



September 25, 2009

Via Email

Advanced Research Project Agency – Energy (ARPA-E)
Department of Energy
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Washington, DC 20585
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To Whom It May Concern:

On behalf of the Organization for International Investment (OFII), we submit this letter in response to the Request for Information (RFI) issued by the Advanced Research Project Agency – Energy (ARPA-E) on August 31, 2009. In its RFI, ARPA-E requested information that would “assist ARPA-E in developing potential programs and funding opportunities.” OFII believes that this submission will aid ARPA-E in developing such programs and funding opportunities.

OFII is a business association representing the U.S. operations of many of the world’s largest international companies. These operations directly employ more than 5 million Americans here in the United States and support an annual U.S. payroll of over \$364 billion. As evidenced by the attached membership list, many OFII members are significant partners of the Department of Energy, as well as household names with historic and substantial U.S. operations.

Earlier this year, ARPA-E issued its first Funding Opportunity Announcement (FOA).¹ That FOA includes a provision that severely restricts the ability of OFII member companies and their American workers to fully participate in the program and compete for program funds. As we explained in a letter to Secretary Chu, sent on May 26, 2009, those restrictions undermine the effectiveness of the program, call into question the U.S.’ historic commitment to a nondiscriminatory environment for foreign investment and invite similar protectionist retribution from other countries. We strongly urge the Department to rescind these restrictions for the remainder of this program and ensure that going forward ARPA-E allows all U.S.-domiciled companies, regardless of ultimate ownership, to compete on a level playing field for available ARPA-E funds.

¹ APRA-E Funding Opportunity Announcement # DE-FOA-0000065. That FOA included two restrictions that we found particularly troublesome. First, the FOA prohibited a foreign entity from serving as the lead of a team competing for ARPA-E funds. Second, the FOA requires that, “no more than 25% of the ARPA-E funds may be expended by the combination of all foreign entities on the project . . . regardless of whether the work is performed in the United States or a foreign location.”

The first FOA took an extraordinary step in expanding the definition of “foreign entities” to include Insourcing companies, i.e., the U.S. subsidiaries of foreign companies. By so doing, it excludes significant DOE partners as Saint-Gobain, BASF, Philips Electronics, Siemens and Bosch from participating in the ARPA-E program. These companies employ thousands of Americans working in research, production and office facilities throughout the United States. As such, the restrictions disadvantage some U.S. companies and workers in favor of other U.S. companies and workers.

OFII Member Companies are well positioned to make important contributions to the ARPA-E program and their participation would be of significant benefit to the Department and to the United States. Respectfully, restrictions that limit in any material way their ability to participate undermine the effectiveness of the program and will deprive U.S. taxpayers of the full value of their investment. Further, excluding U.S. subsidiaries from competing equally with U.S.-headquartered companies will discourage these companies from locating new R&D facilities in the United States and creating American jobs.

Allowing the U.S. operations of **all** companies to compete for funding to develop intellectual property will result in having the most advanced and highest quality work. U.S.-headquartered companies and U.S. subsidiaries of foreign companies have equal motivations and global opportunities when it comes to the development of IP and new technology. Consequently, there is no basis to make a distinction between these two groups of companies. In addition, pursuant to the Bayh-Dole Act (35 U.S.C. 202) and other legislation, the DOE retains certain rights in an invention that is created under a DOE award, and thus can enforce its rights equally.

The need for energy innovation to help solve America’s energy challenges is clear. As ARPA-E seeks to support U.S. innovation efforts in energy, it is important to understand that Insourcing companies do a substantial amount of America’s research and development. In 2006 (the most recent year of available data), Insourcing companies spent \$34.3 billion in the United States on R&D. This was 13.8% of all private-sector American R&D, a share far larger than these companies’ share of private-sector employment that year of 4.6%. Insourcing R&D has historically included many energy projects which have been funded by and partnered with the U.S. Department of Energy and other government agencies, such as Department of Defense.

One prominent example is Air Liquide, which in 2007 opened its Delaware Research and Technology Center. This \$35 million Center already employs over 100 researchers, most with Ph.D.s in a wide variety of science and engineering fields, with a target of growing to 150 in the next few years. It partners with a number of U.S. universities, with other firms, and with the U.S. government--as in the case of its recent collaboration with Babcock & Wilcox to develop and test in real scale oxycombustion technologies for clean coal, supported by the U.S. Department of Energy’s National Energy Technology Laboratory.

Finally, we note that restrictions based on the ultimate nationality of the parent company have no grounding in statute. The discriminatory provisions are not legally required by the America COMPETES Act (PL 110-69). As we discussed in our previous letter, we

understand that restrictions on the initial FOA were adopted by Departmental program officials believing they were “in the spirit” of the Buy America provisions in the American Recovery and Reinvestment Act. We are very concerned that such restrictions have a significant and adverse impact on U.S. companies, on the effectiveness of the ARPA-E program, and on U.S. trade policy more generally.

The exclusion from ARPA-E funding opportunities of U.S. subsidiaries of foreign companies raises serious concerns under a number of U.S. international trade and investment agreements. In addition, the restrictions are inconsistent with the longstanding and explicit U.S. policy to encourage foreign investment in the United States and accord nondiscriminatory treatment. The FOA also invites discrimination against U.S. companies abroad. Moreover, U.S. credibility is severely compromised when it protests discriminatory restrictions imposed by other countries when we adopt similar unwarranted and discriminatory policies. This is exactly why President Obama, along with other global leaders, has pledged to “promote global trade and investment and reject protectionism.”

We strongly urge you to ensure that all U.S. companies – regardless of parentage – are able to compete fairly for ARPA-E funds. We believe that OFII Member Companies have much to offer to the ARPA-E program, and ask only that they be allowed to compete for funds on an equal basis with other U.S. companies.

Sincerely,

Nancy McLernon
President & CEO
Organization for International Investment (OFII)