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ONE HUNDRED TWELFTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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December 7, 2011

The Honorable Steven Chu  
Secretary of Energy  
1000 Independence Avenue SW  
Washington, DC 20585

Dear Mr. Secretary:

The Energy Policy Act of 2005, which created the section 1703 loan guarantee program and would later provide the rules for the section 1705 loan guarantee program, included strong provisions to protect taxpayers from unnecessary losses in the event that a loan guarantee recipient failed. However, since the Obama Administration took office in 2009, actions have been taken to weaken these taxpayer safeguards and expose taxpayers to significant losses in the event that a business relying on a loan guarantee fails.

I am writing to gain a better understanding of facts surrounding the contract terms to the renewable energy projects that benefitted from Department of Energy (DOE) loan guarantees and contained *pari passu* credit terms. Specifically, given your answer to Question A in your November 8, 2011, response,<sup>1</sup> I seek to understand why you permitted the original terms to First Solar, SunPower and ProLogis loan guarantees and related agreements to be structured in a *pari passu* manner.

### Overview

Section 1702 of the Energy Policy Act of 2005 authorizes DOE to provide loan guarantees subject to important constraints intended to protect the taxpayer from undue risk. One of those constraints relates to superiority. Section 1702(g)(2)(B), *Superiority of Rights* (“*Superiority*”), provides for the superiority of the DOE’s claims relative to all other claimants. Specifically, it states “[t]he rights of the Secretary, with respect to any property acquired

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<sup>1</sup> You provided that the “DOE has a first priority security interest in all of the assets of the project to secure the obligations of the borrowers under the loan guarantees and the guaranteed debt is not subordinate to other financing .... DOE and the commercial lenders that hold the remaining (unguaranteed) 20% of the debt share the first lien collateral *pari passu*.” (italics added).

pursuant to a guarantee,<sup>2</sup> shall be superior to the rights of any other person with respect to the property.”

This law requires that the DOE maintain superiority with regard to the assets acquired pursuant to the original guarantee and related agreements. *Pari passu* credit terms, which place the DOE on equal footing with the unguaranteed lenders, seem to violate the requirement of superiority.

### **Congress Refused to Modify Title XVII to Allow for *Pari Passu* Credit Terms**

On July 16, 2009, S. 1462, which specifically would have modified Title XVII to allow for *pari passu* credit terms by disabling the *Superiority* provision, was passed by the Senate Energy and Natural Resources Committee but then failed to pass the full Senate.<sup>3</sup> Also in the last Congress, the House of Representatives passed “Cap and Trade,” under H.R. 2454. That bill had an identical provision to disable *Superiority* under Title XVII. H.R. 2454 also failed to become law. The time invested by lawmakers to draft this modification to Title XVII and introduce it in both the House and the Senate clearly reflects that the law does not currently provide the DOE with authority to agree to *pari passu* terms for 1705 loan guarantees.

Despite the lack of legal authority, on December 4, 2009, the DOE finalized proposed regulations to allow for *pari passu* treatment of DOE loan guarantees. By these actions, the DOE has clearly disregarded the law. To the extent DOE allowed *pari passu* treatment for solar and wind energy projects enabled under Sections 1703 or 1705, the government disregarded the requirement of superiority.

The resulting *pari passu* treatment places the United States on equal footing with other lenders, allowing the United States to recover only a pro-rata share of assets following a default. This means that a portion of the Treasury’s potential recovery would not be superior to the recovery of other lenders.

### **Requests**

To enable the Committee to better understand the circumstances of this situation, please provide responses to the following requests for information, producing documents as noted and as necessary to sufficiently support your answers. Please directly respond to each request as numbered herein. Please provide any documents requested, **in electronic format**, for the time period from January 1, 2009, to the present, unless otherwise specified:

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<sup>2</sup> For the purposes of Section 1702, “guarantee” is defined in 1701(4) (A) and (B) as “loan guarantee” and “loan guarantee commitment” as those terms are defined within 2 U.S.C. 661(a). 2 U.S.C. 661(a) provides, in part: (3) The term “loan guarantee” means any guarantee, insurance, or other pledge with respect to the payment of all or a part of the principal or interest on any debt obligation of a non-Federal borrower to a non-Federal lender, but does not include the insurance of deposits, shares, or other withdrawable accounts in financial institutions. (4) 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.

<sup>3</sup> See S. 1462, Section 103(b)(3), [http://energy.senate.gov/public/\\_files/s1462pcs1.pdf](http://energy.senate.gov/public/_files/s1462pcs1.pdf).

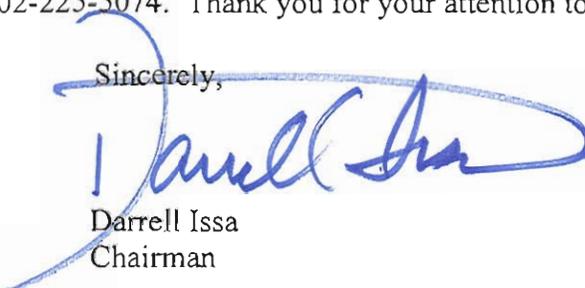
1. Please fully respond to the concerns expressed above regarding DOE's allowance of *pari passu* treatment for Sections 1703 and 1705 energy projects.
2. Identify all Section 1703 and 1705-based projects where the DOE agreed to *pari passu* credit terms within the original terms and conditions of the contract. Provide the signed agreements relating to credit terms and conditions for all projects identified.
3. Provide all communications between and among yourself, DOE attorneys, DOE's outside counsel, and the counsel and executives of entities that entered into agreements referring or relating to the *pari passu* credit structure for energy projects involving 1703 and 1705-based DOE loan guarantees.
4. Provide all legal opinions that participating lenders, their outside legal counsel and DOE legal counsel provided to DOE with regard to energy projects involving DOE loan guarantees that relied on a *pari passu* credit structure as part of the original terms.

The Committee on Oversight and Government Reform is the principal oversight committee of the House of Representatives and has broad authority to investigate "any matter" at "any time" under House Rule X. An attachment to this letter provides additional information about responding to the Committee's request.

We request that you provide the requested information as soon as possible, but no later than 5:00 p.m. on December 21, 2011. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

If you have any questions about this request, please contact Peter Haller or Michael Whatley of the Committee Staff at 202-225-5074. Thank you for your attention to this matter.

Sincerely,



Darrell Issa  
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Minority Member

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**Responding to Committee Document Requests**

1. In complying with this request, you should produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
  - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
  - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
  - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.

6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.
7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when they were requested.
8. When you produce documents, you should identify the paragraph in the Committee's request to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full, compliance shall be made to the extent possible and shall include an explanation of why full compliance is not possible.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you should produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. The time period covered by this request is included in the attached request. To the extent a time period is not specified, produce relevant documents from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.

17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.
19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

### Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might

otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.

4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.
5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.