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Part III

Department of Agriculture

Rural Utilities Service

7 CFR Part 1738
Rural Broadband Access Loans and Loan Guarantees; Rural Broadband Access Loans and Loan Guarantees Program; Interim Rule and Notice

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

7 CFR Part 1738

RIN 0572–AC06

Rural Broadband Access Loans and Loan Guarantees

AGENCY: Rural Utilities Service, USDA.

ACTION: Interim rule.

SUMMARY: The Rural Utilities Service, an agency delivering the United States Department of Agriculture's (USDA's) Rural Development Utilities Programs, hereinafter referred to as the Agency, is amending its regulation for the Rural Broadband Access Loan and Loan Guarantee Program (Broadband Loan Program). Since the Broadband Loan Program's inception in 2002, the Agency has faced and continues to face significant challenges in delivering the program due to the following factors: The competitive nature of the broadband market in certain geographic areas; the significant number of companies proposing to offer broadband service that are start-up organizations with limited resources; continually evolving technology; and economic factors such as the higher cost of serving rural communities. In addition, the Office of Inspector General, in a 2005 report, made recommendations to improve program efficiency. For these reasons and in an effort to improve program operation, the Agency published proposed changes to the program's regulation in the **Federal Register** on May 11, 2007. While the Agency was reviewing public comments and revising the rule, the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill) was enacted and changed the statute under which the program operates. In accordance with the statute and taking into account the public comments received regarding the proposed rule to the extent possible, this interim rule presents the regulations that will govern the program until a final rule is published. The Agency is seeking comments regarding this interim rule to guide its efforts in drafting the final rule for the Broadband Loan Program.

DATES: This rule is effective on March 14, 2011. Comments must be submitted on or before May 13, 2011.

ADDRESSES: Submit comments by either of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov* and in the "Search Documents" box, enter RUS–06–Agency–0052, and select "Submit." To submit a comment, choose "Send a comment or submission," under the Docket Title. In order to submit your comment, the information requested on the "Public Comment and Submission Form" must be completed. Information on using Regulations.gov, including instructions for accessing documents, submitting comments, and viewing the docket after the close of the comment period, is available through the site's "How to Use this Site" link.
- *Postal Mail/Commercial Delivery:* Please send your comment addressed to Michele Brooks, Director, Program Development and Regulatory Analysis, USDA Rural Development, 1400 Independence Avenue, STOP 1522, Room 5159, Washington, DC 20250–1522. Please state that your comment refers to Docket No. RUS–06–Agency–0052.

Additional information about the Agency and its programs is available on the Internet at *http://www.rurdev.usda.gov/index.html.*

FOR FURTHER INFORMATION CONTACT: David Villano, Assistant Administrator, Telecommunications Program, Rural Development, U.S. Department of Agriculture, 1400 Independence Avenue, SW., STOP 1590, Room 5151–S, Washington, DC 20250–1590. Telephone number: (202) 720–9554, Facsimile: (202) 720–0810.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This rule has been determined to be economically significant and was reviewed by the Office of Management and Budget under Executive Order 12866. In accordance with Executive Order 12866, an Economic Impact Analysis was completed, outlining the costs and benefits of implementing this program in rural America. The complete analysis is available from the Agency upon request. The following is the discussion of the Economic Benefits section of the Analysis

Economic Benefits of Broadband Deployment in Rural Areas

Bringing broadband services to rural areas does present some challenges. Because rural systems must contend with lower household density than urban systems, the cost to deploy fiber-to-the-home (FTTH) and digital subscriber line (DSL) systems in urban communities is considerably lower on a per household basis, making urban systems more economical to construct. Other associated rural issues, such as environmental challenges or providing wireless service through mountainous areas, also can add to the cost of deployment. A recent analysis by USDA's Economic Research Service concluded that broadband investment in rural areas yields significant economic and socio-economic gains:

Analysis suggests that rural economies benefit generally from broadband availability. In comparing counties that had broadband access relatively early (by 2000) with similarly situated counties that had little or no broadband access as of 2000, employment growth was higher and nonfarm private earnings greater in counties with a longer history of broadband availability. By 2007, most households (82 percent) with in-home Internet access had a broadband connection. A marked difference exists, however, between urban and rural broadband use—only 70 percent of rural households with in-home Internet access had a broadband connection in 2007, compared with 84 percent of urban households. The rural-urban difference in in-home broadband adoption among households with similar income levels reflects the more limited availability of broadband in rural settings.

Areas with low population size, locations that have experienced persistent population loss and an aging population, or places where population is widely dispersed over demanding terrain generally have difficulty attracting broadband service providers. These characteristics can make the fixed cost of providing broadband access too high, or limit potential demand, thus depressing the profitability of providing service. Clusters of lower service exist in sparsely populated areas, such as the Dakotas, eastern Montana, northern Minnesota, and eastern Oregon. Other low-service areas, such as the Missouri-Iowa border and Appalachia, have aging and declining numbers of residents. Nonetheless, rural areas in some States (such as Nebraska, Kansas, and Vermont) have higher-than expected broadband service, given their population characteristics, suggesting that policy, economic, and social factors can overcome common barriers to broadband expansion.

In general, rural America has shared in the growth of the Internet economy. Online course offerings for students in primary, secondary, post-secondary, and continuing education programs have improved educational opportunities, especially in small, isolated rural areas. And interaction among students, parents, teachers, and school administrators has been enhanced via online forums, which is especially significant given the importance of

ongoing parental involvement in children's education.

Telemedicine and telehealth have been hailed as vital to health care provision in rural communities, whether simply improving the perception of locally provided health care quality or expanding the menu of medical services. More accessible health information, products, and services confer real economic benefits on rural communities: reducing transportation time and expenses, treating emergencies more effectively, reducing time missed at work, increasing local lab and pharmacy work, and savings to health facilities from outsourcing specialized medical procedures. One study of 24 rural hospitals placed the annual cost of not having telemedicine at $370,000 per hospital. (*See http://www.ers.usda.gov/Publications/ERR78/ERR78.pdf,* at pages iv and 24.)

Most employment growth in the U.S. over the last several decades has been in the service sector, a sector especially conducive for broadband applications. Broadband allows rural areas to compete for low- and high-end service jobs, from call centers to software development, but does not guarantee that rural communities will get them. Rural businesses have been adopting more e-commerce and Internet practices, improving efficiency and expanding market reach. Some rural retailers use the Internet to satisfy supplier requirements. The farm sector, a pioneer in rural Internet use, is increasingly comprised of farm businesses that purchase inputs and make sales online. Farm household characteristics such as age, education, presence of children, and household income are significant factors in adopting broadband Internet use, whereas distance from urban centers was not a factor. Larger farm businesses are more apt to use broadband in managing their operation; the more multifaceted the farm business, the more the farm used the Internet.[1]

An analysis based on approximately $1.8 billion in approved loans in the Farm Bill Broadband Program (based on multiple technology platforms) yielded the following results (numbers have been rounded):

- Number of communities funded: 2,800.
- Average cost per community: $640,000.
- Total subscribers: 1.3 million.

[1] Broadband Internet's Value for Rural America, Peter Stenberg, Mitch Morehart, Stephen Vogel, John Cromartie, Vince Breneman, and Dennis Brown.

Most recently, the agency has concluded funding the American Recovery and Reinvestment Act (Recovery Act) Broadband Initiatives Program (BIP) that financed the same types of facilities and entities that are funded under this Farm Bill program.

As noted in the ERS study, rural areas with dispersed populations or demanding terrain generally have difficulty attracting broadband service providers because the fixed cost of delivering broadband service can be too high. Yet broadband is a key to economic growth. For rural businesses, broadband gives access to national and international markets and enables new, small, and home-based businesses to thrive. Broadband access affords rural residents the connectivity they need to obtain healthcare, education, financial, and many other essential goods and services.

The Recovery Act authorized RUS to issue loans and grants to projects that extend broadband service to unserved and underserved rural areas. The funding provided by the Recovery Act is increasing the availability of broadband and stimulating both short- and long-term economic progress. RUS BIP completed two funding rounds, making a significant investment in projects that will enhance broadband infrastructure in scores of rural communities. This represents a critical investment, designed to rebuild and revitalize rural communities. Without this funding, many communities could not cover the costs of providing broadband service to homes, schools, libraries, healthcare providers, colleges, and other anchor institutions.

RUS awarded $3.4 billion to 297 recipients in 45 States and 1 U.S. territory for infrastructure projects. Eighty-nine percent of the awards and 92 percent of the total dollars awarded are for 285 last-mile projects ($3.25 billion), which will provide broadband service to households and other end users. Four percent of the awards and five percent of the total dollars awarded are for 12 middle-mile projects ($173 million) that will provide necessary backbone services such as interoffice transport, backhaul, Internet connectivity, or special access to rural areas. The projects funded will bring broadband service to 2.8 million households, reaching nearly 7 million people, 364,000 businesses, and 32,000 anchor institutions across more than 300,000 square miles. These projects also overlap with 31 tribal lands and 124 persistent poverty counties, traditionally the most costly to serve areas.

Catalog of Federal Domestic Assistance

The Catalog of Federal Domestic Assistance (CFDA) number assigned to this program is 10.886, Rural Broadband Access Loans and Loan Guarantees. The Catalog is available on the Internet and the General Services Administration's (GSA's) free CFDA Web site at *http://www.cfda.gov.* The CFDA Web site also contains a PDF file version of the Catalog that, when printed, has the same layout as the printed document that the Government Printing Office (GPO) provides. GPO prints and sells the CFDA to interested buyers. For information about purchasing the Catalog of Federal Domestic Assistance from GPO, call the Superintendent of Documents at 202–512–1800 or toll free at 866–512–1800, or access GPO's online bookstore at *http://bookstore.gpo.gov.*

Executive Order 12372

This rule is excluded from the scope of Executive Order 12372, Intergovernmental Consultation, which may require a consultation with State and local officials. See the final rule related notice entitled, "Department Programs and Activities Excluded From Executive Order 12372" (50 FR 47034).

Information Collection and Recordkeeping Requirements

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35, as amended), the Rural Utilities Service, an agency delivering the U.S. Department of Agriculture (USDA) Rural Development Utilities Programs, invites comments on this information collection for which approval from the Office of Management and Budget (OMB) will be requested.

Comments on this notice must be received by May 13, 2011.

Comments are invited on (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumption used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques on other forms of information technology.

Title: 7 CFR 1738, Rural Broadband Loan and Loan Guarantee Program.

OMB Control Number: 0572–0130.

Type of Request: Revision of a currently approved information collection package.

Abstract: USDA Rural Development, through the Rural Utilities Service, is authorized by Title VI, Rural Broadband Access, of the Rural Electrification Act of 1936, as amended (RE Act), to provide loans and loan guarantees to fund the cost of construction, improvement, or acquisition of facilities and equipment for the provision of broadband service in eligible rural communities in States and Territories of the United States. In conjunction with this Interim Rulemaking, RUS is submitting a revised information collection package to OMB as required by the Paperwork Reduction Act of 1995, which will include revisions authorized by the 2008 Farm Bill. The information collection package for 7 CFR part 1738 includes estimated burden related to the application process for the Rural Broadband Loan and Loan Guarantee Program. Since the inception of the program in 2003, the agency has tried to accurately determine the burden to respondents applying for a Rural Broadband Loan including soliciting comments from the public. The items covered by this collection include forms and related documentation to support a loan application, including Form 532 and its supporting schedules.

The 2008 Farm Bill provided that the agency take steps to reduce, to the maximum extent practicable, the cost and paperwork associated with applying for a Broadband loan. The information required to process an application is the minimum amount of information necessary to fulfill the statutory requirements for ensuring that loans made under this Act are technically and financially feasible and are capable of being repaid in full, as required. Notwithstanding that requirement, the agency has taken significant actions to reduce, to the extent practicable, the cost and paperwork associated with applying for a loan for all applicants, including first time applicants and start-up applicants. Specifically, the agency has:

(1) Automated its mapping requirements for identifying proposed service territories;

(2) Created an online "public notice" process;

(3) Reduced the Market Survey requirements for certain proposals;

(4) Reduced the Equity Contribution requirements; and

(5) Identified most areas that are not eligible for financing.

Each of these is discussed in more detail, as follows:

Automated Mapping: Previously, applicants were required to submit "hard copies" of their proposed funded service areas. This was laborious, costly in some instances, and prone to inaccuracies. Under the new rule, applicants will be able to submit their proposed funded service territory online though an automated mapping tool created by the agency, saving time and money. In addition, any changes to the proposed service areas can be readily made without the creation of new "paper" maps.

Online Public Notice: Previously, applicants were required to publish in the local newspaper in each jurisdiction their intent to provide service to that area. This requirement proved costly and burdensome, particularly for new or start-up entities. Under the new rule, applicants will be able to post their notice(s) of intent to provide service online, saving time and significant expense.

Market Survey Requirement: In its proposed rule published in 2007, the agency proposed not to require market surveys from applicants that were proposing to obtain a market penetration of 20 percent or less. The 2008 Farm Bill adopted this concept and provides authority to require a market survey if the applicant proposes a market penetration rate of over 20 percent. This requirement will greatly reduce the burden and expenditure, particularly for small start-ups and new market entrants.

Equity Contribution Requirement: Similar to the Market Survey requirement noted above, the agency's 2007 proposed rule sought to reduce the level of up front equity contributions from the current 20 percent requirement to 15 percent. Again, the 2008 Farm Bill adopted this concept and reduced the minimum equity contribution to 10 percent. All applicants must demonstrate this minimum requirement at the time they submit their application.

Addition Cash Requirement: In addition to the 10 percent minimum equity requirement, the Agency is also implementing a procedure to analyze the submitted business plan to determine if an equity position greater than 10 percent will be required to sustain the operation. If the analysis demonstrates that additional cash will be required to sustain the operation, the applicant must agree to provide the additional capital and demonstrate their ability to do so prior to loan approval.

Indentifying Ineligible Areas: The agency has created several online tools for indentifying areas that are not eligible for new financing because they have already received agency funds. In addition, through an online mapping tool, potential applicants can determine if the area they wish to serve meets the eligibility requirements of a "rural area" as defined by the statute. This will save time in identifying areas that are eligible for financing and prevent wasted time spent applying for areas that are not eligible.

The agency seeks comments on its estimate of burden related to the application process for the Rural Broadband Program and welcomes comments related to further reducing application paperwork and costs. Specifically comments should address the estimation of hour and cost burden associated with each component of Form 532. Burden on respondents is considered the time, effort, and financial resources expended to generate, maintain, retain, disclose, or provide information to or for a Federal Agency. The agency is also interested in determining the information that Broadband applicants would have on hand in a format that could be readily provided for the loan application and which items would be prepared by parties outside the applicant's organization. Comments may be sent to Michele Brooks, Director, Program Development and Regulatory Analysis, Rural Development, U.S. Department of Agriculture, 1400 Independence Ave., SW., Stop 1522, Room 5159 South Building, Washington, DC 20250–1522 or via e-mail to: *michele.brooks@usda.gov.*

Estimate of Burden: Public reporting for this collection of information is estimated to average 89 hours per response.

Respondents: Businesses and Not-for-profit institutions.

Estimated Number of Respondents: 75.

Estimated Number of Responses per Respondent: 3.

Estimated Total Annual Burden on Respondents: 10,545 hours.

Copies of this information collection can be obtained from Michele Brooks, Program Development and Regulatory Analysis, at (202) 690–1078.

All responses to this information collection and recordkeeping notice will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

National Environmental Policy Act Certification

The Administrator has determined that this rule will not significantly affect the quality of the human environment as defined by the National

Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*). Therefore, this action does not require an environmental impact statement or assessment.

Regulatory Flexibility Act Certification

It has been determined that the Regulatory Flexibility Act is not applicable to this rule because the Agency is not required by 5 U.S.C. 551 *et seq.* or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. The Agency has determined that this rule meets the applicable standards provided in section 3 of the Executive Order. In addition, all state and local laws and regulations that are in conflict with this rule will be preempted, no retroactive effort will be given to this rule, and, in accordance with Sec. 212(e) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. 6912(e)), administrative appeal procedures, if any, must be exhausted before an action against the Department or its agencies may be initiated.

