US Renewable Energy

Choices & Challenges

A Kaye Scholer report in association with Clean Energy Pipeline

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"US Renewable Energy: Choices & Challenges" describes the state of the US renewable energy M&A market and the myriad considerations confronting investors as the market continues to innovate. The report is a collaboration between Kaye Scholer and Clean Energy Pipeline; transactional data have primarily been extracted from Clean Energy Pipeline's deal databases. The data collected and analyzed for this report, except where expressly noted otherwise, is from 1Q2013–2Q2014.

Overview

With a record 126 acquisitions valued at $9.1 billion in 2013, M&A activity in the US renewable energy sector shifted into a higher gear, accelerating the general upward trend we have seen since 2010 (see ***ƒ*-1**). Deal value is up five percent over 2012's $8.7 billion and volume similarly increased from 113 deals. Early year-over-year indicators already have 2014 ahead of 2013, suggesting 2014 is on track to be another good year.

Within this overall trajectory, we continue to see trends in fluctuations and this report takes a deeper look at the market, regulatory and legislative forces driving this movement. Analyzing renewable energy acquisition activity in the US in the last 12–18 months, this report specifically explores where transactions are taking place, what is driving deal activity and the ways in which new acquirers such as Yieldcos, REITs and institutional investors are making an impact.

On the regulatory front, reporting and approval requirements of the Committee on Foreign Investment in the US (CFIUS) have become an increasingly important consideration with the entrance of foreign investors or foreign-owned pools of capital acquiring operating renewable energy companies in the US. Certain developments at the state level could also potentially impact the availability of a long-term stream of revenues that developers, investors and debt financiers alike have come to rely on in investing and financing a renewable energy project or portfolio, adding a new challenge for the renewable energy market.

The range of topics in this report reflects the considerations and challenges investors will face in an accelerating renewable energy market with numerous choices. Kaye Scholer's nationally recognized, multidisciplinary energy practice has more than three decades of experience helping sponsors, developers, lenders, tax equity investors, sponsor equity providers and underwriters negotiate renewable energy power projects of all sizes across all geographies. Together with Clean Energy Pipeline, we bring you highlights from the market in the last 12–18 months and identify some potential challenges ahead.

ƒ-1

Renewable energy M&A activity in the US

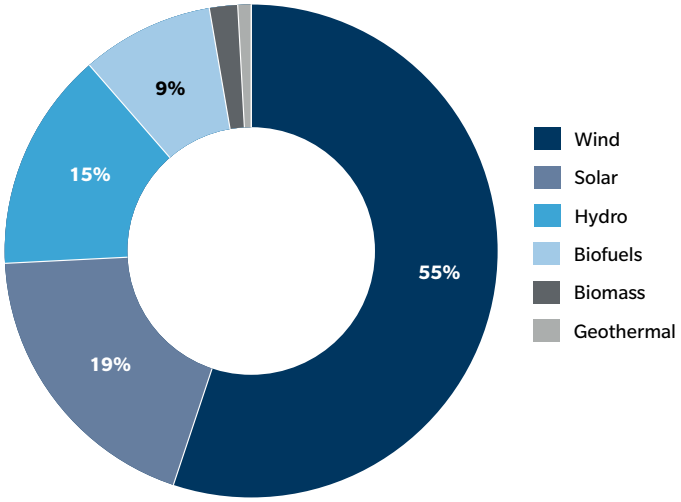
Source: Clean Energy Pipeline. This graph includes acquisitions both of renewable energy generation assets and of companies owning generation assets (IPPs, developers, etc.) located in the US. Sectors covered include wind, solar, hydro, geothermal, biomass and biofuels. The data does not include acquisitions of companies in the supply chain. The figures are based on announced deals.

