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Before the
United States Senate
Committee on Energy and Natural Resources

September 23, 2010

Chairman Bingaman, Ranking Member Murkowski, Members of the Committee, thank you for the opportunity to testify today. My name is Michael Scott and I head the U.S. Government investment banking business at Miller Buckfire.

I appear before you today to provide my views on subjects related to the Department of Energy's ("DOE") Title XVII loan guarantee program. In this testimony, I will cover background on the history and operation of Federal loan guarantees, the role of the Federal Financing Bank and the unique innovative clean energy infrastructure loan guarantee program that the Energy Policy Act of 2005 created in Title XVII. I will also provide my thoughts on the ability of the Federal Credit Reform Act of 1990 to protect the taxpayer from financial loss, the significant implementation obstacles that Title XVII has faced since passage of the Energy Policy Act of 2005, solutions to these obstacles as well as the implications of operationalizing Title XVII for the priorities of President Obama, Congress and the American people pertaining to jobs, the economy, clean and secure domestic energy capacity, and the environment.

I served for almost five years as a Senior Advisor at the Department of the Treasury where I was responsible for, among other things, Federal credit policy, the evaluation, negotiation, and execution of Federal loan guarantees and direct loans as well as the management and oversight of the Federal Financing Bank. In my prior role at Treasury, I was one of the principal people who decided how and in what manner the large one-off Federal credit programs (such as the Air Transportation Stabilization Board, the Rural Economic Development Loan and Grant Program in the 2002 Farm Bill, the Alaska Natural Gas Pipeline Loan Guarantee Program and Title XVII of the Energy Policy Act of 2005) were executed during the September 2001 to July 2006 time period. This required me to be deeply involved with OMB on Federal Credit Reform Act issues pertaining to the individual Federal credit programs as well as the Federal Financing Bank. In conjunction with OMB, Treasury plays a significant role in new programs as it has policy interests in Federal credit and debt management and because of the fact that the Federal Financing Bank is often used to finance Federal loan guarantees, including those related to Title XVII. I was as often ensuring that deals got done as ensuring that deals did not. Contrary to the perception that Federal credit is similar to private sector financings and that all that is needed is enabling legislation, new Federal credit programs are complicated, rely on a knowledgeable and willing Executive Branch for execution, and face many institutional obstacles from both OMB and Treasury. Most Federal credit is concentrated in long-established and/or entitlement type programs that do not require the proactive input of the agencies' senior policy officials. The new

one-off Federal credit programs are rare enough that very few senior officials ever have the chance or need to understand the full range of applicable statutes or the tools and issues that impact their execution. As we have seen in the implementation of Title XVII since late 2006, the President and his Administration can be ill-served by this asymmetrical knowledge of Federal credit between the institutional organs of government and the elected and appointed officials.

Background on Federal Loan Guarantees

The U.S. Government generally establishes Federal credit programs (loan guarantees and direct loans) for one of several reasons. The most common is to correct a private market failure to extend adequate or reasonable access to credit and then to provide a path forward to correct the market failure. This is the fundamental rationale and structure of the Title XVII loan guarantee program. The other reasons include targeted efforts to support national priorities or national emergencies. Setting aside the credit or capital programs provided under the Housing and Economic Recovery Act of 2008, the Emergency Economic Stabilization Act of 2008, or the various programs established under Federal Reserve authorities to address the financial market crisis, the vast majority of pre-crisis Federal credit is concentrated in housing, education, rural development and small business. It is typically the case that these programs have been in existence for decades or generations and are generally characterized by a large number of homogeneous transactions involving relatively small dollar amounts per loan. In all of these Federal credit programs, with the sole exception of §1703 projects under Title XVII, the U.S. Government pays for the "credit subsidy costs" by appropriating those amounts required as calculated by the Federal Credit Reform Act of 1990.

Prior to the Federal Credit Reform Act of 1990, the costs of Federal credit programs were only evaluated and appropriated at the time of default. This approach did not provide legislators or policymakers with the true budget impact of a Federal credit program and was inconsistent with the budgeting process in the non-credit spending programs of the U.S. Government. Since enactment of the Federal Credit Reform Act of 1990, the U.S. Government has calculated the net present value of the long-term costs (also known as the "credit subsidy costs") of Federal credit (loan guarantees or direct loans). In addition to the obvious cash flows of a transaction and the timing of those cash flows adjusted for the probability of default and recovery amounts, the credit subsidy calculation also considers the contractual and structural protections of the transaction. These protections may include, among others, parent or third-party guarantees, access to take-or-pay contracts or State PUC rate recovery mechanisms, or subordinated structures.

In those instances where the Federal Financing Bank is providing the financing pursuant to an agencies loan guarantee, the resulting transaction is considered a direct loan. This requires the credit subsidy calculation under the Federal Credit Reform Act of 1990 to be performed under the requirements for a direct loan. The most significant difference between the calculations of the credit subsidy cost of a loan guarantee as compared with that of a direct loan is that the cash flows derived from the interest rate spread above the Federal Financing Bank's costs of funds (which is the Treasury rate for a given maturity) is generally considered an inflow to the U.S. Government. This inflow serves to reduce the overall credit subsidy costs that need to be appropriated. In the case of the Title XVII program where the borrower is paying the full cost of

the obligation under §1702(b)(2), this inflow would serve to lower the credit subsidy amount that the borrower is required to pay to the Department of the Treasury.

The Role of the Federal Financing Bank

The Federal Financing Bank Act of 1973 created an instrumentality of the U.S. Government under the general supervision of the Secretary of the Treasury. It was established to coordinate agency borrowings and the Federal credit and debt management policies of the U.S. Government. By statute, it is authorized to purchase or sell any obligation issued, sold or guaranteed by a Federal agency. In practice, the Federal Financing Bank finances agencies such as the U.S. Postal Service, the FDIC, the NCUA, as well as the loans guaranteed by DOE, the Department of Education's HBCU program, and the USDA's Rural Utilities Service. The Federal Financing Bank has often been used as an instrument of Federal credit policy by Treasury and OMB to constrain program agencies and insert additional controls on Federal credit programs. At other times, OMB has objected to the availability of the Federal Financing Bank in Federal credit programs and barred its use by limiting the definition of eligible lender in legislation to "non-Federal" entities.

As mentioned previously, one of the most significant benefits to using the Federal Financing Bank to finance guaranteed loans (whether for the U.S. Government in those Federal credit programs where the taxpayer is funding the appropriation or in the case of §1703 projects where the borrower is paying the full cost of the credit subsidy) is that the credit subsidy amount will be lower as a result of the cash inflow to the U.S. Government from the interest spread that the Federal Financing Bank earns above its cost of funds. Use of the Federal Financing Bank will marginally lower the net credit risk exposure of the U.S. Government because loan guarantees that are financed by the private sector are financed at a higher interest rate than the Federal Financing Bank and therefore the U.S. Government is guaranteeing that higher interest rate.

