



Energy Arena Opportunities Created by the American Recovery and Reinvestment Act of 2009

Energy Arena Opportunities Created by the American Recovery and Reinvestment Act of 2009

ROBERTO SCALESE: Good afternoon. The Association of Corporate Counsel and SmartPros Legal and Ethics welcome you to today's webcast, "Opportunities Created by the American Recovery and Reinvestment Act of 2009 in the Energy Arena."

[The instructions provided here were intended for attendees of the live webcast when it was originally broadcast. You may submit questions and comments regarding the content of this course using the [Questions and Comments](#) link on the left side of your screen below the video.]

ROBERTO SCALESE: Our presentation today will be moderated by Tracey Steiner, NRECA Senior Corporate Counsel. Tracey will introduce today's topic and speakers. Take it away, Tracey.

TRACEY STEINER: Thank you, Roberto, and welcome everyone. We're glad you could be with us today for another ACC Energy Committee sponsored webcast. We have with us today four distinguished speakers from one of our Energy Committee sponsors, Covington & Burling, and we'd like to thank them for introducing a very important topic to the committee, and that is Recovery Act opportunities and things to watch out for.

We're going to cover in today's presentation a variety of different funding opportunities that you, as in-house counsel, may want to help your companies consider. These include grants, loans, as well as tax incentives, but, like anything coming from the federal government, it doesn't come without a few strings and red tape attached. So, we will review those as well and give you some pointers on things to watch out for.

Let me begin by introducing our speakers. We have their photos up there on the screen for you; Bill Massey and Bob Fleishman. Bill Massey is a partner in the Washington, D.C. office of Covington. You may know him from his stint at the Federal Energy Regulatory Commission. He served as a commissioner at FERC between 1993 and 2003, and now advises utility companies, investment firms, independent power producers, pipelines, marketers, project developers and others on a wide range of energy matters, including policy, legislation, and regulation affecting those companies. So, thank you, Bill, for being with us today.

Next, we are also going to hear from Bob Fleishman. Bob Fleishman is also with Covington's D.C. office. He represents investor-owned utilities, financial institutions, gas pipelines, private equity firms and others on regulatory enforcement, compliance, commercial, legislative and other matters. Bob was one of us. He was formerly in-house counsel at Baltimore Gas and Electric—now Constellation Energy—and we thank Bob for being with us today.

Next we have George Frampton and Dan Luchsinger. George is senior of counsel in the New York office of Covington. He served as a former chairman of the White House Counsel on Environmental Quality and recently served as a co-chair of President Obama's transition team for the CEQ. He has a long history of work in environmental policy matters and has served in the government and also as president of the Wilderness Society. So, thank you, George, for joining us.

And last but not least, Dan Luchsinger is also a partner in the D.C. office of Covington. His practice is in the tax area. He covers a broad range of federal income tax issues, everything from structuring partnerships and joint ventures to corporate acquisitions, cross-border financing, and a host of other goodies. His clients also cut across a number of industries, so we are glad that Dan can be with us to explain some of the tax incentives in the Recovery Act.

[The CLE code and instructions provided here were for use only by attendees of the live webcast. To obtain your CLE

certificate for this archived webcast when you have finished listening to it, click the EXIT COURSE button at the top right of the screen to return to your My Courses page and then click the certificate link or icon beneath the course listing. In the pop-up window, select the desired jurisdiction from the drop-down list and enter any requested data, such as your bar number and the CLE code that popped up while you were playing the archived webcast. (This code is required for New York and Ohio attorneys only.)]

TRACEY STEINER OK, great. We are ready now for the portion of our webcast which is our formal presentation. Again, we will be concluding today with time for Q&A from the audience, but you're encouraged to send in a question. Just type it in using the questions tool there in your webinar screen at any time that it occurs to you, and we will pick those up again after the formal presentation is complete. So, Bob, I'm going to turn this over to you, to get us started.

BOB FLEISHMAN: Thank you very much. We're going to be talking today, as Tracey indicated, about the American Recovery and Reinvestment Act, which is also known as the stimulus package. And of the \$787 billion associated with that new law, about \$67 billion, depending on how you count, is for energy matters, either for appropriations, grants, loans, loan guarantees, or for energy tax incentives. And Covington's presentation today will cover grants, loan guarantees, and key tax incentives. We'll also discuss some of the strings attached to some of these programs and some of the regulatory hurdles, and describe some of the considerations for in-house counsel.

Now there are some out there that are a bit negative about all of this. In fact, George Will, in the current issue of *Newsweek*, declared that, "The stimulus has effectively made the Energy Department into the nation's largest venture capital firm, scattering scores of billions to speculative energy investments." Now, regardless of your view on the wisdom of the law, there's no question that there's huge interest—huge interest—in this topic. Now the PowerPoint that we'll be speaking from today is long, and it's deliberately so, because what we wanted to do was to make sure you would have it as a resource. What we're going to do today, though, is hit some of the highlights, somewhat like the 45 or so Beatles songs on *Rock Band*, which is also being released today. We will not be singing today, however.

