Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

1700 K Street, NW, Fifth Floor
Washington, D.C. 20006-3817
PHONE 202.973.8800
FAX 202.973.8899
www.wsgr.com

Frequently Asked Questions: The State of Clean Tech in Washington
June 2, 2011

On May 24, 2011 energy loan guarantees made their way back into the national press. There have been several examples of damaging press for the clean tech sector, in some cases where readers are dependent on information with more political spin than substance. And often times, the industry's response is never heard on Capitol Hill.

On May 31, 2011 the House Appropriations Committee voted to take $1 billion from the Department of Energy (DOE) Advanced Technology Vehicle Manufacturing (ATVM) loan program in order to offset an increase in fiscal year 2012 spending in the Homeland Security Appropriations bill for disaster relief efforts. In a statement regarding the House's passage of the bill, Committee Chairman Rogers stated *"I'm proud that we have added $1 billion to the Disaster Relief Fund, while completely offsetting this increase by taking unused funding from the Department of Energy."* It is not clear whether House legislators were aware that promising innovative technology companies are pursuing remaining ATVM funds to establish U.S. manufacturing of advanced vehicles.

On June 1, 2011 the House Energy and Water Development Appropriations subcommittee proposed the 2012 Energy and Water appropriations bill that included a $1.9 billion cut for the DOE's Energy Efficiency and Renewable Energy (EERE) office, which houses ten programs focused on applied research. The cuts at EERE target several initiatives that have been a priority for the White House, including solar power, electric-vehicle deployment, and building energy efficiency. Further, the appropriations mark provided $160 million for the DOE loan program (compared to the $200 million request), and $100 million for the Advanced Research Projects Agency-Energy program, or $450 million below the requested level. The 2012 Energy and Water appropriations bill was subsequently passed by the House subcommittee on June 15, 2011.

It was this series of events in Washington, combined with anecdotal information from those who communicate regularly with House and Senate Members, which triggered not the first but certainly a sobering call to the energy and clean technology sector.

As a firm that that focuses on representing technology companies and their investors, Wilson Sonsini Goodrich & Rosati wanted to ensure the clear and present danger to the industry was communicated. After hosting a webinar on June 2, 2011 to discuss the status of clean energy in Washington, the following briefing document was prepared based on the discussion as well as some of the most commonly asked questions.

For more information, please contact Chris Groobey, Taite McDonald (tmcdonald@wsgr.com), or Sara Hochman (shochman@wsgr.com)

FREQUENTLY ASKED QUESTIONS[1]

Question: **How does political giving work when you have a split between Democrats and Republicans in the Senate, the House and the Administration?**

Answer: As a general matter, giving is generally split 60/40 depending on who is in power on which side of the Hill. For the clean tech sector, and in this political climate, however, it is important to look at the potential political realities coming with the next election cycle. While there is speculation, people in Washington currently expect the House to stay in Republican control and expect the Senate to flip, based on the raw numbers of seats the Democrats have to defend versus the Republicans. As it relates to making any kind of political calculations, it is important to take into consideration not only what is happening now, but what is expected to happen in the next election cycle. If the Obama Administration retains power in the White House, there will be a split in government, with both the Senate and House controlled by the Republicans and a close minority on the Senate side and an even closer minority on the House side. These are the types of factors to be taken into account when evaluating political giving.

Question: **What is the effectiveness of some of the well-known industry organizations that represent the clean tech sector?**

Answer: Powerful members of Congress are saying they have not been contacted by our industry regarding many of the programs they are proposing to cut, and they are not hearing of the benefits of our industry and those programs in a manner that is resonating with their philosophies. Although to those outside of Washington this suggests the trade and industry organizations are not effective, the reality is that industry associations alone cannot be responsible for being the clean tech sector's voice in Washington.

