Dissenting Views on H.R. 6213

I. PURPOSE OF LEGISLATION

The bill's supporters have claimed that this legislation will terminate the Department of Energy's (DOE) Title XVII loan guarantee program. On July 19, 2012, Chairman Whitfield, referring to the relevant sections of Title XVII, said: "We are totally committed to ending this 1703, 1705 program." Similarly, at the August 1, 2012, full committee markup of the bill, Chairman Whitfield stated: "I just philosophically think we need to stop this program. We have an opportunity to do it with this bill." At the same full committee markup, Chairman Stearns stated: "We need to get the government out of the venture capitalist business, and we can start by getting rid of Title XVII." He claimed that the bill "will phase out DOE's flawed loan guarantee program under Title XVII of the Energy Policy Act of 2005."

This description of the bill's purpose and effect is misleading and inaccurate. The bill does not terminate, end, or phase out the loan guarantee program. Under this bill, DOE can use its existing authority to issue $34 billion in new loan guarantees. DOE can issue those loan guarantees tomorrow, next year, or twenty years from now. The bill establishes no end date for the program. As explained in more detail below, the bill would prohibit DOE from considering any applications for loan guarantees submitted after December 31, 2011.

At the July 12, 2012, legislative hearing, David Frantz, the Acting Executive Director of DOE's Loan Programs Office, explained that the bill does not terminate the loan guarantee program. At the July 25, 2012, Energy and Power Subcommittee markup of the bill, Committee counsel confirmed that the bill does not terminate the program and that, under the bill, DOE could use its existing authority to issue $34 billion in additional loan guarantees at any time in the future. Chairman Whitfield conceded this point during the August 1, 2012, full committee markup, stating:

> So while it is appealing to end the project right now, let us just end the program right now, not consider any of these pending applications, I think the better view is, let us let the Department of Energy go through the remainder of these applications that are already pending and let them make that decision. But there is only $34 billion left.

A vote on an amendment offered by Rep. Markey during the full committee markup demonstrated that the purpose of the legislation is not to terminate the loan guarantee program. Rep. Markey's amendment would have expressly prohibited DOE from issuing any new Title XVII loan guarantees without exception, effectively terminating the program. The amendment was overwhelmingly defeated on a bipartisan basis by a vote of 3 to 39. Twenty-five Republican members of the Committee, including Chairmen Upton, Stearns, and Whitfield, voted against the amendment.

II. BILL SUMMARY: H.R. 6213, NO MORE SOLYNDRAS ACT

A. Inaccurate and Misleading Findings

Section 2 of the bill includes several misleading and inaccurate statements. For example, finding number 9 states that the Committee's investigation into Solyndra "has demonstrated that the review in 2009 of the Solyndra application by the Department of Energy and the Office of Management and Budget was driven by politics and ideology and divorced from economic reality where the Department of Energy ignored concerns about the company's financial condition and market for its products." This statement is not supported by the evidence before the Committee.

The Department of Energy awarded the loan guarantee to Solyndra in 2009 after more than two years of thorough due diligence carried out by reputable independent third party experts and career professionals working at DOE through the Bush and Obama Administrations. The findings suggest that no one but short-sighted officials at the Department of Energy thought Solyndra had a chance of succeeding, but this is revisionist history. While, in hindsight, failed investments may look obvious, in 2009 there were many astute investors and market observers who thought that Solyndra was a smart investment. The company had raised nearly $1 billion from sophisticated private investors, including Argonaut Ventures, Madrone Capital, Redpoint Ventures, and Rockport Capital Partners. Moreover, in 2010 after Solyndra was awarded the loan guarantee, the Massachusetts Institute of Technology's *Technology Review,* ranked Solyndra as one of the "50 Most Innovative Companies in the World" and the *Wall Street Journal* ranked Solyndra number one on its list of "The Next Big Thing: Top 10 Venture Backed Clean Technology Companies."[1] The career officials at DOE stress tested Solyndra's financial projections by estimating the impact of a 40% drop in solar prices. Solyndra passed this stress test, but went bankrupt when solar prices dropped a staggering 70% in a two year period – largely because of intense Chinese competition.