The Federal Financing Bank also provides certainty of transaction execution in all market conditions, which is an important benefit for both the borrower and the U.S. Government. During the recent financial market crisis, we saw significant periods where entire classes of loans guaranteed by the U.S. Government either could not trade or could not be traded at levels that one would expect of an obligation guaranteed by the U.S. Government. Dislocations in the private markets for U.S. Government guaranteed loans or securities backed by these loans provide counterproductive signals to market participants, can significantly impede the objectives of the underlying Federal credit programs, and can potentially have implications in the markets for Treasury's debt issuances.

Title XVII History, Congressional Intent and Program Execution (2005-2010)

It is important to consider the original purposes of Title XVII and how Congress structured the section to achieve these purposes. In Title XVII, Congress recognized that there was a private market failure to finance innovative clean energy technologies that reduce greenhouse gas emissions and that this market failure encompassed a broad range of technologies. Congress also recognized the importance of getting these innovative clean energy technologies constructed and into operation, however, given the costs of the various technologies, the U.S. Government was

unlikely to have the budget dollars necessary to appropriate to this program in amounts sufficient to achieve the purposes of the program. In Title XVII, Congress provided a path to finance enough projects to get a technology into "general use", at which point the market failure is presumed to be corrected. The definition of "general use" in the Final Rule is three commercial projects of a particular technology in the same general application as the proposed project, each operating for five years.

Congress provided two options to pay for the cost of the loan guarantees under §1702(b) which reads:

> "(b) Specific Appropriation or Contribution.- No guarantee shall be made unless –
>
> (1) an appropriation for the cost has been made; or
>
> (2) the Secretary has received from the borrower a payment in full for the cost of the obligation and deposited the payment into the Treasury."

§1702(b)(1) is the traditional approach to Federal credit where the U.S. Government pays for the cost of the loan guarantee through an appropriation with the cost of the loan guarantee being measured in accordance with the Federal Credit Reform Act of 1990.

§1702(b)(2) is the "borrower pay" alternative where the borrower pays the full cost of the loan guarantee with the cost of the loan guarantee being measured in accordance with the Federal Credit Reform Act of 1990.

Given the budget constraints of the U.S. Government, both the prior and current Administration have opted for the §1702(b)(2) "borrower-pay" option for the credit subsidy costs to fund §1703 projects. In providing the "borrower pay" option in §1702(b)(2) as a substitute for a taxpayer funded appropriation, and requiring that the "cost of the obligation" be measured by the standards in the Federal Credit Reform Act, Congress was structuring a program that would not impact the Federal budget, would fully compensate the U.S. Government for the risks that it was assuming, and would be of sufficient size to get clean energy technologies into general use.

The American Recovery and Reinvestment Act of 2009 amended Title XVII to add a temporary loan guarantee program under §1705 for renewable energy and power transmission projects. These "shovel ready" projects must commence construction by September 30, 2011. The credit subsidy costs for projects under §1705 are paid for by the U.S. Government through appropriations.

Since the passage of the Energy Policy Act of 2005 that provided the Title XVII loan guarantee program, we saw the effects of an unwilling Executive Branch that published a flawed Final Rule in 2007 and that operationally executed the program in a manner that was inconsistent with the relevant statutes as well as the Congressional intent of the program. President Obama and his team are burdened with this operational legacy from the prior Administration.

To understand the potential size of the Title XVII program, from August 2006 through August 9, 2010, DOE issued eight solicitations for various eligible technologies. According to a July 2010 report from GAO, these solicitations generated requests for $174.7 billion in loan guarantees. Given that the DOE cannot guarantee more than 80% of the project costs, and in fact is frequently directing borrowers to even lower percentages, the applications represented an estimated $250 billion in total project costs. As of August 12th, DOE has closed on $695 million of guarantees, all of which have been through the §1705 portion of the program that was created under ARRA. As previously mentioned, the credit subsidy costs of §1705 projects are paid for with U.S. Government appropriations.

Federal Loan Guarantees for §1703 Projects

§1703 provides ten broad categories of eligible clean energy technology projects that must avoid, reduce, or sequester greenhouse gases and employ new or significantly improved technologies. The variety of technologies and the purposes for which they are used, necessarily result in differing business models, financial requirements, contributions to the statutory objectives, technology risks and financial prospects. However, Title XVII provides the ability to execute the program in a technology neutral manner. This can occur by implementing the program under the borrower pay provisions of §1702(b)(2), where the only statutory limit on loan guarantees is driven by the amount of time that it takes to get a technology into "general use" and the borrowers willingness to pay the credit subsidy and administrative costs. Whereas if Title XVII is executed under the requirements of §1702(b)(1) and the U.S. Government needs to appropriate taxpayer dollars, decisions on the allocation of maximum loan guarantee levels for each technology become necessary.

Regardless of the mechanism used to pay for the credit subsidy costs of the program, each project is subjected to the same statutory and rule requirements that protect the taxpayer and fully price the risk that would be assumed for projects that receive a loan guarantee. For example, the statute requires the project sponsor to have at least 20% "skin in the game" as DOE cannot guarantee more than 80% of the project costs. Each application is subjected to an extensive due diligence process by the U.S. Government, a rating agency as well as by the project sponsor. The terms and conditions of the individual projects are supposed to be fully reflected in the calculation of the credit subsidy under the Federal Credit Reform Act of 1990. These calculations have been employed for a wide variety of Federal credit programs and when employed on a project basis, as opposed to a portfolio basis, ensure that all relevant factors of the individual projects are considered. On June 22, 2007, then CBO Director Orzag sent Chairman Obey a letter that commented on the ability of the Rural Utilities Service to implement a loan guarantee program that would be designed to result in "no net cost" to the U.S. Government. CBO expressed concerns that programs that utilized a single average rate would be very difficult to manage to the "no net cost" to the U.S. Government and then proceeded to lay out the structure and process of a program that could achieve the objective of "no net cost." The most significant recommendation is to establish the credit subsidy fee based on each individual project.

It is important to understand the issues and process that one undergoes with DOE which applies to all technologies. After an extensive review process of the technology and business plan of a

project sponsor, that includes an initial project rating by a rating agency (for those projects exceeding $25 million) as well as a full evaluation by the U.S. Government, DOE decides whether or not to offer a "term sheet" to a prospective project sponsor. Once the "term sheet" is agreed to by both the DOE and the project sponsor, a "conditional commitment" is issued. During this phase of the process, the DOE and OMB will provide the project sponsor with a non-binding estimate of the credit subsidy costs that they will be required to pay at closing. The "conditional commitment" will detail the conditions precedent required for closing, which include all contractual, statutory and regulatory requirements. In addition to these requirements, at a time no later than 30 days prior to the fulfillment of the conditions precedent and scheduled closing, the final project business plan will have been evaluated by a rating agency to determine the actual rating for the project, and the project sponsor will submit all of this to DOE and OMB for evaluation, compliance with the conditional commitment, as well as the calculation of the actual credit subsidy costs.

