

Government & Global Trade Post-Inauguration Webinar Series

Energy Provisions of the New Stimulus Bill

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Jeffrey G. Davis
Partner

(202) 263-3390
jeffrey.davis@mayerbrown.com

Robert H. Edwards, Jr.
Partner

(202) 263-3044
redwards@mayerbrown.com

J. Paul Forrester
Partner

(312) 701-7366
jforrester@mayerbrown.com

Marcia G. Madsen
Partner

(202) 263-3274
mgmadsen@mayerbrown.com

www.mayerbrown.com

Introduction & Overview

- Introduction of Presenters
- Presentation Overview
 - Overview of American Recovery and Reinvestment Act of 2009 (the “Recovery Act”)
 - Direct Spending Provisions
 - Tax Provisions
 - DOE Loan Guarantee Program
 - Procurement Provisions & Oversight Requirements
- CLE information

The American Recovery and Reinvestment Act: Direct Spending on Energy

J. Paul Forrester, Partner, Mayer Brown LLP

The American Recovery and Reinvestment Act: Signed into Law on February 17, 2009

- Promptly following taking office, the Obama administration called for Congress to enact stimulus legislation before Presidents Day
- With uncharacteristic speed, Congress did so
- President Obama signed the American Recovery and Reinvestment Act of 2009 (the “Recovery Act”) into law on February 17, 2009

The Recovery Act: Tax Relief and Appropriations

- The Recovery Act provides for a total of \$787Bn in a combination of tax relief (\$288Bn) and appropriations (\$499Bn), which include (according to Recovery.gov)
 - \$144Bn for state and local fiscal relief
 - \$111Bn for infrastructure and science
 - \$81Bn for protection of the vulnerable
 - \$59Bn for health care
 - \$53Bn for education and training
 - **\$43Bn** for energy
 - \$8Bn for other purposes

The Recovery Act: Amount of Energy-Related Spending is Not Altogether Clear

- These numbers are imprecise:
 - The House Appropriations Committee summary of the Recovery Act reports **\$38Bn** for clean energy
 - The New York Times summary indicates over **\$70Bn** in energy provisions (although some provisions are in more than one category and thereby “double-counted”)
- Much of the direct spending is discretionary and some provisions have sunset dates for expenditure (often September 30, 2010)

Recovery Act: Direct Spending Provisions

- The Recovery Act provisions for direct spending include
 - **\$11Bn** for electric grid modernization (**\$4.5Bn** for the Department of Energy - \$100Mn for worker training, \$10Mn for “smart grid” interoperability framework - and **\$6.5Bn** for two Federal power administrations)
 - **\$6.3Bn** for state and local energy efficiency block grants (**\$2.8Bn** by statutory formula and **\$400Mn** by competitive award)
 - **\$5Bn** for home weatherization financing

The Recovery Act: Direct Spending Provisions (cont'd)

- Direct spending
 - **\$4.5Bn** for improving energy efficiency of Federal buildings
 - **\$4Bn** for repair and modernization of public housing
 - **\$3.4Bn** for clean coal, carbon capture and near-zero emission power plants, including:
 - \$1Bn for research and development
 - \$1.5Bn for competitive funding of large-scale industrial carbon capture projects
 - \$800Mn for Round III of the Clean Coal Power Initiative
 - **\$2.5Bn** for energy efficiency and renewable energy science and research, development, demonstration and deployment, of which:
 - \$800Mn is for biomass
 - \$400Mn is for geothermal

The Recovery Act: Direct Spending Provisions (cont'd)

- Direct spending
 - **\$2Bn** for grants for manufacturing of advanced batteries and components
 - **\$500Mn** for renewable job training
 - **\$400Mn** for state grants for hybrid/energy-efficient vehicles
 - **\$300Mn** to replace older Federal vehicles with hybrid/energy-efficient vehicles

The Recovery Act: Direct Spending Provisions (cont'd)

- Direct spending
 - **\$300Mn** for consumer rebates for energy-efficient appliances
 - Other programs also have authorization (but not requirements) for energy-related spending; for example, of the \$1.15Bn for the National Forest Service, up to \$650Mn can be used for “alternative energy technologies and energy efficiency enhancements”

The Obama Administration's Total Energy Spend

- Some context
 - The Obama administration's proposed budget includes substantial spending for renewable energy/energy efficiency and climate change
 - Notably, the budget includes \$646Bn from "climate revenues" and states that \$150Bn will be for clean energy technologies
 - The DOE budget for FY2010 totals \$40Bn, a substantial portion of which is for renewable energy/climate change research and development

The American Recovery and Reinvestment Act: Energy Tax Incentives

Jeffrey G. Davis, Partner, Mayer Brown LLP

Renewable Energy Incentives: Long-Term PTC Extension

- Section 45 allows a production tax credit (PTC) for electricity generated from renewable resources
 - PTC is allowed over 10-year period from placed-in-service date
 - Facility must be originally placed in service by a specified date
- The Recovery Act extends placed-in-service deadlines
 - Wind – three-year extension through December 31, 2012
 - Closed-loop biomass, open-loop biomass, geothermal, municipal solid waste, qualified hydropower – three-year extension through December 31, 2013
 - Marine and hydrokinetic renewable energy – two-year extension through December 31, 2013