Unfunded Mandates

This rule contains no Federal mandates (under the regulatory provisions of Title II of the Unfunded Mandates Reform Act of 1995) for State, local, and tribal governments for the private sector. Thus, this rule is not subject to the requirements of section 202 and 205 of the Unfunded Mandates Reform Act of 1995.

Executive Order 13132, Federalism

The policies contained in this rule do not have any substantial direct effect on 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. Nor does this rule impose substantial direct compliance costs on state and local governments. Therefore, consultation with the states is not required.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

USDA has undertaken a series of regulation Tribal consultation sessions to gain input by Tribal officials concerning the impact of this rule on Tribal governments, communities, and individuals. These sessions will establish a baseline of consultation for future actions, should any become necessary, regarding this rule. Reports from these sessions for consultation will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will respond in a timely and meaningful manner to all Tribal government requests for consultation concerning this rule and will provide additional venues, such as webinars and teleconferences, to periodically host collaborative conversations with Tribal leaders and their representatives concerning ways to improve this rule in Indian country.

E-Government Act Compliance

The Agency is committed to the E-Government Act, which requires Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible.

Implementation Guidelines

Applications that were submitted after the Farm Bill was enacted (June 18, 2008) have not been processed pending publication of this Interim Rule. These applications will be reviewed in accordance with subpart E of part 1738, and information about any deficiencies and the time frame allowed for addressing them will be communicated to the applicants in writing.

Background

A. Introduction

The Agency improves the quality of life in rural America by providing investment capital for deployment of rural telecommunications infrastructure. Financial assistance is provided to rural utilities; municipalities; commercial corporations; limited liability companies; public utility districts; Indian tribes; and cooperative, nonprofit, limited-dividend, or mutual associations. In order to achieve the goal of increasing economic opportunity in rural America, the Agency finances infrastructure that enables access to a seamless, nationwide telecommunications network. With access to the same advanced telecommunications networks as its urban counterparts, especially broadband networks designed to accommodate distance learning, telework, and telemedicine, rural America will eventually see improving educational opportunities, health care, economies, safety and security, and ultimately higher employment. The Agency shares the assessment of Congress, State and local officials, industry representatives, and rural residents that broadband service is a critical component to the future of rural America. The Agency is committed to ensuring that rural America will have access to affordable, reliable, broadband services and to provide a healthy, safe, and prosperous place to live and work.

B. Regulatory History

On May 13, 2002, the Farm Security and Rural Investment Act of 2002, Public Law 107–171 (2002 Farm Bill) was signed into law. The 2002 Farm Bill amended the Rural Electrification Act of 1936 to include Title VI, the Rural Broadband Access Loan and Loan Guarantee Program (Broadband Loan Program), to be administered by the Agency. Title VI authorized the Agency to approve loans and loan guarantees for the costs of construction, improvement, and acquisition of facilities and equipment for broadband service in eligible rural communities. Under the 2002 Farm Bill, the Agency was directed to promulgate regulations without public comment. Implementing the program required a different lending approach for the Agency than it employed in its earlier telephone program because of the unregulated, highly competitive, and technologically diverse nature of the broadband market. Those regulations were published on January 30, 2003.

In an attempt to enhance the Broadband Loan Program and to acknowledge growing criticism of funding competitive areas, the Agency proposed to amend the program's regulations on May 11, 2007 at 72 FR 26742 to make eligibility of certain service areas more restrictive than set out in the 2002 Farm Bill. In addition to eligibility changes, the proposed rule included, among others, changes to persistent problems the Agency had encountered while implementing the program over the years, especially regarding equity requirements, the market survey, and the legal notice requirements. As the Agency began analysis of the public comments it received on the proposed regulations, the Food, Conservation, and Energy Act of 2008, more commonly known as the 2008 Farm Bill, was working its way through Congress. The proposed rule and key aspects of the public comments were shared with Congress during its deliberations, and the majority of the proposed changes in the proposed rule were incorporated into the legislation, with and without modification. For instance, the proposed rule lowered the equity requirement from 20 percent of the loan value to 10 percent. Congress enacted that change.

Other changes the Congress incorporated were several new

restrictions not found in the 2002 Farm Bill. These were in response to growing public criticism of federally funded competition. First, funding is restricted in areas that contained 3 or more incumbent service providers, which is defined as serving not less than 5 percent of the proposed service area. Second, a requirement was added that at least 25 percent of the proposed service area not have access to more than one incumbent service provider. And third, for incumbent service providers that were merely upgrading the quality of broadband service in their existing service territory, the prior restrictions on competition would be waived.

In response to the growing national debate on what was rural, the 2008 Farm Bill relaxed the restriction to permit urbanized areas that were not adjacent and contiguous to areas with a population of more than 50,000 inhabitants. And lastly, the 2008 Farm Bill incorporated the concept of not requiring market studies for applicants that relied on a penetration rate of less than 20 percent for the loan to be feasible.

In the public interest of having a Broadband Program in place to quickly address the needs of the hundreds of applications that were not funded under the Recovery Act, and in light of the fact that the great majority of changes herein are mandated by the 2008 Farm Bill, or have been proposed in the Agency's prior rule, put out for comment, and subsequently adopted by Congress in the 2008 Farm Bill itself, the Agency is moving forward with certain changes to the Broadband Loan Program by publishing an interim rule. The Agency also believes that this approach is consistent with Congressional intent, given that in section 6110(b) of the 2008 Farm Bill, Congress authorized the Agency to publish these regulations in an interim rule. Notwithstanding the public interest and specific authority previously discussed, the Agency is seeking comment from the public, which will ultimately be incorporated into a final rule. Specifically, the Agency seeks comment on priority of applications, application requirements, the method of determining which applicants could be eligible for 4 percent interest rates, the notice requirement, and processing. In addition, the Agency is seeking comment for future changes to its Broadband Program based on "lessons learned" from the recently concluded Broadband Initiatives Program under the Recovery Act. The Agency believes that public comment on these issues will help the Agency make future adjustments to the Broadband Program to make it more responsive to the needs of rural America. One lesson that the Agency has already learned to date is that the broadband industry is dynamic and that the Broadband Program will need to continue to evolve to be responsive to the needs of the industry.

The Agency urges all interested parties to provide comments via the Internet or postal mail. Please see instructions on how to do so in the **ADDRESSES** section of this document.

Existing location in 2003 final regulation	New location in 2009 interim rule	Action taken	Content change
Subpart A—General:			
§ 1738.1 General Statement.	1738.1	Modified	Revised paragraph (a) to include purpose of loan. Deleted existing paragraphs (b) and (c). Added new paragraph (b) with reference to Agency's Web site.
§ 1738.2 Definitions	1738.2	Modified	Because they are not used in the interim rule, the Agency removed the following definitions: Broadband pilot. Eligible rural community. Initial loan. Interim construction. Loan funds. Mortgage. Private loan guarantee. Release of funds. RUS. RUS telecommunications borrower. The Agency added the following definitions to clarify existing regulations and support rule modifications: Advance. Agency. Arm's length transaction. Broadband borrower. Broadband lending speed. Broadband loan. Build-out. Competitive analysis. Cost share. Customer premise equipment (CPE). Derivative. Equity. Financial feasibility. Guaranteed amount debt derivative. Guaranteed amount equity derivative. Guaranteed amount equivalent. Guaranteed loan amount. Guaranteed loan note. Guaranteed loan portion. Guaranteed loan portion amount. Guaranteed loan portion note. Incumbent service provider. Indefeasible right to use agreement. Loan guarantee.

Existing location in 2003 final regulation	New location in 2009 interim rule	Action taken	Content change
			Loan guarantee documents. Loan funds. Market survey. Pre-loan expense. Funded service area. Reject. Reseller. Rural area. Security documents. Service level objectives (SLOs). Service provider. Service territory. Start-up. System of accounts. Telecommunications loan. Underserved household or Underserved area. Unguaranteed amount equivalent. Unguaranteed loan amount. Unguaranteed loan portion amount.
Subpart B—Loan Purposes and Basic Policies:			
§ 1738.10 General	1738.1(a)	Modified/relocated	Language regarding purpose, paragraph (a), was merged with language in 1738.1(a).
	1738.51(f)	Modified/relocated	Refinancing language in (b) was modified and moved.
	1738.153	Relocated	Language in (c) has been moved to § 1738.153(d).
	1738.206	Relocated	Language in (d) has been moved to § 1738.206—Evaluation for feasibility.
§ 1738.11 Availability of broadband service.	1738.204	Modified/relocated	Public notice language moved to § 1738.204.
	1738.203	Modified/relocated	Paragraphs (a) and (b) incorporated into prioritization scheme presented in § 1738.203.
§ 1738.12 Location of facilities.	1738.51	Modified/relocated	Location of facilities now addressed in § 1738.51(a).
§ 1738.13 Allocation of funds.	1738.203	Modified/relocated	Moved to § 1738.203(c)—Priority for processing loan applications and streamlined to reference the statute.
§ 1738.14 One-time priority for unfunded applications from the broadband pilot program.	Deleted	Deleted	No longer relevant.
§ 1738.15 Priorities	1738.203	Modified/relocated	Incorporated into prioritization scheme presented in § 1738.203.
§ 1738.16 Eligible entities.	1738.101	Modified/relocated	Moved language regarding types of eligible entities to 1738.101(a).
§ 1738.17 Civil rights	1738.156	Relocated	Moved language to new section that lists all applicable Federal requirements.
§ 1738.18 Minimum and maximum loan amounts.	1738.151	Relocated	Moved to 1738.151(b) and (c).
§ 1738.19 Facilities financed.	1738.51	Modified/relocated	1738.51 Eligible loan purposes replaces paragraphs (a) through (d) in previous rule. 1738.51(b)—new language regarding start-up and overhead costs is a further clarification that these costs are eligible for financing. 1738.51(c)—new language (replacing old 1738.19(b)) limiting the cost of the capital lease for the first 5 years of the loan amortization period. 1738.22(d)—new language clarifies Agency practices regarding 1738.19(c) in the previous rule. 1738.51(e)—new language regarding pre-loan expenses.

Existing location in 2003 final regulation	New location in 2009 interim rule	Action taken	Content change
	1738.52	Modified/relocated	1738.52 Ineligible loan purposes replaces paragraphs (e)—(f) in previous rule. This includes modified language regarding financing of CPE equipment; applicants often sell the CPE rather than lease it to the end-user. The original intent was that this equipment would be used as collateral; however, because CPE is often physically out of the control of the applicant and because the value of end-user equipment depreciates quickly, we have determined that other arrangements offer the Agency a similar level of security, while offering the applicant more flexibility under our rules. Paragraph (g) from previous rule deleted as it referenced actions taken prior to October 2004. The issues addressed in paragraph (h) from the previous rule is addressed in 1783.102 (Eligible Service Area). Paragraph (i) from the previous rule deleted, as the loan review process is expected to address this type of concern.
§ 1738.20 Credit support requirement.	1738.207 & 208	Modified/relocated	Now called Equity requirement and Additional cash requirement. Applicants must have equity equal to 10% of the loan amount. Added clarification on the use of letters of credit and bonds to meet equity requirements. Modified cash requirement language so that cash requirements are considered at time of feasibility determination rather than for eligibility.
§ 1738.21 Interim financing.	1738.252	Modified/relocated	Revised for clarification. No substantive change.
§ 1738.22 Loan security	1738.154	Modified/relocated	Requirement unchanged, but reworded to provide further clarity.
	1738.208(b)	Relocated	Language regarding TIER requirement moved.
Subpart C—Types of Loans:			
§ 1738.30 Rural broadband access loans and loan guarantees.	1738.151 & 152	Modified/relocated	Language regarding cost-of-money loans in paragraph (a) of previous rule moved and revised for clarification. No substantive changes were made. Language regarding 4% loans in paragraph (b) of previous rule revised. When they are available, the Agency will use 4% loans to assist applicants in meeting financial feasibility requirements. Unless announced via a notice in the FEDERAL REGISTER, no other criteria apply with regard to eligibility for receipt of a 4% loan.
	1738.301–307	Relocated	Language regarding loan guarantees in paragraph (c) of the previous rule now appears in Subpart G—Loan Guarantee. No substantive changes have been made.
§ 1738.31 Full faith and credit.	1738.308	Relocated	Language has been relocated.
Subpart D—Terms of Loans:			
§ 1738.40 General	1738.153	Modified/relocated	Revised for clarification. No substantive change.
	1738.155	Modified/relocated	Language regarding establishing terms and conditions on a case-by-case basis moved to § 1738.155—Special terms and conditions. Language modified to provide additional clarity.
§ 1738.41 Payments on loans.	1738.153	Modified/relocated	Revised for clarification. No substantive change.

New sections	Subject matter	Content
Subpart C—Eligibility Requirements:		
1738.102	Eligible service area	The rules specified in this section codify requirements included in the 2008 Farm Bill.
1738.103	Eligible service area exceptions for broadband facility upgrades.	The rules specified in this section codify requirements included in the 2008 Farm Bill.
1738.104	Preliminary assessment of service area eligibility.	The rules specified in this section codify requirements included in the 2008 Farm Bill.
Subpart D—Direct Loan Terms:		
1738.156	Other Federal requirements	Codifies standard requirements existing in all broadband loan documents.

New sections	Subject matter	Content
Subpart E—Application Review and Underwriting:		
1738.201	Application submission	New section that clarifies that applicants are encouraged to submit applications through the General Field Representative in their state for review prior to final submission. Applications will still be accepted at the National Office.
1738.202	Elements of a complete application	This new section clearly specifies what must be included in an application before it will be reviewed by the Agency. The Agency believes this demonstrates its commitment to a standardized and more transparent process.
1738.205	Notification of completeness	This new section codifies currently existing internal processes and is designed to help applicants understand the post-application process. The Agency believes this demonstrates its commitment to a standardized and more transparent process.
1738.206	Evaluation for feasibility	This new section codifies currently existing internal processes and is designed to help applicants understand the post-application process. The Agency believes this demonstrates its commitment to a standardized and more transparent process.
1738.209	Market survey	The rules specified in this section codify requirements included in the 2008 Farm Bill.
1738.210	Competitive analysis	The rules specified in this section codify existing requirements published in RUS Bulletin 1738–1. Applicants are aware of the requirements and currently comply with them.
1738.211	Financial information	The rules specified in this section codify existing requirements published in RUS Bulletin 1738–1. Applicants are aware of the requirements and currently comply with them.
1738.212	Network design	The rules specified in this section codify existing requirements published in RUS Bulletin 1738–1. Applicants are aware of the requirements and currently comply with them. New language reserving the Administrator's right to modify the requirements on a case-by-case basis.
1738.213	Loan determination	This new section codifies currently existing internal processes and is designed to help applicants understand the post-application process. The Agency believes this demonstrates its commitment to a standardized and more transparent process.
Subpart F—Closing, Servicing, and Reporting:		
1738.251	Loan offer and loan closing	Codifies standard requirements currently existing in broadband loan closing documents.
1738.252	Construction	Codifies standard requirements currently existing in broadband loan closing documents.
1738.253	Servicing	Codifies standard requirements currently existing in broadband loan closing documents.
1738.254	Accounting, reporting, and monitoring requirements.	Codifies standard requirements currently existing in broadband loan closing documents.

C. Rule Changes

The following summarizes the changes introduced in this rule. The changes are presented in the order in which they appear within the interim rule.

Subpart A—General

Section 1738.1 Overview

Section 1738.1 (b) of the proposed rule contained detailed procedural information including specific contact information that may change over time. This information has been removed in favor of a general reference to the Agency's Web site to avoid the need for future revisions to the regulation based on changes in personnel or procedural guidance. Section 1738.1(c) of the proposed rule stated that no fees or charges will be assessed for broadband loans. This policy statement has been removed from the rule. The Agency does not presently assess fees on broadband loans. Should the Agency's fee policy change, it would be reflected in a separate **Federal Register** notice.

Section 1738.2 Definitions

To provide additional clarity throughout the regulation, the Agency has added several new definitions and removed definitions for terms not used in the interim rule. Each addition to and removal from the 2003 rule is listed in the preceding crosswalk. A number of definitions were refined in the process of responding to public comments on the proposed rule and adapting the rule in response to the 2008 Farm Bill. Key substantive changes in existing definitions are described below, as are new terms relating to policies set forth in this rule that may require explanation.