There is no evidence before the Committee that the decision to award the loan was "driven by politics and ideology." Instead, the voluminous record before the Committee, including over 300,000 pages of documents and more than 60 hours of interviews with the key officials who reviewed the loan guarantee reveals that all decisions on the loan were made on the merits after thorough and independent review, and that political considerations did not affect the key decisions on the loan guarantee.

The Committee interviewed 14 individuals involved in the Solyndra loan guarantee, including White House officials, OMB officials, Energy Department officials, and private investors. The Committee also heard testimony from six additional officials involved in the guarantee, including the Secretary of Energy. Many of these individuals were career officials; one was a Bush Administration appointee. Every individual was asked whether political contributions played a role in the decisions on Solyndra. They unanimously said there was no political influence in these decisions. At the July 12, 2012, legislative hearing, David Frantz, a career civil servant who was the first employee and director of the loan guarantee program in 2007 under the Bush Administration, testified: "To the very best of my knowledge, through the

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[1] *The 50 Most Innovative Companies in 2010*, MIT Technology Review (Feb. 23, 2010) and *Wall Street Journal Ranks the Next Big Thing: The Top 10 Venture Backed Clean Technology Companies*, Wall Street Journal (Mar. 4, 2010).

whole history of the program from its inception to today, it has not been driven by any political considerations whatsoever."

The Committee report compounds the problems with this misleading finding by stating that that there were "potential improprieties" in the Solyndra loan process "such as the influence exerted by George Kaiser, Solyndra's largest investor," that "corners were apparently cut at the urging of the White House" during the Obama Administration's review of the Solyndra loan guarantee, and that upon taking office the Obama Administration "quickly swept aside" the Bush Administration's concerns about Solyndra's viability and awarded the loan guarantee. These claims are inaccurate and ignore key exculpatory evidence received by the Committee.

The Committee report's unfounded claims about "potential improprieties" related to George Kaiser ignore the fact that the key White House officials who were supposedly involved told Committee staff that they were unaware of Mr. Kaiser's contributions to the President until they became public through the Committee's investigation. These same White House officials also told Committee staff that they did not seek to "cut corners" in the review of the Solyndra loan guarantee nor did they have any involvement in the substance of the decisions about the loan guarantee. The career staff at DOE and OMB confirmed that they felt no White House pressure related to their decisions on the loan guarantee, that their decisions were made purely on the merits, and that no corners were cut. Finally, career officials and a Bush Administration political appointee who worked on the Solyndra loan at DOE in both the Bush and Obama Administrations told Committee staff that advancing the first loan guarantee was a key priority of both Administrations and that Solyndra's application was not improperly accelerated at the start of the Obama Administration.

Finding number 10 states that "despite an express provision…prohibiting subordination of the United States taxpayers' financial interest, the Department of Energy restructured the Solyndra loan guarantee." The Committee's investigation revealed that when Solyndra faced severe financial strain, it required new capital from investors in late 2010 and early 2011. DOE looked carefully at the text of the Title 17 loan guarantee statute and concluded that although subordination was not allowed during the origination process for the loan guarantee, it was permitted in the event that a loan needed to be restructured. The most senior lawyers at DOE, the Loan Program's outside counsel, and the top legal counsel at OMB all agreed with this decision. When the Democratic staff of the Committee sought an outside opinion from the former general counsel at DOE, she concurred with DOE's analysis. Furthermore, the independent consultant Herb Alison, who reviewed the DOE loan program, stated that DOE "should have some flexibility to subordinate because that may be the best way … to recover some money for taxpayers. Because by subordinating, it may make it possible to attract additional funding …which can help that project succeed."[2]

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[2] Senate Committee on Energy and Natural Resources, Testimony of Herb Allison, Independent Consultant, *Hearing on the Allison Report on DOE Loan Guarantee Program*, 112th Cong. (Mar. 13, 2012).