The first thing I'm going to talk about is energy efficiency. There are three major programs. There's a \$300 million program for energy efficiency rebates and for the Energy Star program, and this is at the state level. There's a \$3.2 billion program for energy efficiency and conservation, and that's a block grant program, and of that, the lion's share will be distributed through a statutory formula, and about \$400 million will be awarded on the basis of competitive grants. There is also \$3.1 billion for the State Energy Program. This provides financial assistance to activities to fund a variety of energy related activities. And some of the strings attached to this involve updates to building codes and utility so-called decoupling policies.

And finally, there's about \$5 billion for a Weatherization Assistance Program. These funds, too, are awarded to states, and these are distributed to homeowners to assist in the weatherization of homes for those of lesser incomes.

In the area of new energy workforce development—also called clean energy jobs—there's \$500 million for careers in energy, renewable energy, and energy efficiency. And the Department of Labor to date has issued five solicitations to fund a variety of these types of programs. And they're identifying these on pages 10, 11, and 12. Also, there's \$100 million in training for the electric transmission industry. So, this is a very significant part of the whole package.

What I'd like to do now is to turn to Bill Massey, who will start to talk about research, development and demonstration, and this is page 14 of the PowerPoint.

BILL MASSEY: Well, as you can see from the slide, the act makes \$2.5 billion available for applied research and development related to renewables and efficiency programs. About \$800 million of that is earmarked for biomass and biofuels. Slide 15. There is an open solicitation now, \$85 million available for biofuels consortia, which are itemized here, and that is—you can submit your application through September 14. There is a closed solicitation—a good chunk

of funds, \$480 million—for biorefinery operations, but that is already closed. The applications are in.

[On] page 18, [there's] \$117.6 million for solar R&D [research and development]. [For] about \$74.5 million of that, the solicitations are already closed. And page 19, \$93 million available for wind research and development, and of that \$69 million is already closed, so there's about \$24 million that department will have future solicitations on.

So, that's about, if you total that up, of the \$2.5 billion, that's a little over \$1 billion in solicitations. The Department of Energy, if you look at page 22, has indicated that it also intends to fund research and development on a variety of other technologies out of this \$2.5 billion: fuel cells, geothermal programs, energy efficient building technologies and a host of others.

Now to page 23. Let's talk about fossil energy research and development. We all know that North America has a huge supply of coal, and of this \$3.4 billion that is available, there is a closed solicitation—\$800 million—on a clean coal power initiative. And on page 24, [there's] a large solicitation—\$1.5 billion—for carbon capture and generation efficiency grants. That one is closed as well. There is a closed solicitation for geologic carbon capture and storage. But we all know that clean coal technologies, as we move forward, will be essential to our nation's meeting its environmental goal, so those programs are very important.

Let's go to page 26. Equally as important is modernizing the electric grid. On page 26 you see a large chunk of money—\$4.5 billion—is made available for Smart Grid, 50/50 matching funds. Go to page 28, Bob. There have been two solicitations so far: a \$3.4 billion solicitation for the so-called Smart Grid Investment Grant Program that closed in August of this year [2009]. There, the goal is for Smart Grid functions to be enabled as soon as possible; up to \$200 million—page 29, Bob—up to \$200 million per large project. DOE [The U.S. Department of Energy] says it will allocate roughly 40 percent of this \$3.4 billion to small projects and 60 percent to large projects.

On page 31, an additional \$615 million is available for innovative Smart Grid technologies. This is also closed. This solicitation has now closed.

If you look at page 33, the Department [of Energy] wants cutting-edge, highly innovative technologies such as microprocessor-based systems. Energy storage is a very large area. The department intends to award eight to 12 Smart Grid awards and roughly 12 to 19 awards for energy storage. So, this \$4.5 billion for Smart Grid and storage intends to make funds available for highly innovative programs. There's a lot of talk about the importance of Smart Grid up on Capitol Hill, at FERC, and in the industry, as finally putting customers in charge and transforming the electric power industry. It holds huge promise for the future.

BOB FLEISHMAN: OK, now we're going to turn to slide 35, and George Frampton will be the next speaker.

GEORGE FRAMPTON: Thanks, Bill. Quickly, electric cars: DOE put out a solicitation in the early spring; [a] competitive solicitation for grants to support new battery technology and production, drive train technology, hybrid cars and infrastructure—charging stations. All of that—\$2.4 billion—was in grants, [and] was awarded August 5. Forty-eight grants out of 165 applications. So, one out of three got money. And interestingly, it went more or less to the big guys: \$400 million to Chrysler, Ford and GM, a few more hundred million to their battery companies. And geographically, if you look at a map, almost all of the money went to someplace within about a 150-mile radius of Detroit. So, to the extent that that's a harbinger about the likely tilt of DOE in the loan guarantee program, which I'm going to talk about now, [it's an] interesting pattern.

