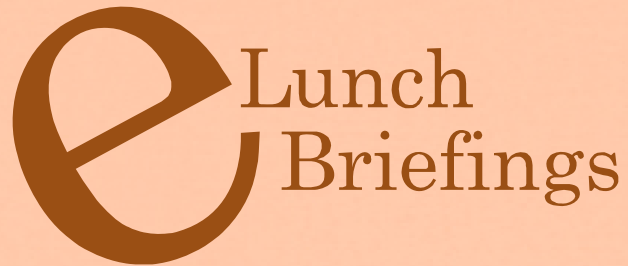


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Energy-Related Funding Opportunities in the American Recovery and Reinvestment Act of 2009

Brought to you by Winston & Strawn's
Energy Department

August 6, 2009

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Challenges Facing the Renewable Energy Industry when the Stimulus Bill Was Passed

- Credit had tightened up as banks faced an unprecedented crisis
- Cash remained on the sidelines out of fear that the Nation was plunging deeper into recession
- Tax equity had dried up as corporate earnings fell and fewer corporations needed tax preferences
- The public-private partnership model for renewable energy investment and production was broken

Because the public-private partnership model was a key part of the Obama Administration's goal of dramatically increasing renewable energy generation, dramatic action was needed to address these challenges



Renewable Energy Tax Credits Require Taxpayers with Large Tax Credit Appetites

- Railroads
- Utilities
- High Tech Companies
- Food Companies

Even Institutional Developers May Not Have U.S. Tax Base

- Foreign utilities with renewable development activity in the United States don't yet have a U.S. tax bill – no matter how big they are at home



ARRA Seeks to Alleviate Tax Base Constraint for Tax Credits

- For most projects eligible for the Production Tax Credit, taxpayers may instead elect a 30% Investment Tax Credit
- For all projects eligible for the Investment Tax Credit including by way of the above election placed in service or the construction which commences before January 1, 2011, the taxpayer can go to the Department of Treasury and get a Grant in lieu of the Tax Credit
 - ❖ Neither the ITC nor the Grant is taxable when received
 - ❖ Both result in a reduction in basis eligible for cost recovery by 50% of the amount of the ITC or the Grant



ARRA Seeks to Alleviate Tax Base Constraint for Tax Credits

- On July 9, 2009, the Treasury Fiscal Assistant Secretary (FAS) issued the first set of rules for the Grant
- Applications for the Grant may now be submitted



Eligible Participants

- Terminology – "Applicant"
- Applicant applies for Grant by
 - ❖ Completing an application form,
 - ❖ Providing supporting documentation,
 - ❖ Signing a "Terms and Conditions" statement, and
 - ❖ Providing payment information
- Application must be filed before October 1, 2011

Who Is Eligible?

- Person who places in service specified energy property
 - ❖ During 2009 or 2010, or
 - ❖ After 2010 and before the credit termination date for such property, if construction on such property began during 2009 or 2010
- Suggests that eligible persons are taxpayers. See section 1603 (g)



Exception For Certain Non-Taxpayers – Section 1603(g)

- Federal, state or local governments
- Tax exempt organizations
- Cooperative electric companies
- Certain clean renewable energy bond lenders
- Any partnership or flow-through entity with an equity or profit interest holder described above

"C" Corporation Blocker

- If an entity that would be ineligible to receive the Grant is a shareholder in a taxable Subchapter C corporation and that Subchapter C corporation is a partner in the partnership, the partnership is eligible to receive the Grant
- Example – tax exempt organization owns Subchapter C corporation which in turn holds a partnership interest in a partnership that is otherwise eligible for a Grant

Eligible Project

"It is intended that the grant provisions mimic the operation of the credit under section 48."

Legislative History

"This funding will operate like the current-law investment tax credit."

