AMERICAN BANKRUPTCY INSTITUTE

VALCON 2021

Alternative Energy & Renewables

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2021

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Alternative Energy & Renewables

"Today, President Biden announced a new target for the United States to achieve a 50-52 percent reduction from 2005 levels in economy-wide net greenhouse gas pollution in 2030."

The White House, April 22, 2021

"Massive solar + storage project receives federal approval to be built on US public lands."

Renewable Energy World, May 5, 2021

"Wind energy could generate 3.3 million jobs within five years, industry body claims."

CNBC, April 30, 2021

"GM announced that it plans to become carbon neutral in its global products and operations by 2040 and has committed to setting science-based targets[i] to achieve carbon neutrality. "

National Public Radio, January 28, 2021

Alternative Energy & Renewables

Goal: Zero-carbon Electricity-Generation

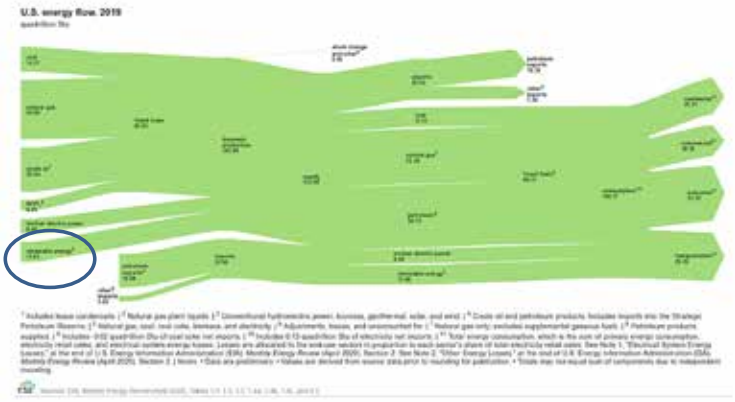
Means: Deployment of Renewable Energy Sources, Improved Transmission & Storage Distribution.

Variables: Market Dynamics, Environment and Federal Law

Results: Distress & Complexity in the Merchant Power Sector

Renewables account for approximately 12% of the US Energy flow

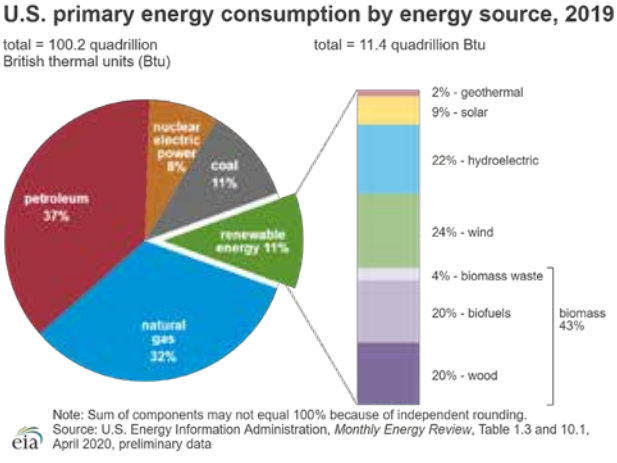
11.68%



5

Renewables increased contribution to fuel mix

- Biofuels like ethanol, wood and biomass make up 43% of the renewables. To expand their use will require additional farmlands and/or transition of existing farmlands away from food production.
- Hydroelectric, solar and wind are often dependent on weather conditions to perform at peak levels. To make them more reliable will relies on advancement in battery technology.



