



Client Alert

Stimulus Law Provides “Rapid Deployment” Expansion of DOE Innovative Technology Loan Guarantee Program

On Tuesday, February 17, President Obama is expected to sign the American Recovery and Reinvestment Act of 2009 (the “Act”) into law. Among its many provisions, the Act provides US\$6 billion for the costs of loan guarantees for the “rapid deployment” of renewable energy and transmission technology projects. The Act thereby substantially expands the size of the loan guarantee program of the US Department of Energy (“DOE”) established under 2005 legislation and requires that the projects supported commence construction prior to September 30, 2011.

Background to the Energy Policy Act of 2005 and the Loan Guarantee Program

Title XVII (Incentives for Innovative Technologies) of the Energy Policy Act of 2005 authorizes the Secretary of Energy to guarantee loans for projects that both “avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases” and “employ new or significantly improved technologies as compared to commercial technologies in service in the United States ...” The primary purposes of the Loan Guarantee Program established under the Act (the “Loan Guarantee Program”) are to encourage early commercial use of innovative technologies in energy projects in the United States and to achieve substantial environmental benefits. Eligible categories of projects include, among others, renewable energy systems, advanced fossil energy technology, advanced nuclear energy facilities, carbon capture and sequestration technologies, and integrated gasification combined cycle projects. No guarantee shall be made unless the Secretary determines that there is reasonable prospect of repayment of the principal and interest on the obligation by the borrower, a guarantee may not be issued for a loan whose principal exceeds 80 percent of the estimated project cost and the maximum tenor of the underlying loan may not exceed 30 years.

Excluding the new appropriations provided in the Act, the DOE has been authorized by Congress to issue an aggregate of US\$42.5 billion in loan guarantees, none of which have so far been issued.

In October 2007, after considering comments from interested parties on proposed rules, the DOE promulgated final rules (“Rules”) governing the Loan Guarantee Program. The Rules provide for a solicitation process by which the DOE invites applications from project sponsors for the loan guarantees. The Rules set out a framework of guidelines, preferences and restrictions governing applications to the Loan Guarantee Program. The Rules require the project to be built and operated inside the United States and to be commercially viable and not for research or development purposes. In order to secure a conditional commitment from the DOE, the project is expected to pay a credit subsidy cost, which is essentially a fee based on the risk-adjusted present value of the net payments from the government under the loan guarantee, accounting for the probability of default by the project. The DOE will determine the credit subsidy cost on an individual project basis.

White & Case is a leading global law firm with more than 2,400 lawyers in 34 offices in 23 countries. Whether in established or emerging markets, the hallmark of White & Case is our complete dedication to the business priorities and legal needs of our clients.

Should you have any comments or questions, please contact, at your convenience:

Troy Alexander, Partner
+ 1 212 819 8532
talexander@whitecase.com

Victor DeSantis, Partner
+ 1 202 626 3607
vdesantis@whitecase.com

Arthur Scavone, Partner
+ 1 212 819 8710
ascavone@whitecase.com

Sandra Warren, Partner
+ 1 212 819 8416
swarren@whitecase.com

White & Case
1155 Avenue of the Americas
New York, NY 10036
United States
+ 1 212 819 8200

Energy, Infrastructure and Project Finance Client Alert

The Rules also provide general requirements regarding the capitalization and financial structure of the project. For example, the project sponsors must take a "significant" equity stake in the project (i.e., cash contributed directly by the borrower, not including proceeds from other debt). The DOE gives express preference to those applications for which the loan guarantees would represent a comparatively smaller percentage of project costs. The DOE will guarantee up to 100 percent of a loan for a project, provided the loan or debt instrument being guaranteed does not constitute more than 80 percent of the total project costs. Where the DOE decides to guarantee 100 percent of a loan or debt instrument, the loan must be issued by the Treasury's Federal Financing Bank.

The DOE takes a first lien position on all project assets and collateral pledged as security for the guaranteed loan. Where the DOE only guarantees a portion of a loan, the DOE may enter into an intercreditor liquidation arrangement to share proceeds from the disposition of project assets with lenders of the non-guaranteed portion of the loan.

Since 2006 the DOE has held three rounds of solicitations, committing up to US\$18.5 billion for nuclear power facilities, up to US\$10 billion for energy efficiency, renewable energy and advanced transmission and distribution projects and up to US\$8 billion for coal-based power generation, industrial gasification, and advanced coal gasification facilities:

- In August 2006, a solicitation was issued inviting pre-applications for up to US\$2 billion in loan guarantees, and 143 pre-applications were received. Of these, 16 pre-applicants were invited to submit full loan guarantee applications and DOE is currently processing those applications that were submitted.
- On June 30, 2008, three solicitations were issued, for applications for a total of up to US\$30.5 billion in federal loan guarantees for projects in the areas of (i) energy efficiency, renewable energy and advanced transmission and distribution technologies; (ii) nuclear power facilities and (iii) advanced

nuclear facilities for the "front-end" of the nuclear fuel cycle. The nuclear facilities solicitation received 19 applications from 17 electric power companies, and two applications were submitted in response to the "front-end" nuclear facilities solicitation.

