

For: LeClairRyan, Glen Allen, Va.
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CEOS SHOULD WEIGH RISKS OF ALTERNATIVE ENERGY PLANS, ATTORNEYS CAUTION

--While exciting, corporate energy projects such as net-metering and cogeneration require careful planning, write members of LeClairRyan's Energy Industry Team.

GLEN ALLEN, Va. (1/24/12) – Thanks to new technologies and incentives, more U.S. companies now see generating their own electricity and other alternative energy projects as viable options. But as c-suite executives mull these exciting possibilities, they should be sure their checklists of potential pros and cons fully reflect the realities of today's energy markets, write two members of LeClairRyan's Energy Industry Team in the latest issue of *Executive Counsel*.

In "Weighing the Pro & Cons of Power Co-Generation," published in the magazine's Dec. 2011/Jan. 2012 issue, Roy M. Palk, a 40-year veteran of the energy business and the firm's senior energy industry advisor, and Samuel R. Brumberg, a veteran associate in LeClairRyan's Glen Allen, Va., office, provide a clear-eyed look at the types of questions c-suite executives should ask as they explore more diverse sources of energy supply.

Today, they note, companies stand to gain additional freedoms, reap new revenues and enjoy substantial cost savings by embarking on the likes of distributed generation or large cogeneration projects. Doing so, however, requires an informed and deliberate strategy, even in cases where power generation is not part and parcel of the company's core business. These issues of cost and risk are not just "bottom line" questions—likely they are lawyers' questions, too, the attorneys note.

"Ideally, the team studying and potentially executing the project should include members who can answer questions that require specific expertise—on technology, markets, legal considerations and more," write Brumberg and Palk. "All of these considerations can have a major bearing, not only on the ease or difficulty of securing financing for the project, but also on its overall risk profile."

Indeed, without proper mitigation of inherent risks, lenders may not be keen on pumping money into unknown or unproven technologies, they advise. Nor are they enthusiastic about backing firms that lack experience in operating, maintaining or repairing alternative energy equipment. "A well rounded team of experts, and proper maintenance and warranty contracts, can help make sure the project's financial modeling is informed and realistic," they explain.

Renewable energy projects also tend to come with unique risks. "Imagine a company that bought a fuel cell for \$250,000. From the perspective of the c-suite, the fuel cell is essentially a black box: It can be turned off or on, but the company cannot break it open to conduct routine repairs or maintenance," write Palk and Brumberg. "This has important implications for the contract itself. Does the fuel cell come with a warranty? Does the deal include a service contract? If the fuel cell ends up being, essentially, a big paperweight sitting outside of the building, what kind of recourse does the company have?"

Likewise, the risk assessment for renewable projects must take operational concerns into account, including the potential power-replacement costs if the unit fails, where executives should go to buy that replacement power, and regulatory constraints, they note. The team should also take a close look at the potential liability, insurance and installation and maintenance risks.

Brumberg and Palk additionally discuss risks related to the deal itself, such as the tendency to cling to ill-advised transactions for the sake of perceived branding benefits. "Ensure that any particular deal rises or falls based on its business merits, even if it does happen to mesh perfectly with a high-priority corporate strategy," they write.

Lastly, Brumberg and Palk discuss dynamics related to today's energy incentives, from the possibility that they might change or expire to state-specific allowances for the likes of "net metering"--the ability to sell power back to the grid. "Oftentimes, executives forget about the potential role of tax credits or the sale of renewable energy certificates in offsetting some of the capital expense associated with renewable projects," they note. "Depending on the local utility's tariff rate, the company could not only save on its energy costs, it might also receive credits for staying off the grid for certain periods of time and using its own supplemental power. Various renewable energy credits are sometimes available for specific types of technologies as well."

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