Moving on to loan guarantees, which are program slides 39 through 52. Many of you know that the Energy Policy Act of 2005 enacted a very robust loan guarantee program for energy efficiency (alternative energy), which turned out to be a total bust. In three and a half years, no guarantees were closed and none look to be closeable by—or very few—by

September 30 of this year, which is the expiration date. The Recovery Act extended and refunded that program under what's called Section 1705—I'm now on slide 40—appropriating \$6 billion to pay for the guarantees, so the \$6 billion in appropriated funds theoretically is designed to support \$25 billion or more of actual loan guarantees. The terms basically are up to 80 percent of total project cost, up to 30 years in many cases. But the projects must commence construction by September 30, 2011.

Now going to slide 44, under the old program—[slides] 44 and 45—under the old program, [Section] 1703, there were two big problems to the real commercial attractiveness of these loan guarantees. One was that the credit subsidy would have to be paid by the lender and the applicant, and that meant that the basically risk cost was not paid by DOE. Under the new program, it is paid by DOE.

The second issue, which was a real problem in the old program, was that the government, DOE, would get a first lien on project assets. That was not changed in the new law, but DOE has now put out for comment proposed rules that would ameliorate that first lien and may make this loan guarantee program more attractive.

Going to slides 46 [and] 47, loan solicitations that are now out are for \$2 billion. This is the appropriated funds—\$2 billion for innovative renewable energy and transmission projects, \$500 million for biofuels, and \$750 million for commercial transmission projects. So, the total that's out for bid now, with a deadline for the part one applications of September 14 this year, is \$3.25 billion of appropriated funds, which theoretically would support about \$12 [billion] or \$13 billion of loan guarantees. And the reason I stressed “innovative” is because the \$2 billion for renewable energy and transmission projects that are out is not really for conventional, commercial projects. A typical wind project or PV [photovoltaic] solar project in the Mojave Desert would not meet these criteria. This is really for new and innovative technologies. So, with \$3.25 billion out for bids and \$6 billion appropriated, that should leave \$2.75 billion for a future program for the more commercial projects, but \$2 [billion] of that \$2.7 billion was given away to Cash for Clunkers, with some promises that it would be restored, but it's not clear what's going to happen. So, what's left for a future round that's been delayed for the much more conventional projects, renewable energy projects, is only another \$750 million.

There's a two-part process for these applications. Part one is really a summary and then, if the Energy Department tells you you meet the criteria—they like it—you can come back and submit much more detailed information for their due diligence. And in all the cases, the initial part-one deadline is September 14, but with respect to the innovative renewable energy and transmission and biofuel projects, there will be a series of seven rounds, and only the first round is due by September 14, so there'll be additional opportunities to apply throughout the fall.

And I think now we're going to talk about tax incentives and credits and the new grant program and Dan Luchsinger.

DAN LUCHSINGER: Thanks, George. I'll try not to get bogged down in the minutia of tax as we move along here, but, of course, being a tax lawyer, I will get bogged down to some extent. But we'll push forward.

I've tried to organize this piece. There's just a ream of incentives—tax incentives and grants and loan guarantees, etc.—that were in the stimulus bill, and I've tried to organize it in a way that helps me remember what's what and highlight the things that I know something about.

So, the first part that I'm going to talk about are the incentives for clean energy production. So, these are for facilities or equipment that actually produce energy. And the credits and grants that I'll talk about are the production tax credit, the investment tax credit, and then grants in lieu of the investment tax credit or the production tax credit.

There's also in the stimulus bill an incentive for the creation, re-equipment, or renewal of manufacturing facilities. So, these manufacturing facilities don't produce energy themselves—it's not the windmills or the solar farms—it's for

manufacturing facilities that create the property used to produce the energy. So, it would be the manufacturing facility for the solar panel or for the wind turbine. So, keep that in mind as we go through; you've got the incentives for the production of energy themselves [and] you've got the incentives for the manufacturing facilities that create the property. And if I have time, I'll talk a little bit about loan guarantees.

There's also a ream of other credits for renewable fuel facilities, renewable fuel vehicles, renewable fuels themselves, either that existed in the code or that were amended or extended in the stimulus bill, and I'm not going to spend any time at all on those, but they're in there as well.