The time period between the "conditional commitment" and the period just before the financial closing provides uncertainty for those costs that have not been contractually set. However, these costs will be substantially confirmed prior to closing and the development of the final business plan will ensure that the full costs of the project are used to determine the actual credit subsidy costs. For the project sponsor and its investors, who will have invested significant sums of their own before any financial closing on a Federal loan guarantee, the final business plan will either confirm the financial viability of the project or the need to cancel the project and therefore not close on the Federal loan guarantee. As it relates to post-closing cost overruns, prior Title XVII commitments required that any post-closing cost overruns be paid for with new equity from the project sponsor.

For a variety of reasons, the actual closing on the conditional commitment will be a very complicated process. It will be complicated because satisfaction of the conditions precedent is often only achievable with the passage of significant time. However, this interim period will provide better and up-to-date information (that may be neutral, favorable or unfavorable) that will drive the final business plan and the rating agency process that will ultimately factor into the calculation of the actual credit subsidy costs. While there are some Final Rule based issues that add ambiguity into the actual closing that are neither normal nor customary in either the private markets or in Federal credit programs, the broad process contributes significant protections to the taxpayer.

Labor has an important role in Title XVII projects and has taken proactive steps to provide cost certainty, work quality, and the availability of a highly skilled workforce for these important projects. For example, the Building and Construction Trades Department of the AFL-CIO has entered into Project Labor Agreements with a number of Title XVII project sponsors selected for due diligence by DOE. These agreements will help project sponsors control the labor and quality costs of the projects and focus all participants on bringing high quality projects in on-time and on-budget. This will also materially contribute to reducing the overall risk of the projects to the U.S. Government.

The detailed Project Labor Agreements are designed to supply the highly skilled and trained workforce needed for these complex and crucial clean energy infrastructure projects. They

include the establishment of multi-craft training centers located near or on the new sites, rearranging traditional apprenticeship parameters so that apprentices arrive on the job with productive skills from the first day, the development of special training partnerships with vendors and suppliers to certify all workers on the installation of their particular components, and the development of programs to train a local workforce for careers in the construction, operation and maintenance of these new clean energy facilities.

Protecting the Taxpayer and the Federal Credit Reform Act of 1990

Historically, the U.S. Government pays for the cost of credit subsidy directly with appropriations of taxpayer funds. The one significant exception to this is in Title XVII where Congress specifically authorized the borrower to pay "in full for the cost of the obligation" in lieu of a taxpayer funded appropriation. As previously discussed, the vast majority of pre-crisis Federal credit is extended in homogeneous transactions characterized by high volumes and relatively low dollar amounts, concentrated in housing, education, rural development and small business. Because the U.S. Government pays for the credit subsidy costs of these transactions, the mechanics of the calculation and the underlying assumptions used by OMB are of less import to the borrower. As a result, OMB makes a number of simplifying assumptions which may be appropriate for the U.S. Government when broadly seeking to implement the purposes of Federal Credit Reform Act. However, this approach can be quite costly to the borrower when the transactions themselves are highly customized and part of a unique self-pay program. As a result, it is very important that in implementing the Federal Credit Reform Act, OMB and DOE do so in a manner that is literally faithful to the language of the statute and that recognize the highly customized and unique nature of each project.

One concern in executing any Federal credit program is whether or not the Federal Credit Reform Act of 1990 provides an accurate calculation of the net present value of the long-term costs to the U.S. Government of extending the credit. In considering the accuracy of the calculation of credit subsidy across those special one-off Federal credit programs such as Title XVII, experience generally shows that the initial credit subsidy cost, calculated either by OMB or CBO, are more conservative than the actual history of the program. The Air Transportation Stabilization Board ("ATSB"), the $10 billion loan guarantee program for airlines after the September 11th attacks was originally expected to produce a positive credit subsidy in the 30% to 35% range (a positive credit subsidy "costs" the U.S. Government, a negative credit subsidy "makes money" for the U.S. Government.) The ATSB made six loan guarantees, three of which subsequently filed for Chapter 11 bankruptcy protection. Even with one $20 million loss due to the post-loan guarantee bankruptcy of ATA, the ATSB netted approximately $300 million through fees and the exercise of warrants after issuing $1.6 billion in Federal loan guarantees, resulting in a negative credit subsidy of over 18% for the overall program. In considering the credit subsidy costs of the TARP program, Table 4-8 on page 41 of the Analytical Perspectives, Budget of the United States Government, Fiscal Year 2011 (http://www.whitehouse.gov/omb/budget/fy2011/assets/econ_analyses.pdf) provides a further example of this. This is not to say that the credit subsidy calculation cannot be wrong, but it is to say that the Federal Credit Reform Act is a very good tool to measure the net present value of the long-term cost to the U.S. Government of any Federal credit program, has a good reputation over

the 20-years since enactment, and absent extreme carelessness on the part of the program agency and OMB, is going to properly protect the taxpayer.

As it relates to the calculation of the credit subsidy costs, I would offer that single point estimates in either the minimum or maximum forms are not supportable suppositions. To follow such a directed outcome would reject the relevance and reliability of the Federal Credit Reform Act in calculating the credit subsidy costs and put the U.S. Government in the untenable position of calculating the credit subsidy costs outside of the statutorily required calculation under §1701(2) of Title XVII.

Properly and faithfully implemented, the Federal Credit Reform Act considers all of the cash flows over the entire lifetime of the loan including fees, defaults, recoveries and contractual and structural protections. This analysis over the entire lifetime of the loan is important as the maximum term of a loan guarantee under §1702(f) is the lesser of 30 years or 90 percent of the useful life of the projects assets. The "entire lifetime of the loan" analysis that is required under the Federal Credit Reform Act is substantially different from the scoring of non-credit spending programs of the U.S. Government. In these non-credit spending programs, there is no attempt to analyze, measure or otherwise calculate the costs beyond the 10-year budget window. To the extent that the spending program continues beyond the 10-year budget window, the taxpayer is fully exposed to those costs and liabilities.

The Title XVII Opportunity

The President and Congress have a very powerful policy tool in Title XVII that is unique and important in the current economic environment, especially with the U.S. Government facing the stresses and difficult choices involved with our significant budget deficits. Thoughtful implementation of Title XVII can:

1. drive economic growth through the development of private sector clean energy infrastructure projects that are built and fully paid for by the private sector;

2. provide significant short-term and long-term jobs in construction, manufacturing and operations;

3. drive significant new investment in our domestic supply chain manufacturing base in supporting industries such as iron and steel;

4. develop environmentally clean and secure domestic energy supply capacity;

5. correct the private market failure to finance clean, innovative energy technologies;

6. provide well qualified project sponsors with confidence that credible projects can receive a Federal loan guarantee through a reasonable and predictable process; and,

7. create and foster America's leadership in the development and deployment of clean energy technologies.

