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Authored by Joseph H. Tippetts

FEDERAL STIMULUS MONEY FOR RENEWABLE ENERGY PROJECTS AND MANUFACTURING

Only days ago, Energy Secretary Steven Chu offered a \$535 million dollar loan guarantee to Solyndra, Inc. to support the company's construction of a commercial-scale manufacturing plant for its cylindrical solar photovoltaic panels. This loan guarantee will be the first to be supported through the recently enacted American Recovery and Reinvestment Act of 2009 (ARRA).

The ARRA appropriates billions of dollars to be invested in renewable energy projects. This alert summarizes the ARRA provisions of most interest to the developers of, and investors in, renewable energy projects and manufacturing. Those provisions include (1) the new federal loan guarantee program (\$60 billion in loan value); (2) substantial new tax benefits (assumed cost of \$15.653 billion over ten years); and (3) R&D funding for the development of renewable energy technologies and demonstration projects (\$2.5 billion).

If you would like to discuss the possible opportunities of the ARRA for your project, please contact an HRO attorney shown on the right side of this alert.

Federal Loan Guarantees for Renewable Energy Projects and Manufacturing

The ARRA creates a temporary program to provide federal loan guarantees for renewable energy projects that can be rapidly deployed and for related manufacturing. The act appropriates \$6 billion to pay for the costs of the loan guarantees, which will be awarded by the Department of Energy (DOE). The DOE's authority to make these guarantees will expire on September 30, 2011.

Projects must commence construction no later than September 30, 2011, to be eligible for loan guarantees under the temporary program. The following types of projects qualify:

- Renewable energy systems (including incremental hydropower) that generate electricity or thermal energy.
- Facilities that manufacture components related to or used in renewable energy systems that generate electricity or thermal energy.
- Electric power transmission systems, including upgrading and reconducting projects.
- Leading-edge biofuel projects that (i) use technologies performing at the pilot or demonstration scale that the DOE determines are likely to become commercial technologies and (ii) produce transportation fuels that substantially reduce life-cycle greenhouse gas emissions compared to other transportation fuels.

Unlike the original loan guarantee program established by the Energy Policy Act of 2005, the temporary program does not require that a project applicant employ "new or significantly improved technologies." Thus, a project employing a technology in general use in the industry may qualify under the temporary program. Conventional wind and solar projects therefore now qualify.

It is estimated that \$6 billion in appropriated funds will guarantee about \$60 billion in new loans under the temporary program. Loan amounts will be determined by the requirements of the lenders that make the loans. Of the \$6 billion, no more than \$500 million may be used for biofuel projects. Also, loan guarantee applicants are not responsible for credit subsidy costs.

HRO CONTACTS

ENERGY, NATURAL RESOURCES AND ENVIRONMENT

Steven B. Richardson
Partner
steve.richardson@hro.com
303-866-0394

Lynn P. Hendrix
Partner
lynn.hendrix@hro.com
303-866-0460

John Davis
Partner
john.davis@hro.com
801-323-3288

Melody Harris
Senior Counsel
melody.harris@hro.com
303-866-0639

Alex Ritchie
Senior Counsel
alex.ritchie@hro.com
303-866-0313

Joseph H. Tippetts
Associate
joseph.tippetts@hro.com
303-866-0556

FEDERAL TAX

Charles B. Bruce
Partner
charles.bruce@hro.com
303-866-0600

Timothy E. Glasgow
Senior Associate
tim.glasgow@hro.com
303-866-0334

FINANCE

William C. Holland
Partner
william.holland@hro.com
303-866-0472

Peter O. Hansen
Partner
peter.hansen@hro.com
303-866-0238



Holme Roberts & Owen LLP
Attorneys at Law

When reviewing the loan guarantee application for an electric transmission project, the DOE “may consider” (i) the viability of the project without the guarantee; (ii) the availability of other federal or state incentives; (iii) the importance of the project; and (iv) the effect of the project in meeting energy and environment goals (including climate change).

Secretary of Energy Steven Chu has indicated that the DOE aims to begin offering loan guarantees under the temporary program in early summer. The DOE is now streamlining the agency’s existing program procedures to expedite the consideration of applications. See <http://www.lgprogram.energy.gov/features.html>.

Tax Benefits for Renewable Energy Projects and Manufacturing

The ARRA includes several tax benefits designed to encourage investment in renewable energy. The most significant of those benefits are summarized below:

1. Extension of the Renewable Energy Production Tax Credit (PTC)

Section 45 of the Internal Revenue Code (Code) provides an income tax credit for the sale of electricity produced from qualified energy facilities placed in service by a specified date. The ARRA extends the placed-in-service deadline for many of these projects by three years. Thus, wind facilities placed in service before January 1, 2013 and biomass, geothermal, landfill gas, trash combustion, hydropower, and marine and hydrokinetic facilities placed in service before January 1, 2014 are eligible for the production tax credit. The ARRA did not extend the placed-in-service deadline for solar, small irrigation, or refined coal facilities.

