

Department of Energy

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Such guarantee shall be conclusive evidence that it has been properly obtained; that the underlying loan qualified for such guarantee; and that, but for fraud or material misrepresentation by the Holder, such guarantee will be presumed to be valid, legal, and enforceable.

§ 609.15 Default, demand, payment, and collateral liquidation.

(a) In the event that the Borrower has defaulted in the making of required payments of principal or interest on any portion of a Guaranteed Obligation, and such default has not been cured within the period of grace provided in the Loan Guarantee Agreement and/or the Loan Agreement, the Eligible Lender or other Holder, or nominee or trustee empowered to act for the Eligible Lender or other Holder (referred to in this section collectively as "Holder"), may make written demand upon the Secretary for payment pursuant to the provisions of the Loan Guarantee Agreement.

(b) In the event that the Borrower is in default as a result of a breach of one or more of the terms and conditions of the Loan Guarantee Agreement, note, mortgage, Loan Agreement, or other contractual obligations related to the transaction, other than the Borrower's obligation to pay principal or interest on the Guaranteed Obligation, as provided in paragraph (a) of this section, the Holder will not be entitled to make demand for payment pursuant to the Loan Guarantee Agreement, unless the Secretary agrees in writing that such default has materially affected the rights of the parties, and finds that the Holder should be entitled to receive payment pursuant to the Loan Guarantee Agreement.

(c) In the event that the Borrower has defaulted as described in paragraph (a) of this section and such default is not cured during the grace period provided in the Loan Guarantee Agreement, the Secretary shall notify the U.S. Attorney General and, subject to the terms of any applicable Intercreditor Agreement, may cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to

the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without the need for consent or other action on the part of the Holders of the Guaranteed Obligations) and may exercise any other remedies available under the applicable agreements. In the event the Borrower is in default as described in paragraph (b) of this section, where the Secretary determines in writing that such a default has materially affected the rights of the parties, the Borrower shall be given the period of grace provided in the Loan Guarantee Agreement to cure such default. If the default is not cured during the period of grace, the Secretary may, subject to the terms of any applicable Intercreditor Agreement, cause the principal amount of all Guaranteed Obligations, together with accrued interest thereon, and all amounts owed to the United States by Borrower pursuant to the Loan Guarantee Agreement, to become immediately due and payable by giving the Borrower written notice to such effect (without any need for consent or other action on the part of the Holders of the Guaranteed Obligations) and may exercise any other remedies available under the applicable agreements.

(d) No provision of this regulation shall be construed to preclude forbearance by any Holder with the consent of the Secretary for the benefit of the Borrower.

(e) Upon the making of demand for payment as provided in paragraph (a) or (b) of this section, the Holder shall provide, in conjunction with such demand or immediately thereafter, at the request of the Secretary, the supporting documentation specified in the Loan Guarantee Agreement and any other supporting documentation as may reasonably be required to justify such demand.

(f) Payment as required by the Loan Guarantee Agreement of the Guaranteed Obligation shall be made 60 days after receipt by the Secretary of written demand for payment, provided that the demand complies with the terms of the Loan Guarantee Agreement. The Loan Guarantee Agreement shall provide that interest shall accrue to the Holder at the rate stated in the Loan

Guarantee Agreement until the Guaranteed Obligation has been fully paid by the Federal government.

(g) The Loan Guarantee Agreement shall provide that, upon payment of the Guaranteed Obligations, the Secretary shall be subrogated to the rights of the Holders. The Holder shall transfer and assign to the Secretary all rights held by the Holder of the Guaranteed Obligation. Such assignment shall include all related liens, security, and collateral rights to the extent held by the Holder.

(h) Where the Loan Guarantee Agreement or any applicable Intercreditor Agreement so provides, the Eligible Lender or other Holder, or other agent or servicer, as appropriate, and the Secretary may jointly agree to a workout strategy and/or a plan of liquidation of the assets pledged to secure the Guaranteed Obligation and other applicable debt.

(i) Where payment of the Guaranteed Obligation has been made (or at any such earlier time as may be permitted by applicable agreements), the Secretary, acting through the U.S. Attorney General, in accordance with the rights received through subrogation or other applicable agreements, subject to any applicable Intercreditor Agreement, may seek to foreclose on the collateral assets and/or take such other legal action as necessary for the protection of the Government.

(j) If the Secretary (or an agent acting for the benefit of the Secretary) is awarded title to collateral assets pursuant to a foreclosure proceeding, the Secretary may take action to complete, maintain, operate, or lease such assets, or otherwise dispose of any such assets or take any other necessary action which the Secretary deems appropriate (and consistent with any applicable Intercreditor Agreement), in order that the original goals and objectives of the project will, to the extent possible, be realized.

