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DEPARTMENT OF ENERGY

10 CFR Parts 609 and 950

RIN 1990-AA38

Modification of Regulatory Provisions Requiring Credit Rating or Assessments in Accordance with Section 939A of the Dodd-Frank Wall Street Reform and Consumer Protection Act

AGENCY: Office of the General Counsel, Department of Energy (DOE).

ACTION: Proposed rule; request for comment.

SUMMARY: Pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act), the Department of Energy (DOE) has reviewed DOE regulations that require the use of an assessment of the credit-worthiness of a security or money market instrument. DOE has identified regulatory provisions that may be subject to the Act's requirement to remove any references to or requirements in such regulations regarding credit ratings. The regulations DOE identified are regulations implementing the loan guarantee program created by Title XVII of the Energy Policy Act of 2005 and regulations implementing the standby support program for certain nuclear plant delays promulgated pursuant to section 638 of the Energy Policy Act of 2005. DOE provided a

report of its review to Congress as required by the Act and, as a result of this review, proposes to modify these regulatory provisions to remove provisions that would require applicants or sponsors to provide a credit rating or other credit assessment to DOE.

DATES: Comments on these proposed procedures must be postmarked by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Interested parties may submit comments, identified by Regulation Identifier Number (RIN) 1990-AA38, by any of the following methods:

1. Federal eRulemaking Portal: www.regulations.gov. Follow the instructions for submitting comments.
2. E-mail: 1990-AA38@hq.doe.gov. Include RIN 1990-AA38 in the subject line of the message.
3. Postal Mail: Office of the General Counsel, U.S. Department of Energy, Room 6A-245, 1000 Independence Avenue, S.W., Washington, DC 20585-0121. Please submit one signed paper original and include RIN 1990-AA38 on your submission.
4. Hand Delivery/Courier: Office of the General Counsel, U.S. Department of Energy, Room 6A-245, 1000 Independence Avenue, S.W., Washington, DC 20585-0121. Telephone: (202) 586-5281. Please submit one signed paper original and include RIN 1990-AA38 on your submission.

FOR FURTHER INFORMATION CONTACT: Samuel Walsh, Office of the General Counsel, Department of Energy, 1000 Independence Avenue, S.W., Washington, DC 20585-0121; phone: 202-586-6732; e-mail: 1990-AA38@hq.doe.gov. Include RIN 1990-AA38 in the subject line of the message.

SUPPLEMENTARY INFORMATION: Section 939A(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Act), Pub. L. No. 111-203, requires Federal agencies, including DOE, to review (1) any regulation issued by such agency that requires the use of an assessment of the credit-worthiness of a security or money market instrument; and (2) any reference to or requirements in such regulations regarding credit ratings. Subsequent to such review, section 939A(b) requires Federal agencies to modify any such regulations to remove any references to or requirements of reliance on credit ratings and to substitute an appropriate standard of credit-worthiness. To the extent feasible, Federal agencies must seek to establish uniform standards of credit-worthiness, taking into account the regulated entities and the purposes for which such entities would rely on the established standard of credit-worthiness. Section 939A(c) also requires Federal agencies to submit a report to Congress describing any regulatory modifications at the conclusion of its review.

DOE submitted a report to Congress on July 20, 2011, describing the results of its review and the regulatory changes DOE was considering. These changes consist of revisions to DOE regulations implementing the loan guarantee program created by Title XVII of the Energy Policy Act of 2005 (10 CFR sections 609.6, 609.8 and 609.9) and its regulations implementing the standby support program for certain nuclear plant delays

promulgated pursuant to section 638 of the Energy Policy Act of 2005 (10 CFR 950.10). In today's proposed rule, DOE proposes changes to these regulatory provisions to references to or requirements of reliance on credit ratings. DOE believes that the remaining provisions in both 10 CFR Part 609 and 10 CFR Part 950 provide an appropriate standard of creditworthiness for potential applicants and sponsors. DOE's Loan Programs Office currently conducts an internal risk analysis pursuant to its policies and procedures. This analysis is independent of any third-party rating and does not require the submission of a credit rating or credit assessment. For the standby support program, a potential sponsor would still be required to submit a detailed business plan that includes intended financing for the project including the credit structure and all sources and uses of funds for the project, and the projected cash flows for all debt obligations of the advanced nuclear facility which would be covered under the Standby Support Contract.

