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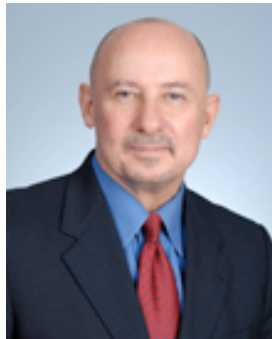
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Opportunities Created by the American Recovery and Reinvestment Act of 2009 (“ARRA”) in the Energy Arena

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Association of Corporate Counsel
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Introduction

- The American Recovery and Reinvestment Act of 2009 (“ARRA”) included approximately \$45 billion in energy appropriations and \$22 billion in energy tax incentives.
- This presentation will cover:
 - Grants, loan guarantees, key tax incentives
 - Strings attached to these programs
 - Considerations for in house counsel

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Energy Efficiency**
 - \$300 million for Energy Efficiency Rebate Program and Energy Star Program
 - States will use state and federal funds to administer appliance rebate programs to create incentives for purchase of energy-efficient appliances and replacement of older, inefficient models.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Energy Efficiency (cont'd)**
 - \$3.2 billion for the Energy Efficiency and Conservation Block Grant Program
 - Projects must reduce fossil fuel emissions and energy consumption and improve energy efficiency within the transportation and building sectors.
 - Eligible recipients are states, units of local governments, and Indian tribes.
 - \$2.8 billion distributed through statutory formula.
 - \$400 million awarded on basis of competitive grants.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Energy Efficiency (cont'd)**
 - \$3.1 billion for the State Energy Program (“SEP”)
 - SEP provides federal financial assistance to states that propose to undertake various energy-related activities.
 - States will establish programs to utilize funding.
 - ARRA waives state and local matching fund requirement.
 - Awards are made on a pro rata basis based on total electric consumption, so larger states or states with high energy consumption receive a greater portion of funds.
 - Strings attached include assurances that states will implement decoupling policies and update building codes.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Energy Efficiency (cont'd)**
 - \$5 billion for the Weatherization Assistance Program
 - Funds awarded to states will be distributed to homeowners to assist in weatherization of homes. Households at or below 200% of poverty line are eligible.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **New Energy Workforce Development**
 - \$500 million for careers in renewable energy and energy efficiency
 - Department of Labor issued five solicitations to fund projects that prepare workers for green jobs.
 - \$150 million for the Pathways Out of Poverty Grant (closes 9/29/2009)
 - » Grants will fund programs that provide training and placement services for employment with the energy efficiency and renewable energy industries.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **New Energy Workforce Development (cont'd)**
 - \$150 million for the Pathways Out of Poverty Grant (closes 9/29/2009) (cont'd)
 - » National grantees may receive \$3 million to \$8 million, and local grantees may receive \$2 million to \$4 million.
 - » National grantees may receive \$3 million to \$8 million, and local grantees may receive \$2 million to \$4 million.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **New Energy Workforce Development (cont'd)**
 - \$500 million for careers in renewable energy and energy efficiency
 - \$190 million for State Energy Sector Partnership and Training Grants (closes 10/20/2009)
 - » Funding for workforce sector strategies that target energy efficiency and renewable energy.
 - » Eligible applicants are State Workforce Investment Boards in partnership with their State Workforce Agency, local Workforce Investment Boards or regional consortia Boards, and One Stop Career Center delivery systems.
 - » Grants will range from \$2 million to \$6 million.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **New Energy Workforce Development (cont'd)**
 - \$500 million for careers in renewable energy and energy efficiency
 - \$100 million for Energy Trading Partnership Grants (closed 9/4/2009)
 - \$50 million for State Labor Market Information Improvement Grants (closed 8/14/2009)
 - \$5 million for Green Capacity Building Grants (closed 8/5/2009)
 - \$100 million in training for the electricity transmission industry

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration**
 - \$2.5 billion for applied research and development related to renewable energy and energy efficiency
 - Biomass/Biofuels--\$800 million
 - Appropriations
 - » \$480 million for demonstration of integrated biorefinery operations
 - » \$176.5 million increase in the federal funding ceiling for two or more demonstration or commercial scale biorefinery projects selected and awarded within the past two years
 - » \$110 million to support research
 - » \$20 million for ethanol research