6

Participants in the fossil fuel industry can complain… but change is coming

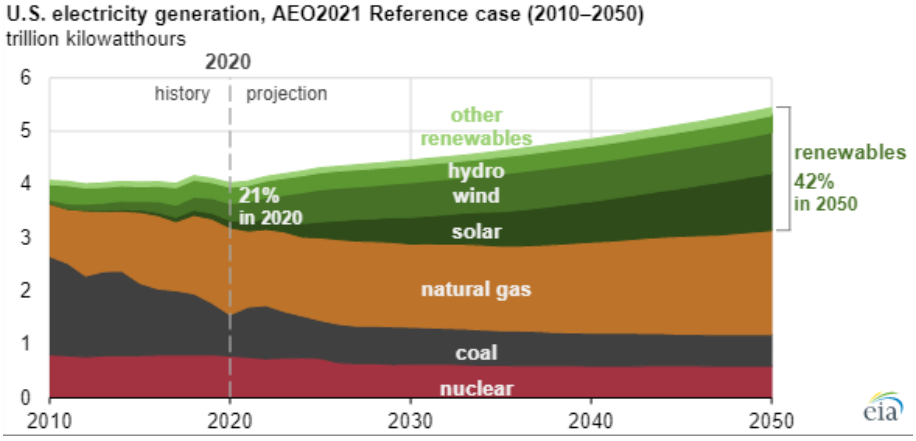
1. ESG (Environmental, Social & Governance) metrics and reporting are being considered a business imperative in the oil and gas industry
2. Larger players are already moving away from investments in new fossil fuel sources and to renewables
3. Investing in carbon capture investments to make the continued use of fossil fuels more acceptable
4. Car companies have announced a dramatic shift to electric or hybrid cars.

Total, BP, Shell, ENI, Repsol, Chevron

Exxon, Northern Endurance Partnership

7

Projected growth in Renewable Electricity Generation



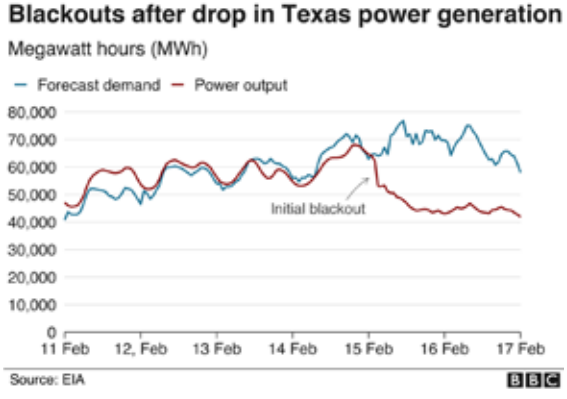
8

Reliability, Reliability, Reliability!

9

Texas Winter Storm (February 15 –19, 2021)

- In the wake of the artic freeze that took over the country the week of February 14, 2021, Texas experienced one of the coldest and longest consecutives days of below freezing temperatures.
- The extreme weather has forced about 34,000 megawatts (MW) of generation off the system or about 40% of forecasted demand.
- While cold weather increased energy demand, the storm also affected energy supply, causing severe and widespread energy market disruptions.



10

Impact of the Polar Vortex in Texas (February 2021)

70% of ERCOT customers were without power for an average of 42 hours, causing 111 deaths

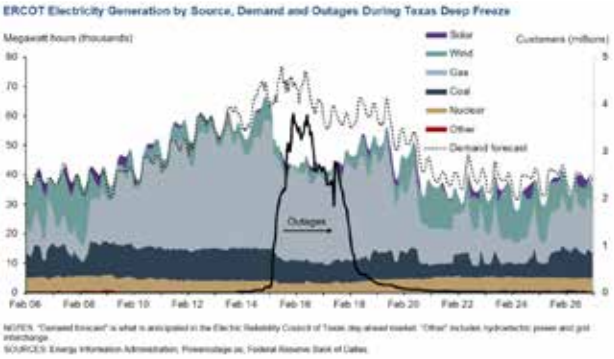
According to the Dallas Federal Reserve, the estimated economic loss for Texas is estimated to be between $80 to $130 billion