Broadband Lending Speed

The "broadband lending speed" is the minimum bandwidth requirement, as published by the Agency in a notice in the **Federal Register**, that an applicant must deliver to the customer in order for the Agency to fund a broadband loan. In order to treat all emerging technologies equally, the Agency may designate a different broadband lending speed for fixed and mobile broadband service. Broadband lending speeds may be different from the minimum rate of data transmission required to determine the availability of broadband service when qualifying a service area. The Agency

feels strongly that in order to be a prudent lender and steward of taxpayer dollars, it must lend to entities capable of repaying loans received from the Agency. As such, the Agency has added this term to make clear that it will only loan funds to entities that plan to offer service at a level that keeps pace with technological innovations while meeting the demands of customers in rural America. The Agency also believes that the constant changes and rapid technological improvements in the broadband industry necessitate that the Agency be flexible in reviewing and, if necessary, adjusting this speed on as frequent as an annual basis.

Equity

The Broadband Loan Program has historically used the term "credit support" in lieu of "equity." The Farm Bill uses the terms "cost share," "credit support," and "equity." In an effort to make this regulation and associated program documents more readable, the Agency has used the commonly-understood term "equity" in lieu of "cost share." Equity and other financial requirements which enhance the security of the loan are all elements of "credit support." For the purpose of Sec. 306F of the Rural Electrification Act of 1936, (SUTA), equity requirements in this program shall have the same meaning as "matching fund requirements." SUTA provides statutory authority for the Agency to make certain adjustments in the requirements of programs with respect to projects on trust territories like Native American reservations. This authority is discussed in more detail below.

Projected Revenues

In addition to the minimum 10 percent equity requirement, the Agency will now allow the use of projected revenues to be considered in determining if more than a 10% equity position is required to maintain a viable operation. For start-up operations and operations that have not demonstrated a positive cash flow, the Agency will only allow fifty percent of the projected revenues to be used to demonstrate a sustainable operation. A financial analysis of the business plan will be performed with a 50 percent reduction in projected revenues to determine if an equity position greater than 10 percent is required. If this analysis demonstrates that a 10 percent equity position is not sufficient to ensure a sustainable operation, the equity requirement will be increased to the appropriate level. We are inviting comment on the use of fifty percent of the projected revenues versus a higher or lower percentage.

Fiscal Year

The term "fiscal year" had previously been defined with reference to the US government's fiscal year. However, the majority of the references to fiscal years in the interim regulation refer to the applicant's fiscal year. Therefore, the term has been redefined. In the two places where the Federal fiscal year is referenced, this is specifically noted.

Incumbent Service Provider

Questions have been raised about the meaning of the statute's use of the term "providing broadband service." Some have argued that it could mean either service providers with a "take-up rate" that meets the specified threshold, or service providers that offer services that "pass by" area households without regard to whether the services are actually purchased by the households. The Agency has concluded that the word "providing" clearly indicates the Congressional intent that the incumbent service provider determination should be based on the services actually purchased by households, not just on the number of households to which services are offered. This interpretation is reflected in the definition, which defines incumbent service provider as one that *provides* broadband service to at least five percent of the households in an applicant's proposed service area rather than one that "offers" such service.

Rural Area

There were 19 comments received relating to the definition of an "Eligible Rural Community." This issue is significant in that it directly determines which constituencies can receive the benefits of the Broadband Loan Program. The 2008 Farm Bill defines a rural area as any area outside of a city, town, or incorporated area that has a population of no more than 20,000 inhabitants provided that it is not in an Urbanized Area (as defined by the Census Bureau) that is contiguous and adjacent to a city or town with a population of 50,000 inhabitants. This definition replaces the definition of "eligible rural community" provided in the proposed rule.

Service Territory

While the concept of a "service area" has been traditionally used within the program, the 2008 Farm Bill refers to a "service territory." The Agency considers the two terms to be synonymous. The interim rule continues to use the commonly-accepted term "service area." The term "service territory" has been defined in order to clarify how the language used in the regulation links to the language in the 2008 Farm Bill but is not used in the interim rule.

Underserved Household or Underserved Area

This definition was added to define an underserved household or area as one that is not offered broadband service at all, or is offered broadband service by only one incumbent service provider, a requirement added by the 2008 Farm Bill.

Section 1738.2 Substantially Underserved Trust Areas

The Agency has developed this interim rule in accordance with USDA's Action Plan for Tribal Consultation and Collaboration submitted in response to President Obama's Memorandum on Tribal Consultation and Collaboration executed November 5, 2009 during the White House Tribal Leaders Conference (USDA Action Plan), President Clinton's Executive Order 13175, titled "Consultation and Coordination with Indian Tribal Governments" (November 6, 2000), and various USDA Departmental Regulations on Tribal Consultation, including DR 1350–001 (September 11, 2008). DR 1350–001 directs the Agency "to the extent practicable and permitted by law, consider any application by an Indian tribe for a waiver of statutory or regulatory requirements in connection with any program administered by it with a general rule toward increasing opportunities for utilizing flexible policy approaches at the Indian tribal level in cases in which the proposed waiver is consistent with the applicable Federal policy objectives and is otherwise appropriate" (DR 1350–001 ¶ 11). Section 6105 of the Farm Bill amended the RE Act by adding section 306F providing the Secretary additional statutory authorities which have been delegated to the Administrator that may be initiated in order to improve the availability of RUS programs in communities located in trust lands (as defined in section 3765 of title 38, United States Code) that the Administrator has determined are in high need of the benefits of those programs.

In order to provide effective consultation and collaboration in the carrying out of its roles and responsibilities, the Agency has been actively participating in a series of consultations across the country with the implementation of its broad authorities in section 306F as a focal point. Because these consultations are ongoing and the USDA Action Plan announced the development of a new

comprehensive Departmental Regulation that will replace all existing Departmental Regulations on Tribal Consultation (including DR 1350–001), the implementation of section 306F is still under development. Nevertheless, enough is known at this point to make it appropriate to specifically recognize in this interim rule the additional authorities that the 2008 Farm Bill created for the Secretary by explicitly increasing the Secretary's legal authority for waivers in designated communities in trust lands, which include Tribal communities and others as more specifically provided in section 306F. This authority has been delegated to the Administrator (*See* 7 CFR 2.17(a)(20) and 2.47(a)(1)).

This interim rule acknowledges these changes in law and reflects the results of consultations on section 306F concluded so far. The Agency has done so by adding a new § 1738.3 entitled "Substantially underserved trust areas" as an initial step in applying the broad authority contained in section 306F specifically to the Broadband Loan Program. The addition of § 1738.3 necessitated a related change in § 1738.2 to expand the definition of "equity" in order to clarify that "equity" as used in this interim rule includes the term "cost share" and is included in the term "credit support" as used in Title VI of the RE Act and for the purposes of section 306F in this program is the same as "matching fund requirements." The Agency will proceed case-by-case in applying § 1738.3 to particular applications considered under this interim rule. Accordingly, it is essential that applicants that believe § 1738.3 should be applied to their requests consult with the Agency early in the development of their applications to determine how § 1738.3 might affect the application of other sections of this interim rule in their particular cases. The Agency invites comments which, together with the results of future consultations and developments in the implementation of USDA's Action Plan, will be considered in developing the final version of this interim rule. From time to time, the Agency may also publish further guidance for use of § 1738.3 either in the form of notices or guidance documents specifically regarding the Broadband Loan Program or in notices, guidance documents or rules relating to the general subjects of Section 306F or Tribal consultation and collaboration.

Subpart B—Eligible and Ineligible Loan Purposes

The Farm Bill imposed no restrictions regarding eligible and ineligible loan purposes, nor did public comments on the proposed rule suggest the need for any change. Therefore, the substantive requirements in this subpart remain largely unchanged from the requirements which were presented in subpart C of the proposed rule. The material has been edited for clarity.

Section 1738.51 Eligible Loan Purposes

This section requires that broadband loan funds be used to fund the construction, improvement, or acquisition of facilities required to provide broadband service. It specifies certain conditions concerning start-up and overhead costs, leasing facilities, acquisitions, pre-loan expenses, and refinancing telecommunications loans made under the RE Act. The discussion of acquisitions has been expanded to include all of the provisions associated with acquisition in one place. This involved moving the item concerning acquiring majority stock and those items concerning acquisitions from affiliates out of the list of ineligible expenses and reframing them as conditions of acquisition under eligible expenses. This was done in order to place all restrictions associated with acquisition together. No substantive change is intended.

A discussion of pre-loan expenses is provided in § 1738.51(e). This paragraph has been edited for clarity and expanded to specify that these expenses may be incurred prior to the date on which notification of a complete application is issued. This is consistent with current Agency practice. No substantive change is intended.

Section 1738.52 Ineligible Loan Purposes

This section excludes certain expenses associated with acquisition of stock, facilities, or equipment of an affiliate, customer premise equipment, vehicles, and systems or facilities that are not designed and constructed in accordance with applicable requirements. The discussion of expenses related to an acquisition has been moved to § 1738.51. For the sake of clarity, the interim rule specifies that costs incurred prior to the date on which notification of a complete application is issued are not considered eligible loan purposes with the exception of eligible pre-loan expenses which are clarified in the regulation. In addition, three ineligible purposes that had been present in the program's application guide, but not listed in the proposed rule, have been added. These ineligible purposes include: broadband facilities leased under the terms of an operating lease; merger or consolidation of entities; and operating expenses of the project. The addition of these ineligible purposes is intended to ensure clarity and completeness in the regulation and does not represent a change in the Agency's policy.

Subpart C—Eligibility Requirements

Section 1738.101 Eligible Applicants

This section specifies criteria that entities must meet in order to be eligible for a broadband loan. Generally, any entity that is not an individual or a partnership is eligible for a broadband loan provided that the applicant meets certain program requirements. Requirements include that applicants: (1) Agree to complete their build-out within three years; (2) demonstrate their ability to provide the service at the Agency's broadband lending speed; (3) demonstrate an equity position equal to at least 10 percent of requested loan amount; and (4) understand that the Administrator may require additional security in order to ensure financial feasibility. Each of these requirements was included in some form in the proposed rule and the Agency received several comments with regard to three of them.

The proposed rule would have required that borrowers complete the build-out of their broadband facilities within three years. The Agency received 10 comments about this requirement, half in favor and half against. The 2008 Farm Bill imposed a statutory requirement that the service described in the loan application be completed within three years. Therefore, § 1738.101(b)(2) of the interim rule requires that all applicants agree to complete the build-out of the broadband service described in their application within three years from the date the borrower is notified that loan funds are available.

The requirement to provide service at the broadband lending speed is stated at § 1738.101(b)(3). While the requirement is succinct, it represents a shift in the Agency's policy and affects definitions and requirements in other parts of the interim rule, including § 1738.102(b) concerning protection of current borrowers' service areas.

After publication of the proposed rule, the Agency received eight comments concerning the speed at which broadband service is provided, nearly all of which suggested that the Agency should change the definition of broadband service to be based on a higher transmission speed. The Agency believes the availability of affordable, high-quality broadband service is a key

factor in promoting and protecting the economic growth and well-being of rural communities. The Agency also believes that as a steward of taxpayer dollars, it should lend money to projects that will provide service at a level for which there is customer demand. As such, the Agency agrees with the commenters that urged the Agency to define broadband at a faster speed.

The concept of broadband speed matters in two different contexts in this regulation. First, it determines what types of projects will be eligible for a broadband loan. Second, it determines which existing providers will be classified as incumbent service providers for the purpose of determining what geographic areas are eligible for a broadband loan. The implications of setting higher or lower speed requirements differ for the two contexts. Specifically, setting a significantly higher speed could open up vast areas of the country as eligible areas, limiting the program's impact on those areas that are most seriously limited in their ability to access broadband service. A higher speed also would result in providing government funding in markets where competition (*i.e.,* three or more service providers) already exists at more modest speeds. On the other hand, requiring higher speeds would help ensure that those areas that receive assistance through a broadband loan receive cutting-edge service that will remain competitive, and therefore financially viable, farther into the future.

The Agency has resolved this dilemma by introducing two different concepts related to the speed of transmission in the interim rule. The term "broadband service" is used in the context of determining whether the services offered by existing service providers can be considered broadband service. To account for the value of mobility, the Agency will distinguish between fixed and mobile broadband service. The Agency's intent is to set these levels low enough to ensure that loans are not made in areas with sufficient competition to offer acceptable services to rural households. The term "broadband lending speed" is used in the context of determining what standards an applicant's proposed services must attain in order to qualify for a broadband loan. The 2008 Farm Bill does not allow for requirements that preclude the use of evolving technologies and therefore the Agency has established the means for setting different requirements for fixed and mobile broadband service. The Agency also believes that these services are sufficiently different to justify a consideration of having different requirements. In the case of mobile service, consumers appear to be willing to accept slower speeds in exchange for mobility. The Agency's intent is to set these lending speeds at an aggressive level to ensure that public funds are used to provide the highest-quality service and that the investments will remain competitive in the long term to allow repayment of the loan. The Agency has carefully adhered to the statutory requirement to remain technologically neutral in its definition of the minimum rate of data transmission that will qualify as broadband service and the minimum bandwidth requirement that will establish the broadband lending speed.

The Agency has not established either the minimum rate of data transmission that will qualify as broadband service or the minimum bandwidth requirement that will establish the broadband lending speed in the regulation. The appropriate level for these standards will change over time as technology evolves. To account for this reality, the Agency will publish these speeds in the **Federal Register**. The Agency's intent is to leave the standards in place over a multi-year period to allow potential applicants to plan and develop their proposals. However, the standards will be altered from time to time, as changes in technology warrant. For the purposes of this interim rule, the broadband service minimum rate of data transmission will be three megabits per second (download plus upload speeds) for both fixed and mobile broadband service and the broadband lending speed will be a minimum bandwidth of 5 megabits per second for fixed and 3 megabits per second for mobile broadband service to the household (download plus upload speeds).

The requirement that applicants demonstrate a 10 percent equity position is stated in § 1738.101(b)(4). The Agency received numerous comments with regard to the equity requirement after publication of the proposed rule. This requirement is expanded upon in § 1738.207 and an explanation of the Agency's policy choices is provided within that portion of the preamble.

Finally, paragraph § 1738.101(b)(5) concerning additional security was not previously included in the applicant eligibility section. Its inclusion here is not meant to change the eligibility requirements laid out in the proposed rule. Instead, it is listed here with a reference to its fuller discussion later in the regulation to ensure that potential applicants are made aware, as they are considering whether they will qualify for a broadband loan, that additional security requirements may be imposed.

Section 1738.102 Eligible Service Area

Section 1738.102(a)(1) clarifies that to be eligible for a broadband loan, a funded service area must be completely contained within a rural area. The specifics of what constitutes a rural area are provided in the definitions section.

The 2008 Farm Bill requires that at least 25 percent of the households in the proposed service area be underserved in order for the area to qualify as an eligible service area. As presented in the definitions, an underserved household is one that is not offered broadband service, or that is offered broadband service by only one incumbent service provider. This requirement is addressed in § 1738.102(a)(2).

Under the proposed rule, applicants would have been precluded from obtaining funding for projects in service areas with four or more existing broadband service providers. The 2008 Farm Bill, however, specified that a service area may be eligible for funding only if no part of the area is served by three or more incumbent service providers. This requirement is addressed in § 1738.102(a)(3).

The proposed rule would have prevented the Agency from making broadband loans in any rural community in which a current borrower was already providing broadband service. In the present rule, the Agency has kept this prohibition, but added further protection to grantees to address the Broadband Initiatives Program awards recently made. Nonetheless, the Agency encourages comments on this issue.

In some cases, applicants may propose areas within their application that are ineligible. Such areas must be included in the review of the financial feasibility of the project, and shown how they are funded by outside sources. For example, an applicant may have requested a loan to provide broadband service in three communities located in eligible areas, but based the feasibility analysis on a five-community strategy with two communities overlapping a current borrower's service territory. In such a situation, the Agency would not make a loan in the two communities that support the current borrower's operations but could make a loan in the three communities that constitute the eligible service area. This is reflected in § 1738.102(a)(4).