Finding number 12 states that a Government Accountability Office (GAO) report found that the DOE loan guarantee program "has treated applicants inconsistently." The record before the Committee has provided no evidence of political favoritism in the loan guarantee program, and the GAO report provides no evidence that any "inconsistent treatment" impacted the decision to grant a loan guarantee or was in any way connected to political considerations.[3] DOE responded to the GAO report by stating, in part, that "within each solicitation the rules have been applied consistently and no applicants have been disadvantaged."[4]

The findings give the misleading impression that the DOE loan programs have been a failure. But this is not true. The projects already financed by the program are expected to support nearly 60,000 jobs and save nearly 300 million gallons of gasoline per year. The program has supported six power generation projects that are already complete and nine projects that are sending power to the electricity grid. The program is funding one of the world's largest wind farms, the world's largest concentrated solar generation project, the world's largest photovoltaic solar power plant, and the nation's first two all-electric vehicle manufacturing facilities. The program has allowed private investors to come off the sidelines to invest tens of billions of dollars and create thousands of jobs.

After the Solyndra bankruptcy, the White House retained Herb Allison to conduct an independent review of the loan guarantee program. Mr. Allison previously served as the Assistant Secretary of the Treasury for Financial Stability, President and CEO of Fannie Mae after it was placed into conservatorship, Chairman, President and CEO of TIAA-CREF, and National Finance Committee Chair for Senator John McCain's presidential campaign. His report, which was conducted free from any Department or White House influence, examined the overall loan guarantee portfolio.

Mr. Allison found that the Department's loan guarantee program is fulfilling Congress' intent to fund "innovative alternative energy projects employing technologies that [have] not reached commercial maturity and involved more risk than is typical for project and corporate debt financing."[5] In fact, Mr. Allison found that the overall loan portfolio is significantly less risky than both the Department and Congress expected. The report estimated potential losses in the portfolio and found them to be $2 billion less than the Department had previously estimated and $7 billion less than the reserve amount that Congress set aside to cover losses.[6] According to Mr. Allison, some losses in the portfolio were anticipated, but overall the portfolio is performing well.

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[3] Government Accountability Office, *Further Actions Are Needed to Improve DOE's Ability to Evaluate and Implement the Loan Guarantee Program* (July 2010) (GAO-10-627).

[4] *Id.* at 26.

[5] The Independent Consultant, *Report of the Independent Consultant's Review with Respect to the Department of Energy Loan and Loan Guarantee Portfolio* (Jan. 31, 2012) (available online at www.whitehouse.gov/sites/default/files/docs/report_on_doe_loan_and_guarantee_portfolio.pdf) at 17.

[6] *Id.* at 32.

B. Picking Winners and Losers

Section 3 provides that DOE shall not issue any new loan guarantees for any applications submitted after December 31, 2011. DOE is permitted to issue new loan guarantees with existing or future loan guarantee authority but only for applications submitted by that date. According to DOE, approximately 50 applications were submitted by December 31, 2011, and were not withdrawn, rejected, or awarded a final loan guarantee. Under the bill, only this arbitrary pool of applications would be eligible for new loan guarantees. Even though the purpose of the loan guarantee program is to foster innovative technologies, DOE would be prohibited from issuing new solicitations or considering new applications for innovative nuclear, fossil, or renewable energy technologies. As a result, tens of billions of dollars of new loan guarantees can be issued in the years to come, but those guarantees may not be used to support the most innovative and promising technologies. As David Frantz, the Acting Executive Director of DOE's Loan Programs Office, explained at the July 12, 2012, legislative hearing: "going forward, the Department would increasingly be unable to guarantee loans with the newest and most innovative technologies, particularly in the area of nuclear and renewable projects."

For example, DOE currently has $10.2 billion in uncommitted loan guarantee authority for nuclear generation projects. Under the bill, this loan guarantee authority and any additional future loan guarantee authority for nuclear projects could only be used to award guarantees to the nuclear project applications submitted prior to December 31, 2011. If a new applicant has a ground-breaking small modular reactor or next generation nuclear technology, DOE would be prohibited from providing support for such a project.

