
March 26, 2009

Joe Genereux  Ross D’Emanuele
Robert Hensley  Tim Goodman
Jocelyn Knoll  Kim Severson
Tom Martin  Walter Mondale

IRS CIRCULAR 230 NOTICE: Any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.
Energy – Robert Hensley
Main Funding Areas

- Electrical Grid Projects - $11B:
  - $4.5B for smart grid technologies
  - $3.25B for Bonneville P.A. and $3.25B for Western Area P.A.

- Energy Efficiency and Renewable Energy - $22.8B:
  - $6B for the Renewable Energy and Electrical Power Transmission Loan Guarantee Program
  - $16.8B to the DOE for its energy efficiency programs: ½ to state government; ½ private sector
  - Advanced Batteries and Systems: $2B in grants
• **Three Year Extension of PTC:** Wind production tax credit extended to December 31, 2012, geothermal, biomass, hydropower, landfill gas, waste to energy and marine facilities until 2013.

• **Advanced Energy Investment Credit:** New 30% investment tax credit for the manufacture of “advanced energy property” including renewable energy, energy storage, energy conservation, carbon capture and sequestration.

• **New ITC:** $2.3B in credits may be allocated. In lieu of PTC, certain qualified property may qualify for 30% investment tax credit that previously only applied to solar.

• **Grants in Lieu of Credits:** Allows project developers to apply for grant in lieu of ITC equal to 30% of the cost of the project started in 2009 or 2010.

• **Clean Energy Renewable Bonds:** $2.4B for loans and grants to implement Green Community Programs.

• **Clean Energy Renewable Bonds:** $1.6B of new clean energy renewable bonds to finance wind, biomass, geothermal, hydropower, landfill gas, marine renewable, and trash combustion facilities.

• **Renewable Energy Loan Guarantee Program:** $6B in temporary loan guarantees for renewable power generation and transmission projects that begin construction by September 30, 2011.
Infrastructure – Jocelyn Knoll
• “Infrastructure is the skeleton on which the economy hangs”

• What is the definition of infrastructure in the Economic Recovery Act?

• Under the Act, infrastructure includes what we traditionally think of as infrastructure, i.e., bridges, roads, highways, water treatment plants, and light rail, but it also includes energy grids and broadband
The US needs both a stimulus package and new infrastructure, but the Act will not solve our infrastructure problems.

The stimulus package includes a smorgasbord of infrastructure projects valued at approximately $81 B. Estimates to re-build and improve our infrastructure exceed $1T.

The investment under the Act is only a down payment on re-building and improving our infrastructure.
Public Private Partnerships (P3): a visionary infrastructure solution?

Public Private Partnerships should not be confused with the new bank rescue plan, which is called the “Public Private Investment Program (PPIP)”

Unlike the PPIP, P3s use private investment to build public infrastructure and have proven to be a successful delivery method in Canada and Europe

The time is ripe to build the P3 model in the US and specifically in Minnesota
Executive Compensation – Tom Martin
H.R. 1586

“The TARP bill, however ill-thought out, was intended to slow the bleeding of our economy. Instead, that money is being used to line the pockets of the very crooks that drew the first blood.”

“AIG—it has become shorthand for ‘Arrogant, Irresponsible Greed.’ The big difference between the AIG insurance bootleggers and Ponzi felon Bernie Madoff is Madoff hasn’t asked for a bailout yet, although taxpayers are providing him public housing in prison.”

“It is . . . a stimulus bill, for it stimulated the greed of the bonus babies at AIG because it protected and approved taxpayer-funded bonuses to that bailed-out company.”
Section 111(b): Treasury to adopt “appropriate standards for executive compensation and corporation governance” for institutions from which the Treasury has made “direct purchases” of troubled assets, including:

- Limits on incentive compensation to “senior executive officers” to ensure no incentive “to take unnecessary and excessive risks that threaten the value of the financial institution”;

- Recovery (“clawback”) of incentive compensation paid to SEOs based on information that was materially inaccurate, and

- A prohibition on making any “golden parachute payments”

Section 302: Adds Section 162(m)(5) to the IRC:

- No deduction for compensation exceeding $500,000 paid in any year to the CEO, CFO or next three highest paid officers, and

- Eliminates exclusions contained in Sections 162(m)(4)(B), (C) and (D), including those for commission-based compensation and “performance-based compensation”
Section 111(b) applies to any entity that participates in CPP and to any entity that is part of the “controlled group”

Clarifies that:

- Compensation Committee must review SEO incentive arrangements with senior risk officers annually and certify in the institution’s annual report that it has made reasonable efforts to ensure such arrangements do not encourage SEOS to take unnecessary and excessive risks.

