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IRS Issues Revised Guidance for Wind-Energy Partnerships

On September 21, 2009, the Internal Revenue Service (the "Service") issued Announcement 2009-69 (the "Announcement"), revising its prior guidance on wind-energy partnerships, Revenue Procedure 2007-65 (the "Revenue Procedure"). The Revenue Procedure sets forth the safe-harbor requirements for partnership flip structures involving wind energy projects qualifying for tax credits under Section 45 of the Internal Revenue Code (the "Code"). The Announcement makes the following specific changes to the Revenue Procedure:

First, the Announcement deletes the following sentence in Section 3 of the Revenue Procedure, and makes some minor corollary changes to the sentences that follow therein:

The Service generally will closely scrutinize a Project Company as a partnership or Investors as partners if a Project Company's partnership agreement does not satisfy each requirement of this revenue procedure.

Thus, the Announcement makes clear that the Service will not use the safe-harbor guidelines in the Revenue Procedure in order to establish substantive rules for partnership flip transactions in Examination process or elsewhere.

A corresponding change is made to Section 5.02, [Example 2](#), which describes a flip partnership in which the investor is initially allocated 99.5 percent of the partnership's gross income or loss and Section 45 credits. The Revenue Procedure originally stated that this fact would cause the Service to closely scrutinize the partnership's classification as a valid partnership. The Announcement excises this language and, instead, states:

Under these facts, the wind energy LLC's classification as a valid partnership would not be governed by the safe harbor in this revenue procedure. Likewise, if any other provision of this safe harbor is not followed for any wind energy partnerships, such partnerships would not be governed by the safe harbor in this revenue procedure.

Second, the Announcement replaces the requirement in Section 4.05 of the Revenue Procedure that any purchase option be available only at fair market value determined at the time of exercise. Rather, the Announcement now provides that a purchase option in favor of the developer, the investors, and any related parties is permissible, provided (i) the option is "negotiated for valid non-tax

business reasons at arm's length by parties with material adverse interests," and (ii) the option's purchase price either is a price that is not less than the fair market value of the property determined at the time of exercise or,

if the purchase price is determined prior to exercise, a price that the parties reasonably believe, based on all facts and circumstances at the time the price is determined, will not be less than the fair market value of the Property at the time the right may be exercised.

This revision in the Announcement signals a major shift in the Service's approach to purchase options in renewable energy deals, allowing an option's purchase price to be fixed at the time of closing. This approach is consistent, however, with established case law in the leasing area.

Third, the Announcement revises the statements in the Revenue Procedure relating to the application of the passive-activity limitations under Section 469. As originally released, the Revenue Procedure suggested that, in the case of individual investors, any Section 45 credits generated by a wind energy project would be available only to offset tax liability arising from that wind energy project and not with respect to tax liabilities arising from passive activities of the individual investor, generally. The Announcement renounces this position and specifically permits credits to offset non-project passive activity liabilities. The new language in Section 4.09 of the Revenue Procedure now reads:

Generally, a taxpayer subject to § 469 may utilize passive activity credits from qualified wind facilities only to the extent of their tax liability allocable to passive activities,

whether from qualified wind facilities or other sources.

Even if the Revenue Procedure does not apply, i.e., by reason of not meeting any other requirement of the guidance, the revised Section 469 language appears consistent with the understood application of Section 469 in the context of Section 45 tax credits.

The revised guidance is issued in the form of an Announcement and replaces the appropriate sections or language in the Revenue Procedure. In this respect, the revisions set forth in the Announcement appear to be both prospective and retroactive. The remaining portions of the Revenue Procedure remain in full force and effect as originally published.

A copy of the Announcement may be obtained by [clicking here](#). A copy of the Revenue Procedure may be obtained by [clicking here](#).

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