So, if we turn to slide 54, let's start with the production tax credit. And again now, we're talking about production tax credit and investment tax credit and grant. All that would apply to facilities that produce the energy themselves. The production tax credit existed before the stimulus bill; it's in Section 45 of the code, and it provides a credit for energy produced. So, it's paid based on the kilowatt-hour that you generate. Depending on where you produce the energy from, you get a credit for each kilowatt-hour generated. So, these are credits that apply to the actual production of energy. They existed before the stimulus bill. Because of their structure, they were structured to apply to the first five or 10 years of life of the facility. Because of their structure, investors would help finance the facilities eligible for the production tax credit through complicated partnership structures. I'm sure you've heard of flip structures and other partnership structures. Basically, that allowed investors to come in and take advantage of the credit which was paid out over time as energy was produced, and also to take advantage of an accelerated depreciation and other tax benefits.

So, that's where we were, basically, before the stimulus bill. If you flip forward to slide 55, the amendments in the stimulus bill with respect to the production tax credit really were not that significant. They extended the deadline for most of the eligible facilities. So, for example, wind was extended through 2012, solar and other facilities were extended through 2013.

Let's move to the next slide. OK. So, then we get to the investment tax credit. The investment tax credit itself has a very, very long history, going back decades. But for the last 10 years or so, the investment tax credit has really applied to a very, very narrow category of property, and for large projects and large corporations, it was basically a dead letter. But, with the stimulus bill, Congress was looking for ways to incentivize the creation of these renewable energy production facilities, and the idea was that they needed alternatives in addition to the production tax credit. So, Section 48 was amended to provide that facilities that qualify for the production tax credit also qualify for the investment tax credit. The investment tax credit is by election, and it's in lieu of the production tax credit.

Well, what is the investment tax credit? The investment tax credit is a credit for the investment in the facility. So, whereas the production tax credit was a credit based on energy produced, the investment tax credit doesn't look to energy produced, it looks to the cost of the facility. You would get a credit based on a percentage of the cost of the facility. In the case of these renewable energy projects, it's a 30 percent credit. So, 30 percent of your basis, or cost, in the facility, is the credit you would get under the amended Section 48.

If we turn to slide 57, as I mentioned, the investment tax credit has been around for decades. And because of that, there is a large body of regulations and case law that govern the investment tax credit.

The investment tax credit, again, is a credit given for the cost of the property when it's placed in service. So, unlike the production tax credit, where the financings have been done through partnerships—flip partnerships, etc.—with respect to the investment tax credit, those structures were really leasing structures back, you know, in the '80s and early '90s, where the credits were pushed, if you will, to the investor based on sale leasebacks and leasing transactions, rather than complicated partnership transactions.

So, the investment tax credit [regulations]—the Section 48 [regulations]—which have now been resurrected, contain detailed rules for leasing, they contain detailed rules for recapture, they contain detailed rules for reduction of your

basis for the credit, generally 50 percent with respect to energy property. Fifty percent of your basis is going to be reduced by the amount of the credit. All of these rules are embodied in the regulations and case law that predated the stimulus act.

One thing that I will mention, before going on, those rules—Section 48 and the regulations there under—also contain a number of rules dealing with progress expenditures. One of the things that has come up, with respect to grants, is that the money is—and I'll talk about that in a moment—the money is not available until after you've placed the property in service. And if you're looking to finance a project, and you needed interim financing, it's not helpful in that regard, or it's not as helpful as it could be.

Well, just a reminder that, with respect to the investment tax credit, there are some detailed provisions dealing with progress expenditures, and when you can get credit during the building phase, if you will, for various projects expenditures. So, the Treasury indicated, correctly, that even if you're going to elect to choose a grant at the end of the day, during your building process, the investment tax credit is there. There's rules for progress expenditures, and you can, as long as you have the capacity or have someone with the tax capacity to absorb those credits and take advantage of those credits, that can help provide interim financing room.

OK, let's go to slide 58. So, the amendments to the investment tax credit. Again, Section 48 was amended to add a new category of property eligible for the investment tax credit, and it's basically, or generally, all property that's otherwise eligible for the production tax credit. And again, with respect to the production tax credit, the credit is based on the energy produced. With respect to the investment tax credit, the credit is based on your cost of tangible property, not including building or its components. So, when you're looking at the amount of the credit that could be available under the investment tax credit, keep in mind that the investment tax credit only applies to tangible property, equipment, etc., etc. It does not include buildings or its structural components.

The investment tax credit is an election in lieu of the production tax credit. You can elect the investment tax credit. When you do so, you preclude yourself from getting the production tax credit. And it's for basically any property that meets the requirements for the production tax credit, as long as it's placed in service during the extended placed-in-service deadlines for the production tax credit.

In addition, the amendments to the investment tax credit have removed some prohibitions that previously applied to projects funded by subsidized energy financing and the proceeds from private activity bonds. Basically, there was a thought previously that Congress didn't want folks to double-dip these energy subsidies. So, if you're getting help through your bond financing, they didn't want you to be able to get the investment tax credit as well. That seems to have gone by the wayside and they're perfectly willing to allow you to double-dip, as long as it's the investment tax credit and some of these other financing benefits, rather than the production tax credit or the grant.

