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# Loan Guarantees and Great Expectations

Revisions to the USDA Section 9003 Biorefinery Assistance Program create opportunities

BY TODD ALEXANDER AND CHADRON EDWARDS

**With the 2011 Federal Budget still under debate in Congress and amidst a landscape of uncertainty (and the occasional wild speculation) regarding the future of most Federal loan guarantee programs,** on March 11 the USDA released a notice of funds availability (NOFA) for approximately \$463 million in

new guaranteed loans under its Section 9003 Biorefinery Assistance Program

This NOFA offers successful applicants guarantees for loans up to \$250 million to support the development of commercial-scale biorefineries in the U.S. With only one round of competition in 2011, the USDA expects to fund four or five projects. Applications are due by May 10. Only the 9003

Program, among several federal programs, exclusively supports large-scale production of advanced biofuels using first-of-a-kind technology.

The 9003 Program was funded by allocations of \$75 million in fiscal year 2009 and \$245 million in fiscal year 2010. While the program's enabling legislation allows discretionary funding, none has been allocated. Funds for the latest NOFA are from residual amounts not awarded under previous solicitations.

To date, the 9003 Program has issued a conditional commitment for an \$80 mil-

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lion loan guarantee to Range Fuels for a thermochemical cellulosic biorefinery in Soperton, G-a., (which closed on March 3, 2010) and a \$54.4 million loan guarantee to Sapphire Energy for an algal oil facility in Columbus, N.M. on Dec. 4, 2009.

Expectations are running higher for 2011. On Jan. 20, the USDA announced conditional commitments for loan guarantees for three projects. The largest, at \$250 million, went to Coskata for a woody biomass facility in Alabama. The other two went to INEOS Bio and Enerkem, for \$75 million and \$80 million, respectively. The INEOS Bio facility in Florida plans to use vegetative waste (including locally abundant citrus waste), while the Enerkem facility in Mississippi plans to use municipal solid waste.

### Recent Program Changes

Under the 9003 Program, lenders, rather than borrowers, apply for loan guarantees. For many borrowers, this creates a chicken-and-egg problem, with lenders uninterested in investing time and money into projects without the prospect of a loan guarantee, and the USDA requiring lender participation to apply for loan guarantees. This and several other concerns were voiced during a comment period for proposed new 9003 Program regulations published April 16, 2010. Comments did not fall on deaf ears, and the USDA promulgated revised interim regulations on Feb. 14, removing several barriers to participation.

Previously, the maximum amount of a loan guarantee was 80 percent of the value of loans up to \$80 million, decreasing thereafter, with a maximum guarantee of 60 percent for loans in excess of \$125 million. Under the new regulations, guarantees of up to 90 percent are available for those under \$125

million, provided that three requirements are met: equity is at least 40 percent; feedstock and off-take contracts for terms of at least one year are in place; and the ratio of total discounted collateral value to the total loan request exceeds 1.5 to 1.

Under both the old and new regulations, loans cannot exceed 80 percent of total eligible project costs, which include the purchase and installation of (most) equipment, construction or retrofitting, permit and license fees, working capital, land acquisition and financing costs, excluding guarantee and renewal fees. The previous citizenship requirement has been removed, and the rural location requirement relaxed to mandate projects be located in U.S. states or territories.

Unlike most other U.S. federal loan guarantee programs, the 9003 Program is designed exclusively for biorefineries. The USDA has delineated several criteria for project eligibility based on feedstocks, output and production. The revised regulations clarify that certain types of organic municipal solid waste are eligible feedstocks.

**The USDA has emphasized that its policy is to have a program that is "technologically, geographically and feedstock neutral."**

While the USDA declined to mirror its definition of "advanced biofuels" with the U.S. EPA's renewable fuels standard, RFS compliance will now earn points under the revised scoring criteria.

The requirement that 70 percent of the revenues be from sales of advanced biofuels was lowered to require

## USDA Scoring Criteria

### Section 9003 Biorefinery Assistance Program

#### 2011 Regulations

Criteria	Maximum Points
Establishment of a market (less than 50 percent commitment) for feedstocks, marketing agreements for the advanced biofuel, and byproducts and the project produces an advanced biofuel that meets an applicable renewable fuel standard (if one or two of the market requirements are met, 5 points; if the advanced biofuel does not meet an applicable renewable fuel standard, 0 points).	10
The area that will supply the feedstock will be not be located in an area with similar advanced biofuel facilities.	5
Use of a feedstock not previously used in the commercial production of advanced biofuels_	15
Plans to work with producer associations or cooperatives for 60 percent of feedstock, biofuel, and byproduct value (if over 30 percent but less than 60 percent, 3 points).	5
Level of financial participation of the borrower, computed based on a debt-to-tangible net worth ratio, equal to or less than 2.5 to 1 Of equal to or less than 3 to 1 but greater than 2.5 to 1, 8 points; if the project uses other federal direct funding, 10 point deduction).	15
Adoption of a process with a positive impact on resource conservation, public health, and the environment (if the project uses a feedstock that can be used for human or animal consumption, 5 point deduction).	10
Will not have any economically significant negative impacts on existing plants or facilities that use similar feedstocks (if feedstock is wood pellets, 0 points).	10
Located in a rural area and creates jobs with an average wage that exceeds the county median.	10
Level of local ownership greater than 50 percent (if over 20 percent but less than 50 percent, 3 points).	5
Can be replicated nationally (if regionally only, 5 points).	10
Uses a technology, system, or process that is not currently operating in the advanced biofuel market as of Oct 1 of the fiscal year for which funding is available.	5
Bonus points for applications that promote partnerships and other activities as identified by the USDA (cannot raise a projects score over 100 points).	10

