

 **Client Alert****A Summary of Select Energy-Related Provisions in the American Recovery and Reinvestment Act of 2009****Introduction**

On February 17, 2009, President Obama is expected to sign into law the American Recovery and Reinvestment Act of 2009 (the "Act"). In the most basic sense, this stimulus bill is designed to be a tool for injecting billions of dollars of federal spending and tax relief into the arteries of an ailing US economy. One important aspect of the stimulus bill is the role it may play in retooling US energy policy including a gradual transition toward energy sources that help reduce greenhouse gas ("GHG") emissions and reinforce US energy independence and security.

The Act builds on previous energy policy legislation such as the Energy Policy Act of 2005 ("EPA05"), the Energy Independence and Security Act of 2007 (the "Energy Security Act"), and the Energy Improvement and Extension Act of 2008 ("Energy Improvement Act") among others. While critics maintain that federal legislation on US energy policy has historically been a mélange of programs haphazardly put together, the Act appears consistent with the Obama Administration's stated energy policy goals. Those goals include the development of a ten percent national-level renewable portfolio standard by 2012 and doubling US production of alternative energy within three years.

The Act includes US\$30 billion in spending and US\$20 billion in tax incentives for various renewable energy initiatives. Among these spending provisions are billions of dollars in appropriations for pre-existing programs, largely administered by the Department of Energy ("DOE") as well as several new and modified programs. Additionally, several important changes to the Internal Revenue Code concerning tax credits and other tax-based subsidies for the energy sector are included.

**New Spending in the Stimulus Bill****Loan Guarantee Program**

The DOE loan guarantee program was established under Title XVII of the EPA05 (the "Loan Guarantee Program"), and is designed to encourage the early commercial use of new or significantly improved technologies in qualifying energy projects. Such qualifying projects include renewable energy systems, hydrogen fuel cell technology, advanced nuclear energy facilities and carbon capture and storage projects, among others. Under the Loan Guarantee Program and subject to certain rules and conditions, the Secretary of Energy is authorized to guarantee up to 100 percent of an eligible project's debt, although, to date, no guarantees have been issued.

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## Energy Infrastructure and Project Finance

Under the Act, US\$6 billion in new funds have been appropriated to support the Loan Guarantee Program. Although these new funds are to be channeled through the existing Loan Guarantee Program, the Act has imposed certain conditions on what kinds of projects are eligible for the guarantees. These conditions are in addition to the existing rules of the Loan Guarantee Program. For example, to qualify for a portion of this US\$6 billion under the Loan Guarantee Program, an eligible project must use a renewable energy technology (including incremental hydroelectric) that produces electric or thermal energy or related manufacturing, focus on electricity transmission, or be a leading edge biofuel project and must be able to start construction by the end of September 2011.

For a more in-depth analysis of the DOE Loan Guarantee Program and the new appropriations provided for under the Act, please see our Client Alert entitled “Stimulus Law Provides ‘Rapid Deployment’ Expansion of DOE Innovative Technology Loan Guarantee Program.”

### “Smart Grid”

The term “smart grid” refers to several different technological improvements to the United States’ electricity transmission and distribution grid.<sup>1</sup> These improvements collectively are intended to address grid reliability and security, efficiency and the grid’s ability to incorporate renewable sources of energy. Both the EAct05 and Energy Security Act contained important provisions designed to address some of these challenges, largely in the form of federal and state research and development programs.

The Energy Security Act also created a Smart Grid Investment Matching Grant Program, administered by DOE, under which the federal government would reimburse investors for up to 20 percent of the cost of certain qualifying smart grid investments.<sup>2</sup> Examples of such qualifying investments include the commercial application

of certain industrial electricity-using equipment, motors and drivers and the use by electric utilities of certain monitoring and communications devices in their transmission and distribution equipment. The Energy Security Act did not, however, contain any funding for the program and without the requisite appropriations, the DOE program has yet to realize its potential.<sup>3</sup>

The Act’s smart grid provisions include:

- Appropriating US\$4.5 billion for electricity delivery and energy reliability programs. This appropriation expressly provides that the funds are also for implementation of the Smart Grid Investment Matching Grant Program.
- Increasing the eligible percentage of federal matching grant funds available for qualifying smart grid investments from 20 percent to 50 percent.
- Amending the Energy Security Act to provide financial support for smart grid demonstration projects, including in areas where transmission and distribution assets are controlled by investor-owned utilities.

### Carbon Capture and Storage

For at least the last decade, fossil fuel-powered energy sources in the United States have made up 70 – 80 percent of total US energy production. Many observers recognize that any near-term energy policy will necessarily need to include a continued and prominent role for such energy sources. If meaningful reductions in GHG emissions are to occur at the national level, solutions for the capture and long-term storage of GHGs from fossil fuel-powered energy sources are among the promising technologies that are expected to be explored.<sup>4</sup>

<sup>1</sup> See *The Smart Grid: An Introduction*, Department of Energy, Office of Electricity Delivery and Energy Reliability, available at: <http://www.oe.energy.gov/1165.htm>.