Approaching conversations individually based on geographic specificity, regional economic benefits, jobs, and innovation, and using terminology that elicits a positive response is often necessary to obtain legislative support and achieve legislative objectives. Alternatively, approaching legislators collaboratively on sector and/or stage specific issues helps garner legislative support for the more narrow issues that broad organizations don't have the capacity to stand behind. It is also increasingly evident that the necessary capital is not being committed to some of these groups who are more constrained in implementing a full communications or legislative strategies

[1] The questions and answers contained herein were generated during a June 2, 2011 webinar discussion on the status of clean energy in Washington.

because they have a broad membership base and corporate obligations that extend beyond advocacy.

Question: **How does the amount of money that clean tech companies contribute impact the appetite for good policy? Most oil/gas companies spend significantly more money for lobbying than emerging clean tech companies. How can we make a splash?**

Answer: The clean tech sector does not have to spend as much as other entrenched industries in order to be able to have a voice in Washington. It is not feasible, and there are many examples of much smaller industries that are very effective in this Washington. They are effective because they have direct representation on Capitol Hill or they come together with the right contacts to advocate on their behalf. Dollars spent on representation with influence, not simply access, can help to address the types of issues the clean tech industry is facing. Even with a couple million dollars over a year and a half's worth of time for collaborative efforts (a mere fraction of what other industries spend) or strategically pursuing individual efforts over the course of a year with the right advocates, impactful results could be accomplished for the clean tech sector.

It is also important to note that the clean tech industry does not currently spend resources in a manner that echoes that of the traditional energy industry and other well-established industries. For example, the oil and gas industry spends money individually on communications and government relations, in addition to spending money on collaborative efforts. Exxon Mobil, for example, spent approximately $12 million of company resources on individual lobbying efforts last year, in addition to being a member of an undisclosed number of trade associations, in addition to hiring external consultants on their communications and media strategy. The clean tech industry can spend capital strategically on both individual and collaborative efforts that include government relations and communications. Our industry associations and trade groups simply cannot do it on their own. Individual companies and investors that stand to benefit both traditionally engage with Washington and interact with legislators in other established industries. Industry associations and trade groups may be part of that interaction, but parallel communication strategies on an individual level and on a more targeted, collaborative level is also important. The clean tech industry can make a splash, but the goal is to stay in the water. Established industries do not have the market cornered on good ideas or good policy.

Question: **Did Venture Capitalists pull away from lobbying for clean tech, which they seemed to do quite a bit around the American Recovery and Reinvestment Act (ARRA)?**

Answer: While many VC firms encouraged companies to pursue ARRA opportunities, it is important to recognize that the VC industry largely did not lobby to create the programs which ultimately received ARRA funding. ARRA was adopted into legislation by Congress less than one month after the Obama Administration took office. Much of the stimulus funding, such as the $2 billion awarded to innovative

battery technologies, was allocated to Department of Energy programs as a result of a White Paper developed by officials in the previous administration. Additionally, members of Congress worked to obtain mandatory funding for the energy programs currently available at USDA in 2008, and the creation and expansion of the ATVM loan guarantee program to include three-wheeled vehicles was done in prior to the stimulus and, in many cases, by Republican legislators and officials. The former DOE Administration was originally responsible for developing the initial documents for the Clean Energy Deployment Administration, as well as other programs that received significant support out of the DOE's Office of Energy Efficiency & Renewable Energy Office.

Question: **How can the clean tech industry be visible in Washington and support "our" clean technology Agenda?**

Answer: **(1)** Organizational Efforts: Join your technology-specific industry association as well as some of the broader industry groups. Membership fees are typically nominal and should easily be accommodated throughout a company's growth. Active participation enhances the value a company gets from these associations, and can be manifested in steering programmatic or advocacy priorities.

(2) Individual Efforts: Once a company reaches its first or second liquidity event, or once a company is ready to pursue the demonstration phase of development, resources should be dedicated to a Washington strategy for at least six consecutive months. It is critical for individual companies to deploy government relations strategies in its early stages to position for later rounds of financing and support. However, for this to be an investment rather than an expense, resources should be spent intelligently and strategically, otherwise, this can prove to be more wasteful than beneficial.