a majority of production be in the form of advanced bio fuels. Previously, measurement based on revenues would have been skewed by the high value of bio-based chemicals, rendering facilities ineligible if over 30 percent of their income came from nonfuel sales. The new regulations will allow projects to increase their production of high-value

products, as long as the majority of production measured in Btu content (or, if no Btu content is established, volume) is advanced biofuels.

In the new regulations, the USDA clarified that the production of electricity from advanced biofuels may be part of an eligible project. Sales of this electricity to producer

associations and cooperatives are treated the same as sales of advanced biofuels in the scoring criteria.

The new regulations state that both the guaranteed and unguaranteed portions of loans must be secured by a first lien, but that the USDA will consider subordinate positions on inventory and accounts payable in certain situations. The program will also extend to guarantees of bonds in limited circumstances where lenders of record serve as bond trustees. The loan term requirement has been relaxed by removing an 80 percent of useful life requirement and allowing loan terms for the shorter of the entire useful life of the project, or 20 years.

Changes were made to mitigate concerns regarding lead lender risk, most notably the change in the minimum retention requirement

from 50 percent of the unguaranteed portion of the loan (which could total up to 20 percent of the total loan amount) to 7.5 percent of the total loan amount. The maximum interest rate for unguaranteed portions of loans was changed to be no more than 5 percent (rather than the previous 1 percent) higher than the rate applicable to the guaranteed portion. A number of fee calculations were changed as well.



**Comments Heeded**  
The USDA responded to comments about its Biorefinery Assistance Program with multiple changes, writes Todd Alexander, partner with Chadbourne & Parke.

### Tips for Success

The USDA has emphasized that its policy is to have a program that is "technologically, geographically and feedstock neutral."

In the scoring criteria, a total of 40 points are directly linked to technology: use of new feedstocks (15 points); positive impact on resource conserva-



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Lion, public health, and the environment (10 points); replicability (10 points); and use of a technology, system, or process that is not currently operating in the advanced biofuel market (5 points). This emphasis on new technology should come as no surprise: one



Short Timeframe Applications to the USDA loan guarantee are due by May 10, says Chadron Edwards, associate with Chadbourne & Parke.

of the main purposes of the 9003 Program is to finance first-of-a-kind projects, with the goal of proving their commercial viability.

Examining the most recent three loan guarantee recipients, each uses a different low- or negative-cost feedstock. Additionally, each of these projects previously demonstrated their

technology in smaller-scale facilities. Scoring criteria for the use of new feedstocks—one of the most heavily weighted single points—is based on use in a commercial facility. Previous use on a smaller, non-commercial scale would not cause a loss of points and, based on previous loan guarantee recipients, may be a key factor to successfully securing a loan guarantee, as the focus on the program is to mitigate scale-up, rather than technology, risk.

In addition to feedstock diversity among projects, feedstock diversity within individual projects may also be a major positive factor for applicants. In January, Secretary of Agriculture Tom Vilsack noted that one of the reasons that the INEOS Bio project was selected for a loan guarantee was "the combination of the feedstocks which allowed us to test a wider variety of feedstocks."

While direct funding from federal government is not included in calculations of equity (and leads to scoring criteria losses), the regulations do not exclude direct funding from state, local or foreign government sources. The elimination of

the citizenship requirement for borrowers opens up a wide variety of options for international equity and other potential funding contributions (although it also opens the program up to competition from international sponsors).

The change to require that the majority of production consists of advanced biofuels and the clarification that costs associated with electricity generation are eligible project costs will help projects attract equity partners, as both of these changes will make higher, more profitable, and more consistent sources of project income accessible to projects competing for loan guarantees. The clarification that municipal solid waste projects are eligible for loan guarantees and the removal of the rural area requirement will allow more waste-

to-biofuels projects to pursue loan guarantees.

Because the \$129 million in funding for most recent NOFA likely represents all of the residual amounts left over from 2009 and 2010 appropriations the question of the continuation of the 9003 Program in the short term will rest on future discretionary federal budget allocations. Unless further funding is provided to the program, or unless awards granted in the current round of funding do not use all of the previous allocations, this will be the final NOFA for the 9003 Program

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