Renewable Energy Incentives: Election of ITC in Lieu of PTC

- Section 48 allows an investment tax credit (ITC) for investments in certain energy property
 - ITC is claimed in year property is placed in service as percentage of energy property
 - ITC rate is 30% or 10%, depending on technology/resource
- The Recovery Act allows irrevocable election to claim Section 48 ITC instead of Section 45 PTC
 - Election applies to facility placed in service through the extended placed-in-service deadline for the applicable Section 45 PTC, but only if no PTCs have been allowed with respect to facility
 - ITC rate is 30%

Renewable Energy Incentives: Grant in Lieu of Tax Credits

- The Recovery Act provides that Treasury will pay a grant in lieu of Section 45 PTC or Section 48 ITC to reimburse a portion of the expense of certain specified energy property
- Grant is payable to “person” who places in service certain specified energy property either (1) during 2009 and 2010 or (2) after 2010 and before expiration of applicable PTC/ITC if construction began in 2009 or 2010
- Amount is equal to specified percentage of basis in energy property
 - 30% for wind, closed-loop biomass, open-loop biomass, geothermal, municipal solid waste, qualified hydropower, marine and hydrokinetic renewable energy
 - 30% for qualified fuel cell (subject to \$1,500 per 0.5 kw limitation), solar, and qualified small wind energy property
 - 10% for qualified microturbine (subject to \$200 per kw limitation), combined heat and power (subject to capacity limitations), and geothermal heatpump property

Renewable Energy Incentives: Grant in Lieu of Tax Credits (cont'd)

- Federal, state and local governments, tax-exempt entities, and qualified issuers of clean renewable energy bonds (and any pass-through entity in which they have an equity interest) are not eligible for grant
- Grant provisions are intended to mimic the ITC rules
 - Grant is not includible in gross income
 - Basis of property is reduced by 50% of grant amount
 - Grant is subject to recapture for 5 years if property is disposed or disqualified
- Adoption of rules similar to those applicable to Section 48 ITC will permit leases of Section 45 facilities
 - 3-month placed-in-service rule for sale-leasebacks

Manufacturing Recovery Provisions: Credit for Investment in Advanced Energy Property

- The Recovery Act provides 30% credit for investment in certain property used in qualified advanced energy manufacturing projects, which produce equipment related to
 - solar, wind, geothermal, or other renewable resources
 - fuel cells, microturbines, or energy storage for electric or hybrid-electric motor vehicles
 - electric grids supporting renewable energy
 - carbon capture and sequestration
 - renewable fuels refining or blending, or energy conservation technologies
 - certain plug-in electric drive motor vehicles or plug-in electric vehicles
 - certain other advanced energy property
- Credits available through certification by Treasury (with DOE input) through competitive process
 - Criteria include commercial viability, domestic job creation, environmental impact, innovation potential, levelized cost of generated or stored energy or of measured reduction in energy consumption or greenhouse gas emission, and time to completion
- \$2.3 billion aggregate limit on credits

Tax Incentives for Businesses: Bonus Depreciation

- Current law generally allows additional 50% depreciation deduction (i.e., immediate tax write-off) for certain property acquired and placed in service during 2008
- The Recovery Act provides one-year extension to allow bonus depreciation to certain property acquired and placed in service during 2009

Other Tax Incentives for Businesses in the Recovery Act

- Removal of limitation on Section 48 ITC for qualified small wind energy property (up to 100 kw capacity)
- Repeal of reduction in Section 48 ITC for tax-exempt financing or subsidized energy financing
- Increase in amount authorized for “new clean renewable energy bonds” and “qualified energy conservation bonds”
- Increase in Section 30C credit for alternative fuel vehicle refueling property
 - Includes ethanol, natural gas, compressed natural gas, liquefied natural gas, liquefied petroleum gas, hydrogen or biodiesel mixtures

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The American Recovery and Reinvestment Act: The DOE Loan Guarantee Program

Robert H. Edwards, Jr., Partner, Mayer Brown LLP

The Recovery Act Significantly Expands the DOE Loan Guarantee Program

- The DOE Loan Guarantee Program for Projects Employing Innovative Technologies was initially established under the Energy Policy Act of 2005
 - Project eligibility requirements included
 - Project to be located in the United States
 - Innovative technologies – new or significantly improved technology that is not a commercial technology
- Eligible projects must employ new or significantly improved technologies that avoid, reduce or sequester air pollutants or anthropogenic emissions of greenhouse gases as compared to commercial technologies in service in the United States at the time the loan guarantee is executed
- Pre-Applications under the original program covered a broad spectrum of energy technologies
 - Biomass projects represented 49% of the pre-applications
 - Advanced fossil energy technology – 16%
 - Solar – 12%
 - Industrial Energy Efficiency – 6%
 - Other – 17%
 - Parallel pre-applications for next generation nuclear projects are also under consideration

