temporarily increased the standard maximum deposit insurance amount for Federal Deposit Insurance Corporation (FDIC)-insured accounts.

Transitioning Borrowers to Private Credit

Sections 302(a), 311(a), and 321(a) of the Consolidated Farm and Rural Development Act (the Con Act) establish the inability ''to obtain sufficient credit elsewhere'' as an eligibility requirement for FLP direct loans. Section 319 of the Con Act requires that FSA develop a plan ''to encourage each borrower * * * to graduate to private commercial or other sources of credit.''

Section 5304 of the 2008 Farm Bill requires that the Secretary ''establish a plan and promulgate regulations (including performance criteria) that promote the goal of transitioning borrowers to private commercial credit and other sources of credit in the shortest time practicable.'' Both section 319 of the Con Act and section 5304 of the 2008 Farm Bill require coordination with the following sections of the Con Act:

- Borrower training established under section 359;
- Loan assessment established under section 360;
- Supervised credit under section 361; and
- Market placement under section 362.

FSA has implemented the borrower training program in existing regulations in 7 CFR part 764, subpart J. The market placement program is addressed in 7 CFR 762.110(g). Requirements regarding a borrower's graduation to another source of credit are addressed in 7 CFR part 765, subpart C. None of these regulations would be changed by this proposed rule. The supervised credit requirement, which includes the loan assessment program, is specified in 7 CFR part 761, subpart C. This rule proposes to amend 7 CFR 761.103 pertaining to farm assessments, as well as 7 CFR 761.1, ''Introduction,'' to encourage the transitioning of borrowers

to commercial credit in the shortest period of time practicable and better establish the use of borrower training, supervised credit, including loan assessment, and market placement to plan for and evaluate a borrower's ability to graduate.

FSA is developing an internal plan that will include performance criteria to evaluate its success in transitioning borrowers to commercial credit. Performance criteria are not being established for borrowers in this proposed rule.

Extension of Right To Reacquire Homestead Property to Family Members

This rule proposes to amend section 766.154, ''Homestead Protection Leases.'' Section 766.154(c) currently addresses the right of a lessee to purchase leased property under Homestead Protection. This proposed amendment would expand that right to also allow an immediate family member of a lessee who is a member of a socially disadvantaged group (as currently defined in section 761.2) to exercise the option to purchase, as required by section 5305 of the 2008 Farm Bill. The lessee may designate a member of the lessee's immediate family (parent, sibling, or child) as having this right to purchase. This immediate family member also has the right under section 5305 to choose any independent appraiser from a list of three approved by FSA to establish the current market value of the property. This policy will be added to the FSA Handbook procedures.

Moratorium on Loan Acceleration and Foreclosure for Borrowers With an Accepted Discrimination Claim

Section 14002 of the 2008 Farm Bill requires a moratorium on certain acceleration and loan foreclosure proceedings against any farmer or rancher who has a claim of program discrimination accepted by the Department as valid or who files such a claim that is accepted. The statutory moratorium applies only with respect to Farm Loan Program loans made under subtitle A, B, or C, of the Con Act, which includes Farm Ownership (FO), Soil and Water (SW), Recreation loans, and Emergency (EM) loans. Section 343(a)(10) of the Con Act defines ''Farmer Program Loan'' to include FO loans under section 303, Operating Loans (OL) under section 312, SW loans under section 304, EM loans under section 321, Economic Emergency (EE) loans under section 202 of the Emergency Agricultural Credit Adjustment Act, Economic Opportunity (EO) loans under the Economic Opportunity Act of 1961, Softwood Timber (ST) loans under section 1254 of the Food Security Act of 1985, and Rural Housing loans for farm service buildings (RHF) under section 502 of the Housing Act of 1949. SW, EE, EO, ST, and RHF loans are no longer being made, but a few remain to be serviced. FSA regulation, 7 CFR 761.2, also includes Recreation loans formerly made under section 304 of the Con Act as a ''program loan.'' Loans made under statutory authorities other than the Con Act, such as the EE, EO, ST, and RHF loans, would not be covered by the section 14002 moratorium, but will continue to be covered by FSA's internal voluntary suspension of acceleration and foreclosure when the borrower has a program discrimination complaint accepted by the USDA Office of Adjudication and Compliance (OAC).

