

Client Alert

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Clean Energy and Electric Transmission Provisions of the American Recovery and Reinvestment Act of 2009

Introduction

On February 17, 2009, President Barack Obama signed into law the "American Recovery and Reinvestment Act of 2009" (ARRA 2009). ARRA 2009 includes a number of grant, loan guarantee, tax and other provisions that are intended to facilitate immediate investment of billions of dollars in the energy sector. This *Client Alert* summarizes the "clean" energy and transmission-related provisions in ARRA 2009 and will be of particular interest to investors and others involved in the development of renewable energy resources, carbon mitigation measures, clean-energy transportation, advanced battery technology, transmission and Smart Grid infrastructure, and energy efficiency technology.¹

Renewable Energy and Energy Efficiency Incentives

Temporary Loan Guarantee Program for Renewable Energy and Electric Transmission Projects

ARRA 2009 provides \$6.0 billion to the Department of Energy (DOE) to cover the cost of loan guarantees under a

temporary program to fund renewable energy and transmission projects. Three project categories are eligible for these loan guarantees:

- i) Renewable energy systems, including incremental hydropower, that generate electricity or thermal energy, and facilities that manufacture related components.
- ii) Electric power transmission systems, including upgrading and reconductoring projects.
- iii) Leading edge biofuel projects that perform at the pilot or demonstration scale that DOE determines are likely to become commercial technologies and will produce transportation fuels that substantially reduce life-cycle greenhouse gas emissions compared to other transportation fuels. ARRA 2009 caps the funding for leading edge biofuel projects under the temporary loan guarantee program at \$500 million.

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DOE will administer the temporary program, which is a supplement to an existing DOE loan guarantee program for innovative technology (*i.e.*, that which is not ready for commercial application) enacted under Title XVII of the Energy Policy Act of 2005 (EPA 2005).² Under the existing Title XVII loan guarantee program and DOE's implementing regulations,³ DOE issues a solicitation describing desired attributes of the projects for which it intends to guarantee loans, and project sponsors file applications identifying the technology to be used and funding needs. Sponsors must pay several non-refundable fees up-front, including an application fee. DOE evaluates project submissions on a competitive basis, offering loan guarantees to a fraction of applicants in each solicitation. DOE has issued five rounds of solicitations under the existing loan guarantee program, but has not yet awarded any guarantees for qualifying projects.⁴

Other than \$35 million targeted for administrative expenses, all of the \$6 billion appropriated in ARRA 2009 for the temporary loan guarantee program will be used to defray "credit subsidy costs" of a loan guarantee. Such credit subsidy costs reflect the net present value of estimated payments from the government (*e.g.* default claim payments) and to the government (*e.g.* recoveries), discounted to the point of disbursement. Consistent with the use of these funds to defray credit subsidy costs, the Joint Explanatory Statement of the Committee of Conference states that Congress expects loan guarantees entered into under this program to support more than \$60 billion in financing activity.

DOE evaluates project-specific factors such as the borrower's credit history, overall project cost and likelihood of default, to determine the amount of credit subsidy costs associated with the loan guarantee. Sponsors under the existing Title XVII program for innovative technologies are required to

self-fund these costs, and the lengthy and opaque process used to calculate these payments confronts many project sponsors with an unattractive combination of uncertainty and delay. By using the funds appropriated in ARRA 2009 to defray these costs, DOE will reduce these risks with respect to qualifying projects.⁵

At this time, it is unclear whether DOE will implement the temporary loan guarantee program under the existing regulations for the Title XVII program for innovative technologies or develop new regulations specific to the temporary loan guarantee program. DOE could seek to implement the temporary loan guarantee program under the existing regulations, but if it does so, it may need to revise these regulations to accommodate certain aspects of the temporary loan guarantee program (*e.g.* by defining "renewable energy systems" and establishing other qualifying criteria for eligible projects). Recent public comments by the Secretary of Energy also suggest that DOE may revise the existing regulations to expedite the application process and ensure that funds are expended under the loan guarantee program more quickly. In either case, new or revised regulations could require the use of public notice and comment rulemaking procedures, which could hinder timely implementation of the temporary loan guarantee program.

Other Investments in Renewables and Advanced Technology

In addition to the temporary loan guarantee program, ARRA 2009 contains several other provisions to facilitate private investments in renewable energy, carbon emissions reduction, and advanced technology research and design:

- \$3.4 billion to fund DOE's Fossil Energy Research and Development program. Of this amount, DOE will fund \$1.0 billion in fossil energy

research and development programs, \$800 million for a Clean Coal project and \$1.52 billion for a competitive solicitation for a range of industrial carbon capture and energy efficiency improvement projects. Several other projects also are slated to receive funding through this program.