Procedural Issues and Regulatory Review

A. Review Under Executive Order 12866

This proposed rule has been determined to be not significant for purposes of E.O. 12866.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires preparation of a final regulatory flexibility analysis (FRFA) for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by Executive Order 13272, "Proper Consideration of Small Entities in Agency Rulemaking"

67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process. 68 FR 7990. DOE has made its procedures and policies available on the Office of the General Counsel's website (www.gc.doe.gov).

DOE has reviewed today's proposed rule under the Regulatory Flexibility Act and certifies that, if adopted, the rule would not have a significant impact on a substantial number of small entities. DOE believes that it is unlikely that any entities wishing to contract with DOE to offer standby support for the specified nuclear plant delays under 10 CFR part 950 are considered small entities. The SBA considers a firm engaged in nuclear power generation (NAICS Code 221113) to be a small business if, including its affiliates, the firm is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours. Because nuclear reactors cost on average \$4-6 billion per reactor to construct and likely exceed the 4 million megawatt hours per year threshold, DOE believes that nuclear firms who would engage with DOE in standby support activities are not small entities. DOE recognizes that some applicants for assistance under 10 CFR part 609 may be small businesses according to SBA size standards. DOE believes, however, that the impact of the proposed rule on both nuclear standby support providers and applicants for assistance would not be significant. The proposed rule would delete from the regulations any requirements to provide a credit rating or other credit assessment to DOE as part of any application, which is expected to decrease the burden on applicants. In addition to reducing regulatory burden, this proposal would save nuclear standby support providers and applicants for assistance the

cost of a credit rating, which is determined based on negotiations between the applicant and the rating agency.

C. Review Under the Paperwork Reduction Act

This proposed rule contains collection-of-information requirements subject to review and approval by OMB under the Paperwork Reduction Act (PRA). This requirement has been submitted to OMB for approval. Public reporting burden for submission of the required information for the Loan Guarantee Program is estimated to average 12 hours per response. These burden estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information for the Loan Guarantee Program to Alvin Leong at Alvin.leong@hq.doe.gov and Chad Whiteman at Chad.S.White@omb.eop.gov.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of

information subject to the requirements of the PRA, unless that collection of information displays a currently valid OMB Control Number.

D. Review Under the National Environmental Policy Act

In this proposed rule, DOE proposes to delete requirements to provide a credit rating or other credit assessment as part of an application for financial assistance or an application to enter into a conditional agreement to provide standby support for certain nuclear plant delays. DOE has determined that proposed change falls within the categorical exclusion found at paragraph A5 of Appendix A to Subpart D, 10 CFR part 1021, which applies to amending an existing rule or regulation that does not change the environmental effect of the rule or regulation being amended. Accordingly, neither an environmental assessment nor an environmental impact statement is required.

E. Review under Executive Order 13132

Executive Order 13132, "Federalism," 64 FR 43255 (August 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt State law or that have federalism implications. The Executive Order requires agencies to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the States and to carefully assess the necessity for such actions. The Executive Order also requires agencies to have an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications. On March 14, 2000, DOE published a statement of policy describing the intergovernmental consultation

process it will follow in the development of such regulations. 65 FR 13735. DOE has considered today's proposed rule in accordance with EO 13132 and its policy and determined that this proposed rule, if adopted, would not preempt State law or have any federalism impacts. No further action is required by Executive Order 13132.

F. Review Under Executive Order 12988

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

to the extent permitted by law, this proposed rule meets the relevant standards of Executive Order 12988.

G. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4) requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and Tribal governments and the private sector. For proposed regulatory actions likely to result in a rule that may cause expenditures by State, local, and Tribal governments, in the aggregate, or by the private sector of \$100 million or more in any one year (adjusted annually for inflation), section 202 of UMRA requires a Federal agency to publish estimates of the resulting costs, benefits, and other effects on the national economy. (2 U.S.C. 1532(a), (b)) UMRA also requires Federal agencies to develop an effective process to permit timely input by elected officers of State, local, and Tribal governments on a proposed “significant intergovernmental mandate.” In addition, UMRA requires an agency plan for giving notice and opportunity for timely input to small governments that may be affected before establishing a requirement that might significantly or uniquely affect them. On March 18, 1997, DOE published a statement of policy on its process for intergovernmental consultation under UMRA. 62 FR 12820. (This policy is also available at <http://www.gc.doe.gov>). Today’s proposed rule contains neither an intergovernmental mandate, nor a mandate that may result in the expenditure of \$100 million or more in any year, so these requirements do not apply.