The reason that Title XVII is so powerful lies in the fact that the President does not need new legislative authority or new appropriations to make the program work. The legislation for Title XVII provides all of the authority that the Executive Branch needs to execute the program. Unlike all other Federal credit programs where the U.S. Government pays for the credit subsidy and administrative costs of the programs, Title XVII provides that the credit subsidy (§1702(b)(2)) and the administrative (§1702(h)) costs are fully paid for by the borrower and substitutes the borrower payments for the appropriations. This means that the Federal budget is not affected by the issuance of the loan guarantees under §1703 and that the level of risk assumed by the U.S. Government is fully compensated for as measured by the Federal Credit Reform Act. The calculation for this risk is completed in the same manner as if this was a traditional Federal credit program where the U.S. Government paid the credit subsidy costs.

What are the Key Impediments to a Fully Functional Title XVII?

The failure of Title XVII to become a meaningful Federal credit program is directly related to the decisions of the prior Administration and OMB in establishing the process, procedures and rules that govern the program today. While DOE is the program agency for Title XVII, OMB's role and responsibility for Federal credit places it at the center of success or failure of Title XVII or any other Federal credit program. To be clear, OMB owns Federal credit. They are responsible for implementing the Federal Credit Reform Act, which includes the calculation of the Federal credit subsidy, they have significant input and final say on the rules and regulations implementing any Federal credit program, they have tremendous influence and responsibility for an agency's budget, and they have significant influence on the tools that can be helpful in successfully executing Federal credit programs, such as the use of the Federal Financing Bank.

The impediments to a fully functional Title XVII rest largely with administrative decisions of the past. The President and his team can correct these problems by providing specific leadership and direction to the agency's whose responsibilities impact the successful execution of Title XVII. The President can correct the impediments by:

1. Implementing the Federal Credit Reform Act in a manner that is literally faithful to the language of the statute, particularly involving the calculation of the Federal credit subsidy payment required from a borrower under §1702(b)(2);

2. Amending the Final Rule to correct rules that are inconsistent with the statute, congressional intent, the Federal Credit Reform Act, and OMB Circulars pertaining to Federal credit programs;

3. Eliminating maximum loan guarantee authorization levels and their inclusion in Appropriation Acts as this approach is inconsistent with the "borrower pay" provision of §1702(b)(2);

4. Discontinuing the Financial Institution Partnership Program (“FIPP”) whose function is inconsistent with Title XVII and negatively impacts the targeted technologies and sponsors;

5. Establishing a contractual “credit subsidy downgrade fee” as a way to address CBO’s concerns that the credit subsidy calculation will underestimate the long term costs to the taxpayers and therefore require the CBO scoring convention that requires a taxpayer funded appropriation of 1% of the loan guarantee authorization levels sought; and

6. Issuing an Executive Order pertaining to Title XVII to provide unambiguous direction to the agencies responsible for its implementation. This also serves to provide credible project sponsors, investors and the supply chain confidence that Title XVII will be a reasonable, predictable and available Federal credit program.

Each of these issues is addressed separately below.

Faithful Implementation of the Federal Credit Reform Act and Calculating the Borrower Paid Credit Subsidy Fee

Key Concerns in Properly Calculating Federal Credit Subsidy

For the U.S. Government, an accurate calculation of the credit subsidy fee is important because:

1. It is required under the Federal Credit Reform Act of 1990;

2. It is a requirement of §1701(2) and §1702(b)(2) of Title XVII;

3. It ensures that the U.S. taxpayer is compensated for the risks that they are assuming in providing for a loan guarantee;

4. It ensures that the Administration is properly protected through a thoughtful and statutorily rigorous methodology; and,

5. An accurate calculation will provide project sponsors, the Administration, Congress and the American people with the full potential of the Title XVII loan guarantee program to achieve the economic, environmental and domestic energy objectives and policies of the President and Congress.

For the borrower, an accurate calculation of the credit subsidy fee is important because the borrower is required to pay upfront for the full cost of the obligation as calculated by the Federal Credit Reform Act and therefore it should be done so in a manner that is faithful to the relevant statutes, rules, regulations, OMB Circulars, and transaction specific facts. The credit subsidy affects the overall costs of the investment and borrower’s need to have confidence that whatever the final outcome, the amount that they would be charged reflects the statute and their particular project.

Critical Definitions and Requirements of the Federal Credit Reform Act

There are several critical definitions and requirements that impact the credit subsidy calculation and therefore are important to be aware of. Specifically:

1. §502(5)(A) defines the term "cost" as meaning "the estimated long-term cost to the Government of a direct loan or loan guarantee or modification thereof, calculated on a net present value basis, excluding administrative costs and any incidental effects on governmental receipts or outlays."

2. The term "direct loan" is relevant here as a Federal Financing Bank financing converts a "Loan Guarantee" into a "Direct Loan" and therefore triggers the calculation of the credit subsidy cost under the provisions of §502(5)(B) which reads: "The cost of a direct loan shall be the net present value, at the time when the direct loan is disbursed, of the following estimated cash flows: (i) loan disbursements; (ii) repayments of principal; and (iii) payments of interest and other payments **by or to the Government** over the life of the loan after adjusting for estimated defaults, prepayments, fees, penalties, and other recoveries; including the effects of changes in loan terms resulting from the exercise by the borrower of an option included in the loan contract.

3. The discount rates used to calculate the net present value is established in statute. §502(5)(E) reads "In estimating net present values, the discount rate shall be the average interest rate on marketable Treasury securities of similar maturity to the cash flows of the direct loan or loan guarantee for which the estimate is being made."

Important Differences between Title XVII and other Federal Credit Programs

As previously discussed, most Federal credit programs involve longstanding programs characterized by a large number of transactions, relatively small dollar amounts per transaction, and the U.S. taxpayer being responsible for paying the Federal credit subsidy as calculated under the Federal Credit Reform Act through an appropriation. Because the U.S. Government pays for the credit subsidy costs of these transactions, the mechanics of the calculation and the underlying assumptions used by OMB are of less import to the borrower. As a result of the nature of these programs, certain calculation shortcuts that are perfectly acceptable from a broad portfolio perspective and that are administratively more efficient are certainly reasonable, particularly when the U.S. Government is responsible for the Federal credit subsidy appropriation. However, this approach can be quite costly to the borrower when the transactions themselves are highly customized and part of a unique self-pay program.

Title XVII provided that the Federal credit subsidy appropriation required could be funded by U.S. Government provided (taxpayer) appropriations as it is in all other Federal credit programs through §1702(b)(1), or alternatively could be funded by the borrower paying the same amount upfront through §1702(b)(2). Congress established the alternative approach of §1702(b)(2) because it understood that the limited budget dollars available for a new Federal credit program would not be sufficient to achieve the statutory objectives of Title XVII given the number and

types of technologies eligible under §1703. Importantly, by enacting a later and more specific law, the provisions of Title XVII supersede conflicting provisions of previously enacted laws, most relevant in the instant case, the Federal Credit Reform Act.