- Incentive payments to any SEO subject to clawback if based on any materially inaccurate financial information or materially inaccurate performance metric criteria.

- Golden Parachute Payments defined in same manner as in 280G, except applies to any payment (other than pursuant to a tax qualified plan) on account of severance that is involuntary or that is the result of bankruptcy, insolvency or receivership.

- Section 162(m)(5) applies on a pro rated basis for partial years.

- Rules related to acquisitions.
For institutions needing “exceptional assistance” (AIG, BofA, Citigroup)

- Compensation cap to SEOs at $500,000 per year, except equity arrangements that vest post-repayment
- SEO compensation must be submitted to an annual non-binding shareholder vote (“say-on-pay”)
- Claw-back provisions apply to SEOs, and next 20 most senior executives if they knowingly engage in deceptive practices
- Golden Parachute prohibition expanded to include top ten officers and prohibits severance exceeding one year to next 25 executives
- Must adopt policies on luxury expenditures
For new participants in “generally available capital access programs” (such as CPP), but not those already participating in CPP:

- **Cap on SEO compensation** at $500,000 annually, unless fully disclosed to shareholders and subject to a say-on-pay vote

- **Expanded claw-back provisions**

- **Golden Parachute provisions extended** to limit severance pay to one times the annual compensation of executives; and

- **The requirement for policies on luxury expenditures** would be applied to all institutions
ARRA Title VII
(February 17, 2008)

Section 111 of EESA restated:

**Applies, retroactively, to any institution that has received TARP assistance** for as long as any obligation arising from financial assistance is outstanding (but not warrants)

Treasury to adopt executive compensation and governance standards that require:

- Review of incentive compensation to SEOs to avoid excessive risk taking (virtually identical to those initially contained in EESA)
- Extension of the claw-back provisions to not only SEOs, but to the next 20 most highly-compensated employees
- Prohibition on any severance payment whatsoever to any SEOs or any of the five most highly compensated employees (except for services performed and benefits accrued)
Treasury to adopt standards (continued):

- Prohibit payment or accrual of any incentive compensation (except restricted stock valued at <1/3 comp and vests only after TARP has been repaid)

Applies to:

- The most highly compensated employee for institutions that receive less than $25M in TARP funds
- The five most highly paid employees for institutions receiving $25M to $250M of TARP funds
- The SEOs and ten next most highly compensated employees for institutions receiving $250M to $500M of TARP funds
- The SEOs and twenty next most highly compensated employees for institutions receiving $500M or more in TARP funds

- Prohibit compensation plans that encourage manipulation of earnings
- CEO and CFO Certification of compliance in annual report filed with SEC (or to Treasury for private institutions)
• Compensation Committee to review compensation plans annually

• Policies on luxury expenditures

• An annual, nonbinding shareholder vote on compensation (say on pay)

• Treasury review of compensation paid to SEOs and the next 20 most highly paid employees prior to ARRA

• Can repay TARP funds regardless of whether from Qualified Equity Financing
Christopher Dodd Letter on 2/20/09 to SEC: Say on Pay Effective on 2/17/09

SEC Compliance Disclosure Interpretation (2/26/09): Confirms:

- Say on pay must be in current years’ proxy
- Say on pay requires filing of preliminary proxy statement
- Say on pay applies regardless of shareholder request
Health Care – Ross D’Emanuele
ARRA Title XIII:

- Subtitle A: Office of the National Coordinator
- Subtitle B: National Institute of Standards & Technology
- Subtitle C: Grants & Loan Funding
- Subtitle D: Privacy & Security
Privacy & Security

- Business Associates Now Directly Regulated Under HIPAA Privacy & Security Rules
- New Breach Notification Rules
- Annual HHS Guidance on Technologies to Comply With Security Rule
- Out-of-Pocket Payment Services
- Accounting for Disclosures
- Minimum Necessary
Dramatically Increased Penalties
Audit Power
State AG Enforcement
Payments to Affected Individuals
Individual Liability
Now we know why we should care about HIPAA privacy
Employee Benefits – Tim Goodman
COBRA and Group Health Plan Subsidy

• In general, employees involuntarily terminated between September 1, 2008 and December 31, 2009 (referred to as AEIs) and covered family members are eligible for a 65% subsidy
  ▪ Affects most employers (including tax-exempt employers and most governmental employers)
  ▪ Applies to most health plans (including dental and vision)
  ▪ Does not apply to non-ERISA HSAs and health FSAs

