United States Department of Agriculture
Section 9003 Biorefinery Assistance Guaranteed Loan Program

On February 14, 2011, the United States Department of Agriculture (USDA) published the long-awaited interim final rule[1] 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. Comments to the interim final rule were accepted until April 15, 2011, and the final rule governing the 9003 Program is expected to be released in the coming months.

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.[2] 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 second project announced under the 9003 Program was a $54.5 million loan guarantee conditional commitment to Sapphire Energy.

The proposed rule was later issued in April 2010, initiating a public comment period during which many private-sector and investor concerns were raised, some of which were elevated to the level of senior USDA officials.[3] 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. Despite ongoing debate and potential rule changes, in May 2010, the third 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

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[1] The interim final rule can be found at: http://www.gpo.gov/fdsys/pkg/FR-2011-02-14/pdf/2011-2473.pdf.
[2] For more information, please see "Overview of the USDA Biorefinery Assistance Loan Guarantee Program," December 13, 2010, at http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/section9003.htm.
[3] For more information, please see "U.S. Department of Agriculture Loan Guarantee Programs and Utilization of Bond Financing," April 26, 2010, at http://www.wsgr.com/publications/pdfsearch/wsgralert_usda_loan_guarantees.pdf.

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 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;
- 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);
- allowing the use of bond financing;
- 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 became effective on March 16, 2011, although the USDA accepted comments on it through April 15, 2011. The interim final rule will remain in effect until the USDA adopts a final rule. The USDA is currently reviewing the comments submitted on the interim final rule and expects to publish the final rule in the coming months. Changes in the final rule are likely to be minimal compared with the previous overhaul, but there is a likelihood that the final rule will be expanded to accommodate alternative project terms and, possibly, new project sectors such as bio-based chemical production.

Program Funding. With workable rules in place and the opportunity for valuable expansion, funding will be the next major challenge for the 9003 Program. The 9003 Program was initially 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 debate in Congress has made discretionary funding for FY2012 challenging at best. While the president's FY2012 budget does not request funding for the 9003 Program and the USDA expects all current funding to be conditionally committed by the end of FY2011, some carryover balances may be available in 2012 from the 2008 Farm Bill. Therefore, the potential for additional future funding and meaningful continuation of the 9003 Program ultimately depends on the reauthorization of the Farm Bill and its energy-related programs in 2012. Discussions on the 2012 Farm Bill have already commenced in the House of Representatives.

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