2. Election to Claim Investment Tax Credit (ITC) in Lieu of the PTC

The ARRA allows taxpayers to elect to take a 30 percent investment tax credit under Section 48 of the Code, in lieu of a PTC, with respect to “qualified property” that is a part of a (i) wind facility (if placed in service in 2009-2012) or (ii) biomass, geothermal, landfill gas, trash combustion, hydropower, marine or hydrokinetic facility (if placed in service in 2009-2013). “Qualified property” means depreciable or amortizable property that is either (x) tangible personal property or (y) other tangible property (not including buildings or their structural components), if used as an integral part of the facility. With respect to wind facilities, only property eligible for five-year depreciation is treated as qualified property. The depreciable or amortizable basis in the property is reduced by 50 percent of the claimed ITC. If construction of the project is expected to take two or more years, the ITC can generally be taken as progress payments are made.

3. Direct Cash Grant Alternative to the ITC

The ARRA also allows a taxpayer to receive a non-taxable cash grant in lieu of either the PTC or the ITC described above. In addition to the renewable energy facilities that became eligible for the ITC by the enactment of the ARRA, the following facilities are eligible for the grant: fuel cell, solar, small wind, combined heat and power, and geothermal heat pump. To qualify for the grant, the facility must be placed in service in 2009 or 2010 or, if construction begins in 2009 or 2010, before the applicable placed-in-service deadline under Section 45 or Section 48 of the Code. The federal grant is to be paid within 60 days after application.

4. Investment Tax Credit for Manufacturing Advanced Energy Property

The ARRA allows a 30 percent investment tax credit for re-equipping, expanding or establishing facilities that manufacture advanced energy property (i.e., property designed to reduce greenhouse gas emissions). Taxpayers must apply through a competitive bidding process to receive an allocation of credits by the Secretary of Treasury in consultation with the Secretary of Energy. The Treasury has 180 days from the date of enactment of the ARRA to establish a certification program and may allocate up to \$2.3 billion in credits.

Examples of advanced energy property include: (i) property used to produce energy from the sun, wind, or geothermal deposits; (ii) fuel cells, microturbines, or energy storage systems for use with electric or hybrid-electric motor vehicles; (iii) electric grids to support the transmission of intermittent sources of renewable energy, including storage of such energy; (iv) property used for carbon capture and sequestration; (v) property technologies (including those designed to refine or blend renewable fuels (but not fossil fuels) or to produce energy conservation smart grid tech or conservation lighting); (vi) new qualified plug-in electric drive motor vehicles or any component that is designed specifically for use with such vehicles; and (vii) other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Secretary of Treasury.

5. Bonus Depreciation Extended

The 50 percent bonus depreciation deduction is extended to apply to qualifying property placed in service prior to January 1, 2010 (January 2011, in the case of certain property that has a production period longer than one year and a cost exceeding \$1 million).

These are promising new tax benefits for renewable energy projects. Some initial observations include:

- The PTC is generally monetized by using a “partnership flip” structure, while the ITC can be monetized through sale-leaseback and pass-through lease structures. Consequently, the ITC may open the leasing market for projects that are eligible for a PTC.
- The PTC is based on the kWh of electricity sold over the (generally) 10-year credit period; and the ITC and cash grant are based on the tax basis of the qualifying property. Thus, the construction cost per megawatt and capacity factor (in the case of wind) will influence the decision whether to elect the PTC, the ITC, or the cash grant with respect to a particular project.
- The use of significant tax-exempt financing or subsidized energy financing for construction of the project may make the ITC or cash grant more attractive. The election of the grant, however, may strand other tax benefits (e.g., depreciation).

Additional Renewable Energy Bonds

The ARRA authorizes an additional \$1.6 billion of new renewable energy bonds to finance facilities that qualify for a PTC under Section 45 of the Code and that are owned by a public power provider, a governmental body, or a cooperative electric company. This new bonding will be allocated according to current law: 1/3 for qualifying public power providers, governmental bodies, and cooperative electric companies, respectively.

Renewable Energy R&D and Demonstration Projects

The ARRA appears to provide \$2.5 billion for research, development and demonstration projects related to energy efficiency and renewable energy. Of these funds, not less than \$800 million is allocated for biomass and \$400 million for geothermal projects. Given the broad and open-ended nature of the appropriation, the DOE's Office of Energy Efficiency and Renewable Energy may use these funds to award grants to private businesses to develop qualifying technologies and demonstration projects. See, e.g., <http://www1.eere.energy.gov/financing/business.html>.

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