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$2.5 billion for applied research and development related to renewable energy and energy efficiency
 - Biomass/Biofuels--\$800 million
 - Open Solicitation
 - » \$85 million solicitation for Alga Biofuel Consortia and Advanced Infrastructure Compatible Biofuels Consortium.
 - » Applications accepted until 9/14/2009.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$2.5 billion for applied research and development related to renewable energy and energy efficiency
 - Biomass/Biofuels--\$800 million
 - Closed Solicitation
 - » \$480 million for demonstration of integrated biorefinery operations closed on 6/30/2009.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$2.5 billion for applied research and development related to renewable energy and energy efficiency
 - Solar--\$117.6 million
 - Appropriations
 - » \$51.5 million for photovoltaic technology development
 - » \$40.5 million for solar energy development
 - » \$25.6 million for concentrating solar power research and development

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$2.5 billion for applied research and development related to renewable energy and energy efficiency
 - Solar--\$117.6 million
 - Solicitations
 - » \$74.5 million for high penetration solar deployment and solar market transformation (closed on 7/30/09)

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$2.5 billion for applied research and development related to renewable energy and energy efficiency
 - Wind Energy--\$93 million
 - Appropriations
 - » \$45 million for wind turbine drivetrain R&D and testing
 - » \$14 million for technology development
 - » \$24 million for wind power R&D
 - » \$10 million for national wind technology center

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$2.5 billion for applied research and development related to renewable energy and energy efficiency
 - Wind Energy--\$93 million
 - Solicitations
 - » \$24 million for wind energy consortia (closed July 2009) and \$45 million for large wind turbine drivetrain testing facility (closed August 2009)

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$2.5 billion for applied research and development related to renewable energy and energy efficiency
 - Hydropower--\$32 million
 - \$32 million for upgrades at non-federal hydroprojects (closed August 20, 2009)

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$2.5 billion for applied research and development related to renewable energy and energy efficiency
 - DOE has also allocated funding for energy efficient building technologies, industrial technologies, geothermal energy, fuel cells, community renewable energy development, information and communications technology, vehicle technologies, and the Massachusetts wind technology testing center.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$3.4 billion for Fossil Energy Research and Development Program
 - \$1 billion fossil energy R&D
 - \$800 million Clean Coal Power Initiative
 - Applications were due for \$800 million solicitation on 8/24/2009.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$3.4 billion for Fossil Energy Research and Development Program
 - \$1.5 billion carbon capture and generation efficiency improvement grants
 - \$1.4 billion solicitation for large-scale industrial carbon capture and sequestration projects from industrial sources (\$1.3 billion) and innovative concepts for beneficial CO₂ use (\$100 million) closed on 8/7/2009.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Research, Development and Demonstration (cont'd)**
 - \$3.4 billion for Fossil Energy Research and Development Program
 - \$70 million geologic carbon sequestration R&D
 - \$50 million solicitation for site characterization of promising geologic formations for CO₂ storage closed on 8/3/2009 .
 - \$6.97 million solicitation for regional sequestration technology training closed on 7/22/2009.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Modernizing Electricity Delivery and Energy Reliability**
 - \$4.5 billion for various Smart Grid programs
 - ARRA increases Federal matching grants for Smart Grid technology from 20% to 50% and requires grantees to utilize open protocols and standards if available and appropriate.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Modernizing Electricity Delivery and Energy Reliability (cont'd)**
 - \$4.5 billion for various Smart Grid programs
 - Programs include:
 - Power Grid Digital Information Technology
 - Smart Grid Regional Demonstration Initiative
 - Smart Grid Investment Matching Grant Program

