



441 G St. N.W.
Washington, DC 20548

B-336406

May 29, 2024

The Honorable Joe Manchin
Chairman
The Honorable John Barrasso
Ranking Member
Committee on Energy and Natural Resources
United States Senate

The Honorable Cathy McMorris Rodgers
Chair
The Honorable Frank Pallone, Jr.
Ranking Member
Committee on Energy and Commerce
House of Representatives

Subject: *Department of Energy: Loan Guarantees for Clean Energy Projects*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Energy (DOE) entitled “Loan Guarantees for Clean Energy Projects” (RIN: 1901-AB59). We received the rule on May 22, 2024. It was published in the *Federal Register* as an interim final rule on May 30, 2023. 88 Fed. Reg. 34419. The effective date of the rule is May 30, 2023.

According to DOE, this interim final rule amends the regulations implementing the loan guarantee provisions in Title XVII of the Energy Policy Act of 2005 (Title XVII), Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005), to implement provisions of the Inflation Reduction Act of 2022 (IRA), Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022), that expand or modify the authorities applicable to the Title XVII Loan Guarantee Program. DOE states that the rule: establishes regulations necessary to implement the Energy Implementation Reinvestment Program and other categories of projects authorized by IRA for Title XVII loan guarantees; revises provisions directly related to DOE's implementation of the Title XVII Loan Guarantee Program as expanded by IRA; amends provisions to conform with the broader changes to the Title XVII Loan Guarantee Program; and revises certain sections for clarity and organization.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective date does not apply, however, if the agency finds for good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, and the agency incorporates the finding and a brief statement of its reasons in the rule. 5 U.S.C. § 808(2). DOE determined that prior notice and comment were contrary to the public interest given the timeline Congress had imposed on DOE for guaranteeing loans up to a total principal amount of \$290 billion prior to the

loan guarantee authority expiration in 2026 and to provide the opportunity for all eligible projects to seek loan guarantees under the new IRA provisions.

Enclosed is our assessment of DOE's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive style with a large initial 'S' and a distinct 'A'.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Ami Grace-Tardy
Assistant General Counsel for Legislation, Regulation, and Energy Efficiency
Department of Energy

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF ENERGY
ENTITLED
“LOAN GUARANTEES FOR CLEAN ENERGY PROJECTS”
(RIN: 1901-AB59)

(i) Cost-benefit analysis

The Department of Energy (DOE) did not include a separate cost-benefit analysis in this interim final rule but described the impacts throughout the rule. DOE stated that the rule will facilitate the agency guaranteeing loans up to a total principal amount of \$290 billion prior to the loan guarantee authority expiring in 2026. DOE also described the increased reporting burdens that will result from the rule (as discussed in more detail below regarding compliance with the requirements of the Paperwork Reduction Act of 1995).

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

DOE stated that it was not obligated to prepare a regulatory flexibility analysis for this interim final rule because such an analysis is required for any rule that by law must be proposed for public comment, and, under the Administrative Procedure Act, there is no requirement to publish a notice of proposed rulemaking for rules, like this one, related to loans.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

DOE determined that this interim final rule will not impose any mandates on state, local, or tribal governments, in the aggregate, or on the private sector, of \$100 million or more, adjusted annually for inflation, in any one year.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to

proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

DOE did not discuss the Act in this interim final rule. In its submission to us, DOE stated that the Act does not apply to the rule because it does not increase direct spending.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

DOE stated that this interim final rule relates to the issuance of loans and therefore is not subject to the Administrative Procedure Act's (APA) notice and comment requirements because it falls within the exemption for rulemakings involving matters relating to public property, loans, grants, benefits, or contracts.

In addition, APA does not require publication of a notice of proposed rulemaking if the agency finds for good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, and the agency incorporates the finding and a brief statement of its reasons in the rule. 5 U.S.C. § 553(b)(B). DOE determined that prior notice and comment were contrary to the public interest given the timeline Congress had imposed on DOE for guaranteeing loans up to a total principal amount of \$290 billion prior to the loan guarantee authority expiration in 2026 and to provide the opportunity for all eligible projects to seek loan guarantees under the new Inflation Reduction Act provisions.

Although DOE did not publish a proposed rule, the rule solicits comments, and DOE stated that it would consider all comments received and publish a final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

DOE determined that this interim final rule contains information collection requirements under the Act. DOE stated that it submitted a revised information collection to OMB for review and that the new requirements will be added to the information collection, "DOE Loan Guarantees for Energy Projects" (OMB Control Number 1910-5134). DOE estimated that the rule's requirements will result in a burden of 146.5 hours per response, and the agency anticipated 89 respondents annually.

Statutory authorization for the rule

DOE promulgated this interim final rule pursuant to sections 7254 and 16511–16517 of title 42, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

DOE stated that this interim final rule is significant under the Order and submitted it to OMB for review.

Executive Order No. 13132 (Federalism)

DOE determined that this interim final rule will not preempt state law and will not have a substantial direct effect on the states, on the relationship between the federal government and

the states, or on the distribution of power and responsibilities among the various levels of government.