Treasury Web Site Document



Eligible Project

- Requirements
 - ❖ "Specified energy property"
 - ❖ Placement in service
 - ❖ Commencement of construction
- "Section 50" operating rules
 - ❖ Recapture
 - ❖ Normalization
 - ❖ Basis reduction



Eligible Project

- "Specified energy property"
 - ❖ Qualified property
 - Part of a qualified facility per section 45
 - ❖ Various types of qualified property per section 48
 - ❖ Must be depreciable (or amortizable)

Eligible Project

- Placement in service
 - ❖ 2009 or 2010
 - No "binding contract" or "substantial construction" exclusion
 - All basis is eligible
 - ❖ Any time prior to credit termination date
 - If construction commences in 2009 or 2010
 - ❖ First user
 - 20% test

Eligible Project

- Commencement of construction
 - ❖ Self construction
 - When significant physical work begins
 - On-site or off-site
 - Not preliminary activities
 - ❖ Construction under contract
 - When significant physical work begins under the contract
 - Contract must be enforceable
 - ❖ Safe Harbor
 - 5% of total cost (excluding land and preliminary activities)
 - Where under contract, measurement is by the applicant
 - Use economic performance



Eligible Project

- Units of property
 - ❖ Relevant to beginning of construction and placement in service
 - ❖ Functional interdependence
 - ❖ Election to aggregate units on same site
 - Does aggregation election bind for depreciation purposes?

Eligible Project

- Tax basis concepts apply
 - ❖ No deducted costs
- Liberal translation of "facility" into "property"
 - ❖ All property integral to the facility
 - ❖ Incremental hydropower – entire cost of modification
 - But, only property related to turbines or other generating devices
 - ❖ Wind – references a "wind facility"

Eligible Project

- Attestation
 - ❖ Must be an independent accountant
 - ❖ More than \$500,000 of basis
 - Agreed Upon Procedures
 - ❖ Grant equal or more than \$1 million
 - Must evaluate cost basis computation under tax principles
 - Must evaluate eligibility under Program
 - Must note uncertainties
 - Reasonable basis level



Eligible Project

- Section 50 operating rules
 - ❖ Recapture
 - Liberal interpretation
 - Dispositions to qualified owner not a recapture event
 - Permanent cessation due to natural disaster
 - Hydropower – not if certain circumstances were beyond control of applicant
 - ❖ Normalization required



