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DEPARTMENT OF ENERGY

Office of Energy Efficiency and Renewable Energy

10 CFR Part 451

RIN 1904–AB62

Renewable Energy Production Incentives

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Final rule.

SUMMARY: The Department of Energy (DOE) Office of Energy Efficiency and Renewable Energy is publishing amendments to its regulations for the Renewable Energy Production Incentives (REPI) program to incorporate changes made by section 202 of the Energy Policy Act of 2005 (EPACT 2005). The REPI program provides for production incentive payments to owners or operators of qualified renewable energy facilities, subject to the availability of appropriations. The statutory changes in these amendments to part 451 relate to allocation of available funds between owners or operators of two categories of qualified facilities, incorporation of additional ownership categories, extension of the eligibility window and program termination date, and expansion of applicable renewable energy technologies. In addition to the changes specified by EPACT 2005, this final rule modifies the method for accrued energy accounting. Other minor changes are made to update the regulations.

DATES: This rule is effective on August 14, 2006.

FOR FURTHER INFORMATION CONTACT: Daniel Beckley, U.S. Department of Energy, Office of Renewable Energy and Energy Efficiency, EE–2K, 1000 Independence Avenue, SW., Washington, DC 20585, (202) 586–7691.

SUPPLEMENTARY INFORMATION:

I. Background

The Energy Policy Act of 1992, Public Law 102–486, established the REPI program to encourage production of electric energy from facilities owned by a State, a political subdivision of a State, or a non-profit electric cooperative using certain renewable energy resources. Subject to availability of appropriations, DOE was authorized to pay 1.5 cents, adjusted annually for inflation, to facility owners or operators for each kilowatt-hour of electric energy produced by qualified renewable energy facilities. As specified in the statute as originally enacted, the first energy production year was fiscal year 1994 and a ten-year eligibility window was prescribed. Therefore, DOE did not accept applications for the REPI program after September 30, 2003. Qualified facility owners are eligible for payment for ten successive years beginning with the first year for which an energy payment is made. As a result, incentive payments were expected to continue through 2013. DOE has continued to make incentive payments, based on available appropriations, to those applicants whose ten successive years of participation in the program have not expired.

Section 202 of EPACT 2005, Public Law 109–58, modifies the REPI program by (a) extending the eligibility window, (b) extending the termination date for the program, (c) increasing the number of renewable energy technologies eligible under the program, (d) broadening the category of qualified owners, and (e) altering the procedure for determining payment distributions if insufficient funds are appropriated to make full incentive payments for all approved applications. On June 26, 2006, DOE proposed revisions to the REPI program regulations at 10 CFR part 451 to implement the EPACT 2005 amendments and to revise provisions that had become outdated since DOE initially implemented the program in 1995 (71 FR 36225). This final rule amends the REPI program regulations as proposed with only minor changes.

DOE included a discussion of each proposed amendment in the June 26 notice of proposed rulemaking (NOPR). The most extensive discussion relates to implementation of the statutory 60:40 distribution between the two categories of eligible renewable energy facilities and the method DOE will use to incorporate accrued energy into *pro rata* calculations when insufficient funds are appropriated to cover all qualified kilowatt-hours. *See* 71 FR 36227.

II. Discussion of Comments

DOE received 6 comments in response to the NOPR, summarized as follows. One commenter suggested modifications to the proposed definition of ''ocean.'' Two utilities currently participating in the REPI program objected to certain features of the proposed revisions to the *pro rata* calculation method. Two national organizations representing utility interests broadly endorsed the proposed revisions to the program regulations. Lastly, a private party offered comments in support of renewable energy projects, but unrelated to the specifics of the proposed rule.

In regard to the definition of ''ocean,'' DOE proposed a definition because the ocean was made an eligible renewable energy source by EPACT 2005. DOE proposed to define ''ocean'' to mean the parts of the Atlantic Ocean (including the Gulf of Mexico) and the Pacific Ocean that are contiguous to the United States coastline and from which energy may be derived through application of tides, waves, currents, thermal differences, or other means. The commenter noted that the term ''contiguous,'' while usually meaning adjacent or touching, also has been used in certain legal descriptions to refer to specific ocean areas and that DOE's use of the term in its definition could create confusion. The commenter also questioned the use of the term ''parts'' as potentially adding further confusion and suggested substitution of the term ''waters.'' DOE agrees with both of these comments and has made modifications to the definition. Having made these changes, DOE has made a corresponding change to the location specification in the section titled ''What is a Qualified Renewable Energy Facility'' so that it is consistent with the revised ocean definition. The effect of this latter

change is to avoid restricting the location of a renewable energy facility to the territorial sea (0–12 nautical miles) and to allow placement in any part of the ocean over which the U.S. claims jurisdiction.