OK, let's go to slide 59. So now, in lieu of the production tax credit or the investment tax credit, Congress added a new provision that provided for a grant. And the amount of the grant is intended to mirror the amount of the investment tax credit. So, the idea with the grant is that if you have a facility that is eligible for the production tax credit or the investment tax credit, but you can't find an investor with tax capacity—you can't find someone to step in who is going to be able to absorb the tax benefits—the credits—associated with these facilities—Treasury is going to cut you a check. They're going to provide a grant in the amount of what you would have received as an investment tax credit. So, the amount of the grant, unsurprisingly, then, is basically 30 percent of your cost basis in the property. And again, it's property that would otherwise be eligible for the production tax credit or the investment tax credit, so you have to begin construction by 2010, and you have to have the property placed in service during the same period that you would have to have the property placed in service for the production tax credit or the investment tax credit.

And why don't we skip, then, to slide 60. The grant, even though it's intended to provide a similar benefit to what you would receive under the investment tax credit, the grant is not found in Section 48 of the code and it is not governed by

the Section 48 regulations like the investment tax credit is. So, basically, Treasury had to issue guidance to the application of the grant, and they did that through a notice. I think it's 2009-52, although I wouldn't swear by it. The notice is 35 pages long, and it basically outlines all of the rules that are going to apply to the grant. And, in large part, those rules are going to mirror the investment tax credit rules. So, there's rules for recapture, there's rules for leasing, and those rules generally mirror the same rules that would apply for the investment tax credit. But there's some big differences that you need to be aware of, so you need to consult this guidance when you're dealing with a possible grant.

For example, the recapture rule for the grants is different than the investment tax credit recapture rule. You can sell property from one qualified investor to another qualified investor, and where that would trigger recapture under the investment tax credit rule, it does not trigger recapture under the grant. Similarly, there is a slightly different definition of eligible, tangible property under the grant program. The notice makes it clear that while buildings don't qualify for the grant, a structural component may qualify, whereas under the ITC, structural components generally don't qualify. So, there are a few of these very subtle differences between the grant program and the investment tax credit [regulations] that we need to be aware of.

The notice came out in early July [2009]. The Treasury began considering applications on July 31, and, in fact, they have now announced that they have made grant awards of approximately \$500 million.

Why don't we skip to slide 61. So, 61 and 62—it's just a very high-level overview of why one might choose the production tax credit, the investment tax credit or a grant. And obviously any list of considerations that I could set out for you is going to be incomplete. It won't apply in some cases, and it'll be incomplete in others. But as a general matter, the choice between your production tax credit and your investment tax credit is going to depend on the capacity and the cost of your facility. The greater the capacity and the lower the cost, the more likely it is that the production tax credit is going to be superior. And why is that? Well, that's because the production tax credit is based on energy produced, whereas the investment tax credit is based on the cost; your basis in the facility. So, to the extent that you've got a cheaper facility that's generating a lot of energy, the production tax credit is generally going to be a better bet.

Why don't we skip to 62? [Here are] some other factors that you might consider in choosing between any one of these three incentives. Performance risk, to the extent that you're worried about performance: [The] production tax credit is linked to energy produced, so the investment tax credit may be a better bet. Grants: Obviously the big incentive there is that you don't have to find an investor who has tax capacity. While there is no provision for grants, again, you can, for progress expenditures with respect to grants, again, you can get the investment tax credit for progress expenditure and then switch over to grants subsequently. And then obviously you have the power sale requirement with respect to the production tax credit.

Why don't we jump now to slide 63? So, now I am switching gears. We have talked about the three big incentives that are available for energy production facilities. Well, now we are going to be talking briefly about the credits that are available for manufacturing facilities. So, these are facilities that produce the equipment that is used to produce the energy, so one step earlier in the process. For manufacturing facilities, the credit is an investment tax credit. It's in Section 48(c) and it's for manufacturing facilities. The only available tax benefit, if you will—at least that was provided in the stimulus bill—is the investment tax credit. So, for these facilities, the production tax credit and the grant don't apply. It's just the investment tax credit in Section 48(c). Generally, it's a 30 percent credit. Again, it applies to your cost or basis in the facility. The facility has to re-equip, expand or establish a manufacturing facility. It applies at any stage in the process, so even if you are producing property that itself is remanufactured before it goes into the energy facility, that's OK. Skipping to slide 64; again, it applies only to tangible property used as an integral part of the project. It does not apply to buildings and generally it does not apply to a structural component.

Why don't we skip to slide 65? [There are] two big issues you have to keep in mind with respect to the manufacturing facilities. The first one is [that] it is discretionary, and it's discretionary based on a number of factors that are listed in the code, they're listed in the legislative history, and they're listed in the guidance that the Treasury published the

governing the manufacturing credit: commercial viability, domestic job creation, greenhouse gas emissions, and reduction in energy costs. And I am not going to go into those in detail. I know if you've got some questions, Bob has looked at how those factors may be weighed, and maybe he could provide additional detail on that.

