ENERGY LAW ALERT

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East Tower, 15th Floor
1425 RXR Plaza, Uniondale, NY 11556-1425
New York City ▼ Uniondale
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# The Leasing Option for Renewable Energy

*Michael L. Faltischek*

Governments worldwide are taking action to address climate change issues. The key to success will be the effective ability and willingness of business and the general population to implement renewable energy products. Renewable energy incentives clearly encourage Americans to go green and provide long-term benefits. However, affordability remains a major obstacle to widespread implementation of any renewable energy option. As the government takes a more serious approach to the development and implementation of renewable energy sources on a distributed basis, the key to success will be to make these investments financially attractive.

Large scale energy projects are already receiving federal, state and local governments' financial incentives that dramatically lower the cost of investment in renewable energy. Most recently, on October 7, 2009, the Department of Energy announced that it would provide up to $750 million in funding from the ARRA to help accelerate the development of conventional renewable energy generation projects. Such funding will cover the cost of the loan guarantee program, which could support as much as $4 to 8 billion in lending to eligible projects. The loan guarantee program provides broad authority to the Department of Energy to guarantee loans and encourages early commercial use in the United States of new or significantly improved technologies in generation projects.

In the distributed energy landscape, Congress passed significant legislation in 2008 to support renewable energy installations, extending for 8 years the 30-percent tax credit established in 2005 for commercial solar installations. President Obama has continued to promote renewable energy and address the current economic challenges of the United States through a combination of direct federal spending, financial aid to states and localities and tax relief through the American Recovery and Reinvestment Act of 2009 ("ARRA"), a multi-billion dollar stimulus package signed into law in 2009. Business taxpayers can apply for a grant equal to 30% of the value of renewable energy systems placed in service in 2009 or 2010 in lieu of claiming either the energy investment tax credit or the renewable energy production tax credit. For large scale projects, if construction begins in 2009 or 2010, the grant can be claimed for renewable energy systems placed in service through 2016.

Of course, a tax credit is only as good as taxable income against which it can be offset. In today's economy, profits are limited, making the tax credit less meaningful. In addition, most businesses and individuals are not looking to make expensive capital investments in renewable energy. This makes leasing, as an alternative to large capital expenditure, a potentially viable option to encourage implementing renewable energy projects. Solar panels can already, in some areas, be leased from manufacturers or renewable energy installers, thereby avoiding high upfront costs. With leasing, there are low or no upfront costs to energy installation, since manufacturers and renewable energy installers can take advantage of government rebates, grant programs, tax credits and depreciation that businesses may not qualify for on their own. However, leasing as a financing tool alone is not enough to expand the number of renewable energy installations in a meaningful way. The slow growth of renewable energy installations suggests that greater incentives are needed to support the leasing option. Leasing itself can work better if there is financing to support the lessor's activity – presumably the manufacturer or installer but in some cases, independent leasing companies. The availability of financing to support leasing is near impossible given today's banking climate. Pending legislation would be a step toward overcoming this dilemma and thawing the credit freeze.

The Green Act of 2009 (pending in both the House and Senate) proposes that insurance coverage for loans made to support leasing of renewable energy systems be made available through the Department of Housing and Urban Development. The Green Act would authorize the Secretary of the HUD to insure loans made by authorized renewable energy lenders to homebuilders, renewable energy installers or manufacturers, public or private corporations or partnerships, associations, trusts or other qualified persons or entities to finance the acquisition of renewable energy systems for lease to homeowners for residential use. Loans may only be insured provided that the borrower under the loan ensures that the systems financed will be leased only to homeowners that grant easements sufficient to provide for the sale of remaining electricity production from the system to a wholesale or retail electrical power grid. The Act also would permit insurance for that portion of a home mortgage that relates to renewable energy or energy efficiency installations.

A further option to consider is to permit installers of renewable energy systems (and energy conservation devices) or third party investors to employ a "pay as you go" means of recouping capital costs. Under current law, only a utility can charge for electricity. Imagine if the installer or third party owner of a distributed renewable energy system could remain its operator and charge users directly for the energy generated and sell any excess energy to the grid for use by others. Further investigation of this option leading to legislative action should be undertaken.

In summary, energy and particularly alternative forms of generation continue to offer opportunities for developers at all levels, and users. Leasing (as well as other creative means of financing) creates new business opportunities and can foster expanded installation of distributed renewable energy systems.

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***Michael L. Faltischek*** *is a senior partner at Ruskin Moscou Faltischek, P.C., in Uniondale, New York, where he chairs the law firm's Energy Practice Group. He is also a member of Ruskin Moscou Faltischek, P.C.'s Corporate & Securities Department, where he advises many business clients on legal and energy-related matters. Mr. Faltischek was a founding member of the Advanced Energy Research and Technology Center at Stony Brook University and serves as its General Counsel. He is a member of the Advisory Board of the Institute for Energy, an international organization comprised of the world's leading energy companies and attorneys. He can be reached at (516) 663-6550 or mfaltischek@rmfpc.com.*

***Allison Eig****, an associate at Ruskin Moscou Faltischek, P.C. in the Corporate & Securities Department and the Energy Practice Group, contributed to this article.*

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