In regard to methods of *pro rata* calculations, DOE proposed to amend the provisions dealing with incentive payments when there are insufficient funds to make payments for all qualifying energy. Under both the original rule and today's amended rule, the total qualified electrical energy consists of (1) the energy produced in the most recent year and (2) the accrued energy (which is the qualified energy produced in all preceding years for which payment was not made). To conform to EPACT 2005, DOE proposed to allocate available funds into two categories on a 60:40 basis (as specified at 42 U.S.C. 13317(a)(4)(A)) and to calculate potential payments initially based on the prior year's energy production and, if funds are not exhausted, secondarily based on accrued energy.

Two previously qualified utilities participating in the same wind project disagreed with this modified approach. Both commenters stated that (a) existing participants should be ''grandfathered,'' *i.e.*, be exempt from the new 60:40 funding allocation and be paid before new entrants assigned to the 60:40 funding groups, and that (b) accrued energy from the former Tier 1 group should continue to be assigned status second only to prior year produced Tier 1 energy and therefore have priority over the new 40 percent (or former Tier 2) group. One of the commenters further asserted that DOE has no mandate to apply the 60:40 funding division ''retroactively'' to participants who entered under the original rule and has done so on an arbitrary basis. DOE has not made the changes recommended by these commenters. The EPACT 2005 amendments to 42 U.S.C. 13317 provide that when there is insufficient funding to make full incentive payments to all qualified participants, DOE must make payments to two groups of qualified facilities with a 60:40 division of funds. The two groups roughly correspond to the Tier 1 and Tier 2 categories of qualified facilities under the original statute and regulations. EPACT 2005 does not include any provision that allows DOE to continue the program under the original regulations—under which funding of Tier 1 facilities takes precedence over funding of Tier 2 facilities—for previously qualified renewable energy facilities. Although 42 U.S.C. 13317(4)(B) permits the Secretary to alter the 60:40 percentage requirements after submitting the reasons for the alteration to Congress, this provision does not authorize grandfathering of previously qualified facilities under the original rule or the exemption of any group of participants from the 60:40 distribution. Thus, DOE may not ''grandfather'' a group of recipients that would receive payment under the old rule before payment to the newly required 60:40 participant groups as requested by the commenter. DOE further rejects the argument that the 60:40 division of REPI funds would apply retroactively under this rule. This final rule will apply prospectively to incentive payments made on or after the effective date set forth in this notice of final rulemaking.

The issue of accrued energy and its status in the payment priority hierarchy (point (b) in the summary of commenters' points above) merits further discussion. DOE recognizes that the effect of EPACT 2005 is to shift payout funds from the former Tier 1 group to the former Tier 2 group. As previously explained, DOE's rule must implement the 60:40 distribution division. DOE also recognizes, as these commenters imply, that the removal of accrued energy from equal status with energy produced in the prior fiscal year has the effect of further reducing the *pro rata* payment that might otherwise be received by former Tier 1 recipients. The statute (as originally enacted and as amended by EPACT 2005) contemplates an annual appropriation to support an annual payment for annual energy production. Although not expressly required by statute, DOE created an accrued energy account under its program regulations because it recognized that unpaid energy could result from insufficient appropriations, and it viewed payment for accrued energy as permissible under the statute. DOE continues to provide for payments for accrued energy under today's final rule. However, DOE believes that making payment for accrued energy secondary to annual energy in the determination of *pro rata* payments is most consistent with the policy choice reflected in the statute as amended by EPACT 2005, and is fairer to all eligible participants. Consequently, DOE has made no changes in the final rule regarding accrued energy calculations.