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Modernizing Electricity Delivery and Energy Reliability (cont'd)**
 - \$4.5 billion for various Smart Grid programs
 - Solicitations issued to date include:
 - \$3.4 billion for Smart Grid Investment Grant Program (closed 8/6/09)
 - » Funding supports the manufacturing, purchasing and installation of Smart Grid devices and related technologies, tools, and techniques for immediate commercial use in electric system and customer-side applications including electric transmission systems, electric distribution systems, building systems, advanced metering, appliances, and equipment.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Modernizing Electricity Delivery and Energy Reliability (cont'd)**
 - \$4.5 billion for various Smart Grid programs
 - Solicitations issued to date include:
 - \$3.4 billion for Smart Grid Investment Grant Program (closed 8/6/09)
 - » Goal is to enable Smart Grid functions on the electric system as soon as possible.
 - » Applications cannot include costs of distributed energy and storage equipment.
 - » For smaller projects, awards will range from \$300,000 to \$20 million.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Modernizing Electricity Delivery and Energy Reliability (cont'd)**
 - \$4.5 billion for various Smart Grid programs
 - Solicitations issued to date include:
 - \$3.4 billion for Smart Grid Investment Grant Program (closed 8/6/09)
 - » For larger projects, awards will range from \$20 million to \$200 million.
 - » DOE expects to allocate 40% of solicitation funding to smaller projects, and 60% to larger projects.
 - » Period of performance is 3 years.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Modernizing Electricity Delivery and Energy Reliability (cont'd)**
 - \$4.5 billion for various Smart Grid programs
 - Solicitations issued to date include:
 - \$615 million for Smart Grid Demonstrations (application deadline 8/26/209)
 - » Projects must demonstrate how existing and emerging Smart Grid technologies can be innovatively applied and integrated.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Modernizing Electricity Delivery and Energy Reliability (cont'd)**
 - \$4.5 billion for various Smart Grid programs
 - Solicitations issued to date include:
 - \$615 million for Smart Grid Demonstrations (application deadline 8/26/209)
 - » Goal is to demonstrate new and more cost-effective Smart Grid technologies, tools, techniques, and system configurations.
 - » Cost of distributed energy and storage equipment can be included up to 20% of total project costs.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Modernizing Electricity Delivery and Energy Reliability (cont'd)**

- \$4.5 billion for various Smart Grid programs

- Solicitations issued to date include:

- \$615 million for Smart Grid Demonstrations (application deadline 8/26/2009)

- » Areas of interest include advanced digital technologies such as microprocessor-based measurement and control, communications, computing, and information, and energy storage programs.

- » 8-12 awards expected for Smart Grid demonstrations, 12-19 awards expected for energy storage.

Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Modernizing Electricity Delivery and Energy Reliability (cont'd)**

- \$4.5 billion for various Smart Grid programs

- Solicitations issued to date include:

- Applicants may submit separate applications for both solicitations, but they must be for distinctly different projects and they cannot involve the use of federal funds from both programs in a single project.

Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Electrifying Transportation, Alternative Fuels and Efficient Vehicles**
 - DOE issued a \$2 billion competitive solicitation for Electric Drive Vehicle Battery and Component Manufacturing (closed 5/19/09)
 - \$1.5 billion in grants to United States-based manufacturers to produce batteries and their components and to expand battery recycling capacity. Includes:
 - Cell and battery manufacturing facilities
 - Advanced battery supplier manufacturing facilities
 - Advanced lithium ion battery recycling facilities

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Electrifying Transportation, Alternative Fuels and Efficient Vehicles (cont'd)**
 - DOE issued a \$2 billion competitive solicitation for Electric Drive Vehicle Battery and Component Manufacturing (closed 5/19/09)
 - \$500 million in grants to United States-based manufacturers to produce electric drive components for vehicles.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Electrifying Transportation, Alternative Fuels and Efficient Vehicles (cont'd)**
 - DOE also issued a \$400 million solicitation for Transportation Electrification activities (closed 5/13/09).
 - Awards are for the testing, deployment, and evaluation of plug-in hybrid and all-electric vehicles; the installation of electric charging infrastructure; and for education and workforce training.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Electrifying Transportation, Alternative Fuels and Efficient Vehicles (cont'd)**
 - On August 5, 2009, DOE announced that 48 new advanced battery and electric drive projects will receive \$2.4 billion.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees**

- Section 1703, established under the 2005 Energy Policy Act, provides for the issuance of loan guarantees for “projects that employ innovative technologies.”

- Borrowers must pay the Credit Subsidy Costs.

Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- Section 1705, established under the ARRA, appropriates \$6 billion to support the “rapid deployment” of renewable energy, transmission, and biofuels projects.

- Credit Subsidy Cost is funded by the ARRA.
- Projects may utilize commercially available technologies and must commence construction by September 30, 2011.

Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- Section 1705, established under the ARRA, appropriates \$6 billion to support the “rapid deployment” of renewable energy, transmission, and biofuels projects.
 - Congress recently cut \$2 billion in order to increase funding for the cash-for-clunkers program.

Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- General financial requirements and limitations:
 - Loan guarantee limited to 80% of total project costs. If DOE guarantees 100% of the loan, the Federal Financing Bank must be lender.
 - If DOE guarantees more than 90% of the loan, then the guaranteed portion of the debt cannot be “stripped.”

Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- General financial requirements and limitations:

- The term of the loan guarantee may not exceed the lesser of 30 years or 90% of the projected useful life of project assets.

Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- General financial requirements and limitations:

- DOE has the first lien on project collateral.
- No guarantee may be made unless DOE determines that there is a reasonable prospect of repayment.
- Applicants seeking loans for “innovative technologies” under Section 1703 must pay the Credit Subsidy Cost.

Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- General financial requirements and limitations:

- On August 6, 2009, DOE issued a Notice of Proposed Rulemaking suggesting two changes:
 - Delete the first priority lien requirement and allow DOE to determine the appropriate collateral package and intercreditor arrangements.
 - Allow DOE to determine if *pari passu* lending is in the best interests of the United States.
- Comments due September 8, 2009.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- On July 29, 2009, DOE issued two new loan guarantee solicitations:
 - Innovative Technologies Solicitation
 - Supports a wide range of projects that employ “new or significantly improved technologies.”
 - Commercial Transmission Projects Solicitation
 - Supports commercial transmission projects that will commence construction by September 30, 2011.
- Solicitation for Commercially Viable Renewable Energy Projects Delayed.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- Innovative Technologies Solicitation

- \$8.5 billion in lending authority for innovative renewable energy projects.
 - \$2 billion in subsidy costs to support loans for renewable energy projects and transmission projects that qualify under the ARRA.
 - \$500 million in subsidy costs to support loans for biofuels projects that qualify under the ARRA.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- Innovative Technologies Solicitation

- To qualify under AARA funding, projects must:
 - Commence construction on or before September 30, 2011 and be ready to proceed to commercialization
 - Comply with Davis-Bacon prevailing wage rules
 - Demonstrate domestic job creation

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**
 - Innovative Technologies Solicitation
 - Part I of the Application Process:
 - Applicants provide summary level detail on the project, project eligibility, financing strategy, and progress.
 - Part II of the Application Process:
 - Applicants provide information to facilitate DOE's due diligence review.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**
 - Innovative Technologies Solicitation
 - Seven rolling rounds of review
 - The deadline for the first Part I submission is September 14, 2009, and the deadline for the first Part II submission is November 13, 2009.

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- Transmission Infrastructure Solicitation

- \$750 million in subsidy costs that will support loan guarantees for commercial transmission infrastructure projects.
- Projects must:
 - Utilize a commercial technology
 - Commence construction by September 30, 2011
 - Not be able to obtain private financing on standard terms
 - Meet at least one of listed technical criteria

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Energy Funding Opportunities: Public Spending, Investment and Loan Guarantees

- **Innovative and Commercial Technology Loan Guarantees (cont'd)**

- Transmission Infrastructure Solicitation

- One round for Part I submissions, which must be received by Sept. 14, 2009.
- Three rounds for Part II submissions, the first of which must be received by Oct. 26, 2009.

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Energy Funding Opportunities: Business Tax Incentives, Credits, and Bonds

- Incentives for clean energy production:
 - Amendments to PTC
 - Amendments to ITC and new provisions
 - Grants
- Incentives for manufacturing facilities
- Clean energy bonds

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Amendments to Production Tax Credit (PTC) – Code § 45**
 - PTC provides tax credit for energy produced from various renewable sources during first 5/10 years facility life, depending on source
 - Sources include wind, certain biomass, geothermal, solar, municipal waste, qualified hydropower and marine energy.

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Amendments to Production Tax Credit (PTC)
(cont'd)**
 - Amendments extended placed in service dates for such projects (e.g., 2012 for wind, 2013 for most other).

Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Investment Tax Credit (ITC) – Code § 48**
 - Prior to amendment, ITC provided credit for small category of renewable energy property (e.g., small wind facilities).
 - Credit equal to 10 or 30%, depending on property.
 - Percentage applied with respect to taxpayer's basis in depreciable, tangible personal property originally placed in service.

Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Investment Tax Credit (ITC) (cont'd)**
 - Requirements detailed in Code and Regs (e.g., rules for leasing, calculation of eligible basis, 50% basis reduction for depreciation, 5-year recapture, certain progress expenditures, and sale/leaseback rules).