At the July 25, 2012, Energy and Power Subcommittee markup of the bill, supporters of the bill claimed that the bill was drafted to allow DOE to issue $34 billion more in loan guarantees to grandfathered applicants who submitted applications prior to December 31, 2011, because DOE might incur liability if it did not issue loan guarantees to applicants with conditional commitments or even applicants that had merely begun due diligence. There is no support for this claim. The text of the loan guarantee program regulations, solicitations, and term sheets makes it clear that DOE can decide not to issue a loan guarantee for any reason at any time.[7] There is no contractual obligation to issue a final loan guarantee.

C. Personal Civil Liability for Federal Employees

Section 6 was added by a subcommittee amendment offered by Rep. Burgess and modified by a full committee amendment offered by Rep. Burgess. It provides that "any federal official who is responsible for the issuance of a loan guarantee" under the program in a manner that violates the requirements of Title XVII or this bill shall be (1) subject to appropriate administrative discipline and (2) personally liable for a civil penalty of at least $10,000 and up to $50,000 for each violation. During the full committee markup, Rep. Burgess described the

[7] *See, e.g.,* 10 C.F.R. 609.2 (stating: "the Secretary may terminate a Conditional Commitment for any reason at any time prior to the execution of the Loan Guarantee Agreement").

provision as giving "real teeth toward ensuring that the egregious activities which occurred during the lead-up to the subordination of taxpayer dollars will never occur again."

This broad provision subjects federal employees to punitive personal civil liability penalties. The provision defines the term "federal official" as an individual serving in an Executive Schedule or Senior Executive Service position, including career civil servants. However, the provision does not define or provide any limits on the term "who is responsible for the issuance of a loan guarantee." It is unclear whether "any federal official who is responsible for the issuance of a loan guarantee" includes the Secretary of Energy, the members of the Credit Review Board, the members of the Credit Committee, the Executive Director of the Loan Programs Office, or officials at the Office of Management and Budget. The inclusion of career Senior Executive Service employees in the definition of "federal official" suggests that a large number of individuals could be subject to civil liability penalties under this provision.

The uncertainty about which federal employees are potentially subject to this new civil liability is exacerbated by the breadth of the civil liability itself. The language of the provision does not limit liability to individuals who knowingly or intentionally violate a requirement of Title XVII. Under this provision, any federal official who unintentionally violates a requirement of Title XVII or who relies in good faith on legal advice from DOE attorneys when making a decision that is later determined to violate a requirement of Title XVII would face personal liability for substantial civil penalties.

Moreover, the language of the provision does not appear to apply to the restructuring of a loan guarantee, which was the stated purpose of the provision's author. On its face, the provision applies to federal officials responsible for the issuance of a loan guarantee in a manner that violates the requirements of Title XVII, not federal officials responsible for the restructuring of a previously-issued loan guarantee.

D. Skewed GAO Study

Section 7 was added by a full committee amendment offered by Rep. Pompeo. It requires a GAO study of federal subsidies in energy markets provided in fiscal years 2003 through 2012. The term "federal subsidies" is defined to include grants, direct loans, loan guarantees, and tax credits.

This definition of "federal subsidies" would skew the GAO analysis by excluding consideration of significant subsidies that oil companies have received for decades. Under this provision, the study would exclude analysis of key tax policies that benefit the oil industry, such as certain tax deductions, accelerated depreciation, and master limited partnerships. Such an analysis would provide an incomplete and inaccurate picture of U.S. energy subsidies.

A second-degree amendment offered by Rep. Waxman during the full committee markup would have expanded the definition of "federal subsidies" to include these longstanding "tax policies" but was defeated. The second-degree amendment also would have ensured that the study examined the economic importance of U.S. leadership in clean energy technology development and manufacturing.

For the reasons stated above, we dissent from the views contained in the Committee's report.

Henry A. Waxman Ranking Member	Bobby L. Rush Ranking Member Subcommittee on Energy and Power	Diana DeGette Ranking Member Subcommittee on Oversight and Investigations