• Employer must provide notice
  ▪ General notice explaining availability of subsidy and providing
    – Confusion at DOL over to whom the notice is to be provided
    – Provide to all qualified beneficiaries who have not yet received notice
  ▪ Abbreviated general notice
    – Provide to qualified beneficiaries who elected COBRA and still on COBRA
  ▪ Extended election notice explaining second chance to elect COBRA
    – Provide to AEIs involuntarily terminated from September 1, 2009 through February 16, 2009 (to be provided by April 18, 2009)
**COBRA and Group Health Plan Subsidy**

- **Subsidy amount**
  - Subsidy is 65% of employee portion of premium
    - If employer subsidizes COBRA, the 65% applies to employee portion
    - If employer subsidizes COBRA during severance, employer may wish to discontinue subsidy

- **Reimbursement for subsidy**
  - Employer is reimbursed by reducing amount of payroll taxes remitted to federal government

- **Coverage Period**
  - Up to nine months
  - Ends earlier if AEI becomes eligible for an employer’s group health plan, Medicare, or ceases paying employee portion of premium

- **Employer must provide notice**
  - General notice explaining availability of subsidy
  - Extended election notice
    - Allows AEIs another 60-day period to request COBRA coverage
    - Available if AEI did not elect COBRA or elected and dropped COBRA
HIPAA Privacy and Security Expansion

• Expands scope of HIPAA privacy and security to cover business associates
  ▪ Business associate agreements will need to be revised
  ▪ Effective date: February 17, 2010

• Disclosure requirements
  ▪ Applies when unsecured protected health information (PHI) is “accessed, acquired, or disclosed” by or to unauthorized third parties
  ▪ Need to inform individuals and HHS
  ▪ May be required to be publish in major news media
  ▪ Regulations within 180 days; provisions apply 30 days later

• Significant penalties
  ▪ Penalties ranging from $100 to $50,000 per violation depending on a number of factors including there was willful neglect
  ▪ State attorney generals given enforcement power
  ▪ Higher risk because individuals now can share in the penalties
Business Tax – Kim Severson
Elective Deferral of Cancellation of Debt ("COD") Income

- Restructuring of debt obligations can create taxable COD income
- Act permits eligible taxpayers to defer COD income arising from debt “reacquisitions” in 2009 and 2010
  - Deferred COD income includible ratably over 5-year period beginning generally in 2014
  - Eligible taxpayers are C corporations and any other business entity or individual that has issued a debt instrument for business purposes
  - Applies to debt exchange or modification, contribution of debt to capital, exchange of debt for stock or partnership interests, forgiveness of debt
• **Net Operating Loss Limitations (Code Section 382)**
  - **Financial Institutions**
    - Act reverses September 2008 Treasury Notice that exempted target financial institutions from limitations on post-acquisition use of net operating loss carryovers and built-in losses
  - **Acquisitions of Debt or Equity Positions by Treasury**
    - Section 382 NOL limitations don’t apply to ownership changes that occur as a result of restructuring plan required under a loan agreement or commitment for a line of credit entered into with Treasury Department under Emergency Economic Stabilization Act of 2008
  - **Small Business NOL Carrybacks**
    - Small businesses permitted to carry 2008 net operating losses back three, four or five years

• S Corporation Built-in Gain Period Temporarily Shortened to 7 Years
  ▪ Under prior law, a corporation that elects S status is taxable at corporate level on built-in gain recognized within 10-year period after election
  ▪ Act temporarily shortens the BIG period from 10 years to 7 years
    ▪ BIG recognition period ends January 1, 2009 for corporations that made their S elections effective for 2000, 2001 or 2002 and January 1, 2010 for corporations that made their S elections effective for 2003

• Qualified Small Business Stock
  ▪ Increases to 75% (from 50%) the exclusion of gain from the sale of certain small business stock acquired and held for more than 5 years
  ▪ Applies to stock acquired after February 17, 2009 and before January 1, 2011

• Bonus Depreciation and Expensing Provisions
• Estimated Tax Payments
  ▪ Small Businesses: Decreases required estimated tax payments for individuals whose income comes primarily from a small business in 2009 to 90% of tax on 2008 returns
  ▪ Large Corporations: Increase in estimated tax payments to 120.5% in July, August and September 2013