Implementing under the borrower pay provisions of §1702(b)(2) inherently requires the recognition of the unique characteristics of each project. This requires a literally faithful interpretation of the Federal Credit Reform Act.

Concerns about OMB's Approach to Calculating Federal Credit Subsidy

There are a variety of concerns about whether OMB is calculating the Federal credit subsidy in a manner that is literally faithful to statute. There are a lot of inputs and assumptions that are required to be made in the modeling of the spreadsheet that feeds OMB's Credit Subsidy Calculator. While the following are not a complete listing of the issues, they do represent significant concerns that are particularly important in a statutorily faithful calculation.

1. The cash flows to the U.S. Government from project sponsors are not fully incorporated into the model that OMB is using for Title XVII. These concerns center on several areas:

    a. The interest spread above the Federal Financing Bank's cost of funds (which is the Treasury rate for a given maturity) should be treated as a cash flow to the U.S. Government;

    b. Fees collected from the borrower that are not specifically cost based should be treated as a cash flow to the U.S. Government;

    c. Recovery values should be fully analyzed, valued and treated as a cash flow to the U.S. Government. This represents a significant issue because:

        i. As outlined in the DOE/OMB Report to the Committees on Appropriations entitled "Credit Subsidy Methodology", OMB established a "base recovery rate" that could be notched up or down according to a "number of factors";

        ii. In practice, OMB has adopted a base recovery rate of 55% for all projects, regardless of individual project-specific factors;

        iii. Recovery values will vary on a project-by-project basis. This is due to the technology, nature and structure of the project, the project sponsors, contractual differences, as well as other factors. Recovery values need to be considered in a project-specific context as there are likely to be multiple sources of recoveries for any particular project. Examples of different sources of recovery include:

            1. From the sale of the underlying asset serving as the collateral;

2. From sponsor commitments to inject new equity based on contractual commitments;

3. From commitments from the project's technology and/or EPC contractors to cover certain obligations, such as cost overruns or other contingencies;

4. From other collateral provided to the U.S. Government, such as cash collateral accounts; and,

5. From other contractual or structural protections agreed to by the project sponsor.

One concrete example of multiple sources of recovery occurred during the execution of the ATSB. The Board hired a variety of valuation experts to provide opinions on a range of collateral that the ATSB ultimately became contractually entitled to. These experts opined on items that would generate recovery cash flows to the U.S. Government such as aircraft, real estate, simulators, equipment, gates, routes, slots, warrants and contractual provisions. The retention of these experts and use of their valuations provided the ATSB with a sound and supportable basis to make recovery valuation estimates and incorporate the data into the credit subsidy calculation.

2. The discount rates used in OMB's Credit Subsidy Calculator model reflect the assumptions used in the President's Budget and not the actual "average interest rate on marketable Treasury securities of similar maturity to the cash flows of the direct loan or loan guarantee for which the estimate is being made" as directed in §502(5)(E). This is particularly meaningful as the loan guarantees are being financed by the Federal Financing Bank based on the Treasury rate for a given maturity at the date of disbursement.

   As OMB recognized in a March 11, 1998 letter to GAO pertaining to a GAO report on credit reform (GAO/AIMD-98-14), "subsidy rates are highly dependent on the interest rate that is used to discount the cash flows. A change in the discount rate will cause the subsidy rate to change, even if the cash flows are unaffected."

   Recognizing the importance of the discount rates and the statutory language and intent that the Federal Credit Reform Act provides, it is critical that this component be faithfully executed. In the instant case of Title XVII, this is especially important because the Federal Financing Bank is the required lender where the U.S. Government is guaranteeing 100% of the guaranteed obligation (see Final Rule at §609.10(d)(4(i)). The importance is clear as the Federal Financing Bank is providing financing based on the Treasury rate for a given maturity at the time of disbursement. A faithful interpretation of the discount rate required under the Federal Credit Reform Act would suggest that the discount rate employed would be equal to the base Treasury rate that the Federal Financing Bank is using in its financing to the borrower. Utilizing the

Treasury rate assumptions in the President's budget would generally be acceptable as long as the borrower's interest payment cash flows to the U.S. Government are modeled off the same Treasury rate assumptions.

3. OMB is providing guidance and direction to DOE (and indirectly to applicants) that is inconsistent with the underlying statutes and rules. Specifically, the Final Rule and the relevant solicitations provide for a non-binding estimate of the Federal credit subsidy costs of a proposed project but recognize that the final Federal credit subsidy amount can only be determined near the date of financial closing and disbursement. Common language in the solicitations says "The final Credit Subsidy Cost determination must be made at or prior to the closing on the Loan Guarantee Agreement and may differ from the preliminary estimate of the Credit Subsidy Cost, depending on project-specific and other relevant factors including final structure, the terms and conditions of the debt supported by the Title XVII guarantee and risk characteristics of the project." This is consistent with the requirements of the Federal Credit Reform Act of 1990, Title XVII, the Final Rule and the relevant solicitations. However, OMB has suggested that the non-binding estimate of the Federal credit subsidy is actually an amount that the final credit subsidy required will not be below. This is problematic for four reasons:

    a. It is not consistent with the Federal Credit Reform Act requirement that the credit subsidy cost be determined at the "date of disbursement";

    b. It suggests that changes in the final business plan, project rating or transaction structure (whether positive, negative or neutral) are not relevant to the final credit subsidy cost calculation;

    c. The existing assumptions and inputs to used to calculate the Federal credit subsidy estimates have not been faithful to the Federal Credit Reform Act; and,

    d. It is important for project sponsors and other stakeholders to know that there is a statutory and fact-based framework that will be followed with respect to the calculation of the credit subsidy payment required and that positive or negative factors that arise after the term sheet but before financial closing will be fully considered in accordance with the law.

The faithful implementation of the Federal Credit Reform Act is a very time sensitive and critical issue, particularly for those project sponsors in the due diligence queue at DOE. The reason is that the non-binding Federal credit subsidy cost estimates that OMB and DOE provide project sponsors, gives the sponsor its first look at the expected check that the U.S. Government will seek, and this informs their investment decision. If the number provided is at a particular level that makes the project uneconomic, principally because the calculation was not faithful to the statute, and this drives a project sponsor and its investors to abandon a project that would otherwise have been viable, then not only have the purposes of Title XVII been frustrated, but the loss to everyone is irreplaceable.