Report Findings: Deal Value and Volume

f-2a

2013 US renewable energy acquisition activity by sector as a percentage of deal value

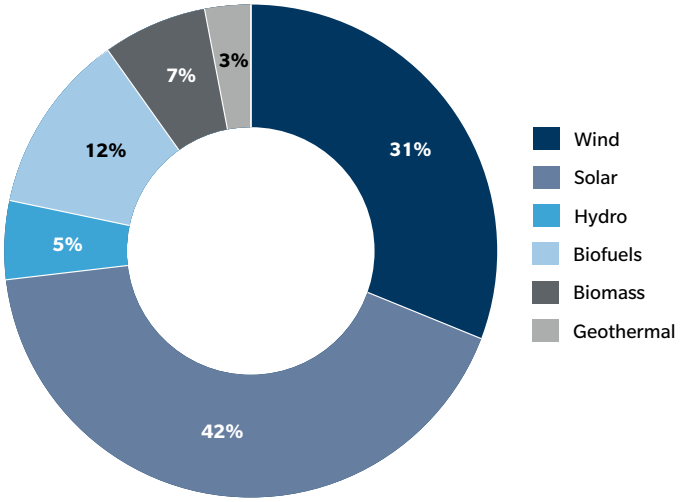
Source: Clean Energy Pipeline.



f-2b

2013 US renewable energy acquisition activity by sector as a percentage of deal numbers

Source: Clean Energy Pipeline.



Much of 2013's increase in deal volume and value was a direct result of a surge in acquisitions of wind assets (see ***f*-2a**). Thirty-nine acquisitions of wind farms, valued at $5.0 billion, were announced in 2013—almost twice the $2.7 billion worth of wind deals announced the previous year. Wind was the largest sector for renewable energy M&A in the US in 2013 by a significant margin, accounting for 55 percent of the total value of transactions. Solar was the second most active sub-sector for acquisitions (accounting for 19 percent of deal value), followed by hydro (15 percent) and then biofuels (nine percent).

Operating solar assets also proved attractive to financial investors (see ***f*-2b**). Approximately 650 MW of operating solar PV capacity was acquired in 2013, compared with only 128 MW in 2012.

In addition to the acquisition of wind and solar projects, equity interests in portfolios of operating wind farms that carry with them the priority right to receive cash from the projects added to the volume of acquisition activity in renewable energy assets. Early in 2013, it was reported that JPM Capital, a subsidiary of JPMorgan Chase & Co, sold its equity interests in a significant portfolio of wind farms to a joint venture owned by JPM Capital and Macquarie CAF, a wholly owned subsidiary of the Macquarie Group Limited. In November 2013, Infigen Energy announced that it had purchased tax equity interests in a portfolio of wind farms with an aggregate capacity of approximately 800 MW. An examination of FERC filings reveal several similar sales took place in 2013 and continues in 2014, as demonstrated by a recent report that Goldman Sachs is seeking to purchase tax equity interests in wind farms operated by Infigen Energy.

Report Findings: The Wind Investment Landscape

"Smaller developers that were unable to incur five percent of the total project costs prior to the end of 2013 and instead had to rely on the 'physical work of a significant nature test' may, due to uncertainty among investors as to the amount of physical work that had to be completed prior to the end of 2013, face challenges getting their projects to completion. This might drive some M&A activity in the short term. In the long term, I think the level of M&A will be driven by whether the PTC is extended and also the new EPA carbon regulations. This will drive demand for renewable energy and also impact M&A activity."

Gregg Benson | **Kaye Scholer LLP** | **Tax**

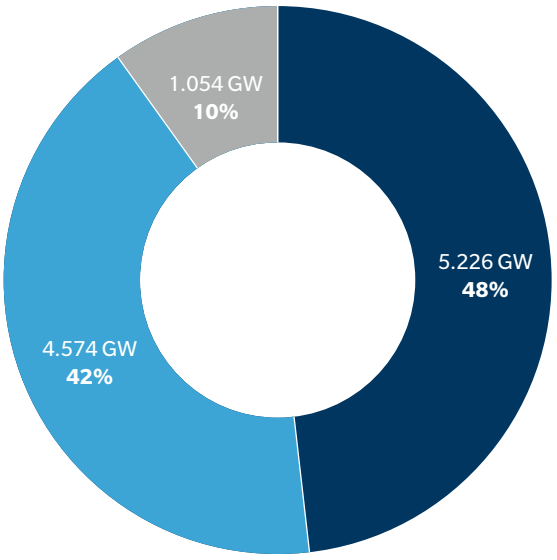
"Investors are uncertain whether many projects qualifying under the 'commencing physical work of a significant nature before the end of 2013' measure have actually qualified for PTC. This is a difficult test to prove. We have seen projects where the owners think projects have qualified but investors are less convinced. Investors rely on their tax counsels and there is definitely a divergence of opinion among tax counsels as to what is acceptable for qualifying projects under the 'physical work of a significant nature' test."