(3) Collaborative Efforts: Once a company has successfully obtained private financing and has gained traction in the industry, they are typically ready to benefit from many of the USDA and DOE programs currently at risk in the near future (i.e., within the next year or two). Therefore, it is important that those companies collaborate with other similarly situated companies to ensure these programs remain intact or new mechanisms for support are created in their place. Furthermore, in cases where a company has already spent resources pursuing the programs at risk of being de-funded, it is important that the company collaborates with other similarly situated companies to ensure the program's funding remains.

Question: **Is it better to start the conversation with local representatives or state Senators?**

Answer: Building relationships at all levels (local, state, and federal) is important, but it is also necessary to consider the political makeup of the group. Using California as an example, the majority of federal representation is on the Democratic side. This matters when evaluating potential effectiveness on Capitol Hill, and can determine whether it is necessary to go beyond the representation in your state. Recently,

Washington has become particularly beltway focused due to the dynamics of who is in a leadership role in each of the House and Senate. As a result, policy in Washington is really coming from within the beltway, driven by the industries in these geographies and their representation in Washington. Talking to state representatives is valuable, but there is often a limit to that kind of effectiveness in advocacy work, so work needs to be on the state and federal level.

Question: **Are United States Department of Agriculture (USDA) and Department of Energy (DOE) loan guarantee programs both equally at risk, or is it just one or the other?**

Answer: The intricacies of these programs are not well understood, both inside and outside of Washington. The DOE Title XVII program (which includes both 1703 and 1705) is the one primarily at risk. After 1705 funds appropriated through the American Recovery and Reinvestment Act (ARRA) expire in September, the 1703 program has limited authority and appropriations to continue. The fiscal year 2011 Continuing Resolution (CR) provided $160 million to cover credit subsidy costs for 1703 loan guarantees, and despite the President's request for a $200 million appropriation in the fiscal year 2012 budget, only $160 million remains in the House budget, with the Senate still to weigh in and the final budget yet to be determined. The DOE Title 17 program is not likely to be funded in its current form, in part because of negative press endured over the last twelve months. The idea of privatizing or rolling the Title 17 program into a Clean Energy Development Administration (CEDA) or "Green Bank" has been socialized in Washington, but without a roadmap that lawmakers can support, it is unlikely to happen.

The DOE Advanced Technology Vehicle Manufacturing (ATVM) Loan Guarantee Program has remaining authority as well as appropriations to cover credit subsidy costs, and has not suffered the same criticisms as Title 17. However, its funds have been targeted by recent House budget markups, where $1 billion may be transferred as an offset to a Department of Homeland Security spending bill. ATVM was created in a Republican administration to encourage the large automakers to improve vehicle fuel economy, but it quickly became a support structure mechanism to help them weather the recession. Today, the usefulness of ATVM to the large auto industry has largely run its course. Without a group in Washington communicating the need to preserve ATVM funds for advanced vehicles, or at least to preserve these funds for other clean tech programs, ATVM will be a target for offsetting non-energy program spending. This is an opportunity for the clean tech industry to work together on a targeted communications strategy that does not require new appropriations, but rather stops the poaching of funds which are important to our industry. The functional challenge within ATVM is simply that it has a narrowly defined rule. While there is precedent for adjusting the rule (a Republican Congressman was responsible for doing so previously), companies would need to work together to expand the program's flexibility. For instance, the rule could be modified to include fleet vehicles, which are currently prohibited due to weight restrictions.