Finally, § 1738.102(b) specifies that, while multiple service areas may be included in a single loan application, non-contiguous areas are considered separate service areas and must be

treated separately for the purpose of determining area eligibility. This means that non-contiguous service areas must also be treated separately for the purposes of the market survey and competitive analysis requirements.

Section 1738.103 Eligible Service Area Exceptions for Broadband Facility Upgrades

The Agency firmly believes rural communities should have affordable access to broadband services of the highest quality. The 2008 Farm Bill supports this position by providing for an exemption from certain area eligibility requirements if an applicant proposes to upgrade its existing broadband service facilities. This is reflected in the interim rule at § 1738.103(a), which exempts current borrowers wishing to upgrade their facilities from the requirements concerning number of underserved households as set forth in § 1738.102 and if the current borrower is also an incumbent service provider, from the number of incumbent service providers stipulated in § 1738.102(a)(2) and (3). This exception will permit the Agency to consider funding borrower efforts to keep their facilities upgraded to current standards, even if competition increases and the percentage of households served increases. The Agency will offer similar consideration to incumbent service providers wishing to upgrade their facilities, even if they are not current borrowers, by exempting them from the requirement concerning the number of incumbent service providers stipulated in § 1738.102(a)(3).

For loans that do not require an exception from § 1738.102(a)(2) and (3) for upgrading, an applicant can treat service areas to be upgraded and new service areas as a single service area, as long as the areas are contiguous. In the case of an upgrade that requires an exception to qualify for funding, however, the interim rule at § 1738.103(c) requires that the geographic area already served by the applicant be treated as a separate service area from any expanded service areas to be added. In this situation, the interim rule specifies that the expansion area will be treated as a new service area even if it is contiguous to the area to receive the exception for upgrading. In such a situation, an applicant may provide the Agency with only one application, but the expansion area must meet all service area eligibility requirements and be treated separately for the purposes of the market survey, competitive analysis, and financial projection requirements. This requirement is necessary to prevent potential applicants from manipulating their expanded service areas to trigger the upgrade exceptions in ways that would circumvent the intent of the statute.

Section 1738.104 Preliminary Assessment of Service Area Eligibility

The 2008 Farm Bill includes a new provision for determining, prior to developing an application, whether a particular geographic area is potentially eligible for a loan. This process is expected to help prevent potential applicants from investing time and other resources in developing applications for ineligible areas, thereby reducing the paperwork burden associated with the program. To address this requirement, the interim rule specifies at § 1738.104(a) that the Agency will make available information about whether the proposed service area is located in a rural area, whether it overlaps with a current borrower's service area, and whether any part of the area overlaps with a service area specified in a pending application.

This preliminary assessment of area eligibility does not account for all factors associated with area eligibility. For example, it is not possible to make a preliminary assessment of whether the area is already served by three or more incumbent service providers. This information will not be known until after the application is submitted and the public notice period has expired. Moreover, the situation in a given service area may change between the preliminary assessment and submission of the application. Section 1738.104(b) highlights the fact that the preliminary assessment indicating that a proposed area may be eligible is not an assurance that the proposed service area will be eligible for a broadband loan at the time of application. The preliminary assessment will, however, provide a basic screening tool to help potential applicants make informed decisions about their choice to develop an application.

Initially, the Agency will provide this preliminary assessment information on a case-by-case basis, as requested by prospective applicants. However, the Agency also is developing an interactive mapping tool that is expected to allow applicants both greater independence and greater flexibility to make informed choices about service area selection and application development when it becomes available.

Subpart D—Direct Loan Terms

Section 1738.151 General

Section 1738.151(a) identifies the two types of direct loans that are available under the program: loans bearing a cost-of-money interest rate or bearing a fixed 4 percent rate. A combination of these two types of loans also may be offered. The details about these types of loans, such as interest rates, terms and conditions, and security, are discussed later in this subpart. Section 1738.151(b) specifies that the program's minimum and maximum loan amounts will be published in the **Federal Register**, along with the amount of funds available for each type of loan. New language has been added to the proposed rule, in light of an explicit limitation noted in the 2008 Farm Bill, on maximum loan amount. Specifically, § 1738.151(c) states that applicants providing telecommunications or broadband service to at least 20 percent of the households in the United States are limited to a loan amount that is no more than 15 percent of the funds available through the program for the fiscal year.

Section 1738.152 Interest Rates

Aside from minor edits for clarity, policies regarding cost-of-money interest rates set forth in § 1738.152(a) remain unchanged from polices stated in the proposed rule. With regard to direct 4 percent loans, the proposed rule would have made such loans available to rural communities with no more than 5,000 residents and served by no more than one service provider. Only two comments were filed relating to this issue, one of which suggested a standard that favored projects with the highest percentage of underserved communities, where feasibility was insufficient under cost of money rates. In light of this comment, the Agency reconsidered the potential usefulness of the 4- percent loans as a tool to help an applicant meet financial feasibility requirements. More specifically, the Agency envisions using 4 percent loans to assist applicants that project a times interest earned ratio (TIER) of greater than 1.00 but less than the required ratio of 1.25. Section 1738.152(b) specifies that the 4- percent loan can be used by the Agency to help meet such feasibility requirements. Before implementation of using 4 percent loans, the Agency requests public comments on the requirements of their use.

Section 1738.153 Loan Terms and Conditions

The material included in this section appeared in the proposed rule in a section entitled "payments on loans."

Paragraph 1738.153(a) of the interim rule includes information on repayment periods and Paragraph 1738.153(b) discusses loan payments. These sections have been edited for clarity, but no substantive changes have been made. Discussion of an extended maturity mentioned in the proposed rule has been moved to § 1738.155 (Special terms and conditions). Paragraph 1738.153(c) has been added to clarify the Agency's existing policy, specified in current loan documents, requiring applicants to obtain a fidelity bond as a condition of receiving the loan.

Section 1738.154 Loan Security

Paragraph 1738.154(a) and (b) states that all loans made by the Agency must be adequately secured and that the Agency must generally be given an exclusive first lien on all of the applicant's assets. Paragraph 1738.154(c) and (d) go on to require that property purchased with loan funds be owned by the applicant and to impose special requirements on facilities that are not self-contained operating systems. Finally, Paragraph 1738.154(e) articulates the Agency's existing policy that financial, investment, operational, reporting, and managerial controls may be specified in the loan documents. The 2008 Farm Bill imposed no new security requirements. The section has been edited for clarity, but no substantive changes have been made.

The 2008 Farm Bill did add a concept related to loan security, requiring the Agency to ensure that the type, amount, and method of security are commensurate with the risk involved. This requirement is addressed in § 1738.155(b).

Section 1738.155 Special Terms and Conditions

Section 1738.155(a) was added to the interim rule to give the Agency additional flexibility, as provided by the 2008 Farm Bill, to bring broadband access to underserved areas (that is, to areas with no service provider or with only one incumbent service provider). The section specifies that if it aids in achieving financial feasibility, the Agency may adjust terms and conditions such as extending the repayment period or lessening security requirements for underserved service areas. Section 1738.155(b) addresses the statutory requirement that the type, amount, and method of security be commensurate with the risk involved.

Section 1738.156 Other Federal Requirements

Applicants must agree in writing to comply with a range of Federal regulations. This section was added to the interim rule to make clear the various regulations and requirements contained in the loan documents with which applicants will be required to comply. It also clarifies that additional requirements may be imposed through the loan documents. It further specifies that applicants must comply with all relevant Federal, State, and local requirements.

Subpart E—Application Review and Underwriting

Section 1738.201 Application Submission

Section 1738.201(a) codifies current Agency policy that applications may be submitted to either the Agency's General Field Representative (GFR) or directly to the National Office. It further specifies that the date received, which determines processing order, will be established based on the date the application is received by the National Office.

Section 1738.201(b) states that the Agency may publish additional application submission requirements in the **Federal Register**, as well as indicating in that document the amount of funds that will be made available for each loan type.

Section 1738.202 Elements of a Complete Application

This section codifies current Agency policy concerning the key elements that must be included in an application. The section does not specify every application requirement. The details of the application process are provided in the Rural Broadband Access Loan and Loan Guarantee Program Application Guide (the Application Guide). This section is sufficiently detailed, however, to allow the reader to understand what information must be provided in the application so that the Agency can evaluate the financial and technical feasibility of the loan application.

Section 1738.203 Priority for Processing Loan Applications

The 2008 Farm Bill directs that the Agency establish priority processing for applicants proposing "to provide broadband service to the greatest proportion of households that * * * had no incumbent service provider." Although the 2008 Farm Bill uses the term "incumbent service provider," Congressional deliberations suggest that the intent of this provision was to provide priority processing to applicants proposing to serve the highest number of households without access to broadband service. The provision has been interpreted as such for the purposes of this regulation.

The Agency processes applications on a rolling basis. For applications not requesting section 306F consideration, § 1738.203(a) establishes three priority categories to implement the statute's priority requirements: (1) Applications in which no broadband service is available in any proposed service area; (2) applications that propose service areas in which at least 75 percent of the households have no access to broadband service (for applications with multiple service areas, the 75 percent calculation is based on all service areas combined); and (3) all other applications. Once applications have been prioritized according to these criteria, § 1738.203(b) provides that they will be processed on a first-in, first-out basis within each priority category.

Section 1738.203(c) specifies that the Agency will establish National and State reserves, as required by the 2008 Farm Bill. Because the method for establishing the reserves is detailed in the 2008 Farm Bill, the section references the statute rather than repeating the information.

Section 1738.204 Public Notice

In the proposed rule, the Agency proposed new legal notice requirements to help identify areas with no existing broadband service for priority consideration and to notify communities of the potential entrance of a new service provider. Doing so was expected to provide existing service providers with an opportunity to be classified as incumbent service providers and to establish their current service territory, service offerings, market share, and so on. The purpose of these changes was to increase transparency, reach a broader range of interested parties, and obtain more detailed information about incumbent service providers to determine if an applicant's proposed service area was eligible for a broadband loan.

The 2008 Farm Bill affirms the need for transparent public notice, requiring the Administrator to publish a notice of each application received. The interim rule addresses the statutory notice requirement through a public notice process. The interim rule, at § 1738.204(a), requires that the applicant provide all required information but places responsibility on the Agency to publish the notice. It is the Agency's intent to post the public notice on an Agency webpage, which will serve as a central, universal, and easily-accessible point of information. The Agency further intends to explore the possibility of developing tools that

will proactively notify existing service providers about applications that may potentially overlap with the geographic areas in which the existing provider offers service (for example, via a listserv or similar communication tool). The Agency would welcome public comment on approaches to information dissemination that would be most useful to the broadband community.

The 2008 Farm Bill requires that the public notice identify the applicant, the proposed service area, and the estimated number of households without terrestrial-based broadband service in the service area. The interim rule requires applicants to supply this information and to supply a map of the proposed service area identifying rural area boundaries and underserved areas. In addition, applicants are required to provide information about the number of underserved households in each service area and a description of the types of services that the applicant proposes to offer in each service area. These pieces of information are essential to allow incumbent service providers to respond appropriately to the published notice and to allow the Agency to determine whether the proposed service areas are eligible for funding.

The interim rule establishes a standard 30-calendar day notice period that begins after an application is filed and the public notice is posted on an Agency Web site. It requires interested parties to provide the Agency with specified information within the 30 day window in order for the Agency to determine whether they meet the criteria for being an incumbent service provider. Section 1738.204(c) specifies that service providers that do not respond to the public notice within the 30 day period will not be considered incumbent service providers for the purpose of determining the service area's eligibility. However, regardless of whether a service provider responds to the notice or not, all known service providers in the proposed service area will be considered in the competitive analysis performed by the Agency. Section 1738.204(d) clarifies that if a portion of the applicant's service area which is proposed to be funded is ineligible, the Agency will provide the information necessary to allow the applicant to adjust the service areas presented in the application.

Twenty-three commenters responded to the notice requirements in the proposed rule. Overall, the comments were supportive of the Agency's efforts to be more transparent about proposed applications. However, respondents were divided as to how much information should be divulged, with some worrying that too much proprietary information would be made accessible to the public. The Agency has considered comments on the proposed rule in developing those portions of the interim rule where the 2008 Farm Bill offers flexibility. The public notice requirements in the interim rule seek to balance and address many concerns about the notice process. Section 1738.204(e) clarifies that information will be treated as proprietary and confidential to the extent permitted under applicable law.

The Agency is aware that any new system will create uncertainties as the users learn where to find information and what information is required. The Agency is committed to developing tools and making appropriate adjustments to ensure that existing service providers have a fair opportunity to respond to the public notice and to enhancing transparency while protecting proprietary information.

Section 1738.205 Notification of Completeness

This section codifies current Agency policy concerning how it reviews applications for completeness. Section 1738.205(a) specifies that applications must include all required documents and information and that the information must be of adequate quality to allow further analysis. Section 1738.205(b) clarifies that the Agency may take one of three courses of action after reviewing an application for completeness: (1) Notify the applicant that the application is complete and proceed with processing; (2) notify the applicant that the application is of adequate quality but incomplete and specify a time frame within which to make required improvements; or (3) notify the applicant that the application is not of adequate quality and reject the application. By specifying these three courses of action, the Agency is seeking to be transparent and consistent in how it reviews and responds to applications.

The distinction between a notification of incompleteness and a notification of rejection has important implications. When an applicant is notified that an application is incomplete, the application holds its place in the processing queue and the service areas that the applicant intends to serve are not available to other potential applicants. If an application is rejected, the applicant loses its place in the processing queue and those service areas that had been proposed in the rejected application are once again available as service areas for other potential applicants. By establishing a mechanism for rejecting applications, the Agency is seeking to ensure that applications that do not meet a minimum standard, or which are not making adequate progress toward completion, are removed from the processing queue. This will help avoid blocking more feasible applications in the same service area from being considered.

Section 1738.206 Evaluation for Feasibility

This section codifies current Agency policy concerning how it evaluates applications. It explains how the Agency evaluates applications in an effort to help potential borrowers provide higher-quality applications. By clearly establishing the concepts of financial and technical feasibility in § 1738.206(a) and (b), the Agency is seeking to be transparent about the criteria it will use to evaluate applications. The section also clarifies the inter-related nature of the application components, indicating that weakness in one component of the application can impact an overall determination of feasibility. The Agency believes applicants that understand these interconnections will supply higher-quality applications, enhancing the likelihood of approval.

Section 1738.207 Equity Requirement

The equity requirement for the program had stood at 20 percent of the value of the requested loan since the program's inception in 2002. Based on the statutory language of the 2008 Farm Bill, the Agency is proposing a minimum equity requirement of 10 percent. To offset this reduction in equity and to ensure that only sustainable operations are funded, the Agency has added review procedures that can increase the amount of equity required based on the proposed business plan. Commenters were generally supportive of this change, with 11 out of 16 supporting the reduction to 10 percent and many of the remainder supporting even deeper reductions (under certain circumstances).

In the changes made in the 2008 Farm Bill, the Congress also supported the concept of a reduction in the equity requirement by specifying that the amount of equity required must not exceed 10 percent of the amount of the loan requested. While the statute would permit the Agency to require less than 10 percent equity, the Agency is cognizant of the importance of balancing applicant preference for low equity requirements with the Agency's

responsibility, as a steward of taxpayer dollars, to require sufficient equity to ensure the viability of the project. Therefore, § 1738.207(a) requires a minimum equity position of 10 percent of the requested loan amount.

The Agency understands that achieving this equity position when it is not yet known whether the loan will be approved may be difficult. Therefore, as in the proposed rule, § 1738.207(b) and (c) account for situations in which an applicant may not have the equity available at the time the application is submitted. The interim rule specifies that an investor's proposal to cover the equity shortfall or, for State and local governments, the authority to issue a general obligation bond, can be sufficient to meet the equity requirement for the purposes of loan approval. The interim rule requires that the 10 percent equity position must be attained prior to execution of the loan documents.