Non-program loans are not covered by the mandatory section 14002 moratorium, but will continue to be covered by the Agency's voluntary suspension policy on acceleration and foreclosure when the borrower has a program discrimination complaint accepted by OAC. Non-program loans are defined by section 761.2 as those loans made on more stringent terms for the convenience of FSA because the applicant or property does not qualify for a program loan under applicable statutes and regulations. For example, under FSA regulations a third party may assume a program loan on non-program terms if the transferee is not eligible for the program loan, and in some circumstances FSA might collect an unauthorized loan by permitting the borrower to continue making payments on non-program terms. Homestead Protection financing and financing of recapture under Shared Appreciation Agreements authorized by sections 352 and 353 of the Con Act, respectively, also are considered non-program loans. Non-program loans historically have not been considered eligible for the broad loan servicing options available for program loans. These servicing rights are commonly the subject of dispute in the program discrimination claims addressed by section 14002, so it is reasonable to limit the moratorium to the program loans specified in the statute. FSA has found no Congressional intent for this moratorium provision to cover non-program loans. In fact, Congress' specific reference to ''Farm Loan Program Loans'' indicates otherwise. Liquidation of non-program loans, therefore, may be delayed if a borrower's program loans are under moratorium. This rule proposes to amend section 766.351, ''Liquidation,'' to specify the provisions of the moratorium accordingly.

An ''accepted'' claim under section 14002 is a claim for which OAC has made the determination to accept on basic jurisdictional grounds. As explained in the Conference Report for the 2008 Farm Bill, ''accepted'' is a procedural term and not a statement as to the merits of the program discrimination claim. The acceptance of the claim is distinct from the person's filing of a program discrimination claim. The moratorium began on the effective date of the 2008 Farm Bill, which was May 22, 2008, if the borrower had a pending claim that was accepted and the borrower was at the point of acceleration and foreclosure on or prior to that date. Otherwise, it will begin when a program discrimination complaint has been accepted and the borrower is at the point of acceleration or foreclosure. In either case, moratorium begins after all available loan servicing and appeal rights have been offered to the borrower. If the borrower's account were accelerated and foreclosed prior to enactment of the statute or OAC's acceptance of the borrower's program discrimination claim, the moratorium would never be triggered. The moratorium will end on the earlier of the date the program discrimination claim is resolved by USDA OAC, or the date that a court of competent jurisdiction renders a final decision on the program discrimination claim if the farmer or rancher appeals the decision of USDA OAC.

In addition to the moratorium on acceleration and foreclosure, section 14002 provided that interest accrual and offset would be suspended on the farm program loans made under subtitle A, B, or C of the Con Act for the claimants during the moratorium period (at the point of acceleration or foreclosure after all servicing and appeal rights have been exhausted). These benefits were not provided under FSA's prior voluntary suspension policy and cannot be provided on any loans not made under subtitle A, B, or C of the Con Act. Interest accrual and Treasury offset generally are required by 31 U.S.C. sections 3717 and 3716, respectively. Interest accruals and offsets will resume on the covered loans when the moratorium terminates. If the borrower does not prevail on the program discrimination claim, the borrower will be liable for the interest that accrued during the moratorium under section 14002. In such case, the interest that would have accrued during the moratorium will be reinstated on the debt. Any debt that would have been

paid down through offset will remain when the moratorium terminates and will be collected through normal procedures. If the borrower does prevail on the program discrimination claim, the borrower will not be liable for the interest and offsets during the moratorium. FSA will implement any settlement agreement or court order, as appropriate.

Establishing a Supervised Bank Account

This rule proposes to amend existing regulations in 7 CFR 761.51(e) which currently require that a financial institution pledge acceptable collateral with the Federal Reserve Bank when the balance deposited into a supervised bank account will exceed $100,000. The Emergency Economic Stabilization Act of 2008, section 136, amended the Federal Deposit Insurance Corporation Act to temporarily increase the standard maximum deposit insurance amount from $100,000 to $250,000, effective October 3, 2008, and ending December 31, 2009. After that date, the standard maximum deposit insurance amount will return to $100,000. This rule, therefore, proposes to amend section 761.51, ''Establishing a Supervised Bank Account,'' to remove the reference to the $100,000 threshold for insured balances and replace it with a reference to ''the maximum amount insurable by the Federal Government.''

Executive Order 12866

The Office of Management and Budget (OMB) designated this rule as not significant under Executive Order 12866 and, therefore, OMB was not required to review this proposed rule.

Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601), FSA is certifying that there would not be a significant economic impact on a substantial number of small entities. All FSA direct loan borrowers and all farm entities affected by this rule are small businesses according to the North American Industry Classification System and the U. S. Small Business Administration. There is no diversity in size of the entities affected by this rule, and the costs to comply with it are the same for all entities.

In this rule, FSA is proposing to revise regulations that affect loan servicing only.

In 2007, over 2,500 direct borrowers (about 3.7 percent of the portfolio) graduated to commercial credit. FSA believes graduation will continue in the 3 to 5 percent range and is dependent on the overall farm economy.

Currently, FSA has 38 inventory properties under a Homestead Protection lease. The extension of purchase rights to the immediate family of lessees who are a members of a socially disadvantaged group will affect very few of these cases.

Due to the acceleration and foreclosure moratorium FSA expects some Government losses due to the suspension of interest accrual (when the borrower prevails) and the loss of some offset payments. FSA does not expect these changes to impose any additional cost to the borrowers. Therefore, the costs of compliance from this rule are expected to be minimal. Therefore, FSA certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Environmental Review

The environmental impacts of this rule have been considered in a manner consistent with the provisions of the National Environmental Policy Act (NEPA, 42 U.S.C. 4321–4347), the regulations of the Council on Environmental Quality (40 CFR parts 1500–1508), and FSA regulations for compliance with NEPA (7 CFR part 799). The changes to the FLP direct loan servicing program, required by the 2008 Farm Bill that are identified in this proposed rule, are non-discretionary. Therefore, FSA has determined that NEPA does not apply to this rule, and no environmental assessment or environmental impact statement will be prepared.

Executive Order 12988

This rule has been reviewed in accordance with E.O. 12988, Civil Justice Reform. In accordance with the executive order: (1) All State and local laws and regulations that are in conflict with this rule would be preempted; (2) no retroactive effect would be given to this rule; and (3) administrative proceedings in accordance with 7 CFR part 11 must be exhausted before bringing suit in court challenging action taken under this rule unless those regulations specifically allow bringing suit at an earlier time.

Executive Order 12372

For reasons set forth in the Notice to 7 CFR part 3015, subpart V (48 FR 29115, June 24, 1983), the programs and activities within this rule are excluded from the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA, Pub. L. 104–4) requires Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments or the private sector. Agencies generally must prepare a written statement, including a cost benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures of $100 million or more in any 1 year for State, local, or tribal governments, in the aggregate, or to the private sector. UMRA generally requires agencies to consider alternatives and adopt the more cost effective or least burdensome alternative that achieves the objectives of the rule. This proposed rule contains no Federal mandates, as defined under title II of the UMRA, for State, local, and tribal governments or the private sector. Thus, this proposed rule is not subject to the requirements of sections 202 and 205 of UMRA.

Executive Order 13132

The policies contained in this rule would not have any substantial direct effect on States, the relationship between the national government and the States, or the distribution of power and responsibilities among the various levels of government. Nor would this proposed rule impose substantial direct compliance costs on State and local governments. Therefore, consultation with the States is not required.

Paperwork Reduction Act

The amendments proposed for 7 CFR parts 761 and 766 require no changes or new collection to the currently approved information collections by OMB under the control numbers of 0560–0233, 0560–0233 and 0560–0238.

E-Government Act Compliance

FSA 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.

Federal Assistance Programs

The title and number of the Federal assistance programs, as found in the Catalog of Federal Domestic Assistance, to which this proposed rule would apply are:

10.404 Emergency Loans;

10.406 Farm Operating Loans;

10.407 Farm Ownership Loans.

List of Subjects

7 CFR Part 761

Agriculture, Agricultural commodities, Credit, Livestock, Loan programs—Agriculture.

7 CFR Part 766

Agriculture, Agricultural commodities, Credit, Livestock, Loan programs—Agriculture.

For the reasons discussed in the preamble, the Farm Service Agency (USDA) proposes to amend 7 CFR chapter VII as follows:

PART 761—GENERAL PROGRAM ADMINISTRATION

1. The authority citation for part 761 continues to read as follows:

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

Subpart A—General Provisions

2. In § 761.1, paragraph (c) is amended by adding a new fourth sentence at the end to read as follows:

§ 761.1 Introduction.

* * * * *

(c) * * * The programs are designed to allow those who participate to transition to private commercial credit or other sources of credit in the shortest period of time practicable through the use of supervised credit, including farm assessments, borrower training, and market placement.

