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Tax Issues in Financing Renewable Energy Projects

Federal Utility Partnership Working Group (FUPWG) Spring 2012

Mark Regante

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About Milbank's Renewable Energy Practice

- Global law firm with **30+ years of experience** in renewable energy
- Over **180 successful deals** closed, totaling more than 9,000 MW of renewable power developed
- Named "**Top Clean Energy Project Finance Legal Advisor to Lenders**" by *Bloomberg New Energy Finance* in 2011, 2010, 2009, 2008, 2007
- Recipient of "**Energy/Projects Award for Excellence**" in 2009 & 2007 by *Chambers USA*
- 2011 "**Global Law Firm of the Year in Project Finance**" by *Project Finance International*
- 2011 "**Project Finance Law Firm of the Year**" by *DealMakers Law Awards*
- 2010, 2009 "**Global Law Firm of the Year in Project Finance**" by *Who's Who Legal*
- 2010 "**Power Legal Advisor of the Year**" by *Infrastructure Journal*
- 2009 "**Project Finance Law Firm of the Year**" by *ACQ Finance Magazine* Law Awards USA

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Today’s Discussion Points

- Federal Incentives (Past, Present and Future)
  - PTCs
  - ITC
  - MACRS/Bonus Depreciation
  - Cash Grants
- Ownership/Financing Structures
  - Partnership Flip
  - Sale-Leaseback
  - Inverted Lease
- PPA as a Service Contract
- End-of-Term Options

THE BASICS

Three Different Markets

- “Distributed Energy”—facilities are “distributed” at or near point of consumption, e.g., “inside-the-fence facilities, box store rooftops, parking lot canopies.
- Residential—customer is homeowner--we represent sponsors and financing parties creating “program documents”.
- Utility Scale Projects (aka “centralized systems”)—power purchaser is a utility that re-sells to consumers.

Key Players

- Power Purchaser—Federal Agency
- Developer/Sponsor
- Project Company
- Tax Equity Investor
- Debt Provider/Lender
- EPC Contractor
- Equipment Supplier/BOP Contractor
- Operator
- Site Lessors/Easement Grantors
- Interconnection Provider

Key Players

- Power Purchaser
  - The entity that receives and uses the electricity generated by the facility and sometimes (particularly in solar and distributed generation projects) provides the site/building on which the facility is located
- Developer/Sponsor
  - The entity sponsoring the project (typically the entity developing the project and who contracted with Power Purchaser– though could inherit this from another entity through, e.g., an acquisition)
  - May or may not itself be a taxable entity, but often does not have a “tax appetite” i.e. the ability to use the tax benefits of owning a facility

Key Players

- Project Company
  - Special purpose entity (“SPE”) established by Developer to own the facility
    - Limits Developer’s liability in connection with the facility to the Developer’s investment in the SPE
    - Permits the facility to be financed on a “project” basis
  - Customers sometimes ask for corporate guarantees (or other credit support, such as letters of credit) to backstop the obligations of the SPE / Project Company under the PPA. Except in very specific and limited circumstances, corporate guarantees are not given – they would defeat the purpose of developing and financing the facility on a “project” basis.

Key Players

- Project Company (SPE)
  - Customers can draw comfort from (1) requirements that SPE obtain and maintain insurance to protect against insurable risks (and require contractors to have insurance), (2) PV solar systems (and, to a lesser extent, other solar and wind facilities) are, relative to fossil fuel-fired generating facilities, simpler to operate and maintain and environmentally “clean”, not presenting risks of explosions, fire, etc. and (3) Developer (and Investor) making a substantial equity investment in the facility.

Key Players

- Tax Equity Investor
  - Provides long-term financing
  - Receives tax benefits and cash flows from operations (rent payments in a lease structure)
  - Entitled to a residual interest in the assets

Key Players

- Debt Provider/Lender
  - Provides construction financing and term financing (and may also provide for working capital and/or letter of credit facilities to support the Project)
  - Receives fixed return based on fees, interests and principal
  - Receives Cash Grant proceeds in certain eligible projects to the extent that the debt facility is financed with the expectation to have such proceeds to repay a portion of the facility or a particular tranche (e.g., cash grant bridge tranche)
  - Receives a first lien on all real and personal property of the Project Company, including rights to Cash Grants, obligations of members and prospective members to make capital contributions, and a lien on the membership interests of the Project Company

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Key Players

- EPC Contractor
  - Hired by Project Company to construct the Facility, usually on a turnkey basis
  - Must be sufficiently creditworthy to backstop performance obligations and/or provide letter of credit or surety bond
  - Required to provide delay and performance liquidated damages to ensure timely construction and Facility ability to meet PPA delivery obligations
- Equipment Supplier/BOP Contractor
  - Common in wind projects to have bifurcated responsibilities between turbine supplier and balance of plant contractor

