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The Stimulus Bill and Funding Opportunities for Cleantech Startups

Scott N. Wolfe, 3/19/09

On February 17, 2009, President Barack Obama signed into law the largest funding bill in the history of the United States, the American Recovery and Reinvestment Act of 2009. The law provides almost \$800 billion in spending to stimulate the recovery of the U.S. economy, a large portion of which is directed toward encouraging the development of energy in ways that protect the environment. The recovery act expands upon a number of existing programs and creates some new ones. Startup companies that are focused on cleantech, as well as venture capital firms that are interested in investing in cleantech companies, should explore the opportunities created by this highly significant legislation.

The federal government has always been an attractive supplemental funding source for cleantech technology, particularly because of the long-standing public interest in developing manufacturing and energy-producing technology that protects the environment. The federal government administers a number of research

grant programs through various agencies. Most federal funds are provided to universities and other non-profit research institutions. However, some programs make research funds available to for-profit entities. That has been true, for example, in the case of Small Business Administration research and development grants to small businesses developing cutting-edge technology. These types of programs have been expanded by the economic stimulus package and now include, for example:

—\$3.4 billion for the Department of Energy (“DOE”) to fund R&D on fossil energy, clean coal and carbon capture projects

—\$2.5 billion for DOE to fund R&D on energy efficiency and renewable energy

—\$2.0 billion for manufacturers to develop advanced batteries

—\$400 million in additional funding for the projects to reduce foreign imports of energy

The recovery act also includes \$6 billion in new funds for loan guarantees for renewable energy and transmission projects. There are



three product categories: renewable energy systems; electric power transmission systems; and cutting-edge biofuel projects. DOE has already administered an innovative technology program under Title VII of the Energy Policy Act. These new funds will expand that program significantly and make it easier to use.

Because the recovery act is so new, most agencies have not had an opportunity to issue implementing regulations or guidance documents explaining program eligibility requirements and the process of taking advantage of them. However, there is enormous pressure

on these agencies to move quickly because these funds are viewed as essential to economic recovery. There also are many deadlines included in the act, which only compounds such pressure.

We've developed a few recommendations to help cleantech startups and VCs get with the program. Applicants for these funds should be prepared to comply with the restrictions of the programs and to understand that the government may request an ownership or licensing agreement in return for providing funding. Possibilities include the potential government ownership of any developed intellectual property, retaining march-in rights (the ability to require licensing or to license third parties on its own), or the receipt of a non-exclusive, royalty-free license. Interested companies should:

- Review the eligibility criteria of the programs and monitor carefully the guidance on new programs which will be issued over the next few weeks and months;
- Consider retaining an experienced grant writer, who can properly address the often complex application requirements;
- Consult with legal counsel to assess potential intellectual property and tax issues; and
- Create in-house mechanisms to benchmark the project and track the funding, particularly since grant programs require detailed reporting on the use and results of the funded initiative.

Startups can often improve the odds of getting government funding by securing support among key senior officials within the White House or other agencies of the Executive Branch as well as members of Congress and their staffs. The California Congressional delegation has historically been interested in the development of technology and many members of the delegation are in key positions to support such efforts. When pursuing funding opportunities, it is essential for companies to explain why their technology deserves funding and the specific benefits the initiative aims to produce. It also is useful to review case studies of successful coalitions to find out what strategies were followed. And finally, the government is placing a premium on projects that can begin construction as soon as possible. ■

[Editor's note: Scott Wolfe wrote this article with Edward W. Correia, counsel in Latham & Watkins' Washington, D.C. office.]

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