(k) In addition to foreclosure and sale of collateral pursuant thereto, the U.S. Attorney General shall take appropriate action in accordance with rights contained in the Loan Guarantee Agreement and any applicable Intercreditor Agreement to recover costs incurred by, and other amounts owed to,

the Government as a result of the defaulted loan or other defaulted obligation. Any recovery so received by the U.S. Attorney General on behalf of the Government shall be applied in the following manner: First to the expenses incurred by the U.S. Attorney General, DOE and any agent acting for the benefit of DOE in effecting such recovery; second, to reimbursement of any amounts paid by DOE, and to pay any other amounts owed to DOE, as a result of the defaulted obligation; third, to any amounts owed to DOE under related principal and interest assistance contracts; and fourth, to any other lawful claims held by the Government on such process. Any sums remaining after full payment of the foregoing shall be available for the benefit of other parties lawfully entitled to claim them.

(1) If there was a partial guarantee by DOE of the Guaranteed Obligation or if any other creditors are secured by a lien on collateral pledged to secure the Guaranteed Obligation, the proceeds received by the collateral agent or other responsible party as a result of any liquidation or sale of, collection from or other realization on any such collateral may, if so agreed in advance or unless otherwise agreed in the applicable agreements, be applied as follows (with any money distributed to the Federal Government to be further distributed according to § 609.15(k)):

(1) First, to the payment of reasonable and customary fees and expenses incurred in the liquidation or sale, collection or other realization (including without limitation any fees and expenses that the Attorney General of the United States is lawfully entitled to claim in connection with such action);

(2) Second, distributed among the Holders of the Guaranteed Obligation (including DOE, as subrogee) and the other creditors entitled to share in such proceeds on no greater than a pro rata share basis; and

(3) Third, as otherwise provided in the applicable agreement or agreements.

(m) No action taken by the Eligible Lender or other Holder or other agent or servicer in respect of any pledged assets will affect the rights of any party,

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including the Secretary, having an interest in the loan or other debt obligations, to pursue, jointly or severally, to the extent provided in the Loan Guarantee Agreement or other applicable agreement, legal action against the Borrower or other liable parties, for any deficiencies owing on the balance of the Guaranteed Obligations or other debt obligations after application of the proceeds received upon liquidation.

(n) In the event that the Secretary considers it necessary or desirable to protect or further the interest of the United States in connection with the liquidation or sale of, collection from or other realization on the collateral or recovery of deficiencies due under the loan, the Secretary will take such action as may be appropriate under the circumstances.

(o) Nothing in this part precludes the Secretary from purchasing any Holder's or other person's interest in the project upon liquidation or sale of, collection from or other realization on the collateral.

§ 609.16 Perfection of liens and preservation of collateral.

(a) The Loan Guarantee Agreement and other documents related thereto shall provide that:

(1) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where the loan is funded by the Federal Financing Bank, or other Holder or other agent or servicer will take those actions necessary or appropriate to perfect and maintain liens, as applicable, on assets which are pledged as collateral for the Guaranteed Obligation; and

(2) Upon default by the Borrower, the holder of pledged collateral shall take such actions as the Secretary (subject to any applicable Intercreditor Agreement) may reasonably require to provide for the care, preservation, protection, and maintenance of such collateral so as to enable the United States to achieve maximum recovery from the pledged assets. The Secretary shall reimburse the holder of collateral for reasonable and appropriate expenses incurred in taking actions required by the Secretary (unless otherwise provided in applicable agreements). Except as provided in § 609.15, no party

may waive or relinquish, without the consent of the Secretary, any collateral securing the Guaranteed Obligation to which the United States would be subrogated upon payment under the Loan Guarantee Agreement.

(b) In the event of a default, the Secretary may enter into such contracts as the Secretary (subject to any applicable Intercreditor Agreement) determines are required or appropriate to care for, preserve, protect or maintain the collateral. The cost of such contracts may be charged to the Borrower.

§ 609.17 Audit and access to records.

(a) The Loan Guarantee Agreement and related documents shall provide that:

(1) The Eligible Lender, or DOE in conjunction with the Federal Financing Bank where loans are funded by the Federal Financing Bank or other Holder or other party servicing the Guaranteed Obligations, as applicable, and the Borrower, shall keep such records concerning the project as is necessary, including the Pre-Application, Application, Term Sheet, Conditional Commitment, Loan Guarantee Agreement, Credit Agreement, mortgage, note, disbursement requests and supporting documentation, financial statements, audit reports of independent accounting firms, lists of all project assets and non-project assets pledged as security for the Guaranteed Obligations, all off-take and other revenue producing agreements, documentation for all project indebtedness, income tax returns, technology agreements, documentation for all permits and regulatory approvals and all other documents and records relating to the Eligible Project, as determined by the Secretary, to facilitate an effective audit and performance evaluation of the project; and

(2) The Secretary and the Comptroller General, or their duly authorized representatives, shall have access, for the purpose of audit and examination, to any pertinent books, documents, papers and records of the Borrower, Eligible Lender or DOE or other Holder or other party servicing the Guaranteed Obligation, as applicable. Such inspection may be made during regular office hours of the Borrower,