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Project Finance and Renewable Energy

TREASURY RELEASES GUIDANCE ON THE SALE OF 5% SAFE HARBOR QUALIFIED PROJECTS

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On December 13, 2011, the U.S. Department of the Treasury released two new FAQs (available here) that provide additional guidance on the sale of 5% safe harbor qualified projects for purposes of the cash grant for renewable energy projects under section 1603 of division B of the American Recovery and Reinvestment Act of 2009, which requires projects to start construction by the end of 2011 to be eligible for the cash grant. Treasury previously created a safe harbor whereby construction can be started if 5 percent of the cost of the renewable energy project is spent by the end of 2011. The FAQs are designed to discourage "trafficking" in items of equipment purchased in connection with satisfying the 5% safe harbor. Therefore, a sale of such equipment, unless it meets the requirements outlined in the FAQs, could render a renewable energy project ineligible for the cash grant.

Q&A 23 provides that a developer's sale of "energy property" (i.e., assets) that itself qualified for the 5% safe harbor results in a loss of the 5% safe harbor status unless (i) the sale is in connection with a "sale-leaseback" within 90 days of when the property is placed in service, or (ii) the developer maintains a 20 percent interest in the property after the sale.

Q&A 24 provides that, in the case of an "entity" that itself qualified for the 5% safe harbor, the sale of such entity—after December 31, 2011, but before its "energy property" is placed in service—results in a loss of the 5% safe harbor status unless the entity holds some combination of (i) land, (ii) permits and licenses, (iii) a power purchase agreement, (iv) an interconnection agreement and (v) an engineering, procurement and construction contract. Unless the entity has some combination of these items, the purchaser cannot rely on costs paid or incurred to acquire the equipment held by the entity in order to preserve the 5% safe harbor following the sale. Q&A 24 clearly applies to sales of an interest in a partnership. To this end, Q&A 24 provides a favorable example in which a sale of a partnership interest in a project company to a tax equity investor in a flip transaction does not result in a loss of the 5% safe harbor because—prior to the sale—the project company itself met the 5% safe harbor and commenced development of the project by acquiring permits, a power purchase agreement and an interconnection agreement—three of the five items enumerated in Q&A 24.

On the face of the FAQs, it is unclear whether the sale of an interest in an entity disregarded as separate from its owner for tax purposes (e.g., an LLC owned 100 percent by a single person) would be treated as an "asset" sale under Q&A 23 or as a sale of an "entity" under Q&A 24. Treasury has informally advised that the sale of an interest in a disregarded entity—such as an LLC wholly owned by a developer that satisfies the 5% safe harbor and subsequently sold, in whole or part, to an unrelated investor—will be treated as a sale of an "entity" for purposes of the section 1603 cash grant and, subject to the requirements of Q&A 24, able to preserve its safe harbor status. Treasury does not appear to intend to amend the FAQs to provide expressly for this result. Q&A 24 also appears to apply to sales of an interest in a corporation that is itself a project company. Therefore, an interest in a corporation that has met the 5% safe harbor should not be sold unless the corporation also holds the development assets enumerated in Q&A 24.

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