<sup>2</sup> Energy Independence and Security Act of 2007, Section 1306 “Federal Matching Fund for Smart Grid Investment Costs.”

<sup>3</sup> See *Smart Grid: Enabler of the New Energy Economy*, a Report by the Electricity Advisory Committee, December 2008, at 2 (recommending, among other things, that one critical step DOE should take is to request that Congress appropriate funds for the Smart Grid Investment Matching Grant Program).

<sup>4</sup> See CO<sub>2</sub> Capture and Storage: A Key Carbon Abatement Option—Executive Summary, International Energy Agency 2008.

Several provisions in the Act signed by President Obama are relevant to carbon capture and sequestration ("CCS") and build on pre-existing federal efforts to encourage development in the field. These provisions promote investment in advanced energy projects, clarify the requirements of a carbon tax credit enacted last fall and increase government funding for existing CCS programs.

For further analysis of the CCS provisions in the Act, please see our Client Alert entitled "New Legislation Provides Additional Support for Carbon Sequestration."

## Municipal Bonds

Clean Renewable Energy Bonds ("CREBs") and Qualified Energy Conservation Bonds were created under the EPAct05 and the Energy Improvement Act, respectively. Under these programs, project-specific bonds can be issued by state, local or tribal governments, or electricity cooperatives, among others, in respect of certain qualifying public-sector renewable energy projects or energy efficiency and conservation projects.

For the CREB program, the Act authorizes an additional US\$1.6 billion of new bonds to finance facilities that generate electricity from qualifying renewable energy sources such as hydropower, landfill gas, marine renewable and trash combustion facilities. This US\$1.6 billion authorization is subdivided into thirds with equal parts going one-third to qualifying projects of state, local and tribal governments; one-third to qualifying projects of public power providers and one-third to qualifying projects of electricity cooperatives.

For the newer Qualified Energy Conservation Bond program, the Act authorizes an additional US\$3.2 billion of new bonds to finance state, municipal and tribal government programs and initiatives designed to reduce greenhouse gas emissions. The Act will also clarify that qualified energy conservation bonds may be issued to make loans and grants for capital expenditures to implement green community programs.

## Tax Relief in the Stimulus Bill

### Time Extension for Production Tax Credits

Originally created in 1992, owners of qualifying renewable energy projects like wind and solar are eligible to take a production tax credit ("PTC") equal to approximately two cents per kilowatt hour of energy produced during the first ten years of operation, beginning on the placed-in-service date. Historically, the PTC provisions have included sunset dates and Congressional approval of extensions of the PTC has been less than consistent; the credit has been allowed to lapse at least twice in the past before then being renewed. This lack of consistency has resulted in an inefficient stop-and-start development process for renewable energy project developers.

The Act takes some action to stabilize economics for the renewable power sector by extending the placed-in-service date for wind facilities through December 31, 2012. The Act also extends the placed-in-service date through December 31, 2013, for certain other qualifying facilities such as closed- and open-loop biomass; geothermal; hydropower; landfill gas; waste-to-energy and marine renewable facilities.

### Investment Tax Credit Option

Under existing legislation, owners of qualifying energy facilities that produce electricity from solar technology are eligible to take a 30 percent investment tax credit ("ITC"). Owners of facilities that produce electricity from certain other sources such as wind, closed- and open-loop biomass, geothermal, hydropower, landfill gas, waste-to-energy and marine renewable facilities are eligible to claim the PTC but not the ITC. Whereas the PTC is payable over a ten-year period, the ITC can be claimed in the year when the facility is placed in service. The Act allows owners of certain qualifying facilities, including wind power facilities and certain other renewable energy facilities, to elect to claim the ITC in lieu of the PTC.

### Monetization of Tax Credits

As discussed above, investors in eligible projects can claim the PTC for electricity produced by certain renewable energy facilities or the ITC for certain investments in renewable energy. These tax credits are a crucial element supporting the tax equity market by helping to attract private capital to invest in renewable energy projects. Current economic conditions, however, have substantially weakened this source of financing largely because the relatively small group of companies that have been participating in this tax equity market may not continue to have sufficient tax-liability of their own to justify these investments. Without a sufficiently robust tax equity market, many renewable projects are finding it difficult to obtain project financing.

The Act allows taxpayers who are eligible to claim the PTC or ITC to instead elect to receive a grant from the Treasury Department in lieu of tax credits. In general, within 60 days of receiving an application for such a grant (or 60 days from the date the facility is placed in service, if later) the Treasury Department will issue a grant in an amount equal to 30 percent of the applicant's basis in "specified energy property." To qualify for the grant the project must be placed in service during 2009 or 2010.

For further discussion of these and other tax provisions in the Act related to renewable energy, please see our Client Alert entitled "New Tax Incentives for Renewable Energy Projects."

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