Madeleine Tan | Kaye Scholer LLP | Head, Project Finance

ƒ-3

2013 wind farm acquisitions by project stage as a percentage of nameplate capacity

Source: Clean Energy Pipeline.



Multiple financial investors acquiring significant stakes in operating wind projects provided the catalyst for wind acquisitions. Some 5.2 GW of operating wind capacity located in the US changed hands in 2013, a 31 percent increase on the 4 GW acquired in 2012. The stable and long-term cash flows provided by contracted wind farms are proving compelling for financial investors, particularly given the current low yields offered by conventional investments such as bonds. In addition, over 1 GW of wind capacity at the construction stage and over 4.5 GW at the preconstruction stage was transacted in 2013 (see ***ƒ*-3**).

The 1.1 GW of wind capacity installed in the US in 2013 is a drop from 13.1 GW in 2012. This is a direct result of a protracted period of uncertainty regarding the extension of the PTC in 2012. The PTC was eventually extended, but only on the second day of 2013.

The late extension meant the pipeline of projects had dried up, leading to very low installation levels in 2013. The PTC extension in early 2013 enabled projects to qualify for the PTC as long as they started construction before the end of 2013. Projects could either qualify by incurring five percent of eligible project costs or by commencing physical work of a significant nature before the end of 2013. The uncertainty over project qualification may trigger a certain amount of acquisition activity.

Report Findings: The Solar Investment Landscape

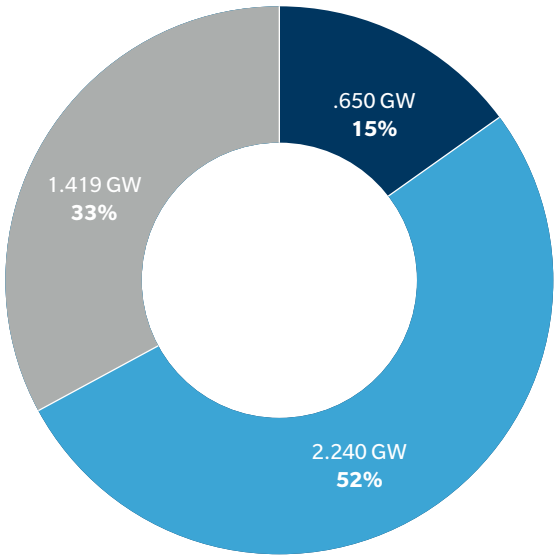
"I think we will see more investment in solar projects because the 30 percent investment tax credit is still going to be available for projects that get placed in service prior to the end of 2016. Investment in solar was also driven by the uncertainty last year about the extension of the wind PTC."

Gregg Benson | Kaye Scholer LLP | Tax

f-4

2013 solar farm acquisitions by project stage as a percentage of nameplate capacity

Source: Clean Energy Pipeline.



- Operating capacity
- Preconstruction / development-stage capacity
- Construction-stage capacity

The solar industry is booming in the US—some 4.7 GW of solar PV capacity was installed in 2013, a 41 percent annual increase. This is due to ongoing declines in system prices (weighted average system prices fell 15 percent to $2.59/W in 2013) combined with clarity that the solar PV investment tax credit will remain in place until 2016.

An increase in installation levels goes hand in hand with a spike in acquisition activity, so it is no surprise that deal activity has increased. Fifty-three acquisitions of US solar assets totaling $1.8 billion were announced in 2013, a 13 percent increase on the 47 acquisitions announced in 2012.

There was also a surge in acquisitions of solar projects at the construction stage. Some 1.4 GW of construction-stage capacity was acquired in 2013, compared with only 285 MW in 2012 (see ***f*-4**).

Yieldcos Enter the Fray

"Being able to raise maybe $200-$300 million while giving some of your investors an exit is very attractive if it comes at the right price. At the moment, the prices are right for Yieldcos. The IPO markets are not always open so sponsors are taking advantage of the opportunity right now. Sponsors also saw Pattern and NRG launch successfully and are trying to do the same thing. The ones that have already listed are actively acquiring assets, but there are also other sponsors out there trying to acquire a portfolio of assets so that they can also create a Yieldco."