III. Effective Date

The Administrative Procedure Act (APA) requires that agencies publish a rule not less than 30 days before the rule will become effective, unless an exception from this requirement applies (5 U.S.C. 553(d)(3)). Under the APA, agencies may bypass this 30-day delay for ''good cause.'' DOE is invoking the ''good cause'' exception in this instance and making these regulations effective immediately upon publication. The final rule published today updates but does not substantially change the existing rules for REPI in 10 CFR part 451, except as required by section 202 of EPACT 2005. The established REPI procedures specify an application period of October 1–December 31 (the first 3 months of the Federal fiscal year) for applicants to provide data on REPI energy produced during the prior fiscal year and to request payment for this energy. There are currently applicants awaiting payment out of FY06 funds for energy produced in FY05. However, payment has not yet been made because EPACT 2005 opened the FY06 funding to new applicants. The new applicants are unable to apply until the final rule is published. With a 30-day delay in effectiveness, there would be insufficient time remaining in FY06 for participants to apply for FY06 funds and for DOE to process those applications. In addition, DOE published a NOPR on June 26, 2006, that included notice of a possible August 31 deadline for applications for FY05 payments. Both EPACT 2005 and the NOPR have given potential REPI participants adequate notice to adjust their behavior. Moreover, DOE foresees little, if any, harm done by bypassing the 30-day delay in effectiveness, and only by making the rule effective upon publication can DOE fulfill the statute's objective of encouraging the production of renewable energy by providing incentive funding to the renewable energy producers.

IV. Regulatory Review

A. Executive Order 12866

This rule has been determined to not be a ''significant regulatory action'' under Executive Order 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action is not subject to review under that Executive Order by the Office of Information and Regulatory Affairs of the Office of Management and Budget.

B. National Environmental Policy Act

DOE has determined that this rule is covered under the Categorical Exclusion found in the Department's National Environmental Policy Act regulations at paragraph A.6 of appendix A to subpart D, 10 CFR part 1021, which applies to rulemakings that are strictly procedural. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

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 has reviewed this rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. These amendments revise DOE's regulations for its program for making production incentive payments to owners or operators of qualified renewable energy facilities, subject to the availability of appropriations. The regulations are procedural in nature and affect only entities that choose to apply for incentive payments under the program. The rule's procedures will not have a significant economic impact on any class of entities. On the basis of the foregoing, DOE certifies that the rule does not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis has been provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

D. Paperwork Reduction Act

This rule does not impose any new collection of information subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*

E. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) generally requires Federal agencies to examine closely the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose upon State, local, or tribal governments an enforceable duty, except a condition of Federal assistance or a duty arising from participating in a voluntary Federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

This rule does not impose a Federal mandate on State, local or tribal governments. The rule does not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

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 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 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 this 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 the Office of Information and Regulatory Affairs (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 should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and 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.

K. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this rulemaking. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

V. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of today's final rule.

List of Subjects in 10 CFR Part 451

Electric utilities, Energy, Power sources, Renewable energy.

Issued in Washington, DC, on August 8, 2006.

Alexander A. Karsner,

Assistant Secretary, Energy Efficiency and Renewable Energy.

■ For the reasons set forth in the preamble, part 451 of title 10, chapter II of the Code of Federal Regulations, is amended as follows:

PART 451—RENEWABLE ENERGY PRODUCTION INCENTIVES

■ 1. The authority citation for part 451 is revised to read as follows:

Authority: 42 U.S.C. 7101, *et seq.*; 42 U.S.C. 13317.

■ 2. Section 451.1(a) is revised to read as follows:

§ 451.1 Purpose and scope.

(a) The provisions of this part cover the policies and procedures applicable to the determinations by the Department of Energy (DOE) to make incentive payments, under the authority of 42 U.S.C. 13317, for electric energy generated and sold by a qualified renewable energy facility owned by a State or political subdivision thereof; a not-for-profit electric cooperative; a public utility described in section 115 of the Internal Revenue Code of 1986; an Indian tribal government or subdivision thereof; or a Native corporation.

* * * * *

■ 3. Section 451.2 is amended by:
■ a. Adding in alphabetical order definitions of ''Biomass,'' ''Date of first use,'' ''Indian tribal government,'' ''Native corporation,'' ''Not-for-profit electrical cooperative,'' and ''Ocean''.
■ b. Revising the definitions of ''Closed loop biomass,'' ''Deciding Official,'' ''Renewable energy source'' and ''State.''
■ c. Removing the definition of ''Nonprofit electrical cooperative.''

The revisions and additions read as follows:

§ 451.2 Definitions.

* * * * *

Biomass means biologically generated energy sources such as heat derived from combustion of plant matter, or from combustion of gases or liquids derived from plant matter, animal wastes, or sewage, or from combustion of gases derived from landfills, or hydrogen derived from these same sources.

Closed-loop biomass means any organic material from a plant which is planted exclusively for purposes of being used at a qualified renewable energy facility to generate electricity.

Date of first use means, at the option of the facility owner, the date of the first kilowatt-hour sale, the date of completion of facility equipment testing, or the date when all approved permits required for facility construction are received.

