[Alerts and Updates]

DOE and Treasury Actions Open the Gate for the Flow of Renewable Energy Stimulus Package Funds

August 5, 2009

On July 29, 2009, the U.S. Department of Energy ("DOE") released two solicitations for applications for renewable energy and transmission projects under its loan guarantee program. The DOE announcement was followed, on July 31, by the U.S. Department of the Treasury ("Treasury") announcement that it is now accepting applications for cash payments in lieu of Investment Tax Credits. These two actions will soon start the flow of funds from the economic stimulus package aimed at supporting rapid investment in the U.S. renewable energy sector.

Section 1705 Loan Guarantee Program

The DOE solicitations implement Section 406 of the American Recovery and Reinvestment Act of 2009 ("ARRA"), signed into law by President Obama in February 2009. ARRA Section 406 added to DOE's pre-existing loan guarantee program under Section 1703 of the Energy Policy Act of 2005 ("EPAct of 2005") to create a new program under Section 1705 for rapid deployment of renewable energy and electric power transmission projects (the "Section 1705 Loan Guarantee Program").

The tightening of credit markets over the past year has resulted in the contraction of the development of electric power generation projects from renewable energy resources and has slowed needed upgrades to the nation's electric transmission infrastructure. The Section 1705 Loan Guarantee Program is aimed, in part, at bolstering confidence in borrower repayment obligations associated with such projects.

The federal government's support of renewable energy and electric transmission debt obligations under the Section 1705 Loan Guarantee Program should help build the necessary confidence for the extension of credit at a reduced cost of capital. The implementation of the Section 1705 Loan Guarantee Program is an important component of the Obama administration's plan to jump-start the economy, built, in part, on increasing use of renewable energy resources. The DOE solicitations initiate the process of making up to $8.5 billion in loan guarantee authority available for both electric generation and transmission projects under the Section 1705 Loan Guarantee Program.

A. New or Significantly Improved Technologies Solicitation

The Loan Guarantee Solicitation for Innovative Energy Efficiency, Renewable Energy and Advanced Transmission and Distribution Technologies (the "New Technologies Solicitation") invites the submission of applications for loan guarantees "in support of debt financing for projects in the United States that employ energy efficiency, renewable energy, and advanced transmission and distribution technologies that constitute New or Significantly Improved Technologies." The New Technologies Solicitation allocates up to $2.5 billion to pay the "Credit Subsidy Costs" of loan guarantees for certain qualifying generation, transmission and biofuel projects, with $500 million set aside to pay for the Credit Subsidy Cost for "Leading Edge Biofuels Projects" (as those terms are defined in the New Technologies Solicitation and DOE's enabling regulations).

While the pre-existing DOE loan guarantee program under Section 1703 of the EPAct of 2005 is intended to "facilitate accelerated commercialization" of "New or Significantly Improved Technology," the Section 1705 Loan Guarantee Program is focused on facilitating the "rapid deployment" and commercialization of such technology. Understanding the meaning of these terms is essential to understanding the broad range of projects that may qualify for the Section 1705 Loan Guarantee Program. "New or Significantly Improved Technology" is defined in the DOE regulations as "a technology concerned with the production, consumption or transportation of energy and that is not a Commercial Technology . . . and that has either only recently been developed, discovered or learned . . . ." (emphasis added). In contrast, "Commercial Technology" requires that the technology be in "general use," meaning that the technology has been used in three or more commercial projects in the United States in the same general application as the proposed project, each such commercial project having been in operation for at least five years.

As such, the Section 1705 Loan Guarantee Program is well-suited for a wide range of projects using technologies that either are close to commercialization (*e.g.*, a demonstration project with proven viability of the technology used and site selected) or in limited commercial use (*e.g.*, less than five years and/or in only one or two U.S. locations). The New Technologies Solicitation includes a list, for illustrative purposes, of manufacturing and stand-alone projects that would generally fall within the scope of projects intended to be covered as "Eligible Projects." Stand-alone projects would generally include, among others, large-scale concentrated solar power and concentrated photovoltaic, geothermal, offshore wind, advanced hydro, tidal and wave energy, and industrial energy efficiency projects. DOE also included implementing hydrogen fuel cells for stationary and/or vehicular applications. Manufacturing projects would generally include, among others, those for advanced wind turbines and/or components, solar technology, advanced geothermal, ocean wave, tidal and river current facilities, hydrogen and fuel cells, energy storage, batteries and hybrid vehicles.