H. Review Under the Treasury and General Government Appropriations Act, 1999

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

I. Review Under Executive Order 12630

DOE has determined, under Executive Order 12630, “Governmental Actions and Interference with Constitutionally Protected Property Rights,” 53 FR 8859 (March 18, 1988), that this regulation would not result in any takings which might require compensation under the Fifth Amendment to the U.S. Constitution.

J. Review Under the Treasury and General Government Appropriations Act, 2001

Section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516, note) provides for agencies to review most disseminations of information to the public under guidelines established by each agency pursuant to general guidelines issued by OMB. OMB’s guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE’s guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed today’s notice under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OIRA at OMB, a Statement of Energy Effects for any proposed significant energy action. A “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to promulgation of a final rule, and that (1) is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use.

DOE has concluded that today’s regulatory action, which would delete requirements to provide a credit rating or other credit assessment as part of an application for financial assistance or an application to enter into a conditional agreement to provide standby support for certain nuclear plant delays, is not a significant energy action because the proposed standards are not likely to have a significant adverse effect on the supply, distribution, or use of energy, nor has it been designated as such by the Administrator at OIRA. Accordingly, DOE has not prepared a Statement of Energy Effects for the proposed rule.

L. Review Under the Information Quality Bulletin for Peer Review

On December 16, 2004, OMB, in consultation with the Office of Science and Technology (OSTP), issued its Final Information Quality Bulletin for Peer Review (the Bulletin). 70 FR 2664 (Jan. 14, 2005). The Bulletin establishes that certain scientific information shall be peer reviewed by qualified specialists before it is disseminated by the Federal Government, including influential scientific information related to agency regulatory actions. The purpose of the bulletin is to enhance the quality and credibility of the Government's scientific information. DOE has determined that today's proposed rule does not contain any influential or highly influential scientific information that would be subject to the peer review requirements of the OMB Bulletin.

Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this proposed rule.

List of Subjects in 10 CFR Part 609

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

List of Subjects in 10 CFR Part 950

Government contracts, Nuclear safety.

Issued in Washington, DC, on October 25, 2011

David Frantz
Director of the Origination Division of the
Loan Programs Office

Dr. John Kelly
Deputy Assistant Secretary for
Nuclear Reactor Technologies

For the reasons stated in the preamble, DOE proposes to amend Part 609 of Chapter II and Part 950 of Chapter III of Title 10, Code of Federal Regulations, to read as set forth below:

**PART 609—LOAN GUARANTEES FOR PROJECTS THAT EMPLOY
INNOVATIVE TECHNOLOGIES**

1. The authority citation for part 609 continues to read as follows:

Authority: 42 U.S.C. 7254, 16511–16514.

§609.6 [Amended]

2. Section 609.6 is amended by:
 - a. Removing paragraphs (b)(21);
 - b. Redesignating paragraphs (b)(22) through (b)(29) as (b)(21) through (b)(28).

3. In §609.8 revise paragraph (a) to read as follows:

§ 609.8 Term sheets and conditional commitments.

(a) DOE, after review and evaluation of the Application, additional information requested and received by DOE, and information obtained as the result of meeting with the Applicant and the Eligible Lender or other Holder, may offer to an Applicant and the Eligible Lender or other Holder detailed terms and conditions that must be met, including

terms and conditions that must be met by the Applicant and the Eligible Lender or other Holder.

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§609.9 [Amended]

4. Section 609.9 is amended by:
 - a. Removing paragraph (f);
 - b. Redesignating paragraph (g) as paragraph (f).

PART 950—STANDBY SUPPORT FOR CERTAIN NUCLEAR PLANT DELAYS

5. The authority citation for Part 950 continues to read as follows:

Authority: 42 U.S.C. 2201, 42 U.S.C. 7101 *et seq.*, and 42 U.S.C. 16014

6. Section 950.10 is amended by revising paragraph (b)(3) to read as follows:

§950.10 Conditional agreement.

* * * * *

(b) * * *

(3) A detailed business plan that includes intended financing for the project including the credit structure and all sources and uses of funds for the project, and the projected cash flows for all debt obligations of the advanced nuclear facility which would be covered under the Standby Support Contract;

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