Deciding Official means the Manager of the Golden Field Office of the Department of Energy (or any DOE official to whom the authority of the Manager of the Golden Field Office may be redelegated by the Secretary of Energy).

* * * * *

Indian tribal government means the governing body of an Indian tribe as defined in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b).

Native corporation has the meaning set forth in the Alaska Native Claims Settlement Act (25 U.S.C. 1602).

* * * * *

Not-for-profit electrical cooperative means a cooperative association that is legally obligated to operate on a not-for-profit basis and is organized under the laws of any State for the purpose of providing electric service to its members.

Ocean means the waters of the Atlantic Ocean (including the Gulf of Mexico) and the Pacific Ocean within the jurisdiction of the United States from which energy may be derived through application of tides, waves, currents, thermal differences, or other means.

* * * * *

Renewable energy source means solar heat, solar light, wind, ocean, geothermal heat, and biomass, except for—

(1) Heat from the burning of municipal solid waste; or

(2) Heat from a dry steam geothermal reservoir which—

(i) Has no mobile liquid in its natural state;

(ii) Is a fluid composed of at least 95 percent water vapor; and

(iii) Has an enthalpy for the total produced fluid greater than or equal to 2.791 megajoules per kilogram (1200 British thermal units per pound).

State means the District of Columbia, Puerto Rico, and any of the States, Commonwealths, territories, and possessions of the United States.

■ 4. Section 451.4 is amended by:
■ a. Revising paragraphs (a)(2) and (a)(3) and adding new paragraphs (a)(4) and (a)(5).
■ b. Revising paragraph (e).
■ c. Adding the word ''ocean'' after the word ''wind'' in paragraphs (f)(1) and (f)(2).
■ d. Adding the words ''or in U.S. jurisdictional waters'' after the word ''State'' in paragraph (g).

The revisions and additions read as follows:

§ 451.4 What is a qualified renewable energy facility.

* * * * *

(a) * * *

(2) A public utility described in section 115 of the Internal Revenue Code of 1986;

(3) A not-for-profit electrical cooperative;

(4) An Indian tribal government or subdivision thereof; or

(5) A Native corporation.

* * * * *

(e) *Time of first use.* The date of the first use of a newly constructed renewable energy facility, or a facility covered by paragraph (f) of this section, must occur during the inclusive period beginning October 1, 1993, and ending on September 30, 2016. For facilities whose date of first use occurred in the period October 1, 2003, through September 30, 2004, the time of first use shall be deemed to be October 1, 2004.

* * * * *

■ 5. Section 451.5 is amended by revising paragraphs (b)(1) and (b)(2) to read as follows:

§ 451.5 Where and when to apply.

* * * * *

(b) * * *

(1) An application for an incentive payment for electric energy generated and sold in a fiscal year must be filed during the first quarter (October 1 through December 31) of the next fiscal year, except as provided in paragraph (b)(2) of this section.

(2) For facilities whose date of first use occurred in the period October 1, 2003, through September 30, 2005, applications for incentive payments for electric energy generated and sold in fiscal year 2005 must be filed by August 31, 2006.

* * * * *

§ 451.6 [Amended]

■ 6. Section 451.6 is amended by adding the word ''consecutive'' before the words ''fiscal years'' in the first sentence, and in the last sentence, by removing the date ''2013'' and adding in its place the date ''2026''.

■ 7. Section 451.8 is amended by:

■ a. Removing the comma after the word ''owner,'' where it is first used in paragraph (a).

■ b. Removing paragraph (h) and redesignating (i) as paragraph (h).

■ c. Revising redesignated paragraph (h).

■ d. Adding a new paragraph (i).

■ e. Revising paragraph (j).

■ f. Removing the word ''nonprofit'' and adding in its place the term ''not-for-profit'' in paragraph (m).

The revisions and additions read as follows:

§ 451.8 Application content requirements.

* * * * *

(h) The total amount of electric energy for which payment is requested, including the net electric energy generated in the prior fiscal year, as determined according to paragraph (f) or (g) of this section;

(i) Copies of permit authorizations if the date of first use is based on permit approvals and this is the initial application;

(j) Instructions for payment by electronic funds transfer;

* * * * *

■ 8. Section 451.9 is amended by revising paragraphs (c), (d), and (e) to read as follows:

§ 451.9 Procedures for processing applications.