Amending the Final Rule

The Final Rule needs to be amended to address rules that are inconsistent with the statute, congressional intent, the Federal Credit Reform Act, and OMB Circulars pertaining to Federal credit programs. The Final Rule was originally issued in October 2007. Under Secretary Chu's leadership, DOE reviewed the Bush Administration's Final Rule and issued a Notice of Proposed Rulemaking in August 2009 to correct what it viewed as statutory misinterpretations on several narrow issues. While it was clear that DOE was correct to pursue the proposed changes, there are in fact other areas where the Final Rule is inconsistent with the underlying statute and Congressional intent of Title XVII, inconsistent with other applicable statutes, inconsistent with OMB Circular's pertaining to Federal credit programs and which impede the ability of Title XVII to achieve its purposes.

The specific items include:

1. Elimination of the partial guarantee in the Final Rule (§609.10(d)(4)(ii) and (iii) and in the §609.2 definition of "Guaranteed Obligation". Partial guarantees are inconsistent with the statutory definition of "Full Faith and Credit" provided in §1702(j) and impede execution of Title XVII.

   In providing for a partial guarantee in the Final Rule, OMB and DOE have usurped the power that the Constitution gave solely to Congress under Article I, Section 8; the power to pledge the credit of the United States.

   Institutionally, both OMB and Treasury have had a preference for partial guarantees and for which OMB provides guidance under OMB Circular A-129 (Appendix A (II) (3) (a)). The principal rationale for this position pertains to the need for the beneficiary of the loan guarantee to have "skin in the game". This particular view fails to recognize that Congress ensured that the project sponsor had "skin in the game" by limiting the guarantee to 80% of the project cost in §1702(c). Regardless of an agencies institutional position, it cannot be imposed in a manner that is inconsistent with the Constitution and the statute, which the current Final Rule is.

   Beyond the Constitutional issues, Congress and the Executive should be concerned whenever rules or regulations cast doubt on the meaning of the U.S. Government's pledge of its full faith and credit as it is detrimental to the U.S. Government's interest in the financial markets. It also creates uncertainty with project sponsors, eligible lenders, financial partners and other stakeholders, all of which impede the execution of Federal credit programs and their general purposes, including correcting a private market failure for credit availability.

   While this particular issue originated in the 2007 Final Rule, in October 2009, DOE created the Financial Institution Partnership Program to implement a partial guarantee program under §1705. For the reasons discussed herein, this is inconsistent with the statutory language of Title XVII and the Executive and Congress should be very

concerned about the implications for both Title XVII and future Federal credit programs.

The inclusion of §609.10(d)(4)(ii) and (iii) and the §609.2 definition of "Guaranteed Obligation" are of particular concern. As it relates to the definition, the inclusion of the words "or any part of" is troubling as these words are used by Congress when they seek to provide the Executive with discretion to provide less than a full faith and credit obligation; however these words were not included in Title XVII and are inconsistent with the underlying statutory meaning and congressional intent of the words "Full Faith and Credit" used in Title XVII.

> §1702(j) reads: "FULL FAITH AND CREDIT.—The full faith and credit of the United States is pledged to the payment of all guarantees issued under this section with respect to principal and interest."

The concept of full faith and credit is well established in the Constitution, in statute and in U.S. Attorney General Opinions. After a long history of agencies seeking the formal opinion of the Attorney General as to whether the full faith and credit of the United States is pledged to a particular obligation, Attorney General Elliott L. Richardson issued a Memorandum to the Heads of Executive Departments dated October 10, 1973 in which he memorializes the Attorney General's opinion on the meaning of "full faith and credit of the United States". The third sentence reads, "More frequently, however, the pledge of full faith and credit is not in doubt and may well be specified in the statute itself." This is the fact in the instant case.

In 6 U.S. Op. Off. Legal Counsel 233, 1982 WL 170692 (O.L.C.), the Attorney General opinion on a full faith a credit question recalls an earlier Attorney General opinion in which he says "…If there is statutory authority for the guaranties, absent specific language to the contrary such guaranties would constitute obligations of the United States as fully backed by its faith and credit as would be the case were those terms actually used."

In 6 U.S. Op. Off. Legal Counsel 262, 1982 WL 170697 (O.L.C.), the Attorney General says "It has long been the position of the Attorney General that when Congress authorizes a federal agency or officer to incur obligations, those obligations are supported by the full faith and credit of the United States, unless the authorizing statute specifically provides otherwise."

An example of where Congress expressly provided discretion to limit the guarantee can be seen in P.L. 107-42 (Air Transportation Safety and System Stabilization Act).

> Sec. 107 (2) reads "FEDRAL CREDIT INSTRUMENT – The term "Federal credit instrument" means any guarantee or other pledge by the Board issued under section 101(a)(1) to pledge the full faith and credit of the United States to pay all **or part of any of** the principal of and interest on a loan or other debt obligation issued by an obligor and funded by a lender."

In establishing the regulations for ATSB, the Board used the discretion that Congress provided under §107 (2) to limit guarantees to less than 100% of the principal and interest (see 14 CFR §1300.14).

There seems to be very little ambiguity in the statutory understanding of "full faith and credit" either by Congress or by the Attorney General. To suggest that the specific statutory language of §1702(j) referencing "full faith and credit" with respect to principal and interest can be further limited beyond the specific limiting statutory language of §1702(c) seems entirely inconsistent with the historical use and understanding of this language. In fact, this would require one to assume that an agency or officer, authorized by Congress to incur an obligation, has the independent authority to determine the quality or quantity of the guarantee different from any specific limiting language. This presumption has been rejected by the Attorney General and was cited in U.S. Op. Off. Legal Counsel 262, 1982 WL 170697 (O.L.C).

2. Elimination of the unilateral right of the Secretary to terminate a Conditional Commitment as currently provided in the Final Rule definition of "Conditional Commitment" (§609.2). This provision is inconsistent with §502(4) of the Federal Credit Reform Act, the standards of the private financial markets for debt and equity conditional commitments and impede execution of Title XVII.

   The Final Rule definition of "Conditional Commitment" (§609.2) contains the provision that "Provided that the Secretary may terminate a Conditional Commitment for any reason at any time prior to the execution of the Loan Guarantee Agreement; and Provided further that the Secretary may not delegate this authority to terminate a Conditional Commitment."

   In Federal credit programs, and in the private financial markets for debt and equity, fulfillment of agreed upon conditions precedent is the legal standard for removing any conditionality to an agreement. §502(4) of the Federal Credit Reform Act reads:

   > "The term "loan guarantee commitment" means a binding agreement by a Federal agency to make a loan guarantee when specified conditions are fulfilled by the borrower, the lender, or any other party to the guarantee agreement."

   While it might be argued that absent language providing the Secretary with the unilateral right to terminate the conditional commitment, the borrower would be required to pay the full amount of the credit subsidy upon the issuance of the conditional commitment, this fails to distinguish between implementing the program under §1702(b)(1) and §1702(b)(2) where the guarantee is also conditioned on the borrower paying the full cost of the obligation at closing. Further, the idea that the borrower should pay the credit subsidy at the time of the conditional commitment in order to remove Secretary's unilateral right to terminate conditional commitment exposes the taxpayer to unnecessary risk that they should not face given the time lag between conditional commitment and the satisfaction of the conditions precedent.