So, if we skip to slide 66, again the credit is for manufacturing facilities. [In] the first round, there's \$2.3 billion appropriated to this credit. The first round is under way this fall. If they use up the whole \$2.3 billion, that's it; there won't be a second round. So, one thing to keep in mind is that there is a two-part application process. You have to go to the DOE with an application and [to] the IRS with an application. The first preliminary application with the DOE is due September 16. So, [it is] very quickly on the time horizon. We've been getting a lot of calls about that. Treasury said that they were considering extending the deadline, but there is no real firm indication that they would do that. So, first-round applications have to be in the DOE by September 16. Assuming you get through that process, the full round has to be in by October 16. The application has to be in the IRS by December 16, and then the IRS will provide for the awards by January 15 of the following year [2010]. Again, so quick-hitting deadlines; that's the second thing to keep in mind. It's a discretionary credit. It's going to be based on your rankings of these projects—the rankings that the DOE gives these projects. So, if you're looking to take advantage of this credit, you really have to act quickly and start moving on the September 16th preliminary application.

Jumping to 67: Clean energy bonds. Actually looking at the time, why don't I turn it over to Bob and we'll move on from here.

BOB FLEISHMAN: Thank you very much. I am going to talk briefly about the status of implementation at DOE. There has been a huge amount of activity. There have been about 45 FOAs, or funding opportunity announcements, that the agency has put out since the bill passed a number of months ago, and of that, \$9 billion has been awarded, but approximately \$430 million has been spent to date.

The administration's priorities are clear. They are looking to spend this money and to award it. Their goal is to have 50 percent of it awarded by September 30—they've still got a little bit of time there—and to award 100 percent of it and spend 70 percent of the funds in about a year.

A lot of the money—particularly [the money] that I talked about at the front end of this presentation—has been already dispersed through formula grants and now they're in the process of awarding a number of competitive grants. There are a large number of DOE and national lab employees that are focused on spending time on these matters, and this is in connection with a number of the different program offices. EERE, or the Energy Efficiency Renewable Energy Program office, the Electric Delivery and Energy Reliability office, the Loan Guarantee Program office, and Fossil Energy are just some of the program offices that have been exceedingly busy as the agency has been pushing very hard to implement the stimulus bill provisions.

I am now going to turn to the part called "strings attached," or regulatory hurdles, and turn the baton to George Frampton, who is going to talk about NEPA [National Environmental Policy Act] considerations. George? Slide 70.

GEORGE FRAMPTON: Thanks, Bob. I'll try to do this in two minutes. NEPA will apply to the grant program. Not to the tax programs, which are not discretionary, but to grants and to loan guarantees. And the agencies and the CEQ have been doing a good job of getting these things done. As of August 3, 170 had been done. Forty-five NEPA processes [are] underway. I think the real issue here will come in how to apply the NEPA to loan guarantees, because if it's a loan guarantee for a project like an alternative energy project on federal land, or has a federal nexus, there is going to be a full environmental impact statement anyway. But if it's a solely private project, the question is: What kind of NEPA—how flexible will the government be about the NEPA analysis of the guarantee itself? And I think that's an issue—an important issue that remains up in the air.

Moving forward, the "buy American" provisions require [that in] public buildings or public works, all of the iron, steel

and manufactured goods—this is [slide] 74—all the iron, steel and manufactured goods must be produced in the U.S. So, there is still OMB [Office of Management and Budget] guidance out on that, and precisely how to interpret that is not yet totally clear, but there will be issues there. And why don't I, then, just give it back to you, Bill, to talk about Davis-Bacon and transparency?

BILL MASSEY: Yes. The Davis-Bacon Act has been around for many, many decades. It has been controversial for at least the last 30 years. There was a major push to repeal Davis-Bacon during the Reagan administration that failed. We're on page 78 here.

Davis-Bacon required local prevailing wages and fringe benefits to be paid to laborers that are employed on federally funded contracts that may involve construction, alteration, maintenance, or repair. It applies to the projects under the ARRA grants, loans, guarantees. [It] doesn't apply to Treasury's grant in lieu of tax credit program.

On page 79, this law expanded the scope of Davis-Bacon requirements as applied to projects funded under the Recovery Act. It's not limited to contracts in which the United States or the District of Columbia is a party; it applies to projects that are funded in whole or in part by and through the federal government. There is no requirement that the workers are employed directly upon the site of the work.

So, I am not a Davis-Bacon expert, but I would advise all listeners to check out the Davis-Bacon provisions and how they apply to you when you are seeking a loan or a grant under this new law.