Madeleine Tan | Kaye Scholer LLP | Head, Project Finance

Active Yieldcos

Based on our analysis of the deal data, there is no doubt that Yieldcos will be a prominent feature of the US renewable energy investment market for several years to come. Yieldcos are new corporate subsidiaries created by IPPs that warehouse operating assets. Shares in these new subsidiaries are then sold to the public through IPOs and the proceeds used to acquire the designated set of assets from the parent IPP. The majority of Yieldcos' earnings are then disbursed to shareholders through dividend payments.

Yieldcos typically own operating assets (although a few own some preoperating stage assets), which provide stable, long-term cash flows. Their structure also generally creates an internal tax shelter to mitigate corporate-level income tax. As a result, they are able to raise equity at very low rates that are close to the cost of debt.

Five North American Yieldcos completed IPOs in 2013 and during the first half of 2014. Including funds raised through IPOs, secondary offerings and convertible notes, these five Yieldcos have raised $3.3 billion on the public markets during the past 12 months.

The emergence of Yieldcos is catalyzing acquisition activity. The five operating Yieldcos acquired stakes in 2.9 GW of wind capacity and 1.2 GW of solar capacity located in the US since their respective IPOs last year (see ***f*-5**).

Planned Yieldcos

More Yieldcos are in the pipeline. For instance, SunEdison has filed a draft registration statement to the SEC relating to the IPO of its Yieldco vehicle TerraForm Power Inc. (see ***f*-6**).

Yieldco Considerations

Portfolio Size

Yieldcos must acquire large portfolios of projects to create an IPO that is large enough to attract investors while remaining cost effective for sponsors. Given the high costs associated with an IPO, sponsors typically like to raise at least $200 million. Sponsors also usually only want to sell minority stakes through IPOs, so must therefore amass project portfolios valued around a minimum of $600 million. Some asset owners already own large enough portfolios, but many need to acquire assets.

Leverage Options

It will be vital for Yieldcos to tap the debt markets in order to finance their acquisition programs. For example, NRG Yield recently announced it will purchase the 947 MW Alta Wind Energy Center for $870 million. NRG Yield raised $495 million through its IPO and a further $345 million through the issue of 3.5 percent convertible notes due 2019, meaning it must issue either more equity or new debt to finance the acquisition.

- Bank loans would appear to be an option. At the date of writing, it was reported that SunEdison had pitched a $425 million financing package that includes a five-year term loan B at LIBOR plus 450 basis points with a one percent floor. The package includes a $125 million credit facility and was reported to be rated Ba3 by Moody's and BB by Standard & Poor's.
- Yieldcos have a number of alternatives to bank loans. Project bonds may be an option, not least because Yieldcos typically seek to acquire utility-scale projects, which are more conducive to bond issuances. There is already some precedent for renewable energy project bonds in the US. In November 2013, Tenaska Inc. closed a $319 million refinancing of the 130 MW Imperial Solar Energy Center South project in California through the issuance of senior secured notes. Earlier that year, MidAmerican completed a $1 billion bond offering to finance construction of its 579 MW Solar Star Projects in South California.
- Securitization may also be an option. The most notable example was SolarCity, which closed a pooled securitization of distributed energy assets in November 2013, raising over $54 million and recently closed a follow-on tranche of approximately $70 million. SolarCity is reportedly planning future issuances.

f-5 **Active Yieldcos in North America** Source: Clean Energy Pipeline.

NRG Yield Inc.

Total funds raised*

$840 M

Target IRR

5.45% p.a.

Current Portfolio**

USA	343 MW of utility scale solar power (CVSR–122 MW, Alpine–66 MW, Borrego–26 MW, Avra Valley–25 MW, Avenal–23 MW, Blythe–21 MW, Roadrunner–20 MW, TA High Desert–20 MW and RE Kansas South–20 MW)
	10 MW of distributed solar power (AZ DG–5 MW and PFMG DG–5 MW)
	1,048 MW of wind capacity (South Trent–101 MW and Alta I-V and X-XI–947 MW)
	1,460 MW of conventional power
	123 MW of thermal generation

Summary

In July 2013, NRG Yield secured $495 million through an IPO on the New York Stock Exchange. In February 2014, it raised an additional $345 million through the issue of 3.5 percent convertible notes due 2019. It will own, operate and acquire contracted renewable and conventional generation