Section 1738.208 Additional Cash Requirements

The 2008 Farm Bill permits the Agency to make additional security requirements beyond the 10 percent minimum equity requirement when necessary to ensure financial feasibility. This section lays out Agency policy for when it will require an applicant to contribute additional cash to the project. Section 1738.208(a) requires that the feasibility analysis show a positive cash balance at the end of each year during the five-year forecast period. Applicants unable to meet this standard will be required to obtain additional infusions of cash necessary to maintain an appropriate cash balance throughout the five-year forecast period.

As the Agency considered how to count projected revenues, a key issue was the difficulty of substantiating projected revenues for an entity without a credible, recent history of generating positive cash flow. To address this concern, the interim rule specifies at § 1738.208(a)(2) that in addition to the initial projections, start-up and existing companies that do not have a positive cash flow for the two years prior to submitting an application must submit adjusted financial projections based on 50 percent of projected revenues. These adjusted projections will be used to determine the amount of additional cash that will be required. Although the Agency has stated that 50 percent of projected revenues will be considered for start-up operations, comments addressing this requirement are encouraged. For those existing operations that have demonstrated a positive cash flow, 100 percent of projected revenues can be used in the determination of additional cash required.

The interim rule at § 1738.208(b) also permits applicants to use an unconditional, irrevocable letter of credit (LOC) to satisfy any additional cash requirement. Issues of how long the LOC must remain in place and what specific standards it must meet are specified in this section. The section concludes in § 1738.208(c) with a discussion of the timing for providing needed cash infusions.

Section 1738.209 Market Survey

The proposed rule set out to reduce the burden on applicants by eliminating the requirement for a market survey in areas where the applicant projects a minimal penetration rate. This proposal generated considerable support from commenters: Out of the 13 comments filed, eight were generally supportive of the overall initiative, while another three pushed for more leniency. The 2008 Farm Bill settled the question of how lenient to be by setting the penetration rate under which applicants were exempted from conducting a market survey at 20 percent.

In an effort to improve the quality of the market surveys received, the interim rule articulates the Agency's polices concerning what is required from a market survey. Specifically, § 1738.209(a) requires a market survey for each service area that meets the proposed penetration threshold of 20 percent, while § 1738.209(b) exempts those that will not achieve this penetration rate. In order for the project to be considered feasible, the market survey must demonstrate the need for the broadband service and support the financial projections. Section 1738.209(c) specifies that the market study must not be more than six months old when the application is submitted and emphasizes that the market survey must support the financial projections. It goes on to specify that the Agency may require an updated market survey if the demographic characteristics in the proposed service area have changed significantly.

The section further specifies at § 1738.209(d) that the Administrator may modify the market survey requirements for loans in underserved service areas.

Section 1738.210 Competitive Analysis

This section codifies current Agency policy concerning its requirements for a competitive analysis. The competitive analysis is a critical component of the Agency's financial feasibility analysis. The competitive analysis helps substantiate whether the applicant's projected penetration rates are realistic given existing competition in the area. The interim rule provides greater detail about this requirement than the proposed rule provided in an effort to help applicants submit higher-quality applications.

Section 1738.211 Financial Information

This section codifies current Agency policy concerning the financial information it requires from applicants prior to making a determination of financial feasibility. The interim rule at § 1738.211(a) provides detail about acceptable documentation to demonstrate the organization's financial capacity, while § 1738.211(b) indicates the information required to demonstrate the proposed project's financial viability. The rule specifies the types of historical financial information required and the form in which this information must be provided. It also provides guidance for applicants that cannot provide audited financial statements or are start-up organizations. The interim rule includes requirements specifying when financial information from parent or affiliated operations is required so the Agency can fully evaluate the financial wherewithal of these operations when they are important to the success of the project.

In addition to the requirements presented in the interim rule, the Application Guide provides detailed procedural guidance to ensure that financial information submitted by the applicant matches closely with the Agency's internal financial evaluation tools. This is expected to provide applicants with a clearer understanding of how the Agency evaluates financial feasibility.

The interim rule maintains the minimum TIER of 1.25 but removes the maximum TIER of 2.0 as a regulatory ceiling. Section 1738.211(c) indicates that specific TIER requirements will be specified in the loan documents.

Section 1738.212 Network Design

This section codifies current Agency policy concerning the network design components that must be clearly described in an application to allow the Agency to make a determination of technical feasibility. In § 1738.212(a), the interim rule specifies essential categories of information that must be provided. These include information about service level objectives and monitoring ongoing service to ensure that applicants are considering how they will provide high quality service to customers after the system is built.

Section 1738.212(b) goes on to describe the required qualifications for the staff responsible for the network design. Finally, § 1738.212(c) notes that these requirements may be modified in underserved service areas. Procedural details are specified in the Application Guide. The Agency anticipates that by providing greater detail about these requirements, the interim rule will help ensure higher-quality applications.

As described in § 1738.101 of this preamble, in its deliberations concerning network design, the Agency wrestled with the implications of establishing a single, aggressive, broadband lending speed. One of the implications not discussed above is that for some areas, it will be economically infeasible to provide service that meets the required broadband lending speed. In such hard-to-serve areas, even relatively slow broadband access, far below the broadband lending speed, would be an improvement over the current lack of service. Currently, no special provision is made for these hard-to-serve areas. The Agency is particularly interested in receiving public comments concerning how a policy could be formulated in a way that would be feasible to implement fairly, that would maintain an aggressive broadband lending speed standard in most areas, but would permit some degree of service to be extended to hard-to-serve areas.

Section 1738.213 Loan Determination

This section codifies current Agency policies concerning loan determination. These include ensuring that all statutory and regulatory requirements are met and demonstrating that the TIER requirement can be met. The section goes on to explain that applications that meet these requirements undergo a consistent loan review process and that all applicants receive a written response to their loan requests. By clarifying these steps, the interim rule provides for greater transparency concerning the Agency's loan determination process and will help ensure consistency in how the Agency handles loan decisions.

Subpart F—Closing, Servicing, and Reporting

This subpart was added to the interim rule to provide borrowers with additional clarity and guidance about Agency policies on closing and post-closing activities.

Section 1738.251 Loan Offer and Loan Closing

This section provides general information about the steps and typical timing involved in the process of moving from the loan offer to loan closing. The section also articulates the importance for the applicant of meeting all conditions set down by the Agency by the required date in order to avoid termination of the loan offer. Finally, it specifies the conditions under which the Agency may approve a request for an extension if the applicant has difficulty meeting the conditions required for loan closing. These policies codify the Agency's current approach to loan offer and loan closing and do not represent a change in Agency policy.

Section 1738.252 Construction

Agency loan documents specify that construction must comply with various regulations and bulletins. Section 1738.252(a) lists key documents with which construction must comply, in order to ensure that potential applicants are aware of the requirements prior to submitting an application.

Section 1738.252(b) discusses the circumstances under which applicants may enter into interim financing agreements and receive reimbursement from the loan funds if a loan is made.

Section 1738.252(c) requires borrowers to begin construction within six months from the day they are notified that loan funds are available. The Agency occasionally approves a loan for a borrower that fails to follow through on the approved project within a reasonable time. Although the loan documents address this situation, the addition of this section to the interim rule makes explicit the Agency's policy that the loan may be canceled if the borrower fails to perform.

Section 1738.252(d) reminds the borrower in the context of the construction process that the build-out must be complete within three years from the day they are notified that loan funds are available. This requirement also is listed in § 1738.101(b)(2) in the discussion of eligible applicants.

Section 1738.253 Servicing

The borrower's responsibilities after loan closing are spelled out in the loan documents. Sections 1738.253(a) and (b) have been added to the interim rule to codify the Agency's essential policies that the borrower must make payments as required in the note and must comply with all terms, conditions, and covenants as stated therein. Section 1738.253(c) specifies that in the event of default on any required payment or other term or condition, the Agency may exercise the default remedies provided in the loan documents. It further stipulates that if the Agency chooses not to exercise its default remedies, it does not waive its right to do so in the future.

Section 1738.254 Accounting, Reporting, and Monitoring Requirements

This section summarizes the borrower's obligations with regard to accounting, reporting, and monitoring.

Section 1738.254(a) articulates the Agency's current policy that borrowers must adopt a system of accounts for maintaining financial records that is acceptable to the Agency.

Section 1738.254(b) lays out the audit requirements for borrowers. Requirements for the first year of the loan may be different than subsequent years, and the differences are specified here.

Finally, § 1738.254(e) requires borrowers to comply with all reasonable Agency requests to support ongoing monitoring efforts. An Agency initiative over the coming years will involve strengthening its ongoing monitoring and servicing efforts. Borrower compliance and cooperation will be essential to the success of this effort. This does not represent a change in the Agency's policy but articulates it in the regulation rather than relying upon loan documents for this authority.

Subpart G—Loan Guarantee

The Agency received few comments on the loan guarantee sections of the proposed rule. Section 1738.301 of the interim rule clarifies that, with a few exceptions, the eligibility requirements, loan terms, and application review and underwriting policies are essentially the same for loan guarantees as for direct loans. The balance of subpart G remains substantively the same as in the proposed rule. Although loan guarantees have not been widely used in the past, the Agency encourages interested parties to provide feedback on the loan guarantee portion of the regulation.

List of Subjects in 7 CFR Part 1738

Broadband, Loan programs-communications, Rural areas, Telephone, Telecommunications.

Accordingly, chapter XVII, title 7, Code of Federal Regulations is amended by revising part 1738 to read as follows:

PART 1738–RURAL BROADBAND ACCESS LOANS AND LOAN GUARANTEES

Subpart A—General

Sec.

1738.1 Overview.
1738.2 Definitions.
1738.3 Substantially underserved trust areas.
1738.4–1738.50 [Reserved]

Subpart B—Eligible and Ineligible Loan Purposes

1738.51 Eligible loan purposes.
1738.52 Ineligible loan purposes.
1738.53–1738.100 [Reserved]

Subpart C—Eligibility Requirements

1738.101 Eligible applicants.
1738.102 Eligible service area.
1738.103 Eligible service area exceptions for broadband facility upgrades.
1738.104 Preliminary assessment of service area eligibility.
1738.105–1738.150 [Reserved]

Subpart D—Direct Loan Terms

1738.151 General.
1738.152 Interest rates.
1738.153 Loan terms and conditions.
1738.154 Loan security.
1738.155 Special terms and conditions.
1738.156 Other Federal requirements.
1738.157–1738.200 [Reserved]

Subpart E—Application Review and Underwriting

1738.201 Application submission.
1738.202 Elements of a complete application.
1738.203 Priority for processing loan applications.
1738.204 Public notice.
1738.205 Notification of completeness.
1738.206 Evaluation for feasibility.
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1738.208 Additional cash requirements.
1738.209 Market survey.
1738.210 Competitive analysis.
1738.211 Financial information.
1738.212 Network design.
1738.213 Loan determination.
1738.214–1738.250 [Reserved]

Subpart F—Closing, Servicing, and Reporting

1738.251 Loan offer and loan closing.
1738.252 Construction.
1738.253 Servicing.
1738.254 Accounting, reporting, and monitoring requirements.
1738.255–1738.300 [Reserved]

Subpart G—Loan Guarantee

1738.301 General.
1738.302 Eligible guaranteed lenders.
1738.303 Requirements for the loan guarantee.
1738.304 Terms for guarantee.
1738.305 Obligations of guaranteed lender.
1738.306 Agency rights and remedies.
1738.307 Additional policies.
1738.308 Full faith and credit of the United States.
1738.309–1738.349 [Reserved]
1738.350 OMB control number.

Authority: Pub. L. 107–171, 7 U.S.C. 901 *et seq.*

Subpart A—General

§ 1738.1 Overview.

(a) The Rural Broadband Access Loan and Loan Guarantee Program furnishes loans and loan guarantees to provide funds for the costs of construction, improvement, or acquisition of facilities and equipment needed to provide service at the broadband lending speed in eligible rural areas. This part sets forth the general policies, eligibility requirements, types and terms of loans and loan guarantees, and program requirements under Public Law 107–171 and 7 U.S.C. 901 *et seq.*

(b) Additional information and application materials regarding the Rural Broadband Access Loan and Loan Guarantee Program can be found on the Rural Development Web site.

§ 1738.2 Definitions.

(a) The following definitions apply to part 1738:

Acquisition means the purchase of assets by acquiring facilities, equipment, operations, licenses, or majority stock interest of one or more organizations. Stock acquisitions must be arms-length transactions.

Administrator means the Administrator of the Rural Utilities Service (RUS), or the Administrator's designee.

Advance means the transfer of loan funds from the Agency to the borrower.

Affiliate or *affiliated company* of any specified person or entity means any other person or entity directly or indirectly controlling of, controlled by, under direct or indirect common control with, or related to, such specified entity, or which exists for the sole purpose of providing any service to one company or exclusively to companies which otherwise meet the definition of affiliate. This definition includes Variable Interest Entities as described in Financial Accounting Standards Board Interpretation (FIN) No. 46(R), *Consolidation of Variable Interest Entities.* For the purpose of this definition, "control" means the possession directly or indirectly, of the power to direct or cause the direction of the management and policies of a company, whether such power is exercised through one or more intermediary companies, or alone, or in conjunction with or pursuant to an agreement with, one or more other companies, and whether such power is established through a majority or minority ownership voting of securities, common directors, officers, or stockholders, voting trust, or holding trusts (other than money exchanged) for property or services.

Agency means the Rural Utilities Service, which administers the United States Department of Agriculture's (USDA's) Rural Development Utilities Programs, including the Rural Broadband Access Loan and Loan Guarantee Program.

Applicant means an entity requesting approval of a loan or loan guarantee under this part.

Arm's-length transaction means a transaction between two related or affiliated parties that is conducted as if they were unrelated, so that there is no question of conflict of interest, or a transaction between two otherwise unrelated or unaffiliated parties.

Borrower means any organization that has an outstanding broadband or telecommunications loan made or guaranteed by the Agency.

Broadband borrower means any organization that has an outstanding broadband loan made or guaranteed by the Agency.

Broadband grant means a Community Connect or Broadband Initiatives Program grant approved by the Agency.

Broadband lending speed means the minimum bandwidth requirement, as published by the Agency in its latest notice in the **Federal Register** that an applicant must propose to deliver to every customer in the proposed funded service area in order for the Agency to approve a broadband loan and may be different for fixed and mobile broadband service. Broadband lending speed may be different from the minimum rate of data transmission required to determine the availability of broadband service when qualifying a service area. If a new broadband lending speed is published in the **Federal Register** while an application is pending, the pending application may be returned unless the proposed broadband system can provide service at the new broadband lending speed. Returned applications will lose their place in the processing queue.

Broadband loan means any loan approved under Title VI of the Rural Electrification Act of 1936 (RE Act).

Broadband service means any technology identified by the Administrator as having the capacity to provide transmission facilities that enable the subscriber to the service to originate and receive high-quality voice, data, graphics, and video. The Agency will publish the minimum rate of data transmission that will qualify as broadband service in a notice in the **Federal Register** and this rate may be different for fixed and mobile broadband service. The minimum rate of data transmission that defines broadband service may be different than the broadband lending speed. If a new minimum rate of data transmission is published in the **Federal Register** while an application is pending, broadband service for the purpose of reviewing the application will be defined by the minimum rate of data transmission that

was required at the time the application was received by the Agency.

Build-out means the construction, improvement, or acquisition of facilities and equipment.

Competitive analysis means a study that identifies service providers and products in the service area that will compete with the applicant's proposed project.

Composite economic life means the weighted (by dollar amount of each class of facility in the loan) average economic life as determined by the Agency of all classes of facilities financed by the loan.

Cost share means equity, as defined by generally accepted accounting principles (GAAP).

Customer premises equipment (CPE), in the context of network services, means any network-related equipment (*e.g.* routers, switches, modems, etc.) used by a customer to connect to a service provider's network.

Derivative means any right, interest, instrument or security issued or traded on the credit of the guaranteed loan or any guaranteed loan portion, including but not limited to any participation share of, or undivided ownership or other equity interest in, the guaranteed loan or any guaranteed loan portion; any note, bond or other debt instrument or obligation which is collateralized or otherwise secured by a pledge of, or security interest in, the guaranteed loan or any guaranteed loan portion; or any such interest in such an interest or any such instrument secured by such an instrument.

Economic life means the estimated useful service life of an asset financed by the loan, as determined by the Agency.