Now, page 81: accountability and transparency. There are some anti-lobbying provisions in this new law. All oral communications from all individuals seeking to influence spending of these funds while the application is pending are barred. And so, it likely means that the work involved in consulting with the Department of Energy, in making sure you get all your ducks in a row, should occur before your application is actually filed. This bar applies only with respect to pending applications for competitive grants and loans.

[On] the next page, 82, there are a number of exceptions—widely attended gatherings and so forth—which you ought to take a look at. Page 83: Communications involving a registered lobbyist must be documented and posted on the agency's recovery Web site within three business days. There's been a lot of controversy about this provision in particular for singling out those who have a registered as a lobbyist in Washington, D.C.

There are significant reporting requirements that are outlined briefly on page 84 that I would commend to you, and I will turn this back to Bob.

BOB FLEISHMAN: OK, some considerations for in-house counsel. The first deals with application deadlines and requirements. There are a huge number of deadlines associated with these particular funding opportunities. And, in fact, DOE had its own webinar within the last few days where, in connection with the loan guarantee program, it laid out a number of the technical and financial attributes that it would find more attractive and what would make the application stronger if they were included. And in the interest of time, I am not going to go through them, but the DOE is trying to be helpful, particularly with respect to the loan guarantee program. George, would you like to speak about the public/private funding opportunities?

GEORGE FRAMPTON: Well, just a note that there are a small group of private equity funds and, sort of parallel, a very small group of investment banks that are talking about consortia approaches to DOE, in which DOE could, in effect, precommit a certain amount of loan guarantee to a series of projects that would be funded through and by the private equity funds, but with government approval. They believe there is authority under the act to do that. [It is] not clear where that's going to go at this point, but it is an interesting initiative.

BOB FLEISHMAN: And to wrap up the presentation, Bill, on executive compensation and political considerations.

BILL MASSEY: Yes, we included executive compensation because we have received calls from those clients who wanted to pursue funding about whether any executive compensation limits apply under the Recovery Act. They do not. There is some nervousness, however, that those provisions which arose in the TARP legislation—so-called financial bailout legislation—could be applied by Congress to the Recovery Act, even retrospectively, if Congress did it very carefully. We don't see any hint that that will happen, but I wanted to raise the issue. In any event, at this point, the Recovery Act does not include limits on executive compensation. Personally, I would be surprised if those were enacted as applicable to this law.

Political considerations: Obviously, any applicant for a grant or a loan or anything else has to do two things. First of all, [you must] submit a technically sound and well-supported and documented application. The Department of Energy is going to have to defend the money it spends here, and it will want to spend the money on well-supported projects. Number two—and this is important as well—applications should be politically astute. Give DOE an application that it wants to fund and make sure you have your political ducks in a row when you do so.

BOB FLEISHMAN: Thank you, Bill. And that ends our formal presentation.

TRACEY STEINER: Terrific. Thank you, Bill, and everyone else. I think that we went through a very large and complex topic in a little less than an hour, and I wasn't quite sure we could do it, but we did, and we still have time for questions, so that's terrific.

[The CLE code and instructions provided here were for use only by attendees of the live webcast. To obtain your CLE certificate for this archived webcast when you have finished listening to it, click the EXIT COURSE button at the top right of the screen to return to your My Courses page and then click the certificate link or icon beneath the course listing. In the pop-up window, select the desired jurisdiction from the drop-down list and enter any requested data, such as your bar number and the CLE code that popped up while you were playing the archived webcast. (This code is required for New York and Ohio attorneys only.)]

TRACEY STEINER: Thank you. And as we wait hopefully for some questions to come in—don't be shy—I did have one, and this is really a follow-up to Bill. You were just talking about some of the political considerations that a company should take into account when debating whether or not to go after Recovery Act funding. And I was wondering if you could elaborate a little bit more on that. I am even reading some commentators saying that a company is somewhat at risk of backlash if they *don't* apply for funding. Are you hearing some of the same thing?

BILL MASSEY: Well, our experience is that applicants need to be politically smart about their applications. As I said, make sure you dot all the I's and cross all the T's in the application process. But secondly, make sure you know what your political support will be. Where does your political support lie? If you are proposing a project to spend money in Texas, do you have your Texas political support lined up? Do you have members of Congress that are willing to support your application? Have you consulted with them? Have you considered available political support when you determine where you intend to spend funds? Those are the kinds of considerations that we believe an applicant ought to take into account.

It is probably true that filling out the paperwork—dotting all the I's and crossing all the T's—is fairly administrative and can be done carefully. I think the political considerations are sometimes more challenging to apply in a very thoughtful and successful manner.

TRACEY STEINER: OK, thank you. Roberto, do we have any questions that have come in as yet?

ROBERTO SCALESE: We do not have any questions at this time, Tracey.

TRACEY STEINER: OK.