- On September 22, 2008, DOE issued a solicitation for applications for up to US\$8 billion in federal loan guarantees for projects that employ advanced technologies that avoid, reduce or sequester emissions of air pollutants or greenhouse gases in the area of coal-based power generation, industrial gasification and advanced coal gasification facilities.

American Recovery and Reinvestment Act of 2009 amends the Loan Guarantee Program

By amending Title XVII of the Energy Policy Act of 2005, Title IV (Division A) of the Act establishes the "Temporary Program for Rapid Deployment of Renewable Energy and Electric Power Transmission Projects" (the "Temporary Program") under the umbrella Loan Guarantee Program. The Act authorizes US\$6 billion to pay the costs of loan guarantees issued toward the Temporary Program and limited to the following three categories of projects:

- (1) Renewable energy systems, including incremental hydropower, that generate electricity or thermal energy and facilities that manufacture related components.
- (2) Electric power transmission systems, including upgrading and reconditioning projects.
- (3) Leading edge biofuel projects that will use technologies performing at the pilot or demonstration scale that the Secretary of Energy 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.

The final version of the Act departs from the House bill previously under consideration, which proposed to limit the Temporary Program's loan guarantees solely to "commercial technology projects" including renewable energy systems and electric power transmission systems. The final Temporary Program encompasses a comparatively broader set of eligible projects and applies a commercial standard only to the biofuel projects described in paragraph (3) above. The Act does not define "renewable energy systems" referred to in paragraph (1) above. It does, however, outline factors considered by the DOE in determining guarantees to be made to the electric power transmission systems projects described in paragraph (2) above, including, among others, the viability of the project without guarantees and the availability of other government incentives.

Sunset provisions in the Act terminate the DOE's authority to enter into the loan guarantees after September 30, 2011 and limit eligibility of the loan guarantees to only those projects which

commence construction prior to September 30, 2011. The Act also limits funding for biofuel projects referred to in paragraph (3) above to US\$500 million. Finally, the Act requires that each loan guarantee recipient provide "reasonable assurance" that its laborers and mechanics will be paid prevailing wage rates.

By establishing the Temporary Program, the Act effectively expands the size of the Loan Guarantee Program and increases the amount of loan guarantees authorized specifically for renewable energy and electric power transmission systems. This expands the DOE's potential scope of credit support for various projects focused in the renewable energy sector. The Act does not, however, provide additional credit support specifically for nuclear energy technologies, although this was debated heavily in Congress prior to the bill's passage.

White & Case

White & Case is a leading global law firm with more than 2,400 lawyers in 34 offices in 23 countries. Among the first US-based law firms to establish a truly global presence, we provide counsel and representation in virtually every area of law that affects cross-border business. Our clients value both the breadth of our global network and depth of our US, English and local law capabilities in each of our regions and rely on us for their complex cross-border transactions, arbitration and litigation provided by our global practices. Whether in established or emerging markets, the hallmark of White & Case is our complete dedication to meeting the business priorities and legal needs of our clients.

Our approach is based on listening to our clients' needs, taking the time to understand their business and responding with effective strategies and solutions, no matter how big the opportunity or formidable the challenge. With new technologies, globalization, consolidation and other forces continuously changing how business gets done, we help our clients evaluate the risks and rewards of ventures designed to advance their interests.

We work with the world's most established and respected companies, including two-thirds of the *Global Fortune 100* and half of the *Fortune 500*, as well as with start-up visionaries, governments and state-owned entities.

White & Case has no responsibility for any websites other than its own and does not endorse the information, content, presentation or accuracy, or make any warranty, express or implied, regarding any other website.

This Alert is prepared for the general information of our clients and other interested persons. It should not be acted upon in any specific situation without appropriate legal advice and is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.

.....

Troy Alexander, Arthur A. Scavone and Sandra Warren are partners in the New York office of White & Case. Victor J. DeSantis is a partner in the Washington, DC office of White & Case. Rohit Sachdev, an associate in the New York Office, assisted in the preparation of this article.

The information in this article is for educational purposes only; it should not be construed as legal advice.

In this document, White & Case means the international legal practice comprising White & Case LLP; a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, corporations and undertakings.

© 2009 White & Case LLP