Key Players

- Operator
  - Hired by Project Company to operate and maintain Facility ideally on a fixed price basis or fee subject only to escalation
  - Should be experienced party
  - Need to insure agreement is structured with incentives to perform well and to reduce costs
- Site Lessors/Easement Grantors
  - Sometimes individuals and not sophisticated companies
  - Need to obtain mortgagee protections
  - Make sure term of lease/easement is longer than financing lease term
- Interconnection Provider
  - Utility that will delivery energy from the Facility site to the electricity grid
  - Consent and Agreements may be difficult to obtain

TAXES 101

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Federal Incentives

- Tax Benefits:
  - Credits:
    - Production Tax Credit (PTC)
    - Investment Tax Credit (ITC)
- ARRA Section 1603 Renewable Energy Grants
- Other Tax Benefits—Depreciation
  - 5 year Modified Accelerated Cost Recovery System (MACRS) depreciation deductions
  - Bonus Depreciation

PTC/ITC/Grant - Options

- Projects must choose between these available benefits
  - PTC is based on energy sold (2.2 cents/kWh for 2011)
  - ITC is 30% of cost of qualifying portion of project
  - Cash Grant is 30% of cost of qualifying portion of project
- Option depends on type of project*****
  - Wind, Geothermal, Biomass Projects, MSW (including methane gas), Hydro, Marine and Hydrokinetic: PTC, ITC or Cash Grant
  - Solar Projects: ITC or Cash Grant

Investment Tax Credits – Basic Rules

- 30% of Eligible Cost Basis
- Tax credits generated 100% on the Placed In Service date (3 month exception for sale-leasebacks)
- Allocated to partners by profit percentage
- Carry back 1 year – Carry forward 20 years
- Reduces AMT
- 5-year recapture period

Production Tax Credit – Qualified Resources

• Wind	• Closed-loop biomass	• Hydropower	• Marine energy
• Open-loop biomass	• Geothermal energy	• Municipal solid waste	• Small irrigation power

Amount of Credit

- 1.5 cents/kWh of electricity sold to unrelated persons
- Inflation adjusted (2.2 cents/kWh for 2011)
- Non-refundable, but 1-yr carry-back, 20-yr carry-forward
- Reduced, but not by more than half, if project financed with tax-exempt debt or "subsidized energy financing" (federal/state grants)
- Phased out if "reference price" of electricity from same sources exceeds prescribed levels (i.e., federal subsidy no longer necessary). Current reference price is close to 4 cents/kWh, while phase-out price is 10.74 cents/kWh.
- Reduced by 50% in the case of open-loop biomass, small irrigation power, landfill gas, trash combustion and hydropower facilities (Note ITC not reduced)
- PTCs may be used to reduce AMT during first four years of operation (as long as facility is placed in service after 10/22/2004)

Production Tax Credit – Qualifying Facilities

- Does not include Solar
- Placed in service **before 1/1/2013 for wind**, otherwise before 1/1/2014
- Located in the U.S. or, subject to special ownership rules, its possessions
- **Owned and operated by the taxpayer** (thus sale-leaseback structures not available for wind), except open-loop biomass facilities and certain closed-loop biomass facilities can be leased by the taxpayer
- PTC Qualification continues for 10 years following original placed in service date
- Limitations on sale of energy to related parties

Cash Grant in Lieu of Credits

- Under Section 1603 of the American Recovery and Reinvestment Tax Act of 2009 (“ARRA”), a cash grant can be claimed for renewable energy facilities that otherwise qualify for the ITC
- The cash grant amount is the same as the amount of allowable ITC (i.e. 30% of the basis of qualifying property)
- To be eligible, the facility must be (1) placed in service in 2009, 2010 or 2011 or construction must begin in 2009, 2010 or 2011 and (2) placed in service before credit termination date
- Like ITC, lessor can elect to allow lessee to claim the grant—based on FMV vs. lessor’s cost

Taxation of Treasury Grant

- Treasury Grant – Section 1603
  - Non-taxable for Federal purposes (tax-exempt income)
  - If pass through to lessee—50% includible in lessee's income over 5 years
- Partner gets basis in his partnership interest for the Treasury Grant
  - Tax basis allows the investor to absorb tax losses (i.e. depreciation deductions)
- Timing considerations of Investor entry into the partnership
  - Investor must be a partner in the partnership when the Treasury Grant income is recognized in order to get the tax basis

Cash Grants-Other Rules

- The Secretary has 60 days from the later of the application for such grant or PIS date to fund the grant
- All applications must be received before October 1, 2011.
- Grant **cannot** be made to
  - **Governmental bodies**, political subdivisions, agencies or instrumentalities thereof
  - Any organization described in Section 501(c) of the Code and exempt from tax under Section 501(a) of the Code
  - A clean renewable energy bond lender
  - A cooperative electric company
  - A pass-thru entity (partnership) in which one of the above holds a direct or indirect interest, other than through a “C corporation”

