

WSGR ALERT

SEPTEMBER 2010

EXPORT MARKETS OFFER CLEAN TECH OPPORTUNITIES AND CHALLENGES

With the global market for clean technology products and services poised for significant growth, both established energy players and emerging technology providers must look beyond local markets to maintain and enhance their leadership positions. For this reason, clean technology is a focus of President Obama's National Export Initiative and the Export Promotion Cabinet, the Trade Promotion Coordinating Committee (TPCC), and the federal agencies working to carry out the National Export Initiative.¹

The Export Promotion Cabinet's newly released "Plan for Doubling U.S. Exports in Five Years" (the export plan) describes both new initiatives and efforts to enhance well-established programs. This WSGR Alert highlights opportunities that may be of interest to the clean technology sector. Although a more specific "National Renewable Energy and Energy Efficiency Export Strategy" is expected soon, clean technology providers should not delay their plans to seek export assistance. Many of the initiatives are already open for business and well underway.

Clean technology providers also should be cognizant of the practical and regulatory challenges that come along with exporting, including the fact that export licenses may be required for goods and technology applicable

to both civilian and military purposes. On this subject, the U.S. Commerce Department's Bureau of Industry and Security (BIS) recently published a report titled "Critical Technology Assessment: Impact of U.S. Export Controls on Green Technology Items" (the BIS report).

The following alert describes key elements of both the export plan and the BIS report. Overall, the export initiative provides clean technology providers with enhanced access to trade promotion activities and export finance. Those interested should act promptly, while developing a realistic strategy that includes planning for application processes and the possibility of export licensing.

The Export Plan

Rather than proposing radical change in the methods for fostering U.S. exports, the export plan focuses on incremental change (and increased coordination in existing programs) across approximately 20 federal agencies. The plan's avenues for progress include increased coordination among federal agencies, outreach to enterprises that are historically less experienced in export assistance (including small- and medium-sized enterprises and the renewable energy industry), and streamlined applications for export finance products. Notable elements of the plan include the following:

- The Export-Import Bank of the United States (Ex-Im Bank) has launched and is continuing to launch a number of new products, which complement the bank's increased activity over the past two fiscal years² and the more favorable terms (including longer tenors) offered for renewable energy and other exports meeting the requirements of the Environmental Exports Program. New initiatives include a program to provide liquidity for enterprises that supply parts and services in larger export transactions. The first transaction approved under this supply-chain trade finance program is a 90 percent guarantee to support up to \$100 million of loans to be made by Citibank N.A. to small- and medium-sized enterprises that supply parts to CNH America LLC (Case New Holland).
- Ex-Im Bank and the Small Business Administration (SBA) are seeking more lenders to participate in their guarantee programs by originating and/or underwriting transactions. As an example, Ex-Im Bank's medium-term delegated authority program enables participant banks to review transactions, thereby speeding the approval of Ex-Im Bank-guaranteed medium-term export loans to foreign buyers of U.S. goods. A

¹ This goal was announced in the January 2010 State of the Union Address and the Export Promotion Cabinet was established by Executive Order 13534 of March 11, 2010. The Export Promotion Cabinet includes (among others) the Secretaries of State, Treasury, Agriculture, Commerce, Labor, Energy, and Transportation; the United States Trade Representative and the heads of the Export-Import Bank of the United States; the Overseas Private Investment Corporation; and the United States Trade and Development Agency.

² Ex-Im Bank authorized more than \$21 billion in fiscal 2009 and \$21.5 billion in the first 11 months of fiscal 2010 (through August), in each case for loans, guarantees, and insurance to support U.S. exports.

Continued on page 2...

Export Markets Offer Clean Tech Opportunities . . .

Continued from page 1...

recent clean tech transaction of this type is Chinook Sciences LLC's sale of waste-to-energy equipment and technology to a Turkish buyer, which will build a plant using recycled metal to produce process gas and electricity. The sale was backed by a \$10 million medium-term loan issued by Northstar Trade Finance, Inc., which was guaranteed by Ex-Im Bank.

- Ex-Im Bank, the U.S. Department of Agriculture, and the SBA are streamlining internal processes for application review and loan processing.
 - For small and medium enterprises, the SBA and Ex-Im Bank have begun using the same forms for working capital loans. Simplifications of certain other Ex-Im Bank applications also are expected and legislative changes have been proposed to increase the maximum loan amount for the SBA's Export Express program (to enter or expand in foreign markets) from \$250,000 to \$500,000.
 - Ex-Im Bank's Solar Express Initiative, announced this spring, provides financing for deal sizes of \$3-10 million. Available financing can include direct loans by Ex-Im Bank or guarantees of loans by other lenders, tenors can be up to 18 years in some circumstances, and processing time can be as little as 60 days for loans in which Ex-Im Bank is the only lender.
 - The Department of Agriculture is modifying its Facility Guarantee Program regulations to streamline operations and adapt to legislative changes.
 - Applicants will need to meet requirements for expedited treatment (including requirements under the Solar Express Initiative for showing the necessary offtake arrangements,

debt service coverage ratios, and minimum equity contributions).

- The Departments of Agriculture and Commerce will increase opportunities for U.S. enterprises to participate in, and benefit from, trade missions and trade shows and the Department of Commerce's Advocacy Center will work to increase awareness of commercial advocacy (to help U.S. enterprises receive fair opportunities for exports). In a related area, the U.S. Trade Development Agency is conducting "clean energy exchange programs" to help countries identify U.S. sources of clean energy technology, particularly when those countries are making purchasing decisions.
- Federal agencies will focus their efforts in countries offering the most potential. For market engagement strategies (including commercial advocacy and bilateral discussions of increased opportunities), Brazil, India, and China are first-tier priorities, and Colombia, Indonesia, Saudi Arabia, Turkey, and Vietnam are in the next tier. For export credit, Ex-Im Bank plans to focus on Mexico, Brazil, Colombia, Turkey, India, Indonesia, Vietnam, Nigeria, and South Africa, although this does not mean support is unavailable for exports elsewhere. For example, in August, Ex-Im Bank provided a \$159 million direct loan to the sponsor of a wind project in Honduras that will use Gamesa wind turbines manufactured in Pennsylvania.

Overall, the opportunities are many, but the challenge is to develop a coordinated strategy. Approaching the appropriate government agencies in a manner that enhances the likelihood of success, understanding the required application process (and related timelines), and structuring transactions that make the best use of available support will be key to taking advantage of these programs. It is also important to understand that, in some cases, opportunities lie not just in the new

programs, but in those that have long been in operation and are now adapting to the clean technology sector.

The BIS Report: Impact of U.S. Export Controls on Green Technology Items

In its report, the BIS assessed the impact of its Export Administration Regulations on clean technology commodities, technology, and software, including the parts, materials, and equipment used to produce clean technology goods. The BIS report concluded that the following likely will require licenses:

- *Wind Power:* Items for the production of wind turbine blades and gear case assemblies and hubs, including carbon fiber, pre-impregnated carbon fiber materials (prepregs), tape-laying and tow/fiber placement machines, machine tools, controllers, and related software and technology.
- *Solar Power:* High-efficiency space-qualified solar cells and assemblies, thin-film and compound, solar cells, metal-organic chemical vapor deposition (MOCVD) equipment, molecular beam epitaxial (MBE) equipment, material for the production of solar cells, and related software and technology.
- *Alternative Fuel Vehicles:* Certain chemicals used for biofuel and hydrogen fuel, fuel cells for lithium ion batteries, and, in some cases, the batteries themselves.
- *Water Purification/Treatment/Desalination:* Diethylamino ethanol, dimethylamine, sodium sulfide, pumps, valves, tanks, mixers, heat exchangers, piping, centrifuges, vacuum pumps, and related software and technology.
- *Energy Efficiency:* Power-generation control systems, carbon fibers, ceramic and ceramic matrix composites and polymer matrix materials, tape-laying and

Continued on page 3...

Export Markets Offer Clean Tech Opportunities . . .

Continued from page 2...

fiber-placement machines, autoclaves, composite lay-up and cure tooling, holding fixtures, filament winding machines, thermal-imaging cameras, and related software and technology.

The BIS report found that less than 1 percent of clean technology exports require licenses. However, the definition of an "export" is fairly broad and penalties for exporting without a required license can be significant (up to the greater of \$250,000 per violation or twice the value of the transaction). For these reasons, enterprises exporting clean technology should take the following steps:

- Examine the proposed transaction to determine whether it qualifies as an export. Steps as simple as establishing operations abroad or sending personnel to train others might be considered to include exports of U.S. intellectual property or technology.
- If exports are involved, classify the relevant goods or technology in advance to determine whether a license is required.
- When a license is required, allow time for the BIS to process the license application. As a general rule, the BIS has up to 90 days to process applications.
- When planned in advance, the classification of the items and obtaining any necessary licenses often can be done in less than 90 days.

The BIS emphasized that it wishes to support the creation of clean technology jobs and the

promotion of clean technology exports in a manner consistent with U.S. national security. As a result of BIS's efforts in this area, coupled with the continued emergence of clean technology, we expect to see an increased awareness of how the Export Administration Regulations affect exports of clean technology items and possible amendments to better suit the evolving sector. Possible amendments to the Export Administration Regulations likely will include a license exception for certain shipments, expediting the license application review process, and issuing guidance on certain export classifications.

* * * * *

Wilson Sonsini Goodrich & Rosati would be pleased to help your company evaluate the opportunities associated with the export market. Our energy and clean technology team draws upon multiple areas of expertise to provide an integrated approach, with our government initiatives practice helping to develop strategies for working with federal agencies, our project finance colleagues offering expertise in export credit and other financing transactions, and our export controls experts providing assistance throughout the export licensing process.

For further information, please contact Chris Groobey or Suzanne Perry in the firm's project finance practice, John Mizroch or Taite McDonald in the firm's government initiatives practice, or Josephine Aiello LeBeau or Melissa Mannino in the firm's export controls practice.



Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on September 27, 2010. To receive future WSGR Alerts and newsletters via email, please contact Marketing at wsgr_resource@wsgr.com and ask to be added to our mailing list.

This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation. We would be pleased to provide you with specific advice about particular situations, if desired. Do not hesitate to contact us.

650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsgr_resource@wsgr.com

www.wsgr.com

© 2010 Wilson Sonsini Goodrich & Rosati,
Professional Corporation
All rights reserved.