DOE Loan Guarantee Program

- Of 143 pre-applications, the DOE invited 16 to submit full loan guarantee applications, including projects in the following energy sectors
 - Advanced fossil energy projects
 - Integrated Gasification Combined Cycle (IGCC)
 - Coal to synthetic gas
 - Industrial energy efficiency projects
 - Manufacturing facility that will produce energy-efficient windows for the commercial and residential building sectors
 - Hydrogen fuels cells manufacturing plant
 - Alternative fuel vehicles project – Tesla Motors
 - Multiple biomass projects

However, the DOE Loan Guarantee Program Was Off to a Slow Start

- To date, no guarantees issued under the program originally authorized in 2005
- The application process has been cumbersome and lengthy
- DOE did not have staff ready to implement the program
- DOE hired experienced staff from the Overseas Private Investment Corporation

The Recovery Act Provides a New Start for the DOE Loan Guarantee Program

- Adds an additional \$6 billion to the program
- Temporarily expands the program beyond “projects that employ innovative technologies” to include commercial technology projects for renewable energy systems and electric power transmission systems if the project will commence construction no later than September 30, 2011
- Doubled funding for the DOE to administer the program

The Recovery Act Provides a New Start for the DOE Loan Guarantee Program (cont'd)

- DOE Secretary Chu has announced a number of initiatives in connection with the loan program
 - Reorganizing the DOE to expedite guarantee processing
 - Reduce paperwork requirements
 - Begin offering loan guarantees under the DOE's previous loan guarantee program by late April or early May
 - Begin offering loan guarantees under the Recovery Act legislation by early summer
 - Disperse 70 percent of the investment from the Recovery Act by the end of 2010
- In light of the current credit market conditions and the backlog of renewable energy projects, project sponsors should move quickly if they are interested in participating in the loan guarantee program

The American Recovery and Reinvestment Act: Procurement Provisions & Oversight Requirements

Marcia G. Madsen, Partner, Mayer Brown LLP

Expanded Procurement & Oversight Requirements

- New and expanded procurement, transparency and oversight requirements apply to contractors, subcontractors, grantees, and contractors under grants
- Provisions impose substantial risks and burdens on entities that accept Recovery Act funds
- Contractors and grantees must be knowledgeable and prepared to comply

Competitive Fixed-Price Contracts

- Contracts must be awarded pursuant to full and open competition, unless exceptions apply
 - Competition In Contracting Act and FAR authorize exceptions for “urgent & compelling” circumstances
 - Any use of exceptions must be posted on Recovery.gov
 - Other restrictions on non-competitive awards also may apply, e.g., disclosure of justification
 - Competition requirements extend to grants and loan guarantees
 - March 4, 2009 Presidential Memorandum emphasizes competition

Fixed-Price Contracts Required

- Contracts must be fixed-price and any exceptions posted on Recovery.gov
 - Fixed-price contracts impose substantial risks on contractors for overruns where requirements are not carefully defined in advance
 - Act emphasizes quick start preference, but says nothing to Agencies about requirements definition
- Expect competition and fixed-price mandate to apply to contracts under grants
- Due to credit market situations, agencies are encouraged by OMB's guidance to consider providing contract financing or to structure contracts to allow partial payment or interim deliverables

Domestic Preference

- Act includes two sets of domestic preference requirements
 - Public buildings or public works must use US iron, steel, and manufactured goods, subject to international agreements and other exceptions
 - DHS procurements limited to covered items that related to national security and are grown or produced in the US, subject to certain exceptions
- Impose substantial compliance burdens and risks on contractors

Labor Requirements

- Davis Bacon wage rates and other labor requirements apply
- Four new Executive Orders also have been issued that apply to contractors
 - Nondisplacement of Qualified Workers Under Service Contracts (EO 13495)
 - Notification of Employee Rights Under Federal Labor Law (EO 13496)
 - Economy in Government Contracting (EO 13494)
 - Use of Project Labor Agreements for Federal Construction Projects (EO 13502)

Transparency and Oversight

- Procurement notices must be posted to FedBizOpps identified as “Recovery” solicitations
 - Orders under task/delivery order vehicles and GSA Schedules must be posted on FedBizOpps
 - Awards must be posted on FedBizOpps, including GSA Schedule orders and task/delivery orders
 - Summary of contracts, orders, or mods over \$500,000 must be provided on Recovery.gov
- Contractors, grantees must report quarterly regarding expenditures, subcontracts, etc.

More and More Oversight

- Agencies must have plans, goals and performance measures
- Proposed contracts will be closely scrutinized for “responsibility,” i.e., capability to perform, skills, ability to meet schedule, past performance and ethics
- Multiple (overlapping, uncoordinated, and burdensome) investigatory authorities
 - IGs authorized not only to obtain documents, but also interview company employees
 - GAO authorized to obtain documents and interview company employees
 - Recovery Accountability & Transparency Board created and authorized to audit, hold hearings and subpoena testimony

More and More Oversight (cont'd)

- New and expanded protections for non federal whistleblowers (contractors, state & local government employees)
 - Includes right to bring a civil action for damages
- Mandatory Disclosure Rule applies to contractors and by OMB Guidance to grants and loan guarantees
- Pending Amendments to civil False Claims Act
 - Includes ability of relators to bring actions against recipients of federal funds at lower tiers

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