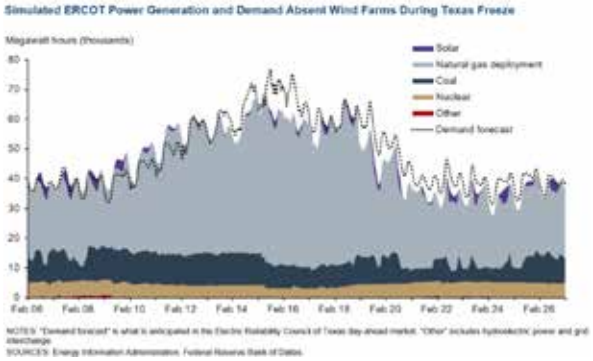
Not only were there economic losses but there was also over $50 billion of wealth transfer that occurred as a result of the storm creating winners and losers

And the bankruptcies and lawsuits begin …

11

Impact of the Polar Vortex in Texas (February 2021)

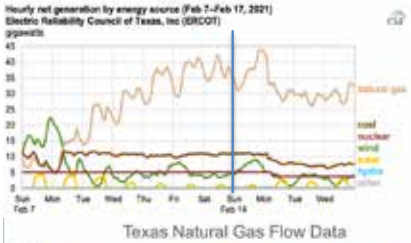


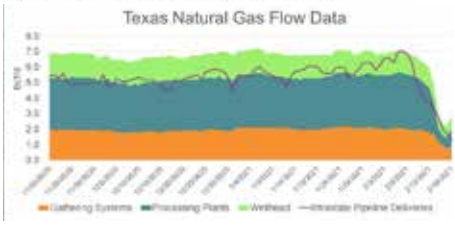


12

Texas Winter Storm (February 15 –19, 2021)

- Power generation (mainly natural gas-fired) fell sharply once ERCOT began implementing rotating outages at midnight on February 15. Output from coal-fired plants, a nuclear facility, and wind farms all fell near midnight on February 15 and experienced sustained outage.
- Additionally, natural gas production and transportation was disrupted primarily due to frozen pipes when the pipeline compressors lost power, among other operational challenges.
- Without winterization of many plants, once power plants went offline, they were not prepared to restart in the below-freezing conditions.
- To further exacerbate the issues, demand for natural gas to heat homes and businesses also spiked, contributing to shortages.
- High gas prices further disrupted generation, as operators who could not buy gas supply took their plants offline.





13

Texas Winter Storm (February 15 –19, 2021)

- ERCOT shattered all records during this storm with gas and power prices surges, as compared to prior periods and to other ISOs during this same period.
- The price of next-day on-peak power for February was 6,334.4% higher year over year, at an average of $1,800.98/MWh at ERCOT.
- At their highest, on-peak spot power prices approached $8,800/MWh on Feb. 17 at ERCOT North and ERCOT South hubs.
- In response, the state's Public Utility Commission ordered operators to cap prices at $9,000 per MWh on Wednesday February 17.
- Underlying gas prices similarly exhibited significant gains. Spot gas prices jumped 1,124.0% year over year to $20.088/MMBtu for the Texas grid operator

Average on-peak power prices ($/MWh) DAM

Region	Feb. 2021	Jan. 2021	Change prior month (%)	Feb. 2020	Change prior year (%)
NYISO	60.93	34.72	75.5	20.71	194.3
PJM	49.73	27.05	83.9	21.02	136.5
MISO	92.33	26.58	247.4	22.95	302.3
ISO-NE	92.62	44.57	95.4	25.01	230.4
CAISO	69.19	34.29	101.8	26.96	156.6
ERCOT	1,800.98	25.58	6,939.5	27.99	6,334.4
SPP	676.81	22.90	2,855.5	20.87	3,143.7
South	41.89	27.63	51.7	25.06	67.2
West	60.99	20.30	115.1	21.31	186.6
Total US	326.15	30.19	980.7	23.54	1,285.4

Data compiled March 1, 2021.
Source: S&P Global Market Intelligence

Natural gas prices by power region ($/MMBtu)

Region	Feb. 2021	Jan. 2021	Change prior month (%)	Feb. 2020	Change prior year (%)
NYISO	5.369	3.265	64.4	1.970	172.5
PJM	6.656	3.618	84.0	2.762	141.0
MISO	7.971	2.549	212.7	1.780	347.7
ISO-NE	7.701	4.004	92.4	2.219	247.1
CAISO	12.059	3.109	287.9	2.181	453.0
ERCOT	20.088	2.560	684.6	1.641	1,124.0
SPP	46.393	2.545	1,719.1	1.541	2,905.1
Total US	15.164	3.093	390.3	2.013	653.2

Data compiled March 1, 2021.
Source: S&P Global Market Intelligence

14

And the winners (and losers) are…..