Lastly, the USDA Biorefinery Assistance Guaranteed Loan Program (the 9003 Program) is also one that is considered to be "working," and has assisted several biofuels companies build projects that may not have otherwise been built in a timely manner. The last solicitation (or opportunity to submit an application) closed in May[2]. All remaining funds are expected to be committed this year, either to projects which have been announced or to projects that submitted applications in the last deadline and are in the pipeline for review. Based on information from USDA officials, the program is reportedly oversubscribed by about a factor of two, so not all applications that were submitted will be funded. In order to obtain additional funding in the 2012 budget and beyond, strategic and targeted efforts will be required, as well as collaboration among companies and trade groups. Unless Congress appropriates new funds into the program, there will not be another window to submit applications. Appropriations are determined by the negotiations for the fiscal year 2012 budget as well as the Farm Bill, both of which are beginning now. Because of the role biofuels play in petroleum displacement, the 9003 Program is one that should have traction with lawmakers on both sides of the aisle. Additionally, individuals are already working to expand this program to support the development of bio-based product and chemical facilities. Companies positioned to benefit from the expansion of this program and those who can benefit from the 9003 program as it stands now, should be working collaboratively if they want to achieve expansion of the program and encourage supplemental appropriations.

Question: **Are the traditional energy sectors, oil and gas, lobbying against the clean tech sector?**

Answer: Yes. However, the strength of competing lobbies is not automatically going to overcome the clean tech industry. For example, what happened with California's Proposition 23 is a great example of how the sector successfully came together when the oil and gas industry was spending significant resources against clean tech interests.

Question: **Did the clean tech industry underestimate how negative the new House would be for the industry?**

Answer: No, but the clean tech industry perhaps did not realize that most of the people who came into the House were new, and had very little or no policy foundation on energy. Immediately after November, the traditional energy lobby was actively communicating with the new House, while by comparison the clean tech side was perceived as doing very little. Republicans do not necessarily have a blanket opinion, negative or positive, on clean tech. Rather, because few people are talking to them at great length, the assumption is that the programs in place (or need for new programs) is not of great consequence to this industry.

[2] USDA subsequently extended the last 9003 solicitation deadline, and applications are now due on July 6, 2011.

Question: **What is DOE, or anybody else who is fairly well informed on the different clean technologies, doing about educating Congress?**

Answer: Executive agencies have been educating Congress to the best of their ability; however, it is important to remember that it is not the primary responsibility of agency officials to educate Congress. Agency officials are tasked with designing and executing the programs for which they receive funding from Congress. Agency officials may educate lawmakers through Congressional hearings and meetings upon request, but that is not how they are expected to spend their time. It is therefore extremely important that the efforts of DOE officials and others are supplemented by the private sector.

Question: **What are the status and the future of the 1603 Cash Grant Program?**

Answer: Continuation of the grant is unlikely. It was very difficult to get it extended last year, but was in part achieved due to collaborative efforts by the industry. This year, it would likely require substantially greater efforts (collaborative and individual), as well as a viable offset strategy, making it even more difficult than last year.

Question: **What's the two minute elevator speech to give to a Board or CEO to convince them of the value of the investment in Washington-facing efforts?**

Answer: The clean tech sector is under attack because of the current political climate in Washington. Every federal budget line item is under the microscope right now due to the budget crisis. Clean tech is currently suffering more than other industries of similar size and experience with Washington-facing interactions. Re-evaluating the current efforts is necessary. There are clear indications that the message and the messengers for the clean tech industry aren't getting through to key Washington lawmakers. To get through to Washington requires taking a different tact, including using multiple types of messengers (trade associations, internal executives, and possibly lobbyists) armed with a cohesive strategy for delivering messages in multiple forms. We can't achieve success as a company and an industry without budgeting funds for these efforts. We don't have to match that of established industries, but we do need to spend our resources intelligently, engaging with the right people to effectively highlight compelling data points that resonate with Washington. This is essential for eliminating the attacks on the programs we rely on, and for creating new programs. Legislators from both sides of the aisle are willing to support the clean tech industry, but we are not effectively communicating with legislators and only minimally engaging with Washington. Even a modest investment in addressing Washington-facing matters can eliminate future hurdles for our company, while simultaneously benefitting the broader clean tech sector.