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Amendments to ITC**
 - Expand category of property eligible for 30% credit to include most property otherwise eligible for PTC (*i.e.*, elect ITC in lieu of PTC) that meets extended placed in service dates for PTC.
 - Remove prohibition on projects funded by subsidized energy financing and the proceeds from private activity bonds.

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Treasury Grants in Lieu of Tax Credits**
 - Provides grant for property otherwise eligible for ITC (*i.e.*, grant in lieu of ITC and PTC).
 - Generally 30% of the basis of the property.
 - Construction must begin by 2010 and property must be placed in service by date applicable to PTC or ITC.

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Treasury Grants in Lieu of Tax Credits (cont'd)**
 - Detailed guidance provided in Notice, which in large part mirrors ITC regulatory requirements.
 - Treasury began accepting applications on July 31, 2009.

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Choice between PTC, ITC, and grants**
 - Value of PTC versus ITC depends, among other things, on capacity and cost – the greater the capacity at lower cost, the more likely the PTC is to be superior. Cash grants, at least in theory, should mirror the ITC.

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Choice between PTC, ITC, and grants (cont'd)**
 - Other considerations:
 - Performance risk.
 - Grants may reduce the need for tax investors.
 - No provision in grants for progress expenditures, but may claim ITC for such expenditures and then refund benefit with grant.
 - Power sale requirement for PTC.

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Credit for Certain Manufacturing Facilities – Code § 48C**
 - 30% credit for investment in eligible property used in a qualified advanced energy manufacturing project.
 - Defined as a project which re-equips, expands, or establishes a manufacturing facility for the production of property designed to be used to produce energy from specified sources.
 - Applies to any stage in the manufacturing process.

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Credit for Certain Manufacturing Facilities (cont'd)**
 - Applies to tangible property used as an integral part of the project (not including building and its structural components).

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Credit for Certain Manufacturing Facilities
(cont'd)**

- Discretionary credit, subject to DOE ranking based on following selection criteria:
 - Commercial viability and timetable to completion
 - Domestic job creation
 - GHG emission reduction
 - Reduction in energy costs

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Credit for Certain Manufacturing Facilities
(cont'd)**

- First round underway this fall.
- 1 year from acceptance to meet certification criteria and 3 years from certification to place property in service.

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Energy Funding Opportunities: Tax Incentives, Credits, and Bonds

- **Clean Energy Bonds – Code §§ 54C & 54D**
 - \$1.6 billion for clean renewable energy bonds to finance renewable energy facilities owned by public power providers, governmental bodies, and cooperative electric companies.
 - \$2.4 billion for qualified energy conservation bonds for facilities that qualify for the PTC.
 - May be used to finance retrofitting of existing private buildings.

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Status of ARRA Implementation

- DOE has only spent \$431 million of the \$36.7 billion available, but a total of \$9 billion has been awarded.
- Stated priority of the Administration
 - DOE's goal is to have 50% of funds awarded by Sept. 30, 2009.
 - DOE plans to award 100% and spend 70% of funds by Sept. 30, 2010.

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Status of ARRA Implementation

- Current Progress
 - First batch of money was dispersed through formula grants to state and local energy programs.
 - The next priority is awarding competitive grants.
- 300 DOE and national lab employees spend time on stimulus matters.

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Regulatory Hurdles

- **The National Environmental Policy Act (“NEPA”)**
 - Requires federal agencies to consider and review the impact of proposed projects on the environment.
 - Triggered by a “major federal action” that significantly affects the quality of the human environment.
 - Generally, the award of any **discretionary** grant, loan, loan guarantee, or other funding is considered a “major federal action.”

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Regulatory Hurdles

- **The National Environmental Policy Act (“NEPA”)
(cont’d)**
 - Not applicable where:
 - Departments or agencies act in ministerial capacity to distribute funds;
 - Statutorily waived; or
 - Activity or project is under another functionally equivalent process, such as CERCLA.

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Regulatory Hurdles

- **The National Environmental Policy Act (“NEPA”)
(cont’d)**
 - ARRA and NEPA
 - Tax Credits
 - No identifiable issues with NEPA. Cash grant in lieu of tax credit does not trigger NEPA because Department has no discretion in deciding whether or not to give the grants.
 - Loan Guarantees and Grants
 - NEPA must be completed before a loan guarantee can be issued.
 - Competitive grants will likely require NEPA review.
 - » Research and development funding is generally not subject to an extensive level of NEPA review.