Equity means total assets minus total liabilities, as determined by GAAP and as classified according to the Agency's system of accounts and as used in this Part for purposes of section 306F of the RE Act includes the requirements of credit support and cost share in Title VI of the RE Act.

Feasibility study means the evaluation of the pro forma financial analysis prepared by the Agency, based on the financial projections supplied by the applicant and as found acceptable by the Agency, to determine the financial feasibility of a loan request. Financial feasibility will be based on the entire operation of the applicant and not limited to the funded project.

Financial feasibility means the applicant's ability to generate sufficient revenues to cover its expenses, sufficient cash flow to service its debts and obligations as they come due, and meet the minimum Times Interest Earned Ratio (TIER) requirement of 1.25 (see § 1738.211(b)(2)(ii)) by the end of the forecast period, as evaluated by the Agency.

Fiscal year refers to the applicant or borrower's fiscal year, unless otherwise indicated.

Forecast period means the time period used in the feasibility study to determine if an application is financially feasible. Financial feasibility of a loan application is based on five-year projections.

Funded service area means the geographic area within which an applicant proposes to offer service at the broadband lending speed using loan funds. (See also "service area.")

GAAP means generally accepted accounting principles.

Guaranteed-amount debt derivative means any note, bond, or other debt instrument or obligation which is collateralized or otherwise secured by a pledge of, or security interest in, the guaranteed loan note or any guaranteed loan portion note or any derivative, as the case may be, which has an exclusive or preferred claim to the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be.

Guaranteed-amount equity derivative means any participation share of, or undivided ownership or other equity interest in, the guaranteed loan or any guaranteed loan portion or any derivative, as the case may be, which has an exclusive or preferred claim to the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be.

Guaranteed-amount equivalent means, with respect to any derivative which is equal in principal amount to the guaranteed loan or any guaranteed loan portion, that amount of payment on account of such derivative which is equal to the guaranteed loan amount or the respective guaranteed loan portion amount, as the case may be; or with respect to any derivative which in the aggregate are equal in principal amount to the guaranteed loan or any guaranteed loan portion, that amount of payment on account of such derivatives which is equal to the guaranteed loan amount or the respective guaranteed loan portion amount, as the case may be.

Guaranteed loan amount means the amount of the loan which is guaranteed by the Agency.

Guaranteed loan note means, collectively, the note or notes executed and delivered by the borrower to evidence the guaranteed loan.

Guaranteed loan portion means any portion of the guaranteed loan.

Guaranteed loan portion amount means that amount of payment on account of any guaranteed loan portion which is guaranteed under the terms of the guarantee.

Guaranteed loan portion note means any note executed and delivered by the borrower to evidence a guaranteed loan portion.

Grantee means any organization that has an outstanding broadband grant made by the Agency.

Incumbent service provider (i) Means a service provider that:

(A) Offers terrestrial broadband service in the proposed funded service area;

(B) Has not less than five percent of the households in an applicant's proposed funded service area subscribing to their broadband service at the time of application submission; and

(C) Provides this information to the Agency through a timely response to the public notice described in § 1738.204.

(ii) Resellers are not considered incumbent service providers. If an applicant proposes an acquisition, the applicant will be considered a service provider for that area.

Indefeasible right to use agreement (IRU) means the effective long-term lease of the capacity, or a portion thereof, of a cable, specified in terms of a certain number of channels of a given bandwidth.

Interim financing means funds used for eligible loan purposes after the applicant is notified by the Agency that the application is complete. Such funds may be eligible for reimbursement from loan funds if a loan is made.

Loan means any loan made or guaranteed under this part by the Agency, unless otherwise noted.

Loan contract means the loan agreement between the Agency and the borrower, including all amendments thereto.

Loan documents means the loan agreement, note(s), and security instrument between the borrower and the Agency and any associated documents pertaining to the broadband loan.

Loan guarantee means a loan made by another lender, some portion of which is guaranteed by the Agency.

Loan guarantee documents means the guarantee agreement between RUS and the lender, the loan and security agreement(s) between the guaranteed lender and the borrower, the loan note guarantee made by RUS, the guaranteed loan note, and other security documents.

Loan funds means funds provided pursuant to a broadband loan made or

guaranteed under this part by the Agency.

Market survey means the collection of information on the supply, demand, usage, and rates for proposed services to be offered by an applicant within each service area. It supports the applicant's financial projections.

Pre-loan expense means any expense associated with the preparation of a loan application. Pre-loan expenses may be reimbursed with loan funds, as approved by RUS.

RE Act means the Rural Electrification Act of 1936, as amended (7 U.S.C. 901 *et seq.*).

Reject means that the Agency returns the application to the applicant and discontinues processing of the loan application because the application failed to meet the requirements set forth herein. If an application is rejected, the loan application loses its place in the application processing queue.

Reseller means, in the context of network services, a company that purchases network services from network service providers in bulk and resells them to commercial businesses and residential households. Resellers are not considered incumbent service providers.

Rural area means any area, as confirmed by the latest decennial census of the Bureau of the Census, which is not located within:

(i) A city, town, or incorporated area that has a population of greater than 20,000 inhabitants; or

(ii) An urbanized area contiguous and adjacent to a city or town that has a population of greater than 50,000 inhabitants. For purposes of the definition of rural area, an urbanized area means a densely populated territory as defined in the latest decennial census of the U.S. Census Bureau.

Security documents means any mortgage, deed of trust, security agreement, financing statement, or other document which grants to the Agency or perfects a security interest, including any amendments and supplements thereto.

Service area means the geographic area within which a service provider offers telecommunications service.

Service level objectives (SLOs) means the characteristics of the service to be delivered to the customer, for example the speed with which new service will be established, service availability, and response time for reports of system failure at a residence.

Service provider means an entity providing telecommunications service.

Service territory means "service area."

Start-up means a new business venture without operations or service delivery available.

System of accounts means the Agency's system of accounts for maintaining financial records as described in RUS Bulletin 1770B–1.

Telecommunications means electronic transmission and reception of voice, data, video, and graphical information using wireline and wireless transmission media.

Telecommunications loan means any telecommunication loan made or guaranteed under Title II, III, or IV of the RE Act.

TIER means times interest earned ratio. TIER is the ratio of an applicant's net income (after taxes) plus (adding back) interest expense, all divided by interest expense (existing and that required in the proposed loan), and with all financial terms defined by GAAP.

Underserved household or Underserved area means a household or an area that is not offered broadband service, or that is offered broadband service by only one incumbent service provider.

Unguaranteed amount equivalent means all amounts of payment on account of any derivative other than the respective guaranteed-amount equivalent.

Unguaranteed loan amount means all amounts of payment on account of the guaranteed loan other than the guaranteed amount.

Unguaranteed loan portion amount means all amounts of payment on account of any guaranteed loan portion other than the respective guaranteed loan portion amount.

(b) Accounting terms not otherwise defined in this part shall have the definition ascribed to them under GAAP and shall be recorded using the Agency's system of accounts.

§ 1738.3 Substantially underserved trust areas.

(a) If the Administrator determines that a community in "trust land" (as defined in section 3765 of title 38, United States Code) has a high need for the benefits of the Broadband Loan Program, he/she may designate the community as a "substantially underserved trust area" (as defined in section 306F of the RE Act).

(b) In order to improve the availability of the Broadband Loan Program in communities in substantially underserved trust areas, the Administrator retains the discretion to

(1) Make available to qualified utilities or applicants, financing with an interest rate as low as 2 percent, and with extended repayment terms;

(2) Waive nonduplication restrictions, matching fund and equity requirements, or credit support requirements; and

(3) Give the highest funding priority to designated projects in substantially underserved trust areas.

(c) The Administrator will only make loans and loan guarantees that RUS finds are financially feasible and that provide eligible program benefits to substantially underserved trust areas.

(d) Applicants should notify the National Office before preparing their applications that they are planning to seek waivers or adjustments based on this section (see § 1738.201).

§§ 1738.4–1738.50 [Reserved]

Subpart B—Eligible and Ineligible Loan Purposes

§ 1738.51 Eligible loan purposes.

Loan funds may be used to pay for the following expenses:

(a) To fund the construction, improvement, or acquisition of all facilities required to provide service at the broadband lending speed to rural areas, including facilities required for providing other services over the same facilities.

(b) To fund the cost of leasing facilities required to provide service at the broadband lending speed if such lease qualifies as a capital lease under GAAP. Notwithstanding, loan funds can only be used to fund the cost of the capital lease for no more than the first three years of the loan amortization period.

(c) To fund an acquisition, provided that:

(1) The acquisition is necessary for furnishing or improving service at the broadband lending speed;

(2) The acquired service area, if any, meets the eligibility requirements set forth in § 1738.102;

(3) The acquisition cost does not exceed 50 percent of the broadband loan amount; and

(4) For the acquisition of another entity, the purchase provides the applicant with a controlling majority interest in the entity acquired.

(d) To refinance an outstanding telecommunications loan made under the RE Act if refinancing the loan supports the construction, improvement, or acquisition of facilities and equipment for the provision of service at the broadband lending speed in rural areas provided that:

(1) No more than 40 percent of the broadband loan amount is used to refinance the outstanding telecommunications loan;

(2) The applicant is current with its payments on the telecommunication loan(s) to be refinanced; and

(3) The amortization period for that portion of the broadband loan that will be needed for refinancing will not exceed the remaining amortization period for the telecommunications loan(s) to be refinanced. If multiple notes are being refinanced, an average remaining amortization period will be calculated based on the weighted dollar average of the notes being refinanced.

(e) To fund pre-loan expenses in an amount not to exceed five percent of the broadband loan excluding amounts requested to refinance outstanding telecommunication loans. Pre-loan expenses may be reimbursed only if they are incurred prior to the date on which notification of a complete application is issued (see § 1738.205).

§ 1738.52 Ineligible loan purposes.

Loan funds must not be used for any of the following purposes:

(a) To fund operating expenses of the applicant;

(b) To fund costs incurred prior to the date on which notification of a complete application is issued (see § 1738.205), with the exception of eligible pre-loan expenses (see 1738.51(e)).

(c) To fund the acquisition of the stock of an affiliate.

(d) To fund the purchase or acquisition of any facilities or equipment of an affiliate, unless approved by the Agency in writing. The Agency may approve such a purchase or acquisition if the applicant demonstrates that the purchase or acquisition will involve an arms-length transaction and that the cost is advantageous for the applicant.

(e) To fund the purchase of CPE and the installation of associated inside wiring unless the CPE will be owned by the applicant throughout its economic life or

(1) The applicant pledges additional collateral that is not currently owned by the applicant, acceptable to the Agency. Such collateral must have a value at least equal to the purchase price of the CPE and cannot be purchased with loan funds; or

(2) The applicant establishes a revolving fund for the initial purchase of CPE to be sold, and as CPE is sold to the customer, at least the applicant's cost of such equipment is returned to the revolving fund and used to purchase additional CPE units.

(f) To fund the purchase or lease of any vehicle unless it is used primarily in construction or system improvements.

(g) To fund the cost of systems or facilities that have not been designed and constructed in accordance with the loan contract and other applicable requirements.

(h) To fund broadband facilities leased under the terms of an operating lease.

(i) To fund merger or consolidation of entities.

§§ 1738.53–1738.100 [Reserved]

Subpart C—Eligibility Requirements

§ 1738.101 Eligible applicants.

(a) To be eligible for a broadband loan, an applicant may be either a nonprofit or for-profit organization, and must take one of the following forms:

(1) Corporation;

(2) Limited liability company (LLC);

(3) Cooperative or mutual organization;

(4) Indian tribe or tribal organization as defined in 25 U.S.C. 450b; or

(5) State or local government, including any agency, subdivision, or instrumentality thereof.

(b) To be eligible for a broadband loan, the applicant must:

(1) Submit a loan application which meets the requirements set forth herein as well as any additional requirements published in the **Federal Register**;

(2) Agree to complete the build-out of the broadband system described in the loan application within three years from the day the applicant is notified that loan funds are available. The loan application must demonstrate that all proposed construction be completed within this three year period with the exception of CPE. CPE can be funded throughout the forecast period;

(3) Demonstrate an ability to furnish, improve, or extend broadband facilities to provide service at the broadband lending speed in rural areas;

(4) Demonstrate an equity position equal to at least 10 percent of the amount of the loan requested in the application (see § 1738.207); and

(5) Provide additional security if it is necessary to ensure financial feasibility (see § 1738.208) as determined by the Administrator.

§ 1738.102 Eligible service area.

(a) A service area may be eligible for a broadband loan if all of the following are true:

(1) The service area is completely contained within a rural area;

(2) At least 25 percent of the households in the service area are underserved households;

(3) No part of the service area has three or more incumbent service providers;

(4) No part of the funded service area overlaps with the service area of current RUS borrowers and grantees;

(5) No part of the funded service area is included in a pending application before RUS seeking funding to provide broadband service. If two or more applications are submitted for the same service area, a lending decision must be made on the application that was submitted to the Agency first before a lending decision can be made on the other application(s).

(b) Multiple service areas may be included in a single broadband loan application. Non-contiguous areas are considered separate service areas and must be treated separately for the purpose of determining service area eligibility. If non-contiguous areas within an application are determined to be ineligible, the Agency may pursuant to this regulation consider the remaining areas in the application. If an applicant fails to respond to agency requests for additional information or modifications to remove ineligible areas, the application may be returned and the application will lose its place in the processing queue.

§ 1738.103 Eligible service area exceptions for broadband facility upgrades.

(a) Broadband borrowers that apply to upgrade existing broadband facilities in its existing service area are exempt from the requirement concerning the number of underserved households in § 1738.102(b)(2).

(b) Incumbent service providers, including borrowers and grantees, which apply to upgrade existing broadband facilities in existing service territories are exempt from the requirement concerning the number of incumbent service providers in § 1738.102(b)(3) unless they are eligible for funding under Titles II and III of the RE Act. Eligibility requirements for entities that would be eligible under Titles II and III can be found in 7 CFR part 1735.

(c) An applicant which is a borrower, grantee or incumbent service provider may submit one application to upgrade existing broadband facilities in existing service areas, which qualify for the exemptions specified in paragraphs (a) and (b) of this section, and to expand services at the broadband lending speed into new service areas, provided the upgrade area and the expansion area are proposed as two separate service areas even if the upgrade and expansion areas are contiguous.

(d) The applicant will be asked to remove areas determined to be ineligible from their funding request. The application will then be evaluated on

the basis of what remains. The applicant may be requested to provide additional information to the agency relating to the ineligible areas. If the applicant fails to respond, the application will be returned and the application will lose its place in the processing queue.

§ 1738.104 Preliminary assessment of service area eligibility.

(a) The Agency will make information available to prospective applicants to allow a preliminary assessment of a proposed service area's eligibility. At a minimum, the prospective applicant will be able to determine:

(1) Whether the proposed service area is located in a rural area;

(2) Whether the proposed service area overlaps with any part of a borrower's or grantee's service area; and

(3) Whether the proposed service area overlaps with any part of a proposed service area in a pending application for a loan.

(b) A preliminary assessment of service area eligibility does not account for all eligibility factors, and the situation within a proposed service area may change between the preliminary assessment and application submission. A preliminary assessment indicating that a proposed service area may be eligible does not guarantee that the area will remain eligible at the time of application.

§§ 1738.105–1738.150 [Reserved]

Subpart D—Direct Loan Terms

§ 1738.151 General.

(a) Direct loans shall be in the form of a cost-of-money loan, a 4-percent loan, or a combination of the two.

(b) The amount of funds available for each type of loan, as well as maximum and minimum loan amounts, will be published in the **Federal Register**.

(c) An applicant that provides telecommunications or broadband service to at least 20 percent of the households in the United States is limited to a loan amount that is no more than 15 percent of the funds available to the Broadband Loan Program for the Federal fiscal year.

§ 1738.152 Interest rates.

(a) Direct cost-of-money loans shall bear interest at a rate equal to the cost of borrowing to the Department of Treasury for obligations of comparable maturity. The applicable interest rate will be set at the time of each advance.

(b) [Reserved].

§ 1738.153 Loan terms and conditions.

Terms and conditions of loans are set forth in a mortgage, note, and loan contract. Samples of the mortgage, note, and loan contract can be found on the Agency's Web site.