Question: **How effective is the jobs argument versus the ability for clean tech to attract capital investment?**

Answer: The jobs argument is important, but the fact that this is a long-term investment with capacity to be an integral component of our economy is key, since activities involve building out a new manufacturing and infrastructure base in the country.

In terms of private capital, discussions with legislators revolve around the realities they face in the kinds of policies they push. Democrats have emphasized providing more support for developing technologies. Republicans support the idea that government should support a developing business -- to a point. It is expected that the private sector will take hold and bring technology to market. A lot of equity dollars spent in clean tech are being pushed overseas to China, India and other places because there are later-stage investment dollars available. One effective means of getting all legislators to understand the importance of the clean tech programs on the chopping block is by conveying the need for policies that stem the flow of U.S. equity dollars leaving our shores.

Question: Would it be effective to utilize our customer base for federal advocacy purposes?

Answer: Yes, if you can get everyone signed on to a simple, common message that can be very effective. Customer advocates on the ground and in the trenches in any sector are tremendous messengers for the sector's importance. This is especially true for clean tech. Involving customers can also help to expand your geographic reach beyond your home state delegation, but the messaging and communications strategy must be carefully developed and implemented in order to be effective.

Question: How effective has the energy security argument been? Is there much traction with this tactic? What the themes really resonate with the Republican side of the aisle? What can the clean tech industry do differently in our approach?

Answer: The national security/energy security argument has now been used by a number of industries. This argument, however, does not resonate equally across the entire clean tech sector. From a domestic electricity generation standpoint, using renewable power doesn't necessarily represent an energy security solution. On the other hand, smart grid and cyber security technologies can still play the energy security card. Other sectors such as biofuels, natural gas vehicles, and electric or hybrid vehicles may consider using a more specific argument around petroleum displacement. Even with a bit of pushback from the oil industry, both parties recognize the importance of petroleum displacement in achieving energy security. No matter the theme or argument, the most important aspect is that it is used in the right context for the audience.

In terms of what the industry may do differently in their approach, one change could be the amount of time they invest in building these relationships. Even with powerful talking points and messaging, it is not realistic to think that a Congressman's attention to or opinion on clean tech-related issues will change overnight. Much like the long term horizon for creating an industry, the dialogue with Washington is also a long-term investment.

Question: **What would the list of key Capitol Hill contacts look like? What are the most important legislative initiatives that can help forge a new team approach with the participants on the call?**

Answer: First and foremost, when speaking with legislators it's important to make your story as geographically relevant as possible. Accordingly, when developing a target list it should always be built using that logic. This would include anyone whose district your company or industry occupies. Examples of the jobs that your companies are creating and the dollars that your technology/industry will save various Congressional districts/states are powerful. Lawmakers are most responsive to companies/industries that affect their electorate. So, it is important to make your story relevant and local.

As far as other contacts on Capitol Hill, the best way to develop a target list is by examining which committees and sub-committees within the House and Senate side have jurisdiction over the programs your company or sector cares about. Beyond targeting the members of your delegation on those committees and sub-committees, it is helpful to speak with others with jurisdiction over your issue. Through these conversations and so that your issue maintains visibility in Washington, it is helpful obtain a "champion" for the issue you seek to resolve, the project you seek to develop, or the legislative opportunity you wish to create. Unfortunately, there is no easy way of determining who will play this role. Instead, it need be done on a case-by-case basis.

In terms of legislative priorities, some clean tech sectors are going to have more traction on Capitol Hill than others in this political climate. This is typically based on how broadly a sector penetrates what the members of Congress are focused on. For example, the issue of high fuel prices is not geography-specific. Those companies in biofuels and alternative vehicles have a ripe opportunity to leverage widespread education and potentially support in Congress, regardless of which state(s) house the manufacturing facilities. Or, traction for a sector can also be a function of leadership within various committees and the kinds of technologies/companies in their purview. As of this writing, we believe there is opportunity for the clean tech sector in the areas outlined below. Clean tech companies positioned to benefit from these programs should work collaboratively on achieving targeted objectives. This will enable companies to obtain effective representation that supplements the work of the associations in an affordable manner.