Eligible Project

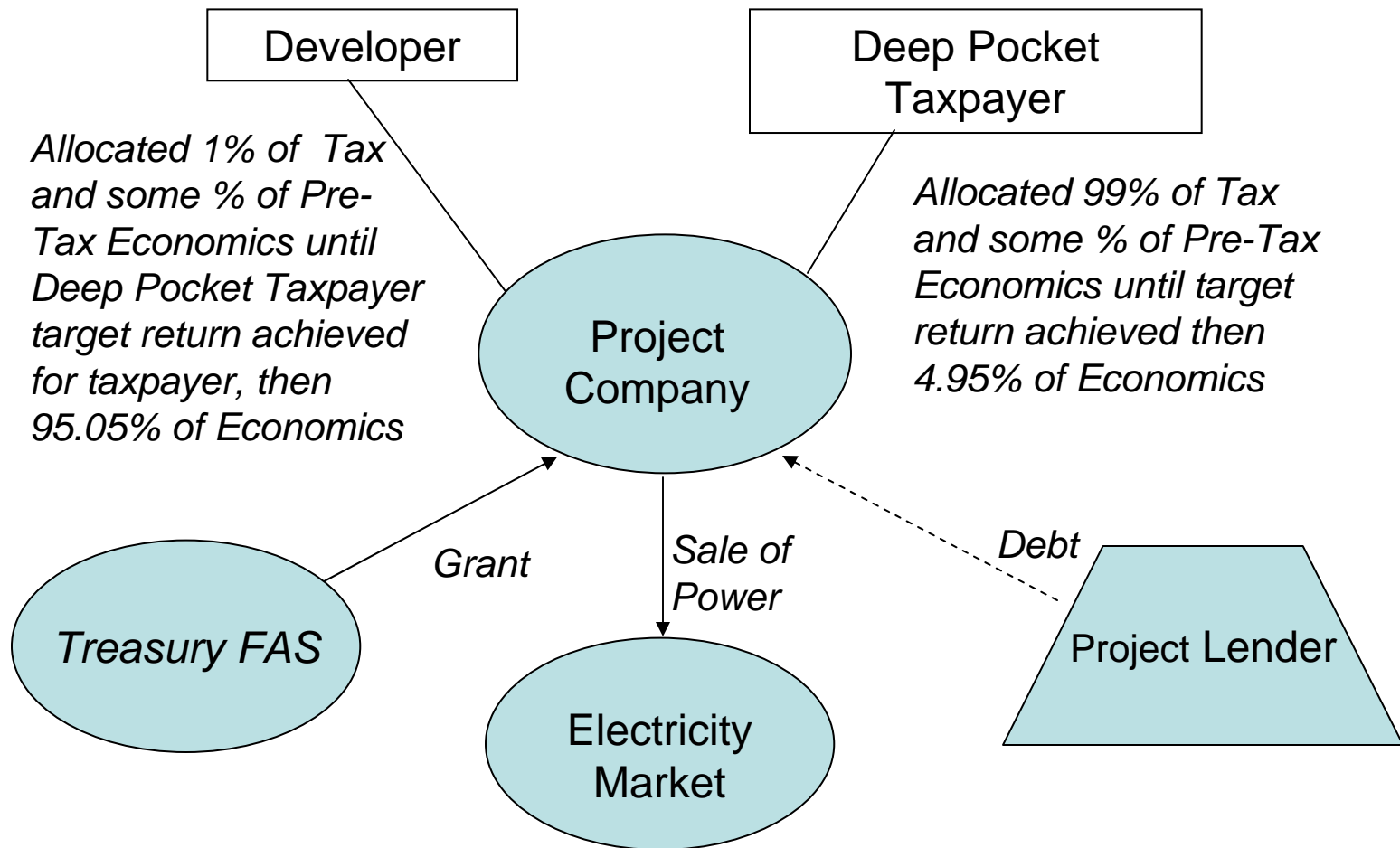
- Accounting differences
 - ❖ Grant accounting
 - ❖ FIN 48 versus FAS 5



