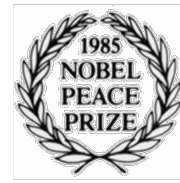




Physicians for
Social Responsibility



United States Affiliate of International Physicians for the Prevention of Nuclear War

Unlimited Taxpayer Liability in the Clean Energy Deployment Administration (S. 1462)

What is CEDA?

Both the American Clean Energy Leadership Act of 2009 (ACELA, S. 1462) in the Senate and the American Clean Energy and Security Act (ACES, H.R. 2454) in the House make changes to the existing Title XVII Department of Energy (DOE) Loan Guarantee Program and establish a new Clean Energy Deployment Administration (CEDA). The Senate version moves Title XVII under CEDA control, while the House version keeps Title XVII administered by DOE. The purpose of CEDA in both bills is to “promote access to affordable financing for accelerated and widespread deployment” of clean energy, energy infrastructure, energy efficiency, and manufacturing technologies. Nuclear power and coal are eligible under the definition of “clean energy technologies” in both versions. CEDA would be authorized to provide direct credit support, like loan guarantees and direct financing, as well as indirect support. The Senate version of CEDA, however, would authorize an unlimited amount of loan guarantees with no congressional authority required.

How is the Senate CEDA unlimited?

Under Section 504(b) of Federal Credit Reform Act,¹ which was enacted to protect US taxpayers from the risk of federal credit programs, Congress must provide authority for the government to commit to loan guarantees, either by (1) appropriating the subsidy cost or (2) by setting a limit to the amount of loan guarantees in which the borrower pays the credit subsidy cost (sometimes called “self-pay” loan guarantees).

The credit subsidy cost, the net present value of the estimated long-term cost to the federal government of the loan guarantee, is assessed for each project that gets a loan guarantee. No Title

¹ FCRA, Section 504(b) APPROPRIATIONS REQUIRED. – Notwithstanding any other provision of law, new direct loan obligations may be incurred and new loan guarantee commitments may be made of fiscal year 1992 and thereafter only to the extent that –

- (1) new budget authority to cover their costs is provided in advance in an appropriations Act;
- (2) a limitation on the use of funds otherwise available for the cost of a direct loan or loan guarantee program has been provided in advance in an appropriations Act; or
- (3) authority is otherwise provided in appropriation Acts.

VII Loan Guarantee Program guarantee can be made unless Congress has appropriated the credit subsidy cost or the borrower has paid the credit subsidy cost to the federal government upfront.

The Senate version of CEDA exempts Title XVII loan guarantees from Sec. 504(b) of the Federal Credit Reform Act of 1990. An exemption from this section means that appropriators no longer have the authority to set a limit on these commitments, thereby allowing DOE to give out unlimited “self-pay” loan guarantees. According to the Congressional Budget Office (CBO), the Senate bill would give DOE “permanent authority to guarantee such loans without further legislative action or limitations” [emphasis added].²

What projects benefit from unlimited guarantees?

Under unlimited “self-pay” loan guarantee authority, nuclear power and coal would benefit disproportionately compared to renewable and efficiency technologies, because large utilities have the resources to pay the subsidy cost themselves. According to CBO, “large capital projects,” specifically new reactors and coal plants, would benefit from the Senate version of CEDA.³ In contrast, US taxpayers are likely to pay the credit subsidy cost for renewable and efficiency projects because they are smaller projects involving companies with smaller financial resources. Therefore, renewable and efficiency projects would be limited by the \$10 billion capital in CEDA used to pay the credit subsidy fee. The Nuclear Energy Institute calls CEDA a “permanent financing platform” for new nuclear reactors.⁴

If the credit subsidy fee is paid, what’s the risk?

Proponents of unlimited loan guarantees argue that they pose no risk to US taxpayers, because the borrower pays the credit subsidy cost. But both CBO and the Government Accountability Office (GAO) have concluded that calculating this fee is extremely difficult and likely to be underestimated, leaving taxpayers on the hook for projects that default. Moreover, CBO found an inherent problem in federal loan guarantees: a higher, accurate fee could actually discourage the borrower from accepting the guarantee.⁵

How much projects will actually pay in credit subsidy cost is unknown, because DOE says that it does not intend to make public the subsidy cost fee. The nuclear industry is asking for a fee of 1% of the guarantee; DOE has indicated that the average fee for renewable projects is between 6% and 10% of the guarantee.⁶

² <http://www.cbo.gov/ftpdocs/106xx/doc10637/s1462.pdf>, page 9.

³ <http://www.cbo.gov/ftpdocs/106xx/doc10637/s1462.pdf>, page 10.

⁴ <http://www.nei.org/resourcesandstats/documentlibrary/newplants/policybrief/2009-nuclear-policy-initiative>

⁵ Congressional Budget Office, “Department of Energy’s Loan Guarantees for Nuclear Power Plants,” *Director’s Blog*, March 4, 2010, <http://cboblog.cbo.gov/?p=478>.

⁶ Calculation from Department of Energy FY 2011 Congressional Budget Request: “For renewable energy systems and efficient end-use energy technology projects, the Department is requesting \$500.0 million in credit subsidy to support an estimated \$3 to \$5 billion in eligible project costs.”

<http://www.cfo.doe.gov/budget/11budget/Content/FY2011Highlights.pdf>, page 53.

Even prior to the current credit freeze, the nuclear industry, unlike the renewable energy industry, was unable to borrow money from Wall Street. Moody's Investor Services called new reactors a "bet the farm" investment. Citigroup concluded that the construction, power price, and operational risks of new reactors "could each bring even the largest utility company to its knees financially." CBO estimated the likelihood of default for loans made to nuclear reactor developers to be "very high – well above 50 percent."⁷

The House version limits US taxpayer liability, right?

Maybe. The House version does not exempt Title XVII from Sec. 504(b) of FCRA. However, there are different interpretations within the federal government about whether Title XVII supersedes the requirements of FCRA. The Congressional Budget Office, as well as the Office of Management and Budget, have determined that FCRA requires Congress to authorize "self-pay" loan guarantees. The Government Accountability Office, on the other hand, does not interpret the law in the same way. According to GAO, the DOE has the right to give out as much "self-pay" loan guarantees as it chooses.⁸ Under both the Bush and Obama Administrations, DOE has followed the interpretation of CBO and OMB, but DOE could revisit this issue with the changes to the Title XVII program and the creation of CEDA in new legislation, or even with a new Administration in the future.

So, what would protect US taxpayers?

In order to protect US taxpayers, a congressionally mandated limit to the amount of total taxpayer liability that can be taken on by CEDA and Title XVII is needed. The unlimited loan guarantee authority in CEDA is equivalent to opening the doors of the U.S. Treasury to back risky energy projects. CEDA also needs to include standards that would prioritize investments that will achieve the maximum greenhouse gas emission reductions per dollar invested and the earliest reductions in greenhouse gases.

⁷ <http://www.cbo.gov/ftpdocs/42xx/doc4206/s14.pdf>, page 11.

⁸ "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." <http://www.gao.gov/decisions/appro/308715.pdf>