• 3% Withholding Tax on Government Contractors
  Delayed One Year to 2012

• Energy Tax Credits for Individuals and Businesses
The Process – Walter Mondale
The Nomination Process

1. Submits Nomination

2. Approves Nominee

3. Confirms Nomination

4. Appoints Nominee by Signing Commission

Example

Gov. Kathleen Sebelius (Secretary, HHS)

- Leaked: February 18, 2009
- Official Intent to Nominate Announced: March 2, 2009
- Submit Nomination to Senate Finance Committee: March 17, 2009
- Hearing Not Yet Scheduled
To achieve such crucial goals, having high-level Senate-confirmed appointees in place is necessary…
α=Crucial to devising and implementing financial stability initiatives
T=Crucial to overhauling tax system
Create a 10-year, $634B reserve fund to expand health insurance, improve the quality of care and modernize the U.S. health care system

- Vacant Senate-Confirmable Positions:
  - Secretary
  - Deputy Secretary
  - Assistant Secretary for Legislation
  - Assistant Secretary for Public Affairs
  - Assistant Secretary for Health
  - Assistant Secretary for Planning and Evaluation

Allow Americans to buy prescription drugs from other countries

- Vacant Senate-Confirmable Positions:
  - Commissioner, FDA
Health & Human Services

SECRETARY
(Nominated: Kathleen Sebelius)

Deputy Secretary
(Nominated: William Corr)

Asst. Sec. for Planning and Evaluation
* 

Asst. Sec. for Health
R ×

Asst. Sec. for Public Affairs
R ×

Asst. Sec. for Legislation
R ×

Commissioner, FDA
(Nominated: Margaret Hamburg)
R ×

Administrator, Centers for Medicare & Medicaid Services
* 

* = Crucial to creating health care fund

R × = Crucial to legalizing the purchase of prescription drugs from other countries
Department of Energy

Implement cap-and-trade program
Create greenhouse gas emissions inventory
Increase R&D spending on renewable energy

- Vacant Senate-Confirmable Positions:
  - Deputy Secretary
  - Under Secretary
  - Under Secretary for Science
  - Assistant Secretary for Congressional and Intergovernmental Affairs
  - Assistant Secretary for Policy and International Affairs
  - Assistant Secretary for Energy Efficiency and Renewable Energy
  - Deputy Administrator, EPA
  - Assistant Administrator for Air and Radiation, EPA
  - Administrator, Energy Information Administration
Under Secretary for Science (Nominated: Steven Koonin)

Under Secretary (Nominee: Kristina Johnson)

Asst. Sec. for Congressional and Intergovernmental Affairs

Asst. Sec. for Energy Efficiency and Renewable Energy

Director, Office of Science

Administrator, Energy Information Administration

SECRETARY (Steven Chu)

Deputy Secretary

Confirmed

Acting

Vacant

* = Crucial to passing and implementing DoE goals
Reform agricultural and food policy

- Vacant Senate-Confirmable Positions:
  - Deputy Secretary
  - Under Secretary for Farm and Foreign Services
  - Under Secretary for Rural Development
  - Under Secretary for Research, Education and Economics
  - Assistant Secretary for Congressional Relations

Increase broadband capacity in rural communities

- Vacant Senate-Confirmable Positions:
  - Administrator, Rural Utilities Service
  - Assistant Secretary of Commerce for Communications and Information
  - Chairman, FCC
Agriculture

@ = Crucial to expanding rural broadband capacity
* = Crucial to reforming agricultural and food policies
** = Crucial to reforming agricultural and food policies and expanding rural broadband capacity

SECRETARY (Vilsack)

Deputy Secretary (Nominated: Kathleen Merrigan)

Under Secretary for Natural Resources and Environment

Under Secretary for Food, Nutrition and Consumer Services

Under Secretary for Rural Development (Nominated: Dallas Tonsager)

Under Secretary for Farm and Foreign Ag Services (Nominated: James Miller)

Under Secretary for Marketing and Regulatory Programs

Under Secretary for Research, Education and Economics

Under Secretary for Food Safety

Administrator, Rural Utilities Service (Nominated: Jonathan Adelstein)

Asst. Sec. for Congressional Relations

Confirmed

Acting

Vacant
Increase budget for 2010 Census
Increase funding for programs to encourage entrepreneurship in economically distressed areas

- Vacant Senate-Confirmable Positions
  - Secretary
  - Deputy Secretary
  - Assistant Secretary for Legislative and Intergovernmental Affairs
  - Assistant Secretary for Economic Development
  - Assistant Secretary for Communications and Information
  - Director, Census Bureau
Commerce
“Third time’s a charm!”