Providing the Secretary with the unconditional right to terminate a commitment after fulfillment of the conditions precedent introduces a very high level of uncertainty that is detrimental to the interests of the U.S. Government. This negatively impacts the perception of Federal guarantees in the financial markets not only for Title XVII, but in other programs as well. It also provides project sponsors with the unhelpful signal that despite fulfilling the conditions precedent, they may never close on the loan guarantee. This type of language discourages project sponsors from advancing eligible projects. The Executive and Congress should each be concerned about setting new standards and precedents that adversely impact their ability to execute statutes and their priorities.

3. Elimination of the solicitation requirement in §609.3 of the Final Rule. This requirement is inconsistent with a program where the borrower is responsible for paying the full cost of the credit subsidy and administrative fees as they are for §1703 technologies and the intent of Title XVII to get technologies into general use. Conforming changes are needed in §602.2 definition of "Application" and "Pre-Application", § 609.3(a) and (b), §609.4, §609.5, §609.6, and §609.7.

   The solicitation approach creates a greater likelihood of suboptimal applications as applicants/sponsors are forced into submitting an application at the time and choosing of DOE as opposed to when they, their partners and the financial markets are in the best position to do so. A new "as-ready" approach for applicants/sponsors to submit applications should replace the current solicitation process. Applications should then be subject to a simple approval or denial consistent with the statute, rules, regulations, and policies.

4. Elimination of the competitive evaluation requirement in §609.7 of the Final Rule. The competitive evaluation requirement is inconsistent with a program where the borrower is responsible for paying the full cost of the credit subsidy and administrative fees as they are for §1703 technologies and the intent of Title XVII to get technologies into general use.

   It is helpful to frame this issue in the context of all other Federal credit programs, where the U.S. Government is directly paying for the appropriation of the credit subsidy with taxpayer funds. Under the traditional approach, there is a finite amount of monies available to support the credit subsidy and administrative expenses of the program and therefore a finite amount of loan guarantee authority. In this traditional approach to Federal credit programs, where the appropriations are made with U.S. Government funds and specifically limited, it is entirely appropriate to establish the solicitation and competitive evaluation process as a way of allocating scarce resources.

   The "borrower pay" mechanisms in §1702(b)(2) and §1702(h) statutorily provide the appropriations necessary for both the credit subsidy and the administrative expenses required to evaluate and execute the program subject to the time limitation that a technology is considered in "general use" and the project sponsor's willingness to pay for the credit subsidy and therefore the competitive evaluation process only serves to impede the statutory objective of Title XVII.

5. Elimination of the one project, per technology, per sponsor limitation in §609.3(a) of the Final Rule. This requirement is inconsistent with a program where the borrower is responsible for paying the full cost of the credit subsidy and administrative fees as they are for § 1703 technologies and the intent of Title XVII to get technologies into general use.

   The limitation on a sponsor to one project per technology is also inconsistent with the statutory purposes of Title XVII which are to commercialize clean energy technologies that reduce greenhouse gas emissions. Title XVII recognizes that the private sector will not fund the targeted technologies on its own and therefore it is in the U.S. Government's interest to participate in its funding until the market failure is corrected. Some of the technologies supported by Title XVII require very large capital commitments and involve a limited number of uniquely and highly qualified operators that are subject to a high degree of regulation. The current prohibition is inconsistent with the statutory and congressional intent of Title XVII, impedes a technology from becoming a commercial technology in general use, and may result in the highest quality sponsors limited to one project with a given technology or proposing multiple technologies for their generation fleet that add complexity and costs unnecessarily, and in ways that are reminiscent of acknowledged mistakes from the past.

6. Remove the ban on Federal entities in the definition of "Applicants" included in §609.2. Federal power agencies that are directed to the private markets for borrowings and that were not statutorily excluded from the Title XVII program should not be excluded by rule. This is inconsistent with the intent Title XVII to get innovative clean energy technologies into general use.

7. Include in the definition of "Credit Subsidy Cost" in §609.2, the definition of the "cost of a direct loan" as provided in §502(5)(B) of the Federal Credit Reform Act for those instances where the Federal Financing Bank is providing the financing pursuant to the DOE guarantee.

8. Assuming implementation under the borrower pay provision of §1702(b)(2), elimination of the requirement under §609.9(c)(1) for receipt of authority in an appropriation act as the specific authority is provided by §1702(b)(2).

Eliminating Maximum Loan Guarantee Authorization Levels

Historical Context

Prior to the Federal Credit Reform Act of 1990, the costs of Federal credit programs were only evaluated, and appropriated for, at the time of default. Over the years, this approach was the subject of significant criticism from OMB, CBO, Congress and GAO. During these pre-credit reform days, GAO strongly encouraged the imposition of limits on the total dollar amount of loans or loan guarantees to be issued and OMB often agreed.

Since enactment of the Federal Credit Reform Act of 1990, the standard operating procedure for Federal credit programs has been to insert maximum volume authorization levels. This is provided in OMB Circular A-129 (prior version Appendix A (II)(3)(e), current version on OMB website Appendix A (II)(3)(5)) which reads:

> "Maximum amounts of direct loan obligations and loan guarantee commitments **should be** specifically authorized in advance in annual appropriations acts, except for mandatory programs exempt from the appropriations requirements under Section 504(c) of the Federal Credit Reform Act of 1990."

As a practical matter, the post-FCRA era establishes maximum authorization levels for those programs subject to the FCRA. GAO's Principles of Federal Appropriations Law, Volume II, Chapter 11, page 11-23 notes:

> "As a result of FCRA, guarantee programs are no longer unrestricted. Even if the applicable appropriation act does not explicitly set a maximum program level, the program level that can be supported by the enacted cost appropriation, reinforced by the Antideficiency Act, constitutes an effective ceiling."

Title XVII's Unique Structure - Borrower-Pays In Lieu of an Appropriation

In providing the "borrower pay" option in §1702(b)(2) as a substitute for a taxpayer funded appropriation, and requiring that the "cost of the obligation" be measured by the standards in the Federal Credit Reform Act, Congress was structuring a program that would not impact the Federal budget, would fully compensate the U.S. Government for the risks that it was assuming, and would be of sufficient size to get clean energy technologies into general use.