DAN LUCHSINGER: Hey, Tracey, this is Dan. I have a question for Bill or George.

TRACEY STEINER: OK.

DAN LUCHSINGER: How does the solicitation process work? Does the DOE have a Web site where they make these things available? Is that it?

BILL MASSEY: Yes, there are solicitations that are published. There is guidance from the agency. The solicitations are quite specific about the information that the agency wants to see and about what the deadline is. And some of the applications require indices that include technical support, engineering support and so forth. So, the solicitations are actually fairly specific.

TRACEY STEINER: And am I correct that every agency that has been appropriated stimulus finding to distribute has to maintain a Web site that lists the funding opportunities and makes reports about their progress on implementing those programs?

BOB FLEISHMAN: Yes, that's correct. This is Bob. And the transparency and accountability provisions of the act have been taken very seriously by all the agencies, and you can go to the Web sites of any of these agencies that are granting funds or that have funding opportunities and see what the status is to date, their periodic reports that they put up there, and the inspector generals of all the agencies as well are on an accountability board to make sure that these funds are used wisely and that there is the minimum possibility for fraud and abuse in the process.

TRACEY STEINER: Bob, about the board: Could you explain just a little bit about its composition and what specifically they are supposed to do in preventing fraud and abuse? For example, do they take reports, whistle-blower reports, that kind of thing?

BOB FLEISHMAN: They will take those, and what they have done is put the people at the agencies who are the inspector generals in charge of these kinds of reviews and compliance activities. And they are on this board that is headed up by Mr. Devaney. And they are charged with keeping track of what's going on and this has been a big part of this particular legislation. And, in fact, I was reading the other day that Vice President Biden made a remark that these kinds of transparency and accountability provisions possibly should be considered government-wide, not just stimulus-wide.

TRACEY STEINER: Wow.

BOB FLEISHMAN: That's what he said. That was what was reported that he said.

TRACEY STEINER: OK. Well, I don't know if too many folks on the call would wish that to happen, but it's something we should certainly be watching out for. I've got just one other question, and that is for those of you that are looking at filing an application, at least one thing that I am hearing is that some of the applications, because they are so specific, that it does take a good bit of time and money in preparing those applications. And that the deadlines tend to be very tight, and a lot of people are using not just in-house staff to get those applications done, but they are hiring grant writers, for example, they are hiring outside counsel and others to assist in that process. Is that something you've been involved in directly at Covington? Helping clients with the actual applications themselves?

BOB FLEISHMAN: We have been advising clients on those, and it's the technical as well as the financial attributes that are really the province of the agencies here. And there are consultants—there are former chief financial officers that are involved, as well as outside counsel—that are working to put together these applications under some very tight deadlines.

TRACEY STEINER: OK.

BILL MASSEY: Yes, I've been struck by how tight some of the deadlines are, and, as I said, the solicitations are quite specific and do require a good deal of time. But it's not rocket science. It's just a matter of getting all the data together and all the engineering support and technical support for a really solid application.

TRACEY STEINER: So, the consortia approach sounds like a very interesting idea, but it does add another layer, if you will, to trying to get that application out or turned around in a short time frame.

All right, I want to thank all of our presenters today. Bill and Bob and George and Dan, thank you again. You gave us a lot of information in a short amount of time, and I hope it was helpful to everyone on the call.

Before folks start leaving, though, I did want to make a couple of reminders on behalf of the ACC Energy Committee. We will be having our next monthly ACC Energy Committee conference call on September 16 at 4 p.m. Eastern. [I] hope you will join us for that. That will be our last meeting before the annual meeting. The ACC annual meeting again is October 18–21 in Boston. And the Energy Committee is putting on two sessions there: one on FERC compliance and one is a legislative update. We are also cosponsoring a session with the IT Privacy and E-commerce Committee called "Growing Green IT." And the energy committee will have its business meeting on Tuesday morning, October 20, at 7:15 a.m. with breakfast. So, that's pretty early, but we hope that those of you that are on the call and planning to attend the ACC annual meeting will take part in those Energy Committee activities. Roberto, is there anything that you have to add before we say goodbye to everyone today?

ROBERTO SCALESE: Thank you, Tracey. On behalf of the Association of Corporate Counsel and SmartPros Legal and Ethics, thank you all again for listening to today's program.

[The instructions provided here were for use only by attendees of the live webcast. To obtain your CLE certificate for this archived webcast when you have finished listening to it, click the EXIT COURSE button at the top right of the screen to return to your My Courses page and then click the certificate link or icon beneath the course listing. In the pop-up window, select the desired jurisdiction from the drop-down list and enter any requested data, such as your bar number and the CLE code that popped up while you were playing the archived webcast. (This code is required for New York and Ohio attorneys only.)]

ROBERTO SCALESE: This program is now concluded. Thank you again, and have a great day.