(a) Unless requested to be shorter by the applicant, broadband loans must be repaid with interest within a period that, rounded to the nearest whole year, is equal to the expected composite economic life of the assets to be financed, as determined by the Agency based upon acceptable depreciation rates.

(b) Loan advances are made at the request of the borrower. Principal payments for each advance are amortized over the remaining term of the loan and are due monthly. Principal payments will be deferred until one year after the date of the first advance of loan funds. Interest begins accruing when the advance is made and interest payments are due monthly, with no deferral period.

(c) Borrowers are required to carry fidelity bond coverage. Generally this amount will be 15 percent of the loan amount, not to exceed $5 million. The Agency may reduce the percentage required if it determines that the amount is not commensurate with the risk involved.

§ 1738.154 Loan security.

(a) The broadband loan must be secured by the assets purchased with the loan funds, as well as all other assets of the applicant and any other signer of the loan documents except as provided in § 1738.155.

(b) The Agency must be given an exclusive first lien, in form and substance satisfactory to the Agency, on all of the applicant's property and revenues and such additional security as the Agency may require. The Agency may share its first lien position with another lender on a *pari passu,* prorated basis if security arrangements are acceptable to the Agency.

(c) Unless otherwise designated by the Agency, all property purchased with loan funds must be owned by the applicant.

(d) In the case of loans that include financing of facilities that do not constitute self-contained operating systems, the applicant shall furnish assurance, satisfactory to the Agency, that continuous and efficient service at the broadband lending speed will be rendered.

(e) The Agency will require financial, investment, operational, reporting, and managerial controls in the loan documents.

§ 1738.155 Special terms and conditions.

(a) The Agency may, when it is in the best interest of the Agency and its mission, the affected community, and the applicant, aid in achieving financial feasibility in an underserved area by taking the following steps:

(1) Extend the loan term up to 35 years, and

(2) Modify its security requirements.

(b) The Agency may reduce the security requirements discussed in § 1738.154(a) to ensure that the security is commensurate with the risk involved.

§ 1738.156 Other Federal requirements.

(a) To receive a broadband loan, the applicant must certify or agree in writing to comply with a variety of Federal regulations including, but not limited to:

(1) The nondiscrimination and equal employment opportunity requirements of Title VI of the Civil Rights Act of 1964, as amended (7 CFR part 15);

(2) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794 *et seq.*; 7 CFR part 15b);

(3) The Age Discrimination Act of 1975, as amended (42 U.S.C. 6101 *et seq.*; 45 CFR Part 90);

(4) Executive Order 11375, amending Executive Order (E.O.) 11246, Relating to Equal Employment Opportunity (3 CFR, 1966–1970). See 7 CFR parts 15 and 15b and 45 CFR part 90, RUS Bulletin 1790–1 ("Nondiscrimination Among Beneficiaries of RUS Programs"), and RUS Bulletin 20–15:320–15 ("Equal Employment Opportunity in Construction Financed with RUS Loans");

(5) The Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151 *et seq.*);

(6) The Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101–19.6);

(7) The requirements of the National Environmental Policy Act of 1969 (NEPA), as amended;

(8) The Council on Environmental Quality Regulations for Implementing the Procedural Provisions of NEPA and certain related Federal environmental laws, statutes, regulations, and Executive Orders found in 7 CFR part 1794;

(9) The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, 42 U.S.C. 4601 *et seq.*, and with implementing Federal regulations in 49 CFR part 24 and 7 CFR part 21;

(10) The regulations implementing E.O. 12549, Debarment and Suspension, 7 CFR 3017.510, Participants' Responsibilities;

(11) The requirements regarding Lobbying for Contracts, Grants, Loans, and Cooperative Agreements in 31 U.S.C. 1352;

(12) Certification regarding Flood Hazard Area Precautions;

(13) Certification regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions; and

(14) Certification that the borrower is not delinquent on any Federal debt and has been informed of the collection options the Federal Government may use to collect delinquent debt.

(b) Applicants must agree in writing to comply with all Federal, State and local laws, rules, regulations, ordinances, codes, and orders applicable to the project.

§§ 1738.157–1739.200 [Reserved]

Subpart E—Application Review and Underwriting

§ 1738.201 Application submission.

(a) Loan applications must be submitted directly to the Agency's National Office or to the General Field Representative (GFR) that is assigned to the area where the applicant's headquarters are located. A list of GFRs and the areas they are assigned can be found on the Agency's Web site. All applications must contain two hard copies and an electronic copy of the entire application. An application is considered received upon receipt of the hard and electronic copies by the National Office. The date and time of that receipt will establish the application's placement in the processing queue.

(b) The Agency may publish additional application submission requirements in the **Federal Register.**

§ 1738.202 Elements of a complete application.

An applicant must submit to the Agency a complete application in a format as required by the Agency in the Rural Broadband Access Loan and Loan Guarantee Program Application Guide (the Application Guide). To be considered complete, the application must contain at least the following items, each of which must be completed in a manner acceptable to the Agency:

(a) A completed RUS Form 532, including any additional items required by the form;

(b) Information required for the public notice to determine service area eligibility (see § 1738.204);

(c) Documentation demonstrating how the applicant will meet the equity requirement (see § 1738.207);

(d) A market survey, unless not required by § 1738.209(b);

(e) A competitive analysis (see § 1738.210);

(f) Required financial information (see § 1738.211);

(g) A network design (see § 1738.212);

(h) A legal opinion that addresses the applicant's ability to enter into a loan as requested in the loan application, to pledge security as required by the Agency, to describe all pending litigation matters, and such other requirements as are detailed in the Application Guide;

(i) All required licenses and regulatory approvals for the proposed operation or the status of obtaining these items; and

(j) Additional items that may be required by the Administrator through a notice in the **Federal Register.**

§ 1738.203 Priority for processing loan applications.

(a) Except as provided in Section 306F of the RE Act (SUTA) and section 1738.3 herein, in making or guaranteeing loans, the Agency shall give priority to applications in the following order:

(1) Applications in which no broadband service is available in any funded service area;

(2) Applications in which at least 75 percent of households in the funded service area have no incumbent service provider. For applications with multiple funded service areas, the 75 percent calculation is based on all funded service areas combined;

(3) Applications in which at least 50 percent of households in the funded service area have no incumbent service provider. For applications with multiple funded service areas, the 50 percent calculation is based on all funded service areas combined;

(4) Applications in which at least 25 percent of households in the funded service area have no incumbent service provider. For applications with multiple funded service areas, the 25 percent calculation is based on all funded service areas combined; and

(5) All other applications.

(b) Once applications have been prioritized according to the criteria listed in paragraph (a) of this section, the applications will be processed on a first-in, first-out basis within each priority category.

(c) The Agency shall establish the National and State reserve levels in accordance with Title VI of the RE Act. In instances when funds in a particular area are insufficient to cover a loan request, priority will be given to processing applications for which funding is available.

§ 1738.204 Public notice.

(a) The Agency will publish a public notice of each application. The application must provide a summary of the information required for such public notice including all of the following information:

(1) The identity of the applicant;

(2) A map of each service area showing the rural area boundaries and the underserved areas using the Agency's Mapping Tool;

(3) The estimated number of underserved households in each service area;

(4) The estimated number of households without terrestrial-based broadband service in each service area; and

(5) A description of all the types of services that the applicant proposes to offer in each service area.

(b) The Agency will publish the public notice on an Agency webpage after the application has been received in the Agency's National Office. The notice will remain on the webpage for a period of 30 calendar days. The notice will ask existing service providers to submit to the Agency, within this 30-day period, the following information:

(1) The number of residential and business customers within the applicant's service area that are currently offered broadband service by the existing service provider;

(2) The number of residential and business customers within the applicant's service area currently purchasing the existing service provider's broadband service, the rates of data transmission being offered, and the cost of each level of broadband service charged by the existing service provider;

(3) The number of residential and business customers within the applicant's service area receiving the existing service provider's non-broadband services and the associated rates for these other services; and

(4) A map showing where the existing service provider's services coincide with the applicant's service area using the Agency's Mapping Tool.

(5) Whether the existing service provider is an existing RUS borrower or grantee.

(c) The Agency will use the information submitted to determine if the existing service provider will be classified as an incumbent service provider. If an existing service provider does not submit a response within the timeframe specified in the public notice, it will not be considered an incumbent service provider. However, all existing service providers will be considered in the Agency's feasibility study and lending decision.

(d) The Agency will determine whether the service areas included in

the application are eligible for funding based on the information provided during the public notice period, whether all portions of the service area qualify as rural areas, and the number of incumbent service providers servicing any portion of the service area. If the applicant's funded service area is ineligible, the Agency will contact the applicant and require that those ineligible areas be removed from the funded service area. If the ineligible service areas are not removed from the funding request, the Agency will reject the application and remove it from the processing queue. The applicant will be notified, in writing, and the application will be returned with an explanation of the reasons for the rejection.

(e) The information submitted by an existing service provider will be treated as proprietary and confidential to the extent permitted under applicable law.

§ 1738.205 Notification of completeness.

If all funded service areas are eligible, the Agency will review the application for completeness. The completeness review will include an assessment of whether all required documents and information have been submitted and whether the information provided is of adequate quality to allow further analysis.

(a) If the application contains all required documents and information and is of adequate quality, the Agency will notify the applicant, in writing, that the application is complete. The notification of completeness will mark the date as of which costs incurred for the eligible purposes listed in § 1738.51(a) through (d) can be reimbursed with loan funds if the loan is ultimately made and proper procedures have been followed. A notification of completeness is not a commitment that the loan will be approved.

(b) If the application is of adequate quality but does not contain all required documents and information, the Agency will notify the applicant, in writing, that the application is incomplete. The notification of incompleteness will include a list of items that the applicant must address and will specify a date by which the applicant's additional information must be received.

(1) If the applicant fails to respond by the specified date, the application will be rejected.

(2) If the applicant responds by the specified date but does not satisfactorily address the issues identified, the Agency will assess the applicant's progress toward submission of a complete application. If the applicant has made progress acceptable to the Agency, a second notification of incompleteness will be provided. If the applicant's progress is not acceptable to the Agency, the application will be rejected.

(c) If the application is considered to be of inadequate quality, the Agency will notify the applicant, in writing, that the application has been rejected. The rejection letter will include an explanation of the reasons for the rejection and the application will be removed from the queue.

§ 1738.206 Evaluation for feasibility.

After an applicant is notified that the application is complete, the Agency will evaluate the application's financial and technical feasibility. The Agency will only make a broadband loan if the applicant's financial operations, taking into account the impact of the facilities financed with the proceeds of the loan and the associated debt, are financially and technically feasible, as determined by the Agency.

(a) The Agency will determine financial feasibility by evaluating the applicant's equity, market survey (if required), competitive analysis, financial information, and other relevant information in the application.

(b) The Agency will determine technical feasibility by evaluating the applicant's network design and other relevant information in the application.

§ 1738.207 Equity requirement.

(a) To be eligible for a loan, an applicant must demonstrate a minimum equity position equal to 10 percent of the requested loan amount at the time of application which must remain available at loan closing. In addition to this minimum equity requirement, please refer to section § 1738.208, Additional Cash Requirements which could cause the equity requirement to be higher than 10 percent.

(b) If the applicant does not have the required equity at the time the application is submitted, the applicant may satisfy the equity requirement at the time of application with an investor's unconditional legal commitment to cover the shortfall by providing additional equity. The additional equity must be transferred to the applicant prior to loan closing. If this option is elected, the applicant must provide evidence in the application that clearly identifies the investor's commitment to the applicant; the amount, terms, and conditions of the investment; and the investor's bank or financial statements that demonstrate its ability to fulfill its commitment. The terms and conditions of the investment must be acceptable to the Agency, which generally prohibits redemption of the investment until such time as stated requirements and financial thresholds are achieved by the applicant. The Agency will reject applications that do not provide evidence acceptable to the Agency regarding the investor's commitment.

(c) For State and local government applicants, the equity requirement can be satisfied with a general obligation bond, as long as the additional equity will be available to the applicant at closing. If the equity requirement is satisfied with a general obligation bond, the broadband loan cannot be subordinate to the bond. The applicant must submit an opinion from its legal counsel that the applicant has the authority to issue a general obligation bond in an amount sufficient to meet the minimum equity requirement. Revenue bonds supported by the operations to be funded cannot be used to satisfy the equity requirement.

§ 1738.208 Additional cash requirements.

(a) If the Agency's financial analysis indicates that the applicant's entire operation (existing operations and new operations combined) will show a negative cash balance at the end of any year during the five-year forecast period, the Agency will require the applicant to obtain additional cash infusions necessary to maintain an appropriate cash balance throughout the five-year forecast period. This cash infusion would be in conjunction with the required 10 percent minimum equity position.

(1) The Agency will require the applicant and its investors to:

(i) Infuse additional cash to cover projected deficits for the first two years of operations at loan closing; and

(ii) Enter into legal arrangements that commit them to making additional cash infusions to ensure that the operation will sustain a positive cash position on a quarterly basis throughout the five-year forecast period.

(2) For purposes of identifying the additional cash requirement for a start-up operation or an operation that has not demonstrated positive cash flow for the two years prior to the submission date of the application, 50 percent of projected revenues for each year of the five-year forecast period will be considered to determine if an operation can sustain a positive cash position. In addition to the initial financial projections required to demonstrate financial feasibility, such applicants must complete adjusted financial projections using the reduced revenue projections in order to identify the amount of additional cash that will be

required. Projections must be fully supported with assumptions acceptable to the Agency. The applicant may present evidence in its loan application that projected revenues or a portion of projected revenues are based on binding commitments and request that more than 50 percent of the projected revenues be considered for the purpose of identifying the additional cash requirement.

(3) For purposes of satisfying the additional cash requirements for an existing operation that has demonstrated a positive cash flow for the two fiscal years prior to the submission date of the application, 100 percent of the projected revenues for each year of the five-year forecast period will be used to determine if an operation can sustain a positive cash position, as long as these projections are fully supported with assumptions acceptable to the Agency.

(4) If debt is incurred to satisfy the additional cash requirement, this debt must take a subordinate lien position to the Agency debt and must be at terms acceptable to the Agency.

(b) An applicant may satisfy the additional cash requirement with an unconditional, irrevocable letter of credit (LOC) satisfactory to the Agency. The LOC must be issued from a financial institution acceptable to the Agency and must remain in effect throughout the forecast period. The applicant and the Agency must both be payees under the LOC. The LOC must have payment conditions acceptable to the Agency, and it must be in place prior to loan closing. The applicant cannot secure the LOC with its assets and cannot pay for any LOC charges or fees with its funds.

(c) If the Agency offers a loan to the applicant, the applicant must ensure that the additional cash infusion required in the first two years is deposited into its bank account within 120 days from the date the applicant signs the loan offer letter (see § 1738.251) and must enter into any other legal arrangements necessary to cover further projected operating deficits (or in the case of the LOC, to provide an acceptable LOC to the Agency) prior to closing. If these requirements are not completed within this timeframe, the loan offer will be terminated, unless the applicant requests and the Agency approves an extension based on extenuating circumstances that the Agency was not aware of at the time the offer was made.

(d) The Administrator may modify the requirements of this section for loans in service areas that are underserved when it is in the best interests of the Agency.

§ 1738.209 Market survey.

(a) Except as provided in paragraph (b) of this section, the applicant must complete a separate market survey for each service area where the applicant proposes to provide service at the broadband lending speed. Each market survey must demonstrate the need for the service at the broadband lending speed, support the projected penetration rates and price points for the services to be offered, and support the feasibility analysis. The market survey must also address all other services that will be provided in connection with the broadband loan. Additional information on the requirements of the market survey can be found in the Application Guide.

(b) The applicant is not required to complete a market survey for any service offering for which the applicant is projecting less than a 20 percent penetration rate in each service area by the end of the five-year forecast period. For example, if the applicant is projecting a penetration rate of 30 percent for data services and 15 percent for video services, a market survey must be completed for the data services. The proposed prices for those services with a projected penetration rate less than 20 percent must be affordable, as determined by the Agency.

