

The Energy Act of 2020 revitalizes and reforms the DOE Loan Guarantee Program

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The US\$900 billion COVID-19 relief bill signed into law in the waning days of 2020 includes the American Energy Act of 2020, a sweeping package of energy provisions that includes significant new government support for energy investments. Among these is a revamped U.S. Department of Energy (DOE) loan guarantee program. Important changes to this program may enable it to realize its promise (not previously fully realized) of advancing the deployment of innovative technologies in the U.S.

Created by Title XVII of the Energy Policy Act of 2005,¹ the DOE Loan Guarantee Program was designed to assist in the deployment of innovative energy technologies that reduce greenhouse gas emissions. It does so by providing federal loan guarantees to projects that might have trouble in obtaining commercial loans precisely because the technologies they employ are innovative, and thus do not have a proven track record of success. Although it has maintained strong congressional support, the DOE Loan Guarantee Program has struggled, in part because it was designed to operate substantially without appropriations. Under the original structure of the program, borrowers were required to pay loan guarantee costs (the so-called credit subsidy cost that reflected the estimated risk value of the project) and administrative fees paid to its consultants and outside lawyers. This structure, particularly when applied to projects embodying innovative technologies, led to very high fees and loan costs that were rarely affordable by the developers of the innovative projects it was designed to promote.

The one period when the loan guarantee program thrived was when it operated under amendments adopted pursuant to the American Reinvestment and Recovery Act of 2009.² From 2009 through 2011, DOE guaranteed more than US\$10 billion in renewable energy projects under provisions of the Recovery Act that eased the requirements for eligibility and, perhaps more importantly, provided congressional appropriations to cover the costs of the loan guarantees. However, those appropriations and the expanded class of eligible projects expired with the Recovery Act, and DOE has issued no new loan guarantees under the Title XVII program since 2011, except for the Vogtle Nuclear Power Plant Project, which is owned by utilities that have a highly reliable customer base, which makes the prospect of repayment depend almost entirely on the success of the technology.

¹ 42 U.S.C. § 16511 et seq.

² 42 U.S.C. § 16516, enacted as Section 406 of Pub. L. 111-5 (2009) (the Recovery Act).

Other problems with the loan guarantee program related to long delays in DOE's evaluation of applications and lack of transparency about the reasons for processing delays. The Energy Act of 2020 makes some important revisions that are designed to address both the funding issue and additional structural problems that have prevented the program from realizing its promise of promoting the deployment of innovative energy technologies that reduce greenhouse gas emissions. Assuming Congress follows through with the appropriations that it has authorized, the loan guarantee program could provide the incoming Biden Administration with an important tool for replicating the kind of clean energy development the loan guarantee program sparked during the 2009 recession.

Among the key changes Congress has made are:

1. Congress authorizes the use of appropriated funds to pay for the credit subsidy cost and administrative fees and allows payment of the fees at the point of loan closure.
2. The Secretary of the Treasury is required to analyze proposed loan guarantees and report back to DOE within 30 days.
3. The Act sets a target period for decision on loan guarantee applications of 180 days from the date of application, and the applicant is entitled to request a written explanation for any delays every 60 days thereafter.
4. The list of qualifying projects is expanded to include: i) new kinds of carbon capture; utilization and sequestration technologies; ii) nuclear component manufacturing facilities to support advanced nuclear reactors; iii) technologies to reduce carbon emissions from certain manufacturing processes; and iv) energy storage technologies.
5. In evaluating whether a project is innovative, DOE is authorized to consider regional variations applicable to a technology.

These are all important changes to the program that will hopefully enable it to realize its promise of advancing the deployment of innovative technologies in the U.S. However, one key challenge remains unaddressed.

The statute requires DOE to conclude that there is "reasonable prospect of repayment" of any DOE-guaranteed loan. On its face, this appears sensible. However, in our experience, DOE has interpreted this requirement to mean, as a practical matter, that an applicant must demonstrate that it has enough committed offtake from the project for revenues to cover the guaranteed loan amount. This works well for power generation projects, where long-term power purchase agreements are commonplace. Nevertheless, it can represent a significant challenge for other kinds of innovative technologies. For example, it is hard to imagine how an innovative manufacturing facility might lock down a substitute for a long-term power purchase agreement. Manufacturing facilities typically depend on many, diverse customers who do not enter into long-term purchase agreements, but rather purchase on a "just-in-time" model.

Although DOE was sharply criticized for the very public failure of its first loan guarantee, Solyndra, since then, it has maintained a very low project failure rate – well below the failure rate of commercial loan portfolios. Perhaps that will inspire DOE and the Secretary of the Treasury to take a harder look at indicators of project success and expand its views as to what is necessary to conclude there is "reasonable prospect of repayment" of a guaranteed loan. The expansion of technologies for which Congress now authorizes loan guarantees – far beyond power generation – should be seen as a clear intent by Congress for DOE to do so.

Contacts



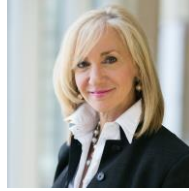
Mary Anne Sullivan
Senior Counsel, Washington, D.C.
T +1 202 637 3695
maryanne.sullivan@hoganlovells.com



James Wickett
Partner, Washington, D.C.
T +1 202 637 6422
james.wickett@hoganlovells.com



Brian R. Chappell
Partner, Baltimore
T +1 410 659 2770
brian.chappell@hoganlovells.com



Edith F. Webster
Partner, New York
T +1 212 918 3625
edith.webster@hoganlovells.com

www.hoganlovells.com

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