

# Summary of Department of Energy May 13, 2023 Interim Final Rule Regarding Loan Guarantees for Clean Energy Projects

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## OVERVIEW

### DOE EXPANDS SCOPE AND AMOUNT OF LOAN FUNDING FOR CLEAN ENERGY PROJECTS

The DOE has acted to increase the loan resources available for the clean energy transition. On May 13, 2023, the Department of Energy (“DOE”) published an interim final rule (“IFR”) regarding “Loan Guarantees for Clean Energy Projects.” The IFR amends the loan guarantee provisions of Title XVII of the Energy Policy Act of 2005 (“Title XVII”) to conform with provisions of the Inflation Reduction Act of 2022 (“IRA”). The IFR establishes the Energy Implementation Reinvestment Program (“EIR”) and makes changes to the existing Title XVII loan guarantees. The DOE is providing a comment period until July 31, 2023 and the programs are available through September 30, 2026.

## INTRODUCTION

The EIR program under 1706 of Title XVII is intended to “help retool, repower, repurpose, or replace energy infrastructure that has ceased operations or to enable operating energy infrastructure to avoid, reduce, utilize, or sequester air pollutants or anthropogenic emissions of greenhouse gases.” The Secretary is authorized to guarantee loans up to \$250 billion dollars for the EIR Program.

The IRA increases the availability to guarantee loans under section 1703 of Title XVII by \$40 billion in total principal. The Secretary is permitted to issue loans for new categories of projects such as critical minerals processing, manufacturing, or recycling, as well as other projects that would not ordinarily fulfil the “innovation requirement” but receive support or credit from a State energy financing institution.

Both loan guarantees under sections 1703 and 1706 are available through September 30, 2026. In addition, the DOE is revising 10 CFR part 609 through the IFR to improve the application process for loan guarantees under Title XVII. Part 609 sets forth the guidance for administering the Title XVII Loan Guarantee Program which includes specific guidance for applicants, eligibility, the process of negotiations, conditional commitment, and generally governs all applications. 609 will now include the 13 categories of eligible projects. The amended rule permits the Secretary of Energy (Secretary) to issue loan guarantees for certain eligible innovative clean energy and energy infrastructure reinvestment projects.

## **SECTION 1703 CLEAN ENERGY PROJECTS**

The DOE is authorized to support innovative energy projects from one or more of the 13 categories specified in section 1703(b). Eligible projects will also include innovative supply chain projects that manufacture a product with an end-use described in section 1703(b) that either:

“(i) deploy a New or Significantly Improved Technology in the manufacturing process; or (ii) manufacture a product that represents a New or Significantly Improved Technology satisfy Title XVII’s Innovation requirement”

Part ii of the “innovation requirement” can be satisfied if the project receives support or credit from a State energy financing institution. The DOE may also offer loan guarantees to projects that increase the domestically produced supply of critical minerals.

## **ENERGY INFRASTRUCTURE REINVESTMENT PROGRAM**

The EIR is allocated \$5 billion dollars through September 30, 2026 with a limitation of total principal not greater than \$250 billion. Examples of projects include:

“Repurposing shuttered fossil energy facilities for clean energy production, retooling infrastructure from power plants that have ceased operations for new clean energy uses, or updating operating energy infrastructure with emissions control technologies, including carbon capture, utilization, and storage (“CCUS”). EIR could also support the transition of an oil or gas pipeline or refinery into a clean energy project, such as clean hydrogen or carbon dioxide transportation infrastructure.”

All EIR projects must avoid, reduce, utilize, or sequester air pollutants or anthropogenic emissions of greenhouse gases.

## **CONDITIONAL COMMITMENTS & CREDIT SUBSIDY COST**

To align the Title XVII Loan Guarantee Program with other federal lending programs, the DOE will now be obligated to provide the credit subsidy cost of a loan guarantee at the time of the “Conditional Commitment” rather than at the final close of the Loan Guarantee Agreement. The DOE is eliminating fees in connection with the application to this program. The facility fee will now be charged at the financial closing of a loan guarantee.

## **TRANSACTION COSTS**

Transaction costs such as those generated by third-party advisors are defined under section 609.2 and are borne by the applicant.

## **PROJECT COSTS**

Project costs defined under section 609.10 include environmental remediation costs and at the DOE’s discretion, the costs of refinancing outstanding indebtedness that is directly associated with the Eligible Project.

**SECTION-BY-SECTION ANALYSIS**

SUMMARY TABLE OF SECTION ADDITIONS, REVISIONS, AND REDESIGNATIONS

Section	Former title	Action	New title
§ 609.1	Purpose and scope	Revised	N/A.
§ 609.2	Definitions and interpretation	Revised	Definitions.
§ 609.3	Solicitations	New section added; redesignated as § 609.19 and revised.	Title XVII eligible projects.
§ 609.4	Submission of applications	Revised	N/A.
§ 609.5	Programmatic, technical, and financial evaluation of applications.	Revised	Evaluation of applications.
§ 609.6	Term sheets and conditional commitments.	Revised	N/A.
§ 609.7	Closing on the loan guarantee agreement.	Revised	N/A.
§ 609.8	Loan guarantee agreement	Revised	N/A.
§ 609.9	Lender servicing requirements	Revised	N/A.
§ 609.10	Project costs	Revised	N/A.
§ 609.11	Fees and charges	New section added, redesignated as § 609.13 and revised.	Transaction costs.
§ 609.12	Full faith and credit and incontestability	New section added, redesignated as § 609.14 and revised.	Credit ratings.
§ 609.13	Default, demand, payment, and foreclosure on collateral.	Redesignated as § 609.15 and revised	Fees and charges.
§ 609.14	Preservation of collateral	Redesignated as § 609.16 and revised	Full faith and credit and incontestability.
§ 609.15	Audit and access to records	Redesignated as § 609.17 and revised	Default, demand, payment, and foreclosure on collateral.
§ 609.16	Deviations	Redesignated as § 609.18 and revised	Preservation of collateral.
§ 609.17	N/A	§ 609.15 redesignated as § 609.17 and revised.	Audit and access to records.
§ 609.18	N/A	§ 609.16 redesignated as § 609.18 and revised.	Deviations.
§ 609.19	N/A	§ 609.3 redesignated as § 609.19 and revised.	Title XVII loan guarantee program guidance.

**CONCLUSION**

The IFR amends the Title XVII Loan Guarantee Program in several ways by increasing the funds available and streamlining the application process. The new EIR program recognizes more categories of eligible projects and authorizing alternative avenues to be eligible for the Loan Guarantee Program.

*\*Editor’s Note: Special thanks to summer associates, **Asha Davis** and **Krista Zamurs** for their contributions to this legal update.*



This Legal Update is intended to keep readers current on developments in the law. It is not intended to be legal advice. If you have any questions, please contact [Charlie Zdebski](mailto:czdebski@eckertseamans.com) at [czdebski@eckertseamans.com](mailto:czdebski@eckertseamans.com) or (202) 659-6605, [Jay Julien](mailto:jjulien@eckertseamans.com) at [jjulien@eckertseamans.com](mailto:jjulien@eckertseamans.com) or (202) 659-6648, or any other attorney at Eckert Seamans with whom you have been working.