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Regulatory Hurdles

- **The National Environmental Policy Act (“NEPA”)
(cont’d)**
 - ARRA and NEPA
 - DOE Progress Report
 - In August 3, 2009 report to Congress, Council on Environmental Quality (“CEQ”) reported that:
 - » Out of 156 ARRA projects, 8 did not require NEPA review;
 - » 170 NEPA reviews had been completed (an increase of 100 since a 5/18/09 report); and
 - » 45 reviews were underway.

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Regulatory Hurdles

- **Buy American**
 - In any project funded by ARRA involving a “public building” or “public work,” “all of the iron, steel, and manufactured goods used in the project” must be “produced in the United States.”
 - Could potentially apply to virtually all “public work” projects funded by stimulus bill.

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Regulatory Hurdles

- **Buy American (cont'd)**

- OMB appears to be taking narrow view of scope of projects and materials covered.
 - Appears only construction projects are subject to OMB's interim guidance.
 - Guidance states that manufactured goods are "good[s] brought to the construction site for incorporation into the building or work," so guidance does not cover tools or equipment used in a project, but not incorporated into the structure.

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Regulatory Hurdles

- **Buy American (cont'd)**

- OMB appears to be taking narrow view of scope of projects and materials covered.
 - OMB's interim rule does not require components of manufactured goods to be produced in the United States. However, manufactured goods that contain materials from another country must be "substantially transformed in the United States into a new and different manufactured good distinct from the materials from which it was transformed."
 - Unmanufactured goods used in ARRA funded projects are not subject to any federal Buy-American requirement.

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Regulatory Hurdles

- **Buy American (cont'd)**

- May be waived if:

- Inconsistent with public interest;
 - Iron, steel, or manufactured good at issue is not produced in sufficient and reasonably available quantities in the United States;
 - Inclusion of U.S. iron, steel, or manufactured good would increase overall cost of product by more than 25%; or
 - Inconsistent with international obligations of the United States.

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Regulatory Hurdles

- **Davis-Bacon**

- Requires local prevailing wages and fringe benefits to be paid to laborers and mechanics employed on federally funded contracts exceeding \$2,000 that may involve construction, alteration, maintenance or repair.
 - Applies to ARRA projects, including grants, loans, and guarantees. But does not apply to Treasury's grant in lieu of tax credit program.

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Regulatory Hurdles

- **Davis-Bacon (cont'd)**
 - ARRA has expanded scope of Davis-Bacon requirements.
 - Not limited to contracts to which the United States of District of Columbia is a party. Instead, applies to projects funded in whole or in part by and through the federal government.
 - No requirement that workers are employed directly upon site of the work.

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Regulatory Hurdles

- **Davis-Bacon (cont'd)**
 - ARRA has expanded scope of Davis-Bacon requirements.
 - No requirement that work is conducted on public buildings or public works.
 - Expansion prevents recipients of funds from avoiding requirements by making sub-grants to non-profit corporations.

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Regulatory Hurdles

- **Accountability and Transparency Provisions**
 - Transparency
 - All oral communications from all individuals seeking to influence spending of ARRA funds while an application for federal assistance is pending are barred.
 - Bar applies only with respect to pending applications for competitive grants and loans.

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Regulatory Hurdles

- **Accountability and Transparency Provisions (cont'd)**
 - Transparency
 - Exceptions:
 - Widely attended gatherings
 - Purely logistical communications
 - Communications with certain government officials (e.g., communications between federal agency officials and other federal government employees)
 - Agency-initiated communications

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Regulatory Hurdles

- **Accountability and Transparency Provisions (cont'd)**

- Transparency

- communications, involving a lobbyist must be documented and posted on the agency's recovery website within 3 business days.

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Regulatory Hurdles

- **Accountability and Transparency Provisions (cont'd)**

- Accountability

- Significant reporting requirements address:
 - Total amount of funds received and amount spent on projects and activities;
 - List of projects and activities funded by name, including project descriptions, completion status, and estimates on jobs created or retained; and
 - Details on sub-awards and other payments.
- Reports must be made 10 days after the end of each calendar quarter.

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Considerations for In-House Counsel

- **Application deadlines and requirements**
- **Public/private funding opportunities**
- **Executive compensation**
- **Political**

Questions?

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