* * * * *

Subpart B—Supervised Bank Accounts

3. In § 761.51, paragraph (e) is revised to read as follows:

§ 761.51 Establishing a supervised bank account.

* * * * *

(e) If the funds to be deposited into the account cause the balance to exceed the maximum amount insurable by the Federal Government, the financial institution must agree to pledge acceptable collateral with the Federal Reserve Bank for the excess over the insured amount, before the deposit is made.

Subpart C—Supervised Credit

4. In § 761.103, paragraph (a) is revised to read as follows:

§ 761.103 Farm assessment.

(a) The Agency, in collaboration with the applicant, will assess the farming operation to:

(1) Determine the applicant's financial condition, organization structure, and management strengths and weaknesses;

(2) Identify and prioritize training and supervisory needs; and

(3) Develop a plan of supervision to assist the borrower in achieving financial viability and transitioning to private commercial credit or other sources of credit in the shortest time practicable.

* * * * *

PART 766—DIRECT LOAN SERVICING—SPECIAL

5. The authority citation for part 766 is revised to read as follows:

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

Subpart D—Homestead Protection Program

6. In § 766.154, paragraph (c) is revised to read as follows:

§ 766.154 Homestead Protection leases.

* * * * *

(c) *Lease-purchase options.* (1) The lessee may exercise in writing the purchase option and complete the homestead protection purchase at any time prior to the expiration of the lease provided all lease payments are current.

(2) If the lessee is a member of a socially disadvantaged group, the lessee may designate a member of the lessee's immediate family (that is, parent, sibling, or child) (designee) as having the right to exercise the option to purchase.

(3) The purchase price is the market value of the property when the option is exercised as determined by a current appraisal obtained by the Agency.

(4) The lessee or designee may purchase homestead protection property with cash or other credit source.

(5) The purchaser may receive Agency program or non-program financing provided:

(i) The purchaser has not received previous debt forgiveness;

(ii) The Agency has funds available to finance the purchase of homestead protection property;

(iii) The purchaser demonstrates an ability to repay such an FLP loan; and

(iv) The purchaser is otherwise eligible for the FLP loan.

* * * * *

Subpart H—Loan Liquidation

7. Section 766.358 is added to read as follows:

§ 766.358 Acceleration and Foreclosure Moratorium.

(a) Notwithstanding any other provisions of this subpart, borrowers who file or have filed a program discrimination complaint that is accepted by USDA Office of Adjudication and Compliance or successor office (USDA), and have been serviced to the point of acceleration or foreclosure on or after May 22, 2008, will not be accelerated or liquidated until such complaint has been resolved by USDA or closed by a court of competent jurisdiction. This moratorium applies only to program loans made under subtitle A, B, or C of the Act (for example, FO, OL, EM, SW, or RL). Interest will not accrue and no offsets will be taken on these loans during the moratorium. Interest accrual and offsets will continue on all other loans, including, but not limited to, non-program loans.

(1) If the Agency prevails on the program discrimination compliant, the interest that would have accrued during the moratorium will be reinstated on the account when the moratorium terminates, and all offsets and servicing actions will resume.

(2) If the borrower prevails on the program discrimination compliant, the interest that would have accrued during the moratorium will not be reinstated on the account unless specifically required by the settlement agreement or court order.

(b) The moratorium will begin on:

(1) May 22, 2008, if the borrower had a pending program discrimination claim that was accepted by USDA as valid and was at the point of acceleration or foreclosure on or before that date or

(2) The date after May 22, 2008, when the borrower has a program discrimination claim accepted by USDA as valid and the borrower is at the point of acceleration or foreclosure.

(c) The point of acceleration under this section is the earliest of the following:

(1) The day after all rights offered on the Agency notice of intent to accelerate expire if the borrower does not appeal;

(2) The day after all appeals resulting from an Agency notice of intent to accelerate are concluded if the borrower appeals and the Agency prevails on the appeal;

(3) The day after all appeal rights have been concluded relating to a failure to graduate and the Agency prevails on any appeal;

(4) Any other time when, because of litigation, third party action, or other unforeseen circumstance, acceleration is the next step for the Agency in servicing and liquidating the account.

(d) A borrower is considered to be in foreclosure status under this section anytime after acceleration of the account.

(e) The moratorium will end on the earlier of:

(1) The date the program discrimination claim is resolved by USDA or

(2) The date that a court of competent jurisdiction renders a final decision on the program discrimination claim if the farmer or rancher appeals the decision of USDA.