1. <u>2012 Farm Bill</u>: Title 9 of the 2008 Farm Bill provided substantial mandatory funding for the clean tech sector. This funding was successfully allocated to help many clean tech companies and projects, but limited funding remains. Moreover, remaining funds in programs like the Rural Energy for America Program ("REAP") and the Biomass Crop Assistance Program ("BCAP") are being targeted for severe cuts, and possibly elimination. Beyond funding, it is important to educate lawmakers on the recent progress in the 9003 Biorefinery Assistance Loan Guarantee Program, the role it plays in financing projects that cannot otherwise obtain financing from the

private markets, and the potential for expanding the program to other bio-based applications (where some efforts to do so are already under way).

2. Investment Tax Credit and Other Renewable Energy Tax Credits: The Investment Tax Credit (ITC) will no longer be available for large-scale wind, biopower, waste-to-energy, and projects in other industry sectors that are put into operation after January 2014. The ITC is an example of an expiring tax benefit assisting our sector, but it will not be extended for the above-referenced technologies if companies don't work collaboratively as well as individually. This is a program that has been well-addressed by industry associations but it is important to remember that this political climate differs from that of prior years when ITC extensions were achieved, which is another reason why companies interested in ITC extension efforts should consider collaborative as well as individual approaches.

3. Defense Production Act: The Defense Production Act is an example of a vehicle that could be used to support commercialization of promising technologies in the fuels and innovative energy technology sector which critical for national defense. As discussed above, several technologies in the industry make a strong contribution to national security. Although this is an existing vehicle, its use has not been widespread. Thus, enabling the use of this Act to help commercialize technology critical to defense will take a coordinated approach on individual as well as collaborative levels.

4. Advanced Technology Vehicle Manufacturing Loan Guarantee Program: This program has successfully been dispersing loan guarantees in a timely and cost-effective manner for applicants. Promising applications are still proceeding through the program, but because the governing regulation is so narrowly drawn, what is deemed a significant amount of funding, especially in times of tough budget cuts, remains in the program. As a result, other industries are attempting to utilize this funding as a budget offset for their objectives. Stakeholders include both the applicants which have expended resources in pursuing the program to date as well as those potential applicants which have an interest in expanding the regulation to accommodate fleet vehicles. These two stakeholder groups have a responsibility to work together to educate lawmakers on the economic benefits that can be derived from keeping the program in place, as well as from a modest rule expansion to accommodate fleet vehicles.

5. Creating New Innovative Energy Technology Financing Programs and Policies: DOE's Title XVII Loan Guarantee Program has most recently filled the gap for financing high-risk, innovative technologies. This is a gap that is likely to re-appear, particularly since the program is not likely to receive substantial new funds to pay for credit subsidy costs. Without additional funds for Title XVII or another policy/program, companies which have already obtained significant U.S. equity investments and stimulus dollars may be forced to seek support overseas. There are several proposals for how to bridge the financing gap for innovative technologies,

including CEDA, privatization of the loan program, and other more targeted policies which specifically address technology risk, which could be of interest to lawmakers on Capitol Hill. However, the next generation of policies will not materialize without industry driving them in collaboration with Washington. The clean tech sector and those who stand to benefit from programs such as the Title XVII DOE Loan Guarantee Program will be the primary stakeholders for driving the creation of new policy.

For more information on effective Washington representation suited to the new political climate or for details on how to participate in any of the above-referenced targeted efforts, please contact Chris Groobey, Taite McDonald (tmcdonald@wsgr.com) or Sara Hochman (shochman@wsgr.com).