* * * * *

(c) *DOE determinations.* The Assistant Secretary for Energy Efficiency and Renewable Energy shall determine the extent to which appropriated funds are available to be obligated under this program for each fiscal year. Upon evaluating each application and any other relevant information, DOE shall further determine:

(1) Eligibility of the applicant for receipt of an incentive payment, based on the criteria for eligibility specified in this part;

(2) The number of kilowatt-hours to be used in calculating a potential incentive payment, based on the net electric energy generated from a qualified renewable energy source at the qualified renewable energy facility and sold during the prior fiscal year;

(3) The number of kilowatt-hours to be used in calculating a potential additional incentive payment, based on the total quantity of accrued energy generated during prior fiscal years;

(4) The amounts represented by 60 percent of available funds and by 40 percent of available funds; and

(5) Whether justification exists for altering the 60:40 payment ratio specified in paragraph (e) of this section. If DOE intends to modify the 60:40 ratio, the Department shall notify Congress, setting forth reasons for such change.

(d) *Calculating payments.* Subject to the provisions of paragraph (e) of this section, potential incentive payments under this part shall be determined by multiplying the number of kilowatt-hours determined under § 451.9(c)(2) by 1.5 cents per kilowatt-hour, and adjusting that product for inflation for each fiscal year beginning after calendar year 1993 in the same manner as provided in section 29(d)(2)(B) of the Internal Revenue Code of 1986, except that in applying such provisions calendar year 1993 shall be substituted for calendar year 1979. Using the same procedure, a potential additional payment shall be determined for the number of kilowatt-hours determined under paragraph (c)(3) of this section. If the sum of these calculated payments does not exceed the funds determined to be available by the Assistant Secretary for Energy Efficiency and Renewable Energy under § 451.9(c), DOE shall make payments to all qualified applicants.

(e) *Insufficient funds.* If funds are not sufficient to make full incentive payments to all qualified applicants, DOE shall—

(1) Calculate potential incentive payments, if necessary on a *pro rata* basis, not to exceed 60 percent of available funds to owners or operators of qualified renewable energy facilities using solar, wind, ocean, geothermal, and closed-loop biomass technologies based on prior year energy generation;

(2) Calculate potential incentive payments, if necessary on a *pro rata* basis, not to exceed 40 percent of available funds to owners or operators of all other qualified renewable energy facilities based on prior year energy generation;

(3) If the amounts calculated in paragraph (e)(1) and (2) of this section result in one owner group with insufficient funds and one with excess funds, allocate excess funds to the owner group with insufficient funds and calculate additional incentive payments, on a *pro rata* basis if necessary, to such owners or operators based on prior year energy generation.

(4) If potential payments calculated in paragraphs (e)(1), (2), and (3) of this section do not exceed available funding, allocate 60% of remaining funds to paragraph (e)(1) recipients and 40% to paragraph (e)(2) recipients and calculate additional incentive payments, if necessary on a *pro rata* basis, to owners or operators based on accrued energy;

(5) If the amounts calculated in paragraph (e)(4) of this section result in one owner group with insufficient funds and one with excess funds, allocate excess funds to the owner group with insufficient funds and calculate additional incentive payments, on a *pro rata* basis if necessary, to such owners or operators based on accrued energy.

(6) Notify Congress if potential payments resulting from paragraphs (e)(3) or (5) of this section above will result in alteration of the 60:40 payment ratio;

(7) Make incentive payments based on the sum of the amounts determined in paragraphs (e)(1) through (5) of this section for each applicant;

(8) Treat the number of kilowatt-hours for which an incentive payment is not made as a result of insufficient funds as

accrued energy for which future incentive payment may be made; and

(9) Maintain a record of each applicant's accrued energy.

* * * * *

[FR Doc. 06–6925 Filed 8–10–06; 1:20 pm]

BILLING CODE 6450–01–P

FEDERAL RESERVE SYSTEM

12 CFR Part 226

[Regulation Z; Docket No. R–1263]

Truth in Lending

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Final rule; staff commentary.

SUMMARY: The Board is publishing a final rule amending the staff commentary that interprets the requirements of Regulation Z (Truth in Lending). The Board is required to adjust annually the dollar amount that triggers requirements for certain home mortgage loans bearing fees above a certain amount. The Home Ownership and Equity Protection Act of 1994 (HOEPA) sets forth rules for home–secured loans in which the total points and fees payable by the consumer at or before loan consummation exceed the greater of $400 or 8 percent of the total loan amount. In keeping with the statute, the Board has annually adjusted the $400 amount based on the annual percentage change reflected in the Consumer Price Index that is in effect on June 1. The adjusted dollar amount for 2007 is $547.

DATES: January 1, 2007.