Signed in Washington, DC, on August 3, 2009.

Jonathan Coppess,

Administrator, Farm Service Agency.

[FR Doc. E9–18986 Filed 8–6–09; 8:45 am]

BILLING CODE 3410–05–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: Proposed rule.

SUMMARY: On October 23, 2007, the Department of Energy (DOE or the Department) published a final rule establishing regulations for the loan guarantee program authorized by Section 1703 of Title XVII of the Energy Policy Act of 2005 (Title XVII or the Act). Section 1703 of Title XVII authorizes the Secretary of Energy (Secretary) 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.'' Section 1703 of Title XVII also identifies ten categories of technologies and projects that are potentially eligible for loan guarantees. The two principal goals of section 1703 of Title XVII are to encourage commercial use in the United States of new or significantly improved energy-related technologies and to achieve substantial environmental benefits. DOE believes that commercial use of these technologies will help sustain and promote economic growth, produce a more stable and secure energy supply and economy for the United States, and improve the environment.

Through experience gained implementing the loan guarantee program authorized by section 1703 of Title XVII, and information received from industry indicating the wide variety of ownership structures which participants would like to employ in implementing projects seeking loan guarantees, DOE believes it is appropriate to consider certain changes to the existing regulations to provide flexibility in the determination of an appropriate collateral package to secure guaranteed loan obligations, facilitate collateral sharing and related intercreditor arrangements with other project lenders, and to provide a more workable interpretation of certain statutory provisions regarding DOE's treatment of collateral.

DATES: Comments on this proposed rule must be postmarked no later than September 8, 2009.

ADDRESSES: Comments may be submitted using any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *E-mail: lgprogram@hq.doe.gov*.
- *Postal Mail:* David G. Frantz, Director, Loan Guarantee Program Office, Office of the Chief Financial Officer, 1000 Independence Avenue, SW., Washington, DC.20585–0121. Please submit one signed original paper copy.
- *Hand Delivery/Courier:* David G. Frantz, Director, Loan Guarantee Program Office, Office of the Chief Financial Officer, 1000 Independence Avenue, SW., Washington, DC 20585–0121. Please submit one signed original paper copy.

FOR FURTHER INFORMATION CONTACT: David G. Frantz, Director, Loan Guarantee Program Office, Office of the Chief Financial Officer, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–8336, e-mail: *lgprogram@hq.doe.gov*; or Susan S. Richardson, Chief Counsel for the Loan Guarantee Program, Office of the General Counsel, 1000 Independence Avenue, SW., Washington, DC 20585–0121, (202) 586–9521, *e-mail: lgprogram@hq.doe.gov*.

SUPPLEMENTARY INFORMATION:

I. Background and Proposed Amendment

Today's proposed rule would amend the regulations implementing the loan guarantee program authorized by section 1703 of Title XVII of the Energy Policy Act of 2005 (42 U.S.C. 16511–16514) (referred to as Title XVII). Section 1703 of Title XVII authorizes the Secretary of Energy (Secretary), after consultation with the Secretary of the Treasury, to make loan guarantees for projects that ''(1) avoid, reduce, or sequester air pollutants or anthropogenic emissions of greenhouse gases; and (2) employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued.'' (42 U.S.C. 16513(a))

Section 1702 of Title XVII 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; and (ii) have available all the patents and technology necessary for any person selected, including the Secretary, to complete and operate the project. (42 U.S.C. 16512(g)(2)(c)). Further, section 1702(d) addresses certain threshold requirements that must be met before the guaranty is made; and section 1702(g) addresses the Secretary's rights in the case of default of the loan. Specifically, section 1702(d) of Title XVII states, under the heading ''Repayment'' and addressing ''Subordination,'' that ''[t]he [guaranteed] obligation shall be subject to the condition that the obligation is not subordinate to other financing.'' Further, when addressing the situation of default, section 1702(g)(2) of Title XVII states, with respect to ''subrogation'' and ''superiority of rights,'' that ''[t]he rights of the Secretary, with respect to any property acquired pursuant to a guarantee or related agreements, shall be superior to the rights of any other person with respect to the property.''

In the October 23, 2007 final rule implementing Title XVII, DOE interpreted the interplay between these two provisions of section 1702 such that both describe the rights the Secretary must secure as a condition of making a guarantee. This understanding is reflected in the text of the regulations which requires that the Secretary receive a first lien security interest in all project assets as an incident to making a guarantee. Moreover, this