- \$2.5 billion in federal grant money through a general appropriation to DOE's Energy Efficiency and Renewable Energy program to fund applied research, development and deployment activities on energy efficiency and renewable energy. Of this amount, \$800 million is dedicated to biomass and \$400 million to geothermal technology.
- \$2.0 billion in grants to manufacturers to develop, design and produce advanced batteries and related components.
- \$400 million in additional funding to the existing Advanced Research Projects Agency—Energy (ARPA-E) to develop technologies that result in reduced foreign imports of energy, reduced energy-related emissions and improvements in energy efficiency. Companies and trade research groups are eligible for ARPA-E funding to research and design novel, early-stage technologies that will achieve these goals.
- \$400 million through a general appropriation to DOE's Energy Efficiency and Renewable Energy program for the electrification of transportation.
- \$300 million through a general appropriation to DOE's Energy Efficiency and Renewable Energy program for an Alternative Fueled Vehicles Pilot Grant Program.
- \$300 million through a general appropriation to DOE's Energy Efficiency and Renewable Energy program to provide consumers with rebates for purchasing Energy Star appliances and other products.
- \$300 million to states and local governments to design and implement projects to reduce diesel emissions.

Transmission Investments

Funding for Smart Grid Demonstration Projects

ARRA 2009 provides \$4.5 billion in funding to DOE to support the modernization of the electric grid, including the development of the "Smart Grid," a broad effort to modernize the United States' electricity transmission and distribution systems to enhance efficiency and reliability. The funding is available to implement existing programs established under the Energy Independence and Security Act of 2007 (EISA 2007).⁶ For example, under EISA 2007, for a "Demonstration Initiative," electric utilities can participate in demonstration projects that are chosen and directed by DOE. The utility that owns grid facilities in the chosen control area is eligible for funding to cover up to 50 percent of the cost of qualifying advanced grid technology investments. At the same time, under the "Matching Grant Program" established under EISA 2007, DOE provides reimbursements of up to 20 percent of the cost of certain investments made to develop technologies compatible with the Smart Grid. An appliance manufacturer, for example, would qualify for reimbursement of documented expenses incurred in the design and manufacture of internal devices that would enable an appliance to engage in Smart Grid functions, such as operation on the basis of digital information concerning electricity cost and demand.

ARRA 2009 amends the existing framework established in EISA 2007 in several important respects to encourage additional investment in the Smart Grid. For example, Congress made "other parties" making qualified investments eligible for cost recovery under the Demonstration Initiative, rather than limiting recovery to the utility owning the grid facilities. Under the Matching Grant Program, Congress raised the proportion of qualifying Smart Grid

investments eligible for funding from 20 percent to 50 percent. Congress also directed DOE to provide this money to the private sector up-front, through grants instead of reimbursements. Finally, qualifying private investments are now eligible for financial assistance even if they would qualify for a specific tax credit or deduction under the Internal Revenue Code, so long as the credit or deduction is not actually utilized.

ARRA 2009 also establishes an information clearinghouse to make real-time information about the Smart Grid available to the public to facilitate the adoption of uniform standards and technologies. Utilities and other participants in the Smart Grid program must provide DOE with information about their projects for inclusion in the clearinghouse as a condition of receiving financial assistance. Participants also are required to utilize open protocols and standards (e.g. Internet-based) when available and appropriate.

To ensure that these commitments have an immediate and noticeable impact on the energy sector, ARRA 2009 establishes an ambitious timeline for implementing the Smart Grid program. DOE is required to establish procedures to implement the program and to issue its first solicitation for projects within 60 days of the enactment of ARRA 2009.

Other Transmission Infrastructure Provisions

- Section 1221 of EAct 2005 requires DOE to complete a study of electric transmission congestion every three years for purposes of potentially designating National Interest Electric Transmission Corridors.⁷ ARRA 2009 requires DOE to include as part of its 2009 study an analysis of, among other things, the potential sources of renewable energy that are unable to access markets because of a lack of adequate transmission capacity, an analysis of the reasons for failure

to develop adequate transmission capacity, and recommendations for achieving adequate transmission capacity.

- ARRA 2009 makes available an additional \$3.25 billion in borrowing authority to the Bonneville Power Administration to assist in financing the construction, acquisition and replacement of its transmission system.
- ARRA 2009 amends the Hoover Power Plant Act of 1984⁸ to permit the Western Area Power Administration (WAPA) to borrow funds from the US Treasury and authorizes the Secretary of the Treasury to loan up to \$3.25 billion to WAPA. Such amounts shall be used for the purposes of constructing, planning and operating transmission facilities that have a terminus within the area served by WAPA, and facilitating the delivery of power from new renewable resources. Other entities are permitted to participate in the financing, construction and ownership of projects financed under this provision.

