

Department of Energy Revises Rule for Loan Guarantees for Innovative Energy Projects

December 17, 2009

On December 4, the Department of Energy (DOE) issued a new rule with respect to loan guarantees for energy projects that employ innovative technologies, revising the rule that had been in effect since October 23, 2007. This new rule makes several important changes to the prior rule:

- **First Lien No Longer Required:** The DOE no longer requires that it be in a first-lien position on all project assets and all additional collateral pledged as security for the guaranteed obligations and other project debt. The DOE merely requires that any guaranteed obligation is not subordinate to any loan or other debt obligation.
- **Jointly Owned Projects:** The DOE will issue loan guarantees with respect to the undivided interest of one joint owner of a project. The other joint owners need not be involved in, or participate in, the DOE loan guarantee. Each joint owner may finance its undivided interest independently.
- **Intercreditor Agreements:** The DOE will negotiate intercreditor agreements with other lenders to the project, addressing such matters as collateral sharing, priorities, and voting rights. Other project debt may have longer or shorter amortization schedules than the guaranteed obligations if certain criteria are met.

This new rule should make it easier for joint owners of an eligible project to finance their undivided interest in the project. This new rule applies to loan guarantees for the following 10 project categories:

- Renewable energy systems
- Advanced fossil energy technology (including certain coal gasification)
- Hydrogen fuel cell for residential, industrial, or transportation applications
- Advanced nuclear energy facilities
- Carbon capture and sequestration
- Efficient electrical generation, transmission, and distribution technologies
- Efficient end-use energy technologies
- Production facilities for fuel-efficient vehicles
- Pollution control equipment
- Refineries, meaning facilities at which crude oil is refined into gasoline

An eligible project must utilize a technology concerned with the production, consumption, or transportation of energy that has either (1) only recently been developed, discovered, or learned or (2) involves or constitutes one or more meaningful and important improvements in productivity or value in comparison to Commercial Technologies (as defined in the rule) currently in use in the United States. Generally, a Commercial Technology is a technology that is being used in three or more commercial projects in the United States and has been in operation in each such commercial project for at least five years.

This new rule indicates the DOE's willingness to be flexible in the determination of an appropriate collateral package to secure guaranteed loan obligations, to facilitate collateral sharing and related intercreditor arrangements with other project lenders, and to provide a more workable interpretation of certain statutory provisions. This new rule should enable project sponsors, borrowers, and lenders to seek federal loan guarantees for a greater variety of innovative energy projects.

DOE is currently soliciting applications for loan guarantees for projects that employ innovative energy efficiency, renewable energy, and advanced transmission and distribution technologies. The last Part I Application Due Date for this solicitation is August 24, 2010.

In an ongoing effort to provide updated information to interested parties, Morgan Lewis will continue monitoring DOE's loan guarantee program. For further information about the topics discussed in this LawFlash, please contact any of the following Morgan Lewis attorneys:

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