On April 20, 2007, GAO issued its Opinion B-308715 where it concluded that §1702(b)(2) confers upon DOE independent authority to make loan guarantees, notwithstanding the FCRA requirements. GAO said:

> **"The language of section 1702(b) makes clear that Congress contemplated two possible paths for making loan guarantees under title XVII. DOE, consistent with FCRA (2 U.S.C. § 661c(b)), could issue loan guarantees pursuant to appropriations for that purpose (EPACT, § 1702(b)(1)); or DOE could issue loan guarantees if it receives payments by borrowers of the "full cost of the obligation" (EPACT, § 1702(b)(2)). To read section 1702(b) as subjecting title XVII loan guarantees to the requirements of FCRA would read subsection (b)(2) out of the law, and we cannot do that; we have to give meaning to all of the enacted language.** *E.g.,* 70 Comp. Gen. 351, 354 (1991); 29 Comp. Gen. 124, 126 (1949). *See also* 2A Sutherland, *Statutory Construction*, § 46:06 at 193–94 (6th ed. 2000). **Section 1702(b)(2) is clearly inconsistent with FCRA, and it is a later enacted, more specific law. It is well established that a later enacted, specific statute will typically supersede a conflicting previously enacted, general statute to the extent of the inconsistency.** *E.g., Smith v. Robinson*, 468 U.S. 992, 1024 (1984); B-255979, Oct. 30, 1995. **For these reasons, we conclude that EPACT section 1702(b)(2) allows DOE to issue loan guarantees if the borrowers pay the "full**

cost of the obligation." The alternative path clearly represents authority to make loan guarantees independent of and notwithstanding the earlier, more general FCRA requirements.

Given our answer to the first part of this question, we need not address the second part which asks whether, in the alternative, section 1702(b)(2) constitutes new budget authority for the purposes of FCRA. **Suffice it to say that section 1702(b)(2) provides DOE authority to make loan guarantees independent of FCRA."**

Future Approach

The Administration should eliminate the current approach of establishing arbitrary dollar limits for loan guarantees on different technologies. The current approach is not only inconsistent with the "borrower pay" appropriation model and the statutory intent to get commercial technologies into "general use", it harms the U.S. Government's ability to incent sponsors and third-party providers of capital to invest in new technologies when they consider the cost of each technology, the number of projects needed for a given technology to become a commercial technology as defined, and the amount of loan guarantee authority arbitrarily allocated in the current approach.

The U.S. Government should acknowledge that under the "borrower pay" mechanism authorized in Title XVII and implemented for the loan guarantee program, the total amount of potential loan guarantees will be dependent on:

1. the amount of time before a technology becomes a commercial technology in "general use";

2. the number and quality of applications/applicants and the applicants willingness to pay the required credit subsidy and application fees;

3. the ability of the applicants to meet the statutory requirements and rules established under Title XVII; and,

4. the success of the program in achieving the policy objectives of the U.S. Government.

This is not to say that every project will or should be approved, as thoughtful implementation of Title XVII still subjects each application to a rigorous process and those projects that are not credible should be rejected. However, thoughtful implementation that removes improper rule based impediments and arbitrary limits will advance a program that is consistent with the underlying statutes and Congressional intent. It will also enhance Title XVII's credibility with the private sector and should bring highly qualified project sponsors and their projects to the U.S. Government for reasonable consideration.

This approach is consistent with the statute and Congressional intent of Title XVII as well as GAO's opinion on DOE's authority. It also provides applicants, sponsors, investors, contractors, third parties that provide other financial or risk support, and other stakeholders with clarity that

does not exist today. This clarity will incent sponsors to commit to spending the substantial dollars necessary to bring projects to a financial closing and provide supply chain partners with the business visibility that is necessary for them to make new U.S. based investment in manufacturing and operations to support their partner's projects.

Congress Appropriation Control

Congressional concerns over control should be considered through agreed-upon formal reporting mechanisms that provide transparency and confidence that the program is being implemented thoughtfully and that the individual loan guarantees are being structured to achieve the objectives of Title XVII, including the long-term protection of the taxpayer.

Discontinuation of the Financial Institution Partnership Program

Discontinue the Financial Institution Partnership Program ("FIPP"). First, the execution of a partial guarantee program is inconsistent with the Full Faith and Credit provided under §1702(j) as discussed earlier. Second, the financing execution provided under FIPP is inferior to that of the Federal Financing Bank and significantly more costly to the U.S. Government and the borrower, all of which impedes the program, particularly §1705 projects. This will have significant positive impacts on the implementation and execution of §1705 projects, addressing a major source of unnecessary friction with key constituents.

Addressing CBO's Credit Subsidy Concerns and Scoring Convention

Establishment of a "credit subsidy downgrade fee" as a way to address CBO's concerns that the credit subsidy calculation will underestimate the long term costs to the taxpayers. CBO's scoring convention currently requires a separate 1% credit subsidy appropriation for Title XVII loan guarantees (over and above the borrower paid credit subsidy fee).

The "credit subsidy downgrade fee" would be a contractual provision that addresses CBO concerns that principally result from "project downgrade risk". Operationally, DOE would require every term sheet, conditional commitment and final documentation, to include the credit downgrade trigger that would require the borrower to pay 25 basis points in additional interest rate spread for each two notch downgrade up to a maximum of 50 basis points ("credit subsidy downgrade fee"). This contractual provision would be in lieu of the current CBO requirement of a 1% credit subsidy appropriation. The credit downgrade trigger would be activated upon the downgrade by one or more of the rating agencies and would remain in effect as long as the downgrade persists. Subsequent upgrades that return the project rating to the original rating will reduce the credit subsidy downgrade fee up to the 50 basis points maximum.

This approach saves the U.S. Government from having to use scarce budget dollars for the CBO 1% credit subsidy appropriation, yet provides the U.S. taxpayer with the protection from the downgrade risk that CBO is seeking. All of this is accomplished through a borrower paid contingency fee, maintaining the statutory intent of §1702(b)(2).

Issuing an Executive Order on Title XVII

Issuance of an Executive Order pertaining to Title XVII, the Final Rule issues to be addressed, the operational execution of maximum loan guarantee authority issues and calculation of the Federal credit subsidy, appropriation issues as well as Administration policy and objectives pertaining to jobs, clean energy infrastructure development, domestic energy supply, the environment and domestic manufacturing priorities.

This approach provides the Executive Branch agencies with the unambiguous Presidential leadership and direction necessary to establish a fully functional Title XVII. It also provides the private sector with an equally clear message that Title XVII will be a reasonable, predictable and available Federal credit program.

Summary

In summary, Title XVII is a very powerful policy tool that provides a means to achieve the priorities and policies of the President and Congress pertaining to jobs, the economy, clean and secure domestic energy capacity, and the environment. It does so through a clean energy infrastructure build that is fully funded by the private sector. This build will also be the engine of growth in the investments that develop our domestic supply chain manufacturing base in supporting industries such as iron and steel. The key to all of this is a fully functional Title XVII. The President and his Administration can accomplish these critical objectives by exercising their discretion to amend the Final Rule and to provide direction to OMB, DOE and Treasury on the operational execution of this Federal credit program as well as his policies and priorities. I am pleased to answer any questions that you may have.