The New Technologies Solicitation requires that an "Eligible Project" commence construction no later than September 30, 2011, and create or retain jobs in the United States. Applications may be made in a series of seven rounds of applications. Applications must be filed online in two parts. For first round applicants:

- Part I of the Application is due September 14, 2009, and is expected to provide DOE with a summary-level description of the project, the project's eligibility, financing strategy and progression to date, supported by critical path schedules.
- Part II of the Application is due on November 13, 2009, and requires much more detail.

Unlike the ARRA Section 1603 cash grant program (described below), loan guarantee applications are subject to a competitive review process where applicants will compete with other applications filed in the particular round, and are not necessarily granted to every qualified applicant. While the first part of the application for the seventh round may be filed as late as August 24, 2010, earlier-round applicants will enjoy a "first mover's advantage in terms of order of priority of review."

B. Transmission Infrastructure Loan Guarantees

The Loan Guarantee Solicitation for Applications for Electric Power Transmission Infrastructure Investment Projects (the "Transmission Solicitation") invites the submission of applications for Section 1705 loan guarantees for complex electric transmission systems located in the United States. The Transmission Solicitation allocates up to $750 million to pay the Credit Subsidy Costs of loan guarantees for certain qualifying transmission infrastructure projects.

Under the Transmission Solicitation, an "Eligible Project" *must* utilize a Commercial Technology (in contrast with the New Technologies Solicitation); commence construction no later than September 30, 2011; meet all EPAct of 2005 Title XVII requirements (including Section 1705 requirements); cannot be financed from private sources on standard commercial terms; and meet at least one of eight criteria involving the technical specifications or designated purpose of the project. DOE indicates that "[p]rojects that support the generation of power from renewable energy sources will receive special consideration."

Applications may be made in a series of three rounds. Applications must be made online and in two parts. For all applicants, Part I of the Application is due on September 14, 2009, and first round applicants must submit Part II by October 26, 2009.

ITC Cash Grant Program

The Treasury announcement implements Section 1603 of the ARRA, which gave entities eligible for the Investment Tax Credit ("ITC") an option to elect a cash grant from the Treasury in lieu of the ITC (the "Cash Grant Program"). In addition, the ARRA provided entities eligible for a Production Tax Credit ("PTC") with the option to elect an ITC and then participate in the Cash Grant Program. As discussed in our June 15, 2009 Alert, the Internal Revenue Service issued Notice 2009-52 in early June, providing guidance on the process required to elect the ITC instead of the PTC.

In our July 10, 2009 Alert, we advised that Treasury and the DOE had released Program Guidance, Terms and Conditions and a form of application for cash payments under the Cash Grant Program. On July 31, Treasury announced that it is now accepting ITC grant applications. The Treasury Application is available, and is intended to be completed, online. Treasury and DOE officials have stated that they will not substantively review an application until the applicant has submitted the required documentation that the property has been placed in service.

Under the Cash Grant Program, the Treasury provides grants of up to 30 percent of project costs for ITC-qualifying property. Treasury and DOE officials estimate they will provide $3 billion to an estimated 5,000 qualifying renewable energy projects under the program, which they estimate will allow $10 billion to $14 billion in private capital investment to move forward. These figures, however, were developed only for budgeting purposes, as the ARRA places no cap on available funds for qualifying property. Unlike the Section 1705 Loan Guarantee Program, the Cash Grant Program employs objective criteria and does not make applicants compete against one another. The implementation of the Cash Grant Program is the second significant component upon which the Obama administration has stated it hopes to build a green economy.

Section 1603 payments are made to qualified applicants in an amount generally equal to 10 percent or 30 percent of the basis in the qualifying property, depending upon the type of technology being employed. Qualifying property must be placed in service in 2009 or 2010, provided that property for which construction began in 2009 or 2010 may still qualify for the grant if it is placed in service by the "Credit Termination Date," and applications are submitted to Treasury after construction commences but before October 1, 2011. The Credit Termination Date ranges from January 1, 2013, to January 1, 2017, for different types of technology, and the grant payments similarly range from 10 percent to 30 percent of the basis in the qualifying property. Legislation (H.R. 3136) has been proposed in Congress to extend the Section 1603 grant program beyond the current eligibility periods.

For Further Information

If you have questions about this Alert, please contact Benjamin L. Israel in our Washington, D.C. office, James W. McTarnaghan in our San Francisco office, any other member of the Renewable Energy and Sustainability Practice Group or the attorney in the firm with whom you are regularly in contact.

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