Winners

- Kinder Morgan, Enterprise, ETP and other pipeline companies that were able to deliver gas during the storm
- Comstock, along with Cabot, Southwest Energy and Range, if their gas production was not shut in
- Macquarie and other energy traders

Losers

- Exelon, NRG, Vistra, Brazos Electric Co-op and any other power generator that were not able to produce power during the storm
- Windfarms that could not deliver power like Algonquin, Innergex
- Griddy, Just Energy, Liberty and other retail or wholesale electric power providers (REPs)

15

Renewable Energy Restructuring - CFIUS

- What is CFIUS?
  - CFIUS stands for Committee on Foreign Investment in the United States, established 1975
- Who are the players?
  - Interagency Committee, including heads of the Department of the Treasury, Department of Justice, Department of Commerce, Department of Homeland Security, among others
  - President granted non-reviewable authority to block foreign investments that may present national security concerns.

Renewable Energy Restructuring – CFIUS cont.

- What sort of transactions does CFIUS cover?
  - Originally directed to arrange the preparation of analysis of trends and developments in foreign investments in the US and review investments in the US which might have implications for US national interests
  - 1992 – Byrd Amendment required CFIUS to investigate proposed mergers, acquisitions, and takeovers where the acquirer is acting on behalf of a foreign government and may affect national security

Renewable Energy Restructuring – CFIUS cont.

- What sort of transactions does CFIUS cover cont.
  - 2018 – Foreign Investment Risk Review Modernization Act ("FIRRMA") codified CFIUS jurisdiction over transactions arising from bankruptcy proceedings
  - 2019 – Pilot Program: implemented two sections of FIRRMA
    - Expanding the scope of transactions subject to review by CFIUS including non-controlling investments made by foreign entities in U.S. businesses involved in critical technologies in specific industries
    - Made effective mandatory declaration provision for transactions in the scope of the pilot program.

Renewable Energy Restructuring – CFIUS cont.

- For an investment to be covered by the pilot program, it would have to give the foreign investor:
  - Access to material nonpublic technical information of the target U.S. business
  - Membership or observer rights on the board of directors or the equivalent, or right to nominate an individual to the board of directors or equivalent
  - Any involvement, other than voting of shares, in substantive decision making regarding use, development, acquisition, or release of critical technology of the U.S. business

Renewable Energy Restructuring – CFIUS cont.

- Timeline of Review Process
  - After CFIUS receives a filing it has 45 days to review and request additional information
  - If CFIUS is unable to determine if a national security concern exists during the first 45 days, it can initiate an additional 45 day investigation, which may be extended by a 15 day period in extraordinary circumstances
  - Can impose conditions on the transaction or may refer the transaction to the President who may block the transaction

Renewable Energy Restructuring – CFIUS cont.

- Ways to avoid a CFIUS related hurdle of your transaction
  - Investors/lenders should insist upon this review and monitor the company as necessary
  - If any risk review is necessary, plan a sale process that ends early enough to account for any potential review
    - Decisions should be made as to whether to affirmatively seek approval
  - Where subject to the pilot program, the Debtors should submit an application as soon as possible.
  - Make sure government is put on notice of potential sale and likely assets in bid procedures notice
  - If government reviews, provide it with thorough and complete information.
- CFIUS is becoming more active and with more foreign buyers coming into the market, this is an area that will develop over the next few years.