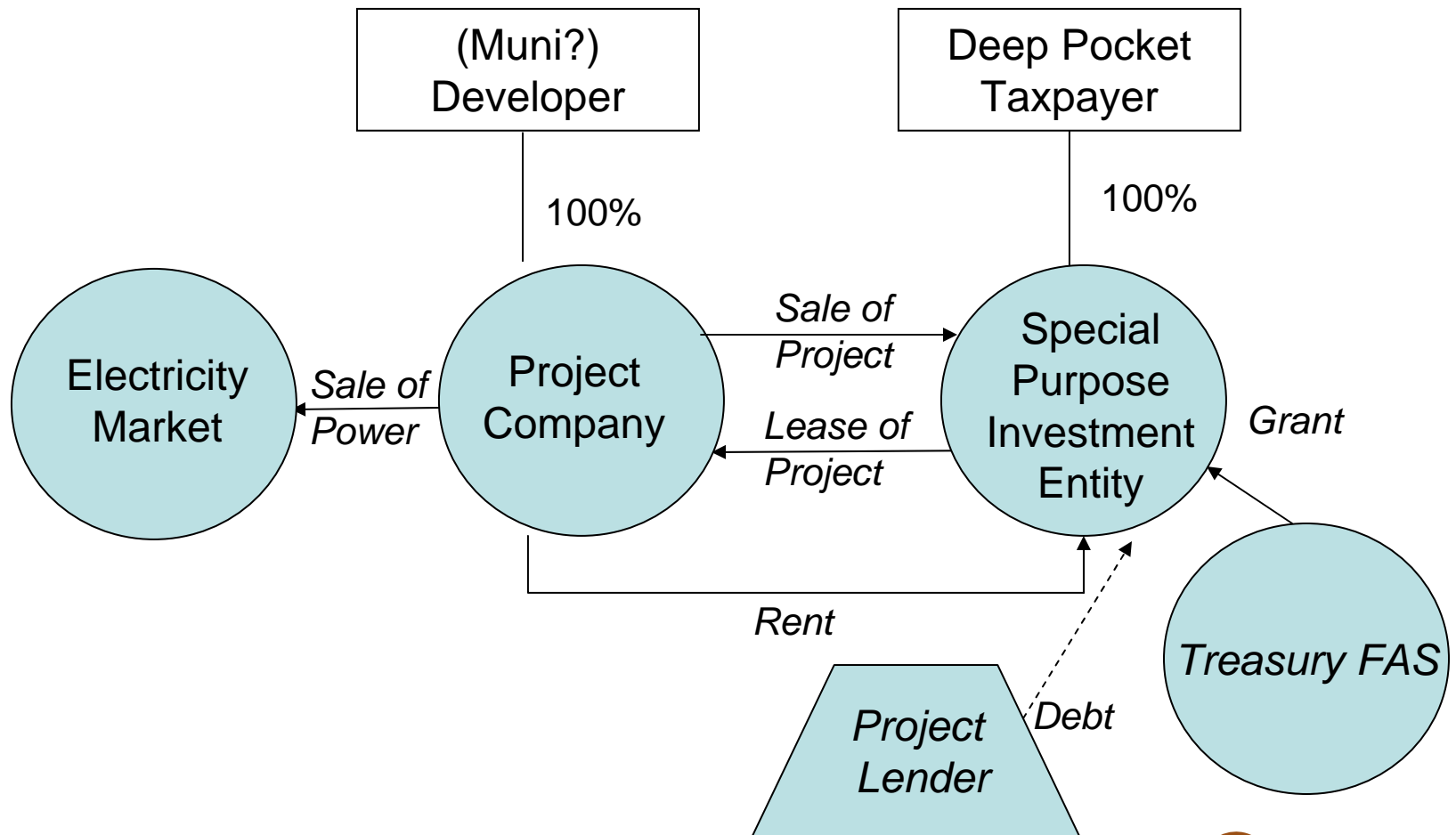
Financing Structures

- "Go-it-Alone" (i.e., none)
- Partnership Joint Venture
- Leasing

Special Allocation Partnership

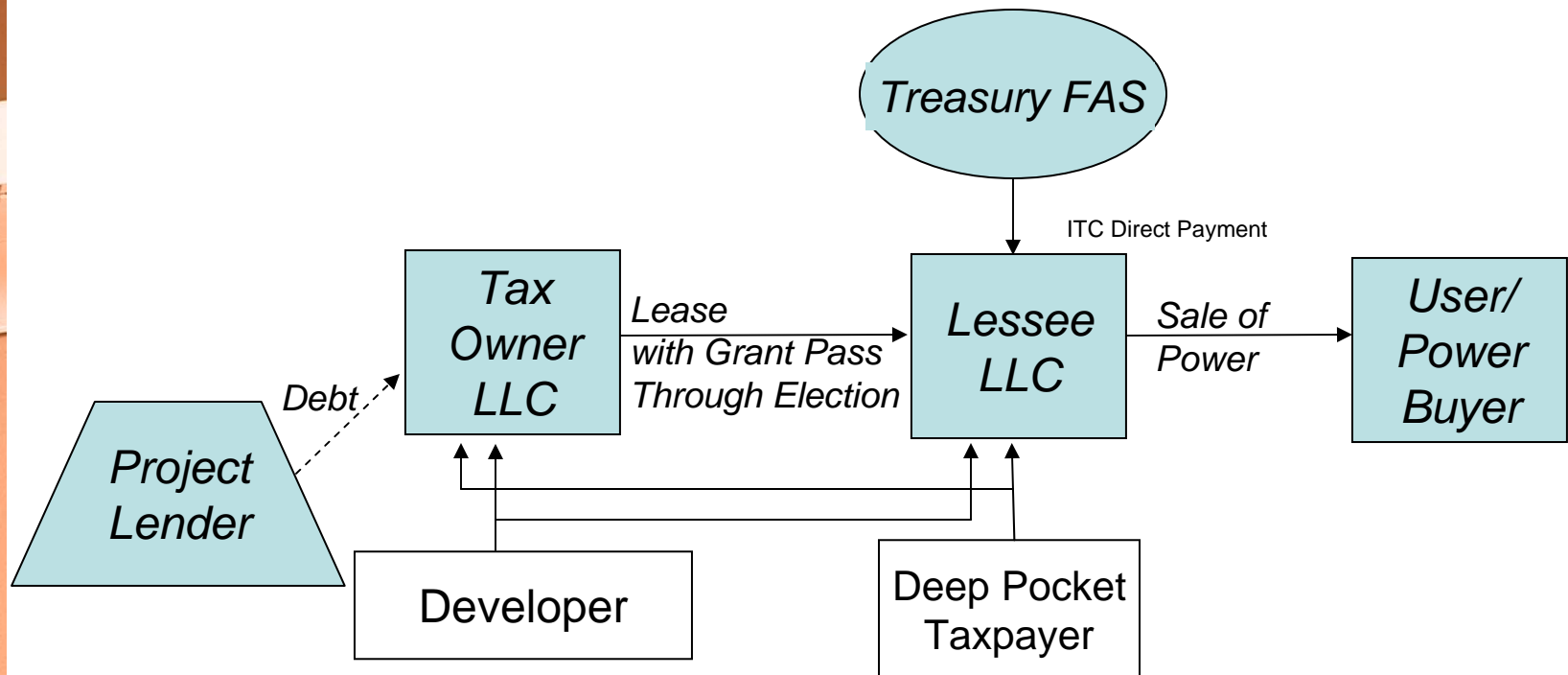


How to Involve a Tax Investor: Sale Leaseback



"Inverted" Lease

- The Grant can be passed through to a lessee by election permitting the separation of the cost recovery deductions from the tax credits or Grant





Conclusion for Structures

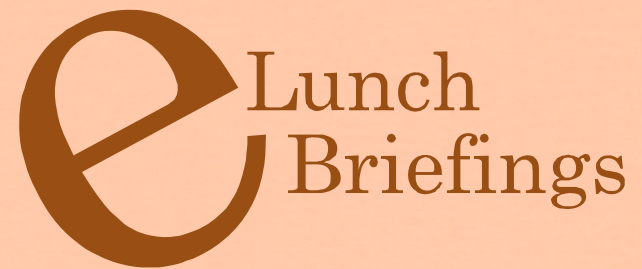
- Diligence is required to determine precise tax and Grant benefit package based upon physical reality of project
- Numerous structures, each with their own unique tax and economic consequences and constraints, are available
- Optimization takes experienced focus, creativity and patience



Issues to be addressed by Congress this Fall

- Whether to extend the Grant in lieu program for another year
- Whether to amend section 1603 to permit Grants directly to partnerships with nontaxable partners
- Whether to amend section 1603 to allow Grants directly to REITS without limits as to their taxable income
- Economic Substance Doctrine codification and special rules for tax credit based transactions

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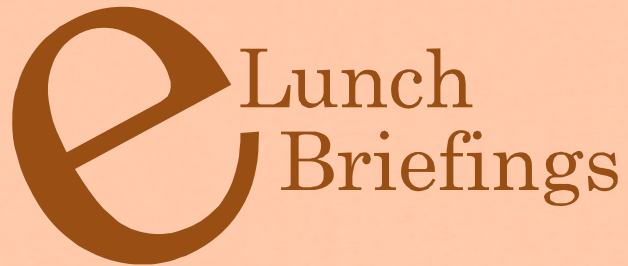
Questions?

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Thank You.

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