*=Crucial to implementing DoC goals

SECRETARY
(Nominated: Gary Locke)

Asst. Sec. for Legislative and Intergovernmental Affairs
(Nominated: April Boyd)

Deputy Secretary

Under Secretary for Economic Affairs

Under Secretary for Industry and Security

Under Secretary for International Trade

Under Secretary and Admin. NOAA
(Nominated: Jane Lubchenco)

Asst. Sec. for Economic Development

Asst. Sec. for Communications and Information

Director, Census Bureau

Confirmed
Acting
Vacant

= Crucial to implementing DoC goals
The Vetting Process

Changing Washington Through the Vetting Process: Is It Hindering the Administration’s Agenda?

- Most stringent vetting process in history limits pool of potential nominees
- Revolving Door Ban (Lobbying)
- Reveal *any* e-mails, blog posts, text messages, instant messages and diaries that may embarrass the Administration
- Provide receipts for past charitable contributions
- Some are even asked to sell off investment portfolios
The Vetting Process

Notable Names Who Have Withdrawn

Annette Nazareth – Treasury Deputy Secretary
H. Rodgin Cohen – Treasury Deputy Secretary
Lee Sachs – Under Secretary for Domestic Finance
Tom Daschle – Secretary of Health & Human Services
Gov. Bill Richardson – Secretary of Commerce
The Filibuster

U.S. Senate (by caucus): 58 Democrats, 41 Republicans, 1 Unresolved Seat

60 Senators required to invoke cloture to avoid filibuster

Senate Republicans threatened to filibuster stimulus bill
  - Forced negotiations with moderate Republicans
Budget reconciliation, unlike the rules for most substantive legislation, requires only a simple majority of 51 votes to pass.

One parliamentary option for avoiding the 60 Vote cloture rule in the Senate is the budget reconciliation process. The Bush Tax Cuts (which sunset in 2010) were passed through budget reconciliation in order to avoid the filibuster.

A few Senate Democrats and Administration officials have suggested using the budget reconciliation process to pass substantive legislation (i.e. health care reform, cap & trade and education reform).
Obstacles to Using Reconciliation
The Senate’s Byrd Rule

In place since 1985, is an attempt to curb abuses of the budget reconciliation process by the majority.

Allows the minority to object to legislation that would increase outlays of revenue or increase the deficit beyond the current fiscal budget term.

Once an objection is made, the majority has two options:

- Limit the spending outlay or effective period of the law to the budget term (why the Bush tax cuts sunset in 2010)
- Get 60 votes to pass the measure
Public Opinion

Initial Reaction to President Obama’s Proposed Budget is More Positive Than Negative (44%-26%) – But Many Still Had Not Formed An Opinion (30%) (Gallup, Feb. 27-28, 2009)

President Obama’s Proposed Budget Will

- Improve the Economy (80%-18%)
- Reduce the Deficit (68%-30%)
- Improve the Health Care System (75%-23%)
- Create or Save Millions of Jobs (82%-17%)
  (CNN/Opinion Research Corp, Feb. 24, 2009)

Economic Growth (51%) Takes Precedence Over Environment (42%) (Gallup, Mar. 5-8, 2009)
Most Believe That Republicans Who Have Opposed President Obama’s Economic Proposals Do Not Have a Plan of Their Own For Reviving The Economy (58%-31%) (Newsweek, Mar. 4-5, 2009)

63% of U.S. Voters Support Affordable Health Care for “Every Single American” (Rasmussen, Mar. 22-23, 2009)

Most Favor Increasing the Federal Government’s Influence Over the Health Care System to Attempt to Lower Costs and Provide Health Care to More Americans (72%-27%) (CNN/Opinion Research Corp, Feb. 18-19, 2009)
• Public Finance to the Rescue: Economic Recovery Act Introduces New Kinds of Bonds, Expands Existing Authority, and Increases Incentives for Investing
• Build America Bonds: An Introduction
• Baraga and Grahame: Telecommunications Group Releases Stimulus Advisory
• Economic Stimulus Alert: New Tax-Favored Financing Opportunities for Tribal Governments
• Economic Stimulus Alert: Tribal and Other Public Comment Sought on Stimulus Allocation
• Major Changes to HIPAA Security and Privacy Rules
• Stimulus Bill Imposes New Requirements on Third Party Administrators, Wellness Program Vendors, Disease Management Companies and other Business Associates
Questions?