Additional Federal and State Programs

Energy Efficiency and Conservation in the Federal Government

ARRA 2009 contains a number of provisions embodying Congress's intent to ensure that the federal government leads by example in the movement towards energy efficiency and conservation:

- \$4.5 billion to the General Services Administration to convert federal facilities to High-Performance Green Buildings, with improved efficiency in the use of energy, water and other natural resources, use of renewable energy sources and enhanced indoor environmental quality.
- \$300 million to the Department of Defense for improvements in energy generation and efficiency,

transmission and storage. These funds are also intended to fund research into using renewable energy on military installations and for operational forces.

- \$300 million to the General Services Administration to acquire a fleet of high-fuel economy vehicles, including hybrid vehicles, electric vehicles and commercially available, plug-in hybrid vehicles. These funds will remain available until September 30, 2011.
- \$250 million to the Department of Housing and Urban Development for grants and loans to retrofit government-sponsored, low-income housing to increase energy efficiency.

Funding to States for Energy Programs

ARRA 2009 makes available to States billions of dollars to achieve energy efficiency and conservation improvements:

- \$5.0 billion in grant money for states to distribute to certain low-income households for weatherization investments. Utilities and other private entities also are eligible for funding to install energy efficiency improvements in low-income housing.
- \$3.2 billion in additional funding to implement the Energy Efficiency and Conservation Block Grant Program, which was established as part of EISA 2007. This program is designed to assist eligible government entities, such as state and municipal governments, in implementing energy efficiency and conservation measures to reduce fossil fuel emissions and total energy use. Government funding is also available to private sector entities able to perform energy audits, install new technologies and perform energy efficiency retrofits in state facilities. States may also use these funds to establish loan funds or provide sub-grants to non-government organizations assisting in the implementation of the energy

efficiency and conservation strategy. Four-hundred million dollars of these funds will be awarded on a competitive basis, and the remaining \$2.8 billion will be made available to states and eligible government entities through a formula established in EISA 2007.

- \$3.1 billion in funding to design and implement State Energy Programs (SEP), which were authorized under the Energy Policy and Conservation Act.⁹ SEPs are comprehensive evaluations to identify ways to achieve energy efficiency and conservation through new laws, policies, programs and procedures. DOE will provide financial and technical assistance to states to prepare and implement these plans. ARRA 2009 conditions the making of grants from such funds to a state on the certification by the state Governor that (1) the state utility commission will seek to implement polices that ensure that the state-regulated electric and gas utilities have the appropriate financial incentives to help their customers use energy more efficiently (*i.e.*, the “decoupling” of a utility’s revenues from energy consumption); and (2) the state, or the applicable unit of local government, will implement energy codes for residential and commercial buildings that meet or exceed certain conservation and efficiency standards. States also are required to prioritize funding to energy efficiency and renewable energy projects, such as building retrofits. As an additional incentive for taking advantage of these funds, ARRA 2009 lifts state matching funds requirements.

Conclusion

ARRA 2009 makes available billions of dollars in immediate funding and/or financial support for a variety of projects involving renewable energy resources, advanced energy efficiency and renewable technology, advanced battery

technology, design and demonstration projects for the Smart Grid, and energy efficiency building retrofits.

Endnotes

¹ A separate *Client Alert* has been issued to summarize the energy-related tax provisions of ARRA 2009.

² 42 U.S.C. §§ 16511-16514.

³ 10 C.F.R. Part 609.

⁴ A separate *Client Alert* discussing DOE's existing loan guarantee program for innovative technologies will be issued in the near future. That *Client Alert* will provide an overview of the existing program in general and the current solicitation for projects employing New and Significantly Improved Technologies in particular, highlighting several key considerations with respect to the current solicitation.

⁵ To date, DOE has interpreted Title XVII of EAct 2005 as requiring either a project sponsor or DOE, but not both, to pay credit subsidy costs. At the same time, DOE has declined to seek appropriations from Congress to pay any of these costs.

⁶ Pub. L. No. 110-140.

⁷ Section 1221 of EAct 2005 further provides the Federal Energy Regulatory Commission with back-stop siting authority for transmission projects located within DOE-designated National Interest Electric Transmission Corridors.

⁸ 43 U.S.C. §§ 619 et seq.

⁹ 42 U.S.C. § 632l.

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