FOR FURTHER INFORMATION CONTACT: Minh–Duc T. Le, Senior Attorney, Division of Consumer and Community Affairs, Board of Governors of the Federal Reserve System, at (202) 452–3667. For the users of Telecommunications Device for the Deaf (''TDD'') only, contact (202) 263–4869.

SUPPLEMENTARY INFORMATION:

I. Background

The Truth in Lending Act (TILA; 15 U.S.C. 1601 – 1666j) requires creditors to disclose credit terms and the cost of consumer credit as an annual percentage rate. The act requires additional disclosures for loans secured by a consumer's home, and permits consumers to cancel certain transactions that involve their principal dwelling. TILA is implemented by the Board's Regulation Z (12 CFR part 226). The Board's official staff commentary (12 CFR part 226 (Supp. I)) interprets the regulation, and provides guidance to creditors in applying the regulation to specific transactions.

In 1995, the Board published amendments to Regulation Z implementing HOEPA, contained in the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. 103–325, 108 Stat. 2160 (60 FR 15463). These amendments, contained in §§ 226.32 and 226.34 of the regulation, impose substantive limitations and additional disclosure requirements on certain closed–end home mortgage loans bearing rates or fees above a certain percentage or amount. As enacted, the statute requires creditors to comply with the HOEPA rules if the total points and fees payable by the consumer at or before loan consummation exceed the greater of $400 or 8 percent of the total loan amount. TILA and Regulation Z provide that the $400 figure shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index (CPI) that was reported on the preceding June 1. (15 U.S.C. 1602(aa)(3) and 12 CFR 226.32(a)(1)(ii)). The Board adjusted the $400 amount to $528 for the year 2006.

The Bureau of Labor Statistics publishes consumer–based indices monthly, but does not ''report'' a CPI change on June 1; adjustments are reported in the middle of each month. The Board uses the CPI–U index, which is based on all urban consumers and represents approximately 87 percent of the U.S. population, as the index for adjusting the $400 dollar figure. The adjustment to the CPI–U index reported by the Bureau of Labor Statistics on May 15, 2006, was the CPI–U index ''in effect'' on June 1, and reflects the percentage increase from April 2005 to April 2006. The adjustment to the $400 figure below reflects a 3.55 percent increase in the CPI–U index for this period and is rounded to whole dollars for ease of compliance.

II. Adjustment and Commentary Revision

Effective January 1, 2007, for purposes of determining whether a home mortgage transaction is covered by 12 CFR 226.32 (based on the total points and fees payable by the consumer at or before loan consummation), a loan is covered if the points and fees exceed the greater of $ 547 or 8 percent of the total loan amount. Comment 32(a)(1)(ii)–2, which lists the adjustments for each year, is amended to reflect the dollar adjustment for 2007. Because the timing and method of the adjustment is set by statute, the Board finds that notice and public comment on the change are unnecessary.

III. Regulatory Flexibility Analysis

The Board certifies that this amendment will not have a substantial effect on regulated entities because the only change is to raise the threshold for transactions requiring HOEPA disclosures.

List of Subjects

12 CFR Part 226

Advertising, Federal Reserve System, Mortgages, Reporting and recordkeeping requirements, Truth in lending.

■ For the reasons set forth in the preamble, the Board amends Regulation Z, 12 CFR part 226, as set forth below:

PART 226—TRUTH IN LENDING (REGULATION Z)

■ 1. The authority citation for part 226 continues to read as follows:

Authority: 12 U.S.C. 3806; 15 U.S.C. 1604 and 1637(c)(5).

■ 2. In Supplement I to Part 226, under *Section 226.32—–Requirements for Certain Closed–End Home Mortgages*, under Paragraph 32(a)(1)(ii), paragraph 2. xii. is added.

SUPPLEMENT I TO PART 226–OFFICIAL STAFF INTERPRETATIONS

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SUBPART E–SPECIAL RULES FOR CERTAIN HOME MORTGAGE TRANSACTIONS

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Section 226.32–Requirements for Certain Closed–End Home Mortgages

32(a) Coverage

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Paragraph 32(a)(1)(ii)

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2. Annual adjustment of $400 amount.

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xii. For 2007, $547, reflecting a 3.55 percent increase in the CPI–U from June 2005 to June 2006, rounded to the nearest whole dollar.

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By order of the Board of Governors of the Federal Reserve System, acting through the Director of the Division of Consumer and Community Affairs under delegated authority, August 9, 2006.

Jennifer J. Johnson,

Secretary of the Board.

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