WSGR ALERT

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DEPARTMENT OF AGRICULTURE ISSUES INTERIM FINAL RULE FOR BIOREFINERY ASSISTANCE (SECTION 9003) LOAN GUARANTEE PROGRAM

On February 14, 2011, the United States Department of Agriculture (USDA) published the long-awaited interim final rule governing its Biorefinery Assistance Loan Guarantee Program (the 9003 Program). Previous concerns raised by private-sector lenders and project developers when the proposed rule was issued in April 2010 are addressed in the interim final rule, which allows for greater participation by private-sector lenders and relaxes certain eligibility requirements. The interim final rule therefore should make Section 9003 loan guarantees more accessible to biorefinery developers.

Background

Section 9003 of the 2008 Farm Bill authorizes the USDA to guarantee loans of up to $250 million for the development and construction of commercial-scale biorefineries that produce advanced biofuels.[1]

A Notice of Funding Availability (NOFA) was first issued in November 2008, which reflected a budget authority of $75 million to cover the credit subsidy risk of selected loan guarantees. It was not until March 2010 that the USDA issued its first conditional loan guarantee under the 9003 Program—an $80 million loan guarantee for Range Fuels' cellulosic biorefinery project in Georgia. Subsequent to the announcement of the Range Fuels project, the USDA issued a second NOFA in March 2010 indicating that not all of the 2009 budget authority had been committed and that the USDA was requesting additional applications.

The proposed rule was issued in April 2010, initiating a public comment period that raised many private-sector and investor concerns, some of which were elevated to the level of senior USDA officials.[2] Specifically, some industry stakeholders voiced concerns that certain provisions of the proposed rule made participation in the 9003 Program unfeasible for many private-sector lenders. In May 2010, a NOFA was issued for $245 million of fiscal year 2010 budget authority, as appropriated through the Farm Bill. At this point, applicants were able to apply for the program under the guidance in the proposed rule.

On January 20, 2011, the USDA announced three additional conditional commitments under the 9003 Program: (1) a $250 million guarantee for Coskata's 55 million gallon-per-year cellulosic refinery in Alabama, (2) an $80 million guarantee for Enerkem's 10 million gallon-per-year advanced biofuels refinery in Mississippi, and (3) a $75 million guarantee for Ineos Bioenergy's 8 million gallon-per-year cellulosic ethanol plant in Florida. All three commitments were issued under the proposed rule. In order for the USDA to reach financial closing on these three pending commitments, certain changes to provisions of the proposed rule were necessary. It appears that the recently issued interim final rule contains some of the key changes that will make the 9003 Program more feasible for lender and developer participation.

Key Changes in the Interim Final Rule

Changes in the interim final rule generally allow for greater participation by private-sector lenders and relax eligibility requirements by, among other things:

- increasing the maximum guarantee percentage to 90 percent for loans of $125 million or less;
- adding refinancing as an eligible project purpose under certain conditions;
- extending the maximum term of the guaranteed loan to the lesser of 20 years or the useful life of the project;

[1] For additional background information, please see "Overview of the USDA Biorefinery Assistance Loan Guarantee Program," December 13, 2010.
[2] See "U.S. Department of Agriculture Loan Guarantee Programs and Utilization of Bond Financing," April 26, 2010.

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- increasing the amount by which the rate on the unguaranteed portion of the loan may exceed the guaranteed portion to 5 percent;
- eliminating the requirement that a project must be located in a rural area (although whether a project is in a rural area remains an important scoring criterion);
- reducing the minimum retention requirement for lenders to 7.5 percent of the total loan amount; and
- eliminating the citizenship requirement for borrowers.

The interim final rule will become effective on March 16, 2011, and the USDA is accepting comments on it through April 15, 2011. The interim final rule will remain in effect until the USDA adopts a final rule.

Program Funding

With workable rules in place, funding will be the next major challenge for the 9003 Program.

The 9003 Program initially was authorized and funded by the 2008 Farm Bill, with a total mandatory funding allocation of $320 million, drawn from the Commodity Credit Corporation to provide for credit subsidy costs. The Farm Bill also provided additional authorization for the 9003 Program of up to $150 million in discretionary funds, to be appropriated by Congress during the annual budget cycle. To date, Congress has not utilized any discretionary budget authority to fund the 9003 Program. Early estimates and conversations with senior USDA officials suggest that the credit subsidy allocations in the 9003 Program may be leveraged three to four times, resulting in an approximately $1 billion guarantee facility. With $485 million committed and other applicants currently under consideration, the initial $1 billion tranche likely will be conditionally committed by the end of FY2011.

The budgetary stalemate in Congress has made discretionary funding in FY2011 and FY2012 challenging at best. While the President's FY2012 budget does not request discretionary funding for the 9003 Program, the USDA expects that some carryover balances will be available in 2012 from the 2008 Farm Bill. The potential for additional future funding and meaningful continuation of the 9003 Program depends in the end on reauthorization of the Farm Bill and its energy-related programs in 2012.Discussions on this subject usually would begin this year, but the Congressional calendar has become exceedingly hard to predict.

The various energy programs that are a part of the Farm Bill support the biofuels sector as well as solar, wind, energy efficiency, and other sectors. The 2012 Farm Bill reauthorization process is therefore critical, and will require industry support to ensure that energy programs remain a focus of the USDA's efforts. Wilson Sonsini Goodrich & Rosati's Energy & Clean Technology practice is tracking these developments and would be pleased to discuss them with you, as well as discuss other government financing programs. Please feel free to contact any member of the team, including Chris Groobey (202-973-8802; cgroobey@wsgr.com), John Mizroch (202-973-8806; jmizroch@wsgr.com), Sara Hochman (202-973-8882; shochman@wsgr.com), or Michael Klaus (202-973-8841; mklaus@wsgr.com).

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