Renewable Energy Restructuring – Department of Energy Loans

- The Energy Policy Act of 1992 directed the Department of Energy ("DOE") to "further the commercialization of renewable energy and energy efficiency technologies."
- The Act provides for loan guarantees for entities that develop or use innovative technologies that avoid the by-production of greenhouse gases.
- The Energy Policy Act of 2005 provided additional guidance on types of energy development that could qualify for DOE loan guarantees including first-of-a-kind commercial-scale deployments of advanced fossil, advanced nuclear, renewable energy, energy efficiency and distributed energy projects in the United States.

Renewable Energy Restructuring – DOE Loans cont.

- These loan guarantees incorporate 10 C.F.R. Part 600 which provides:
  - "[i]f the recipient does not elect to retain title to real property or equipment or does not request approval to use equipment as trade-in or offset for replacement equipment, the recipient must request disposition instructions from the responsible agency." 10 C.F.R. § 600.321(f)(iv).
  - Once disposition instructions are issued, the recipient must "[s]ell the real property or equipment and pay the Federal Government for that percentage of the current fair market value of the property that is attributable to the Federal participation in the project." 10 C.F.R. § 600.321(f)(2)(ii)(B).

Renewable Energy Restructuring – DOE Loans cont.

- Recipients of such loans must obtain DOE consent prior to transferring funded property in a restructuring proceeding.
- Sale of such funded property without prior consent of the DOE may result in objections to the sale, thereby slowing the process, and/or objections to the reorganization plan if the plan provides for such disposition of property as well, potentially impeding the debtor's emergence from bankruptcy.
- Case Study: *In re Abeinsa Holding Inc., et. al.* Case No. 16-10790 (KJC).

Renewable Energy Restructuring – Other Regulatory Issues

- Power Purchase Agreements ("PPAs")
  - FERC has sought to use its authority under the Federal Power Act to order a utility not to abrogate, amend or reject in bankruptcy any of the rates, terms and conditions of its wholesale power-purchase agreements

- Some circuits have ruled that Bankruptcy Courts and the FERC have "concurrent jurisdiction" over contracts subject to FERC rates, creating uncertainty surrounding the rejection of executory contracts that fall under the FPA.

Renewable Energy Restructuring – Other Regulatory Issues cont.

- The question of whether the FERC or the Bankruptcy Court has jurisdiction over certain contracts creates potential for lengthy litigation regarding the estate's rejection of these contracts.

- This can also have implications for treatment of such contracts as part of the debtor's plan for emergence from bankruptcy. Section 1129(a)(6) provides that a bankruptcy court can only confirm a plan of reorganization that contains a change in rates if the governmental regulatory commission that will have jurisdiction over the debtor following confirmation approves such rate change

Renewable Energy Restructuring

Power Purchase Agreements and the Bankruptcy Safe Harbor: How Safe Are They?

Power Purchase and Sale Agreements:

- Powerful hedging tool
- Reduce income and rate volatility risk

Bankruptcy Impact:

- In the event of a Chapter 11 filing, a renewable energy debtor risks losing valuable tools such as automatic stay and avoiding powers, as contract counterparties may be protected by one or more "safe harbor"
  - If safe harbors apply, value attributable to PPAs can ⇩
- For non-debtor counterparties, safe harbors can protect against downside risk; pre-negotiated options remain on the table (at least for a period of time)

Renewable Energy Restructuring

Bankruptcy Safe Harbor

- Designed to protect commodities and financial markets from destabilization due to bankruptcy
- Exempts certain contracts and counterparties from key debtor protections:
  - Automatic Stay;
  - Nullification of *Ipso Facto* Clauses; and
  - Preference/Fraudulent Conveyance Actions
- Generally, applies to "**Forward Contracts**" between one or more "**Forward Contract Merchants**" and:
  - ***Prohibits*** avoidance and recovery of "settlement payments" **by or to** a Forward Contract Merchant (except intentional fraudulent transfers) (11 U.S.C. § 546(e)); and
  - ***Permits*** exercise of enforcement rights (subject to contractual entitlement and applicable law) (11 U.S.C. §§ 362(b)(6) and 556), including:
    - Termination, liquidation, acceleration or modification of contract; and
    - Setoff/netting (**But no triangular setoff, regardless of contract language)

Renewable Energy Restructuring

What Qualifies as a Forward Contract?

- "**Forward Contract**" is defined in the Bankruptcy Code as "a contract (other than a commodity contract as defined in section 761) for the purchase, sale, or transfer of a commodity, as defined in section 761(8) of this title, or any similar good, article, service, right, or interest which is presently or in the future becomes the subject of dealing in the forward contract trade … with a maturity date more than two days after the date the contract is entered into…."
- **Test**:
  (1) contract for the sale of a commodity (i.e., energy) that is not exchange traded;
  (2) that has a maturity date more than 2 days after entry into the contract;
  (3) that has a relationship to the financial markets (i.e., contracts to hedge against possible fluctuations in commodity pricing; not ordinary supply contracts)
  (4)that has fixed quantity & time elements (*cf. In re Nat'l Gas Distribs.,* 556 F.3d 247 (4th Cir. 2009) (contract without fixed quantity not a forward contract) and *In re MBS Mgmt. Servs.,* 432 B.R. 570 (Bankr. E.D. La. 2010) (contract without fixed quantity is forward contract)).

Renewable Energy Restructuring

Who Qualifies as a Forward Contract Merchant?

- "**Forward Contract Merchant**" is defined in the Bankruptcy Code as "an entity **the business of which** consists **in whole or in part** of entering into forward contracts as or with merchants"
- Split in Authority:
  - Broad Interpretation (Delaware, Arizona):
    - Any contract counterparty that enters into a forward contract in a commercial setting qualifies as a forward contract merchant for purposes of the Safe Harbor
    - Focus on the words "*in whole or in part"*
  - Narrow Interpretation (Texas, New York, Ohio, Indiana):
    - Only contract counterparties that participate in the forward contract trade in order to make a profit qualify as forward contract merchants for purposes of the Safe Harbor
    - Focus on the words "*the business of which*" and "*as or with merchants*"

Renewable Energy Restructuring

Forward Contract Merchants: Case Studies

Broad Interpretation	Narrow Interpretation
In re Borden Chemicals & Plastics, 336 B.R. 214 (Bankr. D. Del. 2006) • Focusing on "in whole or in part", Judge Walsh held that an entity that acted as a buyer and seller of natural gas through the use of forward contracts was a forward contract merchant • "Congress's addition of the phrase 'in whole or in part' had the effect that 'essentially any person that is in need of protection with respect to a forward contract in a business setting should be covered, except in the unusual instance of a forward contract between two nonmerchants who do not enter into forward contracts with merchants.'" (quoting 5 Collier on Bankruptcy ¶ 556.03[2], at 556-6). *In re Clear Peak Energy, Inc.*, 488 B.R. 647, 660-61 (Bankr. D. Ariz. 2013) • Termination of contract and exercise of setoff rights by non-debtor counterparty to renewable solar power purchase agreement did not violate the automatic stay because debtor was a "forward contract merchant" • Court focused on the plain language of the forward contract – that was entered into for hedging purposes	*In re FirstEnergy Solutions Corp.*, 596 B.R. 631, 641-44 (Bankr. N.D. Ohio 2019) • Focusing on "the business of which" and "as or with merchants", Judge Koschik held that entity that entered into energy supply contracts as an end-user of electricity, and not to generate a profit, was not "forward contract merchant" • End-users *may* qualify if they buy, sell or trade in the forward contract market of the commodity "to generate a profit" *In re Mirant Corp.*, 310 B.R. 548, 567 (Bankr. N.D. Tex. 2004) • Focusing on the terms "business" and "merchant", court held that, to qualify as a forward contract merchant, one needs to be engaged in the forward contract trade as a merchant or with merchants in order to profit • End-users do not qualify

Renewable Energy Restructuring

What is a Settlement Payment?

- "**Settlement Payment**" is defined broadly in the Bankruptcy Code as "a settlement payment on account, a final settlement payment, a net settlement payment, or any other similar payment commonly used in the forward contract trade."
- Courts have routinely held that the term is intended to apply broadly and encompasses all payments made in connection with a commodity forward contract. *See, e.g., Borden Chemicals*, 336 B.R. at 225-26; *In re Magnesium Corp. of Am.*, 460 B.R. 360, 368 (Bankr. S.D.N.Y. 2011).

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Questions or Comments?

Faculty

Patrick M. Birney is a partner at Robinson & Cole LLP (Robinson+Cole) in Hartford, Conn., and focuses his practice on complex transactional, litigation and advisory work related to the debtor/creditor relationship, including energy- and renewable-energy related restructurings, chapter 11 bankruptcy cases, workouts and project financing. He also served as the long-time vice chairman of the Wallingford Public Utilities Commission, which oversees the distribution of power to several municipalities within the State of Connecticut, owns transmission lines and is the home to two gas-powered generation facilities (totaling 327-megawatts) and a newly operational 16-megawatt solar panel field. Mr. Birney received his B.A from the University of Dayton, his M.B.A. from Loyola University of Chicago, his J.D. from the University of New Hampshire School of Law and his LL.M. in Bankruptcy from St. John's University School of Law.

Loretta R. Cross, CPA, CIRA, CDBV is a managing director in Strategy and Transactions Advisory group at Grant Thornton LLP in Houston, where she specializes in restructuring energy companies. She has more than 40 years of experience in consulting including turnaround, restructuring, strategic, operational, financial and litigation consulting. Ms. Cross has served in management roles for both operating companies and liquidation/litigation trusts. She has been a key business advisor to parties in some of the nation's largest financial and operational restructurings and has provided expert testimony on a variety of issues. Ms. Cross has been an avid supporter of women in business and has put this support to work, serving in leadership roles for the Executive Woman's Partnership, Women's Leadership Council, Texas Executive Women, International Women's Forum and the Houston Area Women's Chamber of Commerce. She is also a frequent writer and speaker. Ms. Cross received her B.B.A. in accounting from the University of Texas at Austin.

Kizzy Jarashow is counsel in Goodwin Procter LLP's Financial Restructuring practice in New York and represents debtors, creditors, sponsors, special-situations investors and other stakeholders in all aspects of complex corporate restructurings, workouts and distressed-debt investments and acquisitions. She has represented clients in a variety of industries, including energy, retail, technology, manufacturing, health care, automotive, media, hospitality and gaming, education, financial services and real estate. She has also written extensively on restructuring-related topics, including articles published by the *Norton Journal of Bankruptcy Law and Practice*, the *ABI Journal* and ABI committee newsletters, INSOL International, and the International Bar Association's Insolvency and Restructuring International section. Ms. Jarashow is actively involved in *pro bono* matters, having worked extensively in areas of voting rights, LGBTQ+ rights and public benefits. In recognition of her work, was selected as a Rising Star in Bankruptcy by *Super Lawyers* and is a member of the International Insolvency Institutes' NextGen Leadership Program and the National Conference of Bankruptcy Judges' Next Generation Program. Ms. Jarashow received her B.A. in 2004 from New York University and her J.D. *cum laude* in 2007 from Fordham University.

Ronald J. Silverman is co-head of Hogan Lovells US LLP's U.S. Business Restructuring and Insolvency practice group in New York. He represents hedge and private-equity funds, banks and financial institutions, and other sophisticated investors and commercial enterprises involved in distressed M&A, restructurings, rescue financings and insolvencies. His range of experience includes compre-

hensive knowledge of restructurings involving the renewable energy, power, mining, and oil and gas sectors. He is particularly involved in cross-border restructurings that span Latin America, Europe and Asia and has completed restructurings in dozens of countries across the globe. Mr. Silverman has led some of the most significant chapter 15 cases in connection with cross-border restructurings, and wrote the chapter 15 primer for a leading treatise. He also served as ABI's Vice President-International Affairs and served on the board of directors of INSOL International. Mr. Silverman received his B.A. with honors from Trinity College in 1988 and his J.D. from the University of Connecticut School of Law in 1991.