

## WSGR ALERT

MARCH 2011

# CLEAN TECH WASHINGTON UPDATE: IMPORTANT ACTION ITEMS AS A 2011 BUDGET DRAWS NEAR

Once again, Congress avoided a government-wide shutdown on March 17 by extending the Continuing Resolution (CR) for a sixth time through April 8, 2011. Although there is the potential for additional CRs beyond that date, the likelihood of this has been significantly reduced by pressure from the Obama administration urging Congress to reach a budget consensus. Thus, as negotiations between the U.S. House of Representatives and the U.S. Senate continue over the next three weeks, the energy and clean technology industry has a narrow window of opportunity to ensure that the adopted 2011 budget does not contain a provision that was proposed in the fiscal year 2011 House Appropriations Bill, H.R. 1, that rescinds certain funding supporting clean tech companies and investors. Specifically, the energy and clean technology industry has the opportunity to initiate a critical education process within Congress so that future energy technology programs gain support and do not remain a target for fiscal disciplinarians.

### The Potential Setback for the Clean Tech Industry

On February 11, 2011, the U.S. House of Representatives passed the FY 2011 House Appropriations Bill, an appropriations bill for the fiscal year ending September 30, 2011, which includes the following clause:

There are hereby rescinded all unobligated balances remaining available as of February 11, 2011, of the discretionary

appropriations provided by division A of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5) [(the "ARRA")].<sup>1</sup>

If enacted into law, this provision would affect many agencies that have yet to obligate all of their ARRA funds, including the Department of Transportation (DOT) and the Department of Energy (DOE), most notably in the DOE Loan Guarantee Program. This WSGR Alert provides an assessment of the political circumstances and drivers around the FY 2011 House Appropriations Bill, and ultimately the role of the private sector, in achieving an FY 2011 budget resolution that does not negatively impact the clean tech community.

### Political Assessment of the Rescission Risk

From a political standpoint, key questions revolve first around whether unobligated ARRA funds will be rescinded as part of the FY 2011 budget negotiation, and second, whether such a rescission of funds is likely to be retroactive, wherein any funds obligated after February 11, 2011, would be at risk.

While the FY 2011 House Appropriations Bill would do both, it appears unlikely to be adopted into law. The fifth and most recently expired CR, H.J.Res. 44, which was passed on March 1, 2011, provided funding to the government at similar levels to FY 2010 without rescinding any ARRA funding. On March 17, 2011, Congress adopted a sixth

CR, H.J.Res. 48, which proposed the rescission of some ARRA funds, albeit none from government programs that fund the clean technology sector. Until a final FY 2011 budget is passed, government agencies still maintain the legal authority to continue obligating their ARRA funds.

Government agency efforts to communicate to Congress the statistics for potential job creation and leveraging of private investment will remain indirect at best, due to restrictions on lobbying that apply to the executive branch. Companies, investors, and other industry advocates are the primary stakeholder groups with the ability to impact Congress' decisions. Active engagement by the private sector in strategic, targeted communication efforts to educate lawmakers on the positive impact that clean tech projects have on the U.S. economy can be helpful in avoiding a negative outcome for the energy and clean tech industries in the budget process. As noted above, recent political publications suggest that the March 17th CR will be the final extension, and Congress will be negotiating the final FY 2011 budget over the next three weeks. Therefore, it appears evident that clean tech companies, investors, and organizations have a narrow window of opportunity for action.

On March 4, Wilson Sonsini Goodrich & Rosati convened a panel of experts for a discussion titled "The State of Clean Tech Support in Washington, D.C."<sup>2</sup> As a follow up to this webinar, Clean Economy Network has

<sup>1</sup>H.R. 1, 112th Cong. §3001(a) (2011).

<sup>2</sup>This presentation is now available on the firm's On-Demand Learning site. To access the On-Demand Learning site, please visit <http://wsgrexternal.vportal.net/?avid=101>. If you need help setting up an account, please feel free to contact Nancy Heaney at [nheaney@wsgr.com](mailto:nheaney@wsgr.com) or (650) 461-6705.

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drafted an action alert (available at <http://www.wsgr.com/news/PDFs/Clean-Economy-Network-alert.pdf>) that contains useful guidance for approaching congressional representatives.

For additional information regarding strategic guidance and other impactful action items that you can take, please contact any member of Wilson Sonsini Goodrich & Rosati's government initiatives practice, including John Mizroch (202-973-8806; [jmizroch@wsgr.com](mailto:jmizroch@wsgr.com)), Sara Hochman (202-973-8882; [shochman@wsgr.com](mailto:shochman@wsgr.com)), or Taité McDonald (202-973-8937; [tmcdonald@wsgr.com](mailto:tmcdonald@wsgr.com)).



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