(c) For a market survey to be acceptable to the Agency, it must have been completed within six months of the application submission date. The Agency may reject any application in which the financial projections are not supported by the market survey. If the demographics of the proposed service area have significantly changed since the survey was completed, the Agency may require an updated market survey.

(d) The Administrator may modify the requirements of this section for loans in service areas that are underserved when it is in the best interests of the Agency.

§ 1738.210 Competitive analysis.

The applicant must submit a competitive market analysis for each service area regardless of projected penetration rates. Each analysis must identify all existing service providers and all resellers in each service area regardless of the provider's market share, for each type of service the applicant proposes to provide. This analysis must include each competitor's rate packages for all services offered, the area that is being covered, and to the extent possible, the quality of service being provided.

§ 1738.211 Financial information.

(a) The applicant must submit financial information acceptable to the Agency that demonstrates that the applicant has the financial capacity to fulfill the loan requirements and to successfully complete the proposed project.

(1) If the applicant is an existing company, it must provide complete copies of audited financial statements (opinion letter, balance sheet, income statement, statement of changes in financial position, and notes to the financial statement) for the three fiscal years preceding the application submission. If audited statements are not available, the applicant must submit unaudited financial statements and tax returns for those fiscal years. Applications from start-up entities must, at a minimum, provide an opening balance sheet dated within 30 days of the application submission date.

(2) If the applicant is a subsidiary operation, it must also provide complete copies of audited financial statements for the parent operation for the fiscal year preceding the application submission. If audited statements are not available, unaudited financial statements and tax returns for the previous year must be submitted.

(3) If the applicant relies on services provided by an affiliated operation, it must also provide complete copies of audited financial statements for any affiliate for the fiscal year preceding the application submission. If audited statements are not available, unaudited statements and tax returns for the previous year must be submitted.

(4) Applicants must provide a list of all its outstanding obligations. Copies of existing notes and loan and security agreements must be included in the application.

(5) Applicants must provide a detailed description of working capital requirements and the source of these funds.

(b) Applicants must submit the following documents that demonstrate the proposed project's financial viability and ability to repay the requested loan.

(1) Customer projections for the five-year forecast period that substantiate the projected revenues for each service that is to be provided. The projections must be provided on at least an annual basis and must be developed separately for each service area. These projections must be clearly supported by the information contained in the market survey, unless no market survey is required (see § 1738.209(b)).

(2) Annual financial projections in the form of balance sheets, income statements, and cash flow statements for the five-year forecast period. Prior to the submission of an application, an applicant may request that alternative

information related to financial viability be considered when the applicant can for good cause demonstrate why a full five-year forecast cannot be provided. If this request is approved by the Agency, then the applicant can submit the application using the alternative information that was approved.

(i) These projections must use a system of accounts acceptable to the Agency and be supported by a detailed narrative that fully explains the methodology and assumptions used to develop the projections.

(ii) The financial projections submitted by the applicant must demonstrate that their entire operation will be able to meet a minimum TIER requirement equal to 1.25 by the end of the five-year forecast period. Demonstrating that the operation can achieve a projected TIER of 1.25 does not ensure that the Agency will approve the loan.

(iii) If the financial analysis suggests that the operation will not be able to achieve the required TIER ratio, the Agency will not approve the loan without additional capital, additional cash, additional security, and/or a change in the loan terms.

(c) Based on the financial evaluation, the loan documents will specify TIER requirements that must be met throughout the amortization period.

§ 1738.212 Network design.

(a) Applications must include a network design that demonstrates the project's technical feasibility. The network design must fully support the delivery of service at the broadband lending speed, together with any other services to be provided. In measuring speed, the Agency will take into account industry and regulatory standards. The design must demonstrate that the project will be complete within three years from the day the Agency notifies the applicant that loan funds are available and must include the following items:

(1) A detailed description of the proposed technology that will be used to provide service at the broadband lending speed. This description must clearly demonstrate that all households in the funded service area will be offered service at the broadband lending speed;

(2) A detailed description of the existing network. This description should provide a synopsis of the current network infrastructure;

(3) A detailed description of the proposed network. This description should provide a synopsis of the proposed network infrastructure;

(4) A description of measurable service metrics and target service level objectives (SLOs) that will be provided to the customer, and the methods that will be used to measure performance and respond to unmet SLOs;

(5) A description of the approach and methodology for monitoring ongoing service delivery and service quality for the services being deployed;

(6) Estimated project costs detailing all facilities that are required to complete the project. These estimated costs must be broken down to indicate costs associated with each proposed service area and must specify how Agency and non-Agency funds will be used to complete the project;

(7) A construction build-out schedule of the proposed facilities by service area on a quarterly basis. The build-out schedule must include:

(i) A description of the work force that will be required to complete the proposed construction;

(ii) A timeline demonstrating project completion within three years from the date the Agency notifies the applicant that loan funds are available;

(iii) Detailed information showing that all households within the funded service area will be offered service at the broadband lending speed when the system is complete; and

(iv) Detailed information showing that construction of the proposed facilities will start within six months from the date the Agency notifies the borrower that loan funds are available.

(8) A depreciation schedule for all facilities financed with loan and non-loan funds;

(9) An environmental report prepared in accordance with 7 CFR part 1794; and

(10) Any other system requirements required by the Administrator through a notice published in the **Federal Register**.

(b) The network design must be prepared by a registered Professional Engineer with telecommunications experience or by qualified personnel on the applicant's staff. If the network design is prepared by the applicant's staff, the application must clearly demonstrate the staff's qualifications, experience, and ability to complete the network design. To be considered qualified, staff must have at least three years of experience in designing the type of broadband system proposed in the application.

(c) The Administrator may modify the requirements of this section for loans in underserved service areas.

§ 1738.213 Loan determination.

(a) If the application meets all statutory and regulatory requirements and the feasibility study demonstrates that the TIER requirement can be satisfied, the application will be submitted to the Agency's credit committees for consideration. Submission of the application to the Agency's credit committees does not guarantee that a loan will be approved. In making a loan determination, the Administrator shall consider the recommendations of the credit committees.

(b) The applicant will be notified of the Agency's decision in writing. If the Agency approves the loan, a loan offer will be extended. If the Agency does not approve the loan, a rejection letter will be sent to the applicant, and the application will be returned with an explanation of the reasons for the rejection.

§§ 1738.214—1738.250 [Reserved]

Subpart F—Closing, Servicing, and Reporting

§ 1738.251 Loan offer and loan closing.

The Agency will notify the applicant of the loan offer, in writing, and the applicant will typically have 10 working days to accept the offer. If the applicant accepts the loan offer, a loan contract will be executed and sent to the applicant. The applicant must execute the loan contract and satisfy all conditions precedent to loan closing within the timeframe specified by the Agency which is typically 120 days from the date of the loan contract. If the conditions are not met within this timeframe, the loan offer will be terminated, unless the applicant requests and the Agency approves an extension. The Agency may approve such a request if the applicant has diligently sought to meet the conditions required for loan closing and has been unable to do so for reasons outside its control.

§ 1738.252 Construction.

(a) Construction paid for with broadband loan funds must comply with 7 CFR part 1788, 7 CFR part 1794, RUS Bulletin 1738–2 and any other guidance from the Agency.

(b) Upon notification by the Agency that an applicant has submitted all the required documentation and the application is considered complete for analysis (see § 1738.205), the applicant, at its own risk, may enter into an interim financing agreement with a third-party lender or use its own funds to start construction that is included in the loan application. For this construction to be eligible for reimbursement with loan funds, all construction procedures contained

herein must be followed. The Agency's determination that an application is complete is not a commitment that a loan will be approved.

(c) The borrower must begin construction within six months from the date the Agency notifies the applicant that loan funds are available. This is the final step in closing the loan with the applicant. If the borrower fails to begin construction, the Agency may cancel the loan.

(d) The build-out must be complete within three years from the day the Agency notifies the applicant that loan funds are available. Build-out is considered complete when the network design has been fully implemented, the service operations and management systems infrastructure is operational, and the borrower is ready to support the activation and commissioning of individual customers to the new system.

§ 1738.253 Servicing.

(a) Borrowers must make payments on the broadband loan as required in the note.

(b) Borrowers must comply with all terms, conditions, affirmative covenants, and negative covenants contained in the loan documents.

(c) In the event of default of any required payment or other term or condition:

(1) A late charge shall be charged on any payment not made in accordance with the terms of the note.

(2) The Agency may exercise the default remedies provided in the loan documents but is not required to do so.

(3) If the Agency chooses to not exercise its default remedies, it does not waive its right to do so in the future.

§ 1738.254 Accounting, reporting, and monitoring requirements.

(a) Borrowers must adopt a system of accounts for maintaining financial records acceptable to the Agency, as described in 7 CFR 1770, subpart B.

(b) Borrowers must submit annual audited financial statements along with a report on compliance and on internal control over financial reporting, and management letter in accordance with the requirements of 7 CFR part 1773. The Certified Public Accountant (CPA) conducting the annual audit is selected by the borrower and must be approved by RUS as set forth in 7 CFR 1773.4.

(c) Borrowers must comply with all reasonable Agency requests to support ongoing monitoring efforts. The Borrower shall afford RUS, through its representatives, reasonable opportunity, at all times during business hours and upon prior notice, to have access to and the right to inspect the Broadband System, and any other property encumbered by the Mortgage, and any or all books, records, accounts, invoices, contracts, leases, payrolls, timesheets, cancelled checks, statements, and other documents, electronic or paper of every kind belonging to or in the possession of the Borrower or in anyway pertaining to its property or business, including its subsidiaries, if any, and to make copies or extracts therefore.

(d) Borrowers records shall be retained and preserved in accordance with the provisions of 7 CFR part 1770, subpart A.

§§ 1738.255–1738.300 [Reserved]

Subpart G—Loan Guarantee

§ 1738.301 General.

(a) Applicants wishing to obtain a loan guarantee for private financing are subject to the same requirements as direct loan borrowers with respect to:

(1) Loan purposes as described in Subpart B;

(2) Eligible borrowers and eligible areas as described in Subpart C;

(3) The loan terms described in Subpart D, with the exception of the interest rates described in § 1738.152; and

(4) The application review and underwriting requirements in Subpart E.

(b) The Agency will publish a notice annually in the **Federal Register** indicating any additional requirements, as well as the amount of funds available, if any, for loan guarantees.

§ 1738.302 Eligible guaranteed lenders.

To be eligible for a loan guarantee, a guaranteed lender must be:

(a) A financial institution in good standing that has been a concurrent lender with RUS; or

(b) A legally organized lending institution, such as commercial bank, trust company, mortgage banking firm, insurance company, or any other institutional investor authorized by law to loan money, which must be subject to credit examination and supervision by a Federal or State agency, unless the Agency determines that alternative examination and supervisory mechanisms are adequate.

§ 1738.303 Requirements for the loan guarantee.

At the time of application, applicants must provide in form and substance acceptable to the Agency:

(a) Evidence of the guaranteed lender's eligibility under § 1738.302;

(b) Evidence that the guaranteed lender has the demonstrated capacity to adequately service the guaranteed loan;

(c) Evidence that the guaranteed lender is in good standing with its licensing authority and meets the loan making, loan servicing, and other requirements of the jurisdiction in which the lender makes loans;

(d) Evidence satisfactory to the Agency of its qualification under this part, along with the name of the authority that supervises it;

(e) A commitment letter from the guaranteed lender that will be providing the funding, and the terms of such funding, all of which may be conditioned on final approval of the broadband loan guarantee by the Agency; and

(f) A description of any and all charges and fees for the loan, along with documentation that they are comparable to those normally charged other applicants for the same type of loan in the ordinary course of business. Such charges and fees will not be included within the Agency's loan guarantee.

§ 1738.304 Terms for guarantee.

Loan guarantees will only be given on the conditions that:

(a) The loan guarantee is no more than 80 percent of the principal amount, which shall exclude any and all charges and fees;

(b) The guarantee is limited to the outstanding loan repayment obligation of the borrower and does not extend to guaranteeing that the guaranteed lender will remit to a holder, loan payments made by the borrower;

(c) The interest rate must be fixed and must be the same or lesser for the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed amount equivalent, as the case may be, and unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be;

(d) The entire loan will be secured by the same security with equal lien priority for the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be, and unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be;

(e) The unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be, will neither be paid first nor given any preference or priority over the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be;

(f) Prior written approval is obtained from the Agency for any assignment by the guaranteed lender. Any assignment shall entitle the holder to all of the guaranteed lender's rights but shall maintain the guaranteed lender responsible for servicing the entire loan;

(g) The borrower, its principal officers, members of the borrower's board of directors and members of the immediate families of said officials shall not be a holder of the guaranteed lender's loan;

(h) The Agency will not guarantee any loan under this subpart that provides for a balloon payment of principal or interest at the final maturity date of the loan or for the payment of interest on interest;

(i) All loan guarantee documents between the Agency and the guaranteed lender are prepared by the Agency; and

(j) The guaranteed loan agreement between the borrower and the lender shall be subject to Agency approval.

§ 1738.305 Obligations of guaranteed lender.

Once a loan guarantee has been approved, the guaranteed lender will be responsible for:

(a) Servicing the loan;

(b) Determining that all prerequisites to each advance of loan funds by the lender under the terms of the contract of guarantee, all financing documents, and all related security documents have been fulfilled;

(c) Obtaining approval from the Agency to advance funds prior to each advance;

(d) Billing and collecting loan payments from the borrower;

(e) Notifying the Administrator promptly of any default in the payment of principal and interest on the loan and submit a report no later than 30 days thereafter, setting forth the reasons for the default, how long it expects the borrower will be in default, and what corrective actions the borrower states that it is taking to achieve a current debt service position; and

(f) Notifying the Administrator of any known violations or defaults by the borrower under the lending agreement, contract of guarantee, or related security instruments or conditions of which the lender is aware which might lead to nonpayment, violation, or other default.

§ 1738.306 Agency rights and remedies.

(a) The guarantee must provide that upon notice to the lender, the Agency may assume loan servicing responsibilities for the loan or the guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed-amount equivalent, as the case may be, or require the lender to assign such responsibilities to a different entity, if the lender fails to perform its loan servicing responsibilities under the loan guarantee agreement, or if the lender becomes insolvent, makes an admission in writing of its inability to pay its debts generally as they become due, or becomes the subject of proceedings commenced under the Bankruptcy Reform Act of 1978 (11 U.S.C. 101 *et seq.*) or any similar applicable Federal or State law, or is no longer in good standing with its licensing authority, or ceases to meet the eligibility requirements of this subpart. Such negligent servicing is defined as the failure to perform those services which a reasonable prudent lender would perform in servicing its own portfolio of loans that are not guaranteed and includes not only a failure to act but also not acting in a timely manner.

(b) The guarantee shall cease to be effective with respect to any guaranteed loan amount or any guaranteed loan portion amount or any guaranteed-amount equivalent to the extent that:

(1) The guaranteed loan amount or the respective guaranteed loan portion amount or the respective guaranteed amount equivalent, as the case may be, is separated at any time from the unguaranteed loan amount or the respective unguaranteed loan portion amount or the respective unguaranteed-amount equivalent, as the case may be, in any way, directly or through the issuance of any guaranteed-amount equity derivative or any guaranteed-amount debt derivative; or

(2) Any holder of the guaranteed loan note or any guaranteed loan portion note or any derivative, as the case may be, having a claim to payments on the guaranteed loan receives more than its pro-rata percentage of any payment due to such holder from payments made under the guarantee at any time during the term of the guaranteed loan.

§ 1738.307 Additional policies.

The Agency shall provide additional loan guarantee policies, consistent with OMB Circular A–129, in order to achieve its mission of promoting broadband in rural areas, which shall be published annually in the **Federal Register**.

§ 1738.308 Full faith and credit of the United States.

Loan guarantees made under this part are supported by the full faith and credit of the United States and are incontestable except for fraud or misrepresentation of which the holder had actual knowledge at the time it became a holder.

§§ 1738.309–1738.349 [Reserved]

§ 1738.350 OMB control number.

The information collection requirements in this part are approved by the Office of Management and Budget (OMB) and assigned OMB control number 0572–0130.

Dated: March 8, 2011.

Jessica Zufolo,

Acting Administrator, Rural Utilities Service.

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