MACRS

- Most renewable energy property is depreciated over 5 years using the 200% declining balance method shifting to straight line, the half-year convention and a zero salvage value
  - the percentages are 20%, 32%, 19.2% 11.52%, 11.52% and 5.76%
- Basis for depreciation is reduced by half of the ITC or Grant, so basis is 85% of cost.
- New entities have “short” tax years that start in month property is first placed in service and need to reduce first year’s deductions to reflect that short first year
- Mid-Quarter Convention
  - If more than 40% of the basis of property is placed in service in the last three months of a year, treat property as placed in service in the middle of each quarter
  - May result in greater deduction in first year

MACRS (cont'd)

- Alternative Depreciation System (ADS)--generally, 12 years straight line for renewables
  - Can elect ADS
  - Property financed by tax-exempt bonds
  - **Tax-exempt use property, generally property leased to a tax-exempt person** or owned by a partnership that includes such persons and that does not have "straight-up" qualified allocations-same rules as those that disqualify property for the credit

Bonus Depreciation

- Available to taxpayer who “first” places in service
  - 3-month safe-harbor for sale-leasebacks
  - Not available for ADS property
- 100% Bonus
  - Calculated after basis reduction for ITC or cash grant
  - Available for property placed in service 9/8/2010 – 12/31/2011
  - Excludes property constructed by taxpayer or lessee in a sale leaseback structure (or a related party to either) if construction began before 2009
- 50% Bonus
  - Available for property placed in service on or before 12/31/2012

Placed in Service

- When is a facility placed in service?
  - "Ready and available for its intended use" – IRC definition
  - Public Utility signoff – Permission to Operate Letter
  - Facility completed, licenses obtained, pre-operational testing complete
  - Care, custody and control, and title have transferred

Placed in Service

- Generally, person who owns the property on date the property is placed in service entitled to ITC/Grant.
- 90 day window for sale/leaseback
  - Lessee can place in service and lessor claim ITC/Grant if sale leaseback done within 90 days of placed in service. (No such partnership rule)
- Lessor can pass through to lessee the ITC/Grant – Inverted Lease Structure – More on that later
- Used property has already been placed in service, so need new property. Can have 20% used parts. 80/20 test

Tax-Exempt Use

- ITC/Accelerated Depreciation not available if there is "tax-exempt use"
- Can apply where:
  - The owner is tax-exempt
  - The lessee is tax-exempt
  - Complex rules where there is a part owner/lessee that is tax-exempt ("qualified allocations")
- The Treasury Grant is not available where a "pass-through" owner has any tax-exempts or governmental entities, but a lease to a tax-exempt is permitted

Tax-Exempt Use

- If property is used by (i.e., leased to)
  - tax-exempt organizations (unless used in an unrelated trade or business whose income is taxable to the tax-exempt),
  - the US, any State or political subdivision, any US possession or any agency or instrumentality of the foregoing or
  - foreign persons (unless more than 50% of the income is subject to US tax either directly or under the controlled foreign corporation regime)
- Property leased to a partnership is deemed to be leased to the partners pro rata

Tax-Exempt Use

- Property owned by a partnership that has tax-exempt, governmental or foreign member is deemed owned by that member to the extent of that member’s maximum partnership interest unless the allocations to that member are straight-up and unchanging, which they will not be in a “flip” deal.
  – Taxable corporations 50% or more of whose stock (by value) is owned by tax-exempt entities or governments are generally treated as tax-exempt for this purpose (unless the tax-exempts agree to pay tax on income and gain (dividends and sale income) related to the corporations).

Limitations on credits and losses – Individuals

- Passive Loss Rules
  - Rules apply to individuals and closely-held "C corporations"
  - Generally can only use credits and losses against passive income
  - Passive income does not include active income (salary, income from self-employment) or portfolio income (interest, dividends, gains on securities)
  - Closely-held C corporations may offset "net active income"
  - High net worth individuals with passive income are natural investors, but do they exist?

Limitations on credits and losses – Individuals

- Passive Loss Rules continued
  - Rental activities are passive by definition
  - Real estate professionals enjoy an exception
  - PPAs, leases and service contracts may be considered rental activities (Reg. Section 1.469-1T(e)(3))
  - Because of rule above, material participation may not matter
    - Primary test for active engagement (material participation) is spending 500 hours a year on the activity
  - The key is to have passive income to offset

Limitations on credits and losses – Individuals

- At-Risk Rules - Rules apply to individuals and closely held C corporations
  - Losses limited to amount at-risk
  - At-Risk basis - Capital contributions plus partner loans
  - Non-recourse debt generally provides no At-Risk basis
  - Result can be suspended loss carryforwards

Limitations on credits and losses – Individuals

- Affect on tax credits - Section 49
- Credit base is reduced to the extent the property is funded by “non-qualified” non-recourse debt
  - Qualified Commercial Financing counts
    - 20% equity in the deal
    - Property not purchased from a related person
    - Lender is actively and regularly engaged in the business of lending money
    - Lender not related to taxpayer, seller of the property or a fee recipient
    - Loan is made or guaranteed by a government
- Developer fee notes

Legislative Initiatives

- Difficulty of relying on tax benefits in a weak economy
  – Will the traditional tax credit equity investors return?
  – Where is the high net worth individual with passive income?
- Extend Cash Grant Program
  – Although being discussed, unlikely in light of Congressional grid-lock, deficit reduction concerns and perceived abuses
- Extend 2012 PTC/ITC sunset date for wind
  – Likely, but may not occur until post-election
- Extend 100% bonus depreciation
  – Opportunity has passed

Other Legislative Initiatives

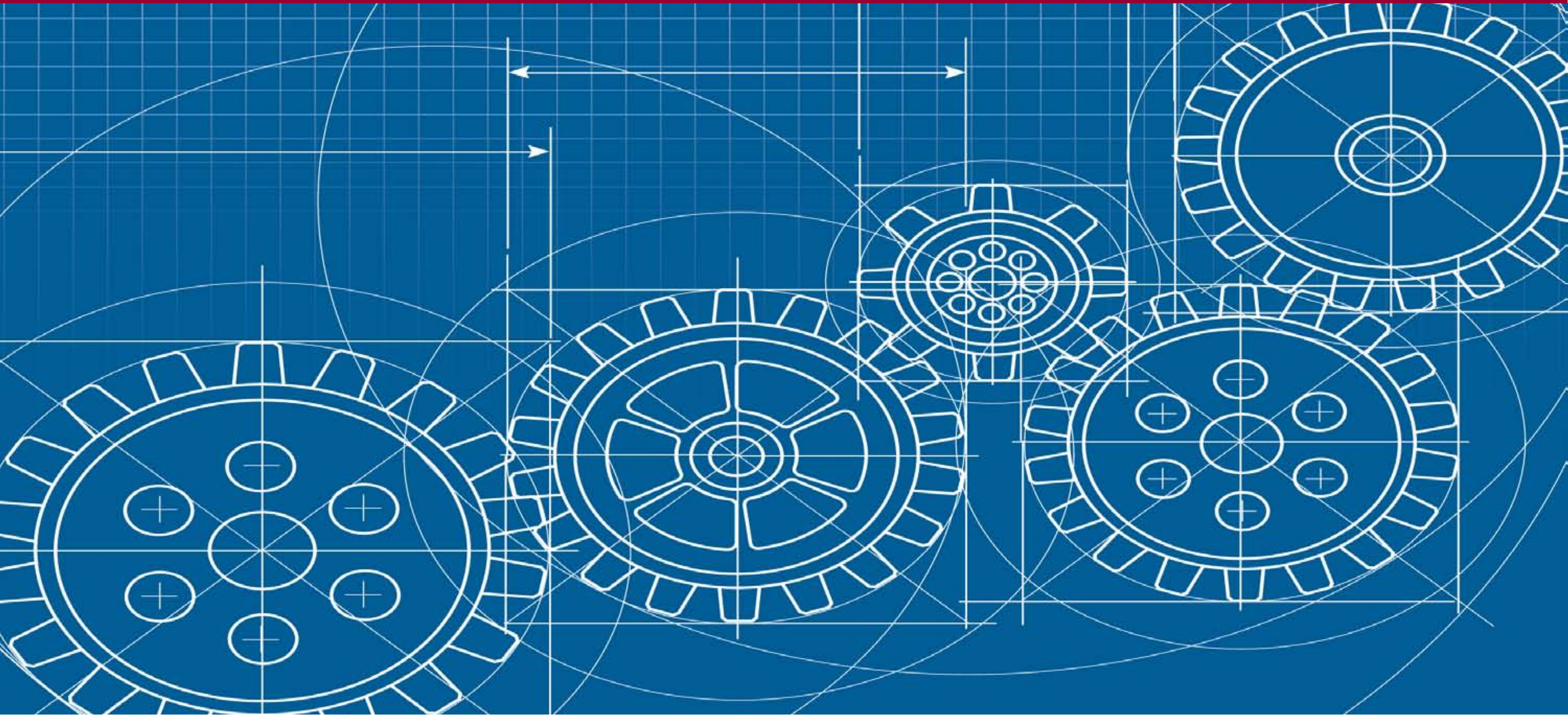
- Master Limited Partnerships ("MLPs")—they are publicly traded partnerships exempt from rule taxing widely-held partnerships as corporations. Currently, 90%+ of gross income must be from passive income or qualifying activities (income from the "exploration, development, mining or production, processing, refining, transportation . . . or the marketing of any mineral or natural resource . . . .").
  - Would create a class of "cash equity investors"
  - Expectation that they would require lower returns than institutional investors.

Other Legislative Initiatives (cont'd)

- Extending tax equity market to individuals
  - Exempt alternative energy from the passive loss rules
  - Exempt alternative energy from the Section 465 At-Risk rules
  - Ease the Section 49 credit base At-Risk rules
    - Unlikely and--for those old enough to remember the pre-1986 era of tax shelters marketed to individuals--probably bad policy

Other Legislative Initiatives (cont'd)

- National Renewable Portfolio Standard
- Carbon Tax
- Other???
  - Not in the next [?] years



FINANCING STRUCTURES

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How are renewable energy transactions ***structured***?

1-Partnership Flip

2-Sale-Leaseback

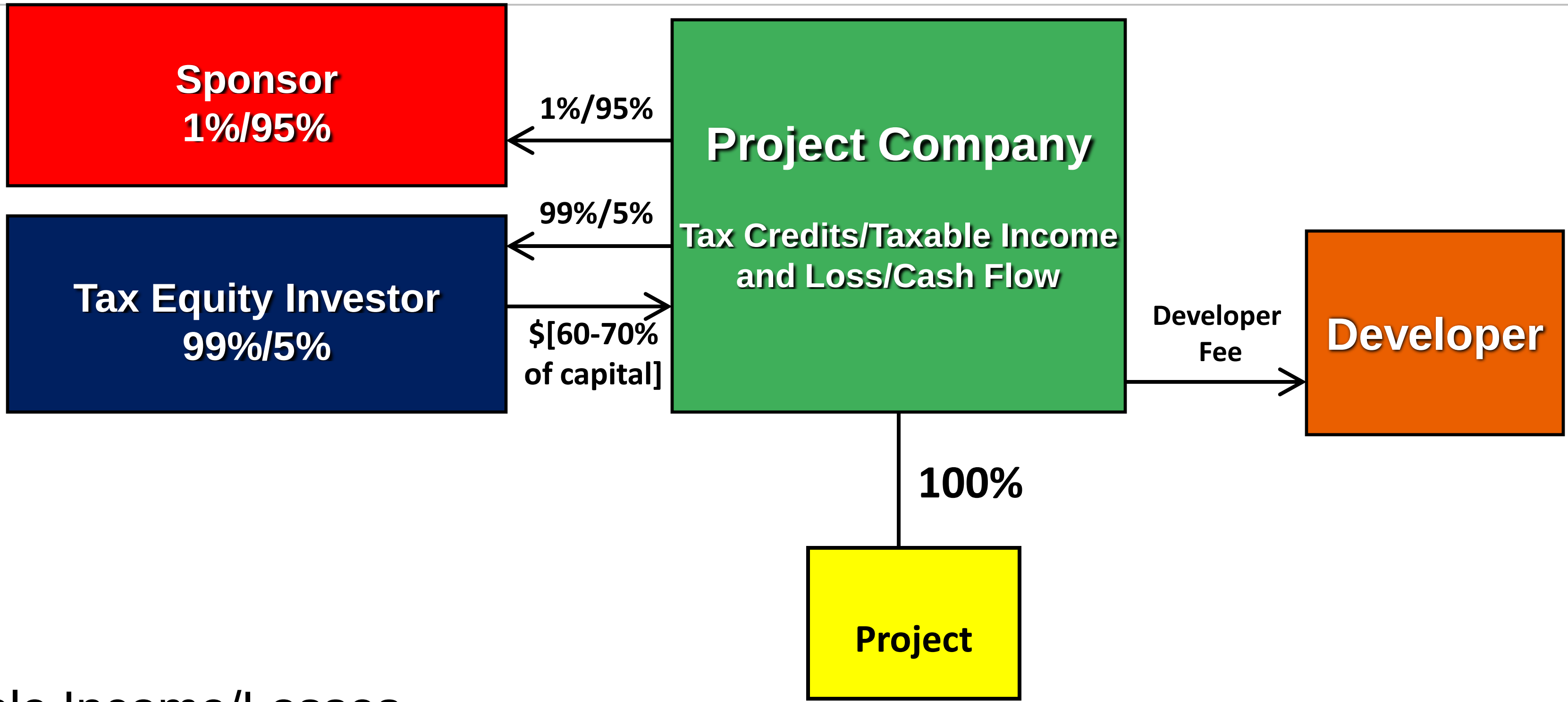
3-Lease Pass-Through (Inverted Lease)

Project Company and Investment Funding

- Three common arrangements have developed:
  - “Partnership with a Flip” Structure
    - Originated in wind energy transactions and adapted for solar
  - Lease (Sale/Leaseback) Structure
    - Sale/leaseback cannot be used in wind transactions utilizing PTCs because PTCs are not available to a non-operator owner
  - Lease Pass-Through (Inverted Lease Structure)
    - Originated in historic tax credit transactions and adapted for solar

Partnership Flip

Partnership Flip



Taxable Income/Losses allocated 99/1 until the Flip Date, then 5/95.

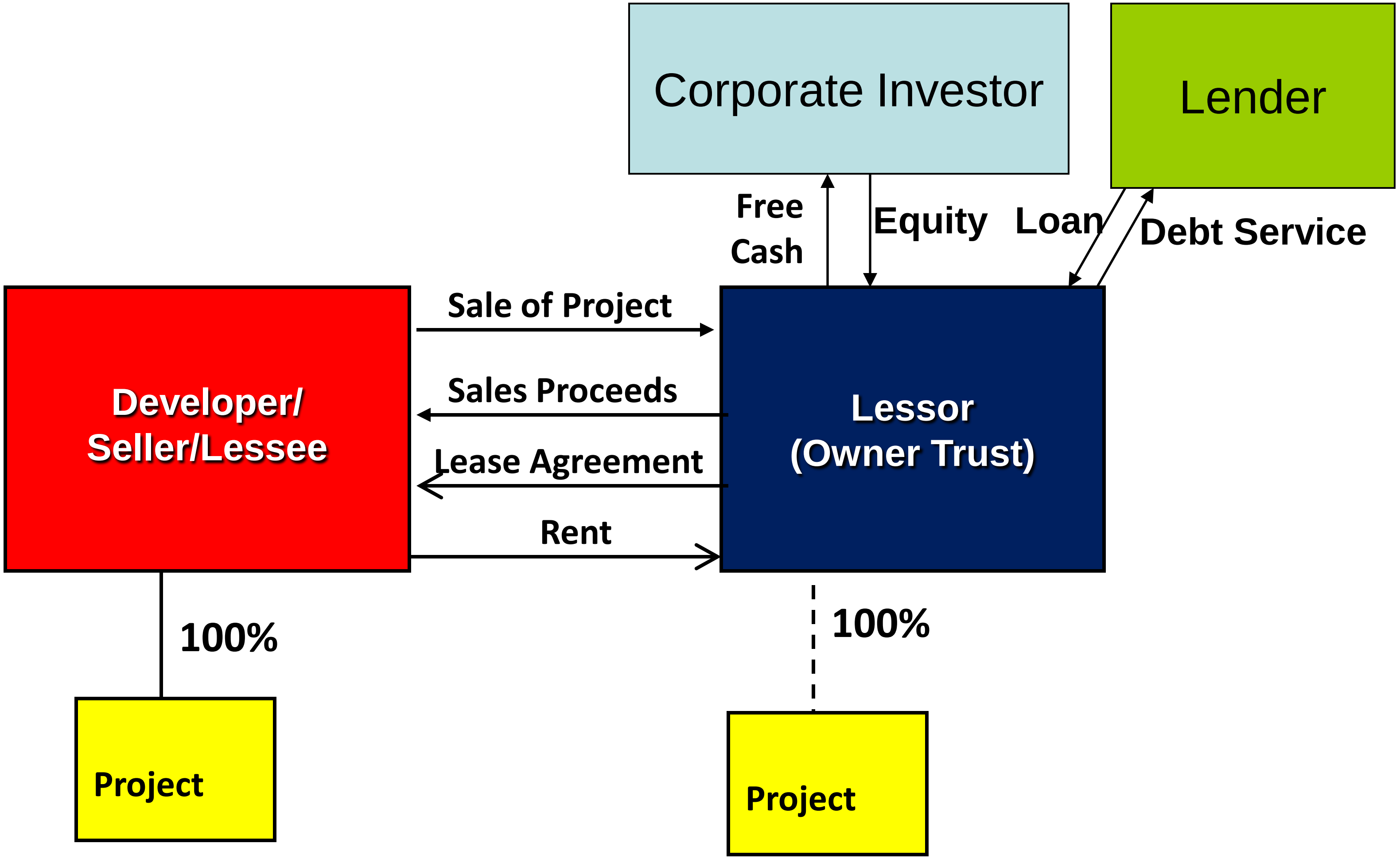
Capital contributions and cash distributions vary

Partnership with a Flip

- During the period when tax benefits are available or until such later time as the Investor achieves a specified rate of return on its investment (the “flip date”; typically 6-7 years), a large majority (typically, 99%) of taxable income, loss and credits are allocated to the Investor.
- After the flip date, the allocations of profits, losses and distributions flips to, for example, 90% or 95% to the Developer and the rest to the Investor.
- After flip date, Developer frequently has an option to buy out the Investor's interest for fair market value determined when the option is exercised. Option should not be continuous, but may be exercisable at predetermined times.

Sale Leaseback Structure

Sale Leaseback Structure



Sale Leaseback Structure

- SPV established by Investor purchases the qualifying facility from Developer and immediately leases the facility back to Developer (or an SPE established by Developer).
  - Thus, Investor is the lessor, Developer is the lessee
- Lease is typically a net, "hell-or-high water" lease
- SPE/lessee is obligated to pay fixed rent (or specified termination value in the event of a loss of the assets) to Investor/lessor for the term of the lease irrespective of the actual performance of the facility, existence of force majeure events, etc.

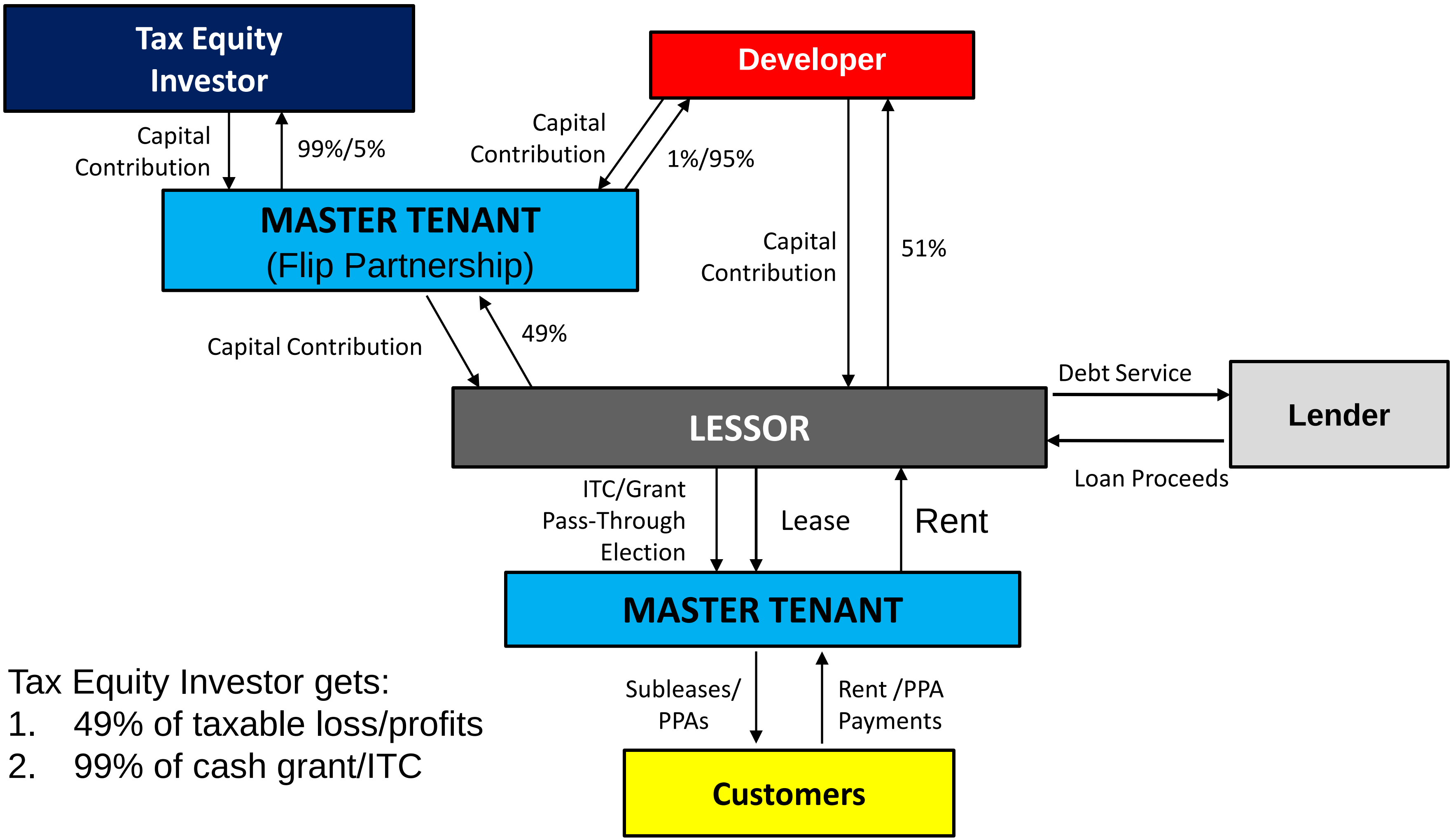
Sale Leaseback Structure

- Developer lessee bears all operating costs, costs of insurance, etc.
- At the end of the lease term, the facility is retained by the Investor/lessor (who is its owner all along)
- Developer/lessee typically has an option to purchase the facility at the end of the lease term (and sometimes at one or more specified times before the end of the term)

Lease Pass-Through Structure

(Inverted Lease)

Lease Pass-Through (inverted Lease)



Tax Equity Investor gets:

1. 49% of taxable loss/profits
2. 99% of cash grant/ITC

Lease Pass-Through Attributes

- Allows Lessee to claim Grant/ITC based on appraised FMV and Developer to avoid full gain on sale
- Some monetization of Lessor's tax losses by Investor through indirect ownership of Lessor's assets
- No basis reduction to depreciable basis for Lessor, but
- Lessee required to recognize over 5 years income equal to 50% of Grant/ITC
- Concerns
  - Economic substance doctrine issues
  - Risk that ownership structure gets collapsed into a partnership?

PPA AS A “SERVICE CONTRACT” (MORE TAX)

Tax Aspects of PPAs

- Issue is whether the power purchase agreement (PPA) for the sale of electricity is to be treated as a service contract, a lease or something else.
  - Relevant to PPAs in both leases and in partnerships
- If PPA is a lease and power purchaser is tax exempt, then the property is exempt use property, no PTCs and depreciation over 12 years; if power purchaser is taxable, need to apply leasing rules to determine who is the true owner.
- If PPA is a service contract, there is disagreement over whether the power seller is automatically the owner or whether ownership principles still apply. We believe the better view is that the power seller is the owner, but may still be advisable to limit PPA to 80% of property life.

Service Contract or Lease General Principles

- Code section 7701(e) lists vague factors distinguishing service contracts and leases—(fortunately because of a safe harbor these factors are often unimportant):
  - the service recipient is in physical possession of the property
  - the service recipient controls the property
  - the service provider has a significant possessory or economic interest in the property
    - service provider likely to use property for a substantial portion of its useful life
    - service recipient shares the risk that the property will decline in value
    - service recipient shares in appreciation in property value
    - service recipient shares in savings in property's operating costs

Service Contract or Lease General Principles

- service recipient bears the risk of damage or loss to property
  - The service provider does not bear any risk of substantially diminished receipts or substantially increased expenditures if there is non-performance under the contract.
  - The service provider does not use the property concurrently to provide significant services to parties unrelated to service recipient.
  - The total contract price does not substantially exceed the rental value of the property for the contract period.
- Best source of interpretation of these rules is the legislative history, esp. the 1984 Blue Book.

Service Contract or Lease Safe Harbor

- **Safe harbor** for waste disposal, clean water and alternative energy. **A contract that purports to be a service contract will be treated as such**, **unless**:
  - the service recipient (or a related entity) operates such facility
  - the service recipient (or a related entity) bears any significant financial burden if there is nonperformance under the contract or other arrangement (other than for reasons beyond the control of the service provider)

Service Contract or Lease Safe Harbor

– the service recipient (or a related entity) receives any significant financial benefit if the operating costs of such facility are less than the standards of performance or operation under the contract or arrangement

  • PLR 8749045 allows certain expenses to be passed through as long as electricity is being provided.

– the service recipient (or a related entity) has an **option to purchase**, **or may be required to purchase**, all or part of the facility **at a fixed or determinable price** (other than for fair market value)

• Requirements often conflict with business desires. Creativity as to how to avoid the rules above is to be discouraged.

End-Of-Term Options

- In a cash grant or ITC deal, can have lease to tax-exempt (with FPPO)
  - Seller will be subject to ADS depreciation
  - Term will be limited to 80% of EUL (and 20% residual)
- Rely on general IRC Section 7701(e) service contract rules:
  - Take if delivered
  - Term less than 80% of EUL
  - Sales to third parties permitted
- Reversion at end of site lease term
  - Will require that site lease term equal EUL
  - Sellers will customarily want right to remove (but may be unlikely)

Fixed Price Purchase Options

- Generally three constraints:
  - Preserve Investor's minimum economic expectations (Targeted IRR)
  - Not less than projected FMV at time of exercise
  - No economic compulsion to exercise
    - Exercise Price must be greater than sum of expected value of PPA at that time (imagine PPA with a fixed escalation above expected rate of inflation) and present value of expected residual at end of PPA
    - In a lease, exercise price > sum of PVs or remaining rent and expected residual value

About the Presenter

Mark L. Regante
New York
212-530-5236
mregante@milbank.com

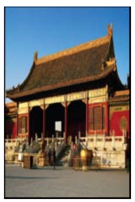
Mark L. Regante has been a partner in Milbank's Tax Department since 1987. His practice is devoted primarily to the tax aspects of asset financings, including leasing, project finance, securitization transactions and municipal finance transactions. He works closely with Milbank's transportation finance and project finance practice groups and regularly represents major financial institutions as investors, lessors and lenders as well as project development sponsors, airlines, aircraft leasing companies and underwriters.

Mr. Regante received his undergraduate degree from Rensselaer Polytechnic Institute. He has a law degree from St. John's University, where he was an editor of the *Law Review,* and an LL.M. in Taxation from New York University.

He is a member of the New York State Bar Association, the Association of the Bar of the City of New York and the National Association of Bond Lawyers.

Worldwide Offices

New York
One Chase Manhattan Plaza
New York, NY 10005
+1-212-530-5000



Beijing
Units 05-06, 15th Floor, Tower 2
China Central Place
79 Jianguo Road, Chaoyang Dist
Beijing 100025, China
+8610-5969-2700

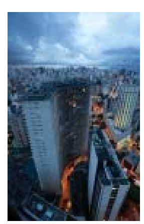
Frankfurt
Taunusanlage 15
60325 Frankfurt am Main
Germany
+49-69-71914-3400

Hong Kong
3007 Alexandra House
18 Chater Road
Central, Hong Kong
+852-2971-4888

London
10 Gresham Street
London EC2V 7JD
England
+44-20-7615-3000

Los Angeles
601 South Figueroa Street
30th Floor
Los Angeles, CA 90017
+1-213.892-4000

Munich
Maximilianstrasse 15
(Maximilianhoefe)
80539 Munich
Germany
+49-89-25559-3600



São Paulo
Rua Colombia, 325
Jardim América
São Paulo, SP 01438-000
+55-11-3927-7700

Singapore
30 Raffles Place
#14-00 Chevron House
Singapore 048622
+65-6428-2400

Tokyo
21F Midtown Tower
9-7-1 Akasaka, Minato-ku
Tokyo 107-6221, Japan
+813-5410-2801

Washington, DC
International Square Building
1850 K Street, NW, Suite 1100
Washington, DC 20006
+1-202-835-7500

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