

WSGR ALERT

APRIL 2011

HOUSE APPROPRIATIONS COMMITTEE RELEASES FINAL CONTINUING RESOLUTION; INCREMENTALLY POSITIVE FOR RENEWABLE ENERGY AND CLEAN TECHNOLOGY INDUSTRIES

On April 12, 2011, the House Appropriations Committee released the final Continuing Resolution bill for the remainder of fiscal year 2011 (the CR).¹ As described below, the CR amends the Department of Energy's (DOE's) authority to provide loan guarantees pursuant to the Section 1703 innovative projects loan guarantee program and enhances the Section 1705 American Recovery and Reinvestment Act (ARRA) loan guarantee program. In addition, the CR appropriates funds for DOE's Advanced Research Projects Agency and rescinds unobligated funds that had been appropriated for other DOE programs.

The CR currently is being reviewed by both houses of Congress and is expected to be voted upon by the end of this week. The language of the CR may not yet be final and resolutions already are being offered to change it. Instructions for how to follow the progress of the CR are included at the end of this alert. We will continue to provide updates of any material changes to the CR.

Loan Guarantee Program Modifications

The CR makes the following modifications to the DOE loan guarantee programs:

- The CR rescinds \$18.183 billion of DOE's authority to guarantee loans for Section 1703 renewable energy and energy-efficient systems where the borrower pays the Credit Subsidy Cost. The 2009 Fiscal Year Omnibus Appropriations Bill

(Public Law 111-8) authorized DOE to provide up to \$47 billion in loan guarantees for Section 1703 projects where the borrower pays the Credit Subsidy Cost (this authorization was separate from the ARRA appropriation of funds to pay the Credit Subsidy Cost for projects that qualify for Section 1705). \$18.5 billion of that authority was reserved for renewable energy and/or energy-efficient systems and manufacturing, and distributed energy generation, transmission, and distribution. As a practical matter, however, DOE could not use much of this authority, because few borrowers were able to pay the Credit Subsidy Cost with their own funds. The CR rescinds the remaining, unused \$18.183 billion of this authority, while also providing new authority for DOE to guarantee \$1.183 billion in loan guarantees for renewable energy or efficient end-use energy technologies under the Section 1703 program. This rescission does not affect authority provided under previous appropriations bills, including Public Law 111-8, to provide loan guarantees for nuclear energy, fossil energy, and other eligible Section 1703 projects that employ innovative technologies. *In practice, this rescission should not have a negative impact on the renewable energy and clean technology industries, since the rescinded authority was*

unlikely to be used in the first place. In contrast, the new \$1.183 billion authority incrementally increases the amount of loan guarantees that can be issued to applicants already in the pipeline.

- The CR appropriates an additional \$170 million to pay Credit Subsidy Costs for Section 1703 projects that use renewable energy or efficient end-use energy technologies. Prior to the CR, Congress had appropriated funds to pay Credit Subsidy Costs only for projects that qualify for the Section 1705 program, which requires that projects, among other things, commence construction and reach financial closing by September 30, 2011. The CR appropriates an additional \$170 million to pay Credit Subsidy Costs for Section 1703 projects that use renewable energy or efficient end-use energy technologies, and this appropriation is not subject to an expiration date. Assuming a Credit Subsidy Cost of approximately 20 percent, this appropriation could support an additional \$850 million in loan guarantees for Section 1703 projects that use renewable energy or efficient end-use energy technologies. *As described below, however, this new appropriation is likely a benefit less for Section 1703 innovative technology projects and more for Section 1705 commercialized technology projects that*

¹ The CR is available at <http://www.gpo.gov/fdsys/pkg/BILLS-112hr1473ih/pdf/BILLS-112hr1473ih.pdf>. The sections most applicable to the renewable energy and clean technology industries are Section 1417 (ARPA-E) and Section 1425 (Loan Guarantee Program).

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are having trouble meeting the September 2011 deadline.

- The CR provides that the new \$170 million appropriation to pay Credit Subsidy Costs also can be used for projects that applied under the Section 1705 program prior to February 24, 2011. Projects that do not employ innovative technology rely on DOE's authority under the Section 1705 program, which requires that projects commence construction and reach financial closing by September 30, 2011. By allowing Section 1705 projects to benefit from the new \$170 million appropriation, projects that applied under the Section 1705 program before February 24, 2011, and do not employ innovative technology (such as wind and solar projects that applied under the Financial Institutions Partnership Program) would be eligible to receive loan guarantees after September 30, 2011. Renewable energy projects that employ innovative technology are also eligible to benefit from the new \$170 million appropriation, because those projects qualify for the Section 1703 program.
- The CR retains the prohibition on "double dipping" for projects seeking loan guarantees under the Section 1703 program. Public Law 111-8 provides that DOE may not provide loan guarantees based on its authority under Public Law 111-8 (as opposed to its authority under ARRA) to projects that benefit from other federal grants or support (other than tax benefits, federal leases, insurance, and transmission facilities). The CR retains this double-dipping prohibition. As a result, projects that seek support under DOE's new authority for the Section 1703 program rather than the existing ARRA/Section 1705 program (because, for instance, they will not reach financial closing by September 30, 2011) will not be eligible for loan guarantees if they receive other federal support. *This means that projects already in the loan guarantee program and that have benefited from DOE or other federal grants still must reach financial closing*

and commence construction by September 2011 and use ARRA funds to pay their Credit Subsidy Costs. They cannot take advantage of the new \$170 million appropriation or the ability to transfer from the Section 1705 program to the Section 1703 program.

Other DOE Appropriations and Rescissions

In addition to the appropriations and rescissions with respect to the loan guarantee program described above, the CR provides the following notable appropriations and rescissions with respect to other DOE programs:

- appropriates \$180 million for DOE's Advanced Research Projects Agency;
- rescinds \$30 million of unobligated balances from prior-year appropriations available for DOE's Energy Efficiency and Renewable Energy programs;
- rescinds \$3.7 million of unobligated balances from prior-year appropriations available for DOE's Electricity Delivery and Energy Reliability programs;
- rescinds \$6.3 million of unobligated balances from prior-year appropriations available for DOE's Nuclear Energy programs; and
- rescinds \$140 million of unobligated balances from prior-year appropriations available for DOE's Fossil Energy Research and Development programs.

These rescissions do not affect companies that already have received DOE grants or other forms of DOE support but may affect projects in the process of applying for support in response to solicitations that have been previously issued by DOE.

Summaries and Tracking

As noted above, the CR may not yet be in final form, as both houses of Congress are starting their review and have a few days until the vote. Members of Congress already have introduced resolutions attempting to change the provisions of the CR and more can

be expected. You can track the progress of the CR by going to <http://thomas.gov/> and typing "H.R.1473" as the bill number.

Various summaries of the CR and overall funding levels are also now available from the Senate Appropriations Committee (<http://appropriations.senate.gov/news.cfm?method=news.view&id=180ea521-c1f7-416b-b628-9e15eecea83d>) and House Appropriations Committee (<http://republicans.appropriations.house.gov/files/41211SummaryFinalFY2011CR.pdf> and <http://republicans.appropriations.house.gov/files/41211Finalprogramcuts.pdf>).

Wilson Sonsini Goodrich & Rosati's energy and clean technology practice is tracking all of these developments and would be pleased to discuss them with you, as well as other government financing programs (which remain largely unaffected by the CR). Please feel free to contact any member of the team, including Chris Groobey (202-973-8802; cgroobey@wsgr.com), Michael Klaus (202-973-8841; mklaus@wsgr.com), Sara Hochman (202-973-8882; shochman@wsgr.com), or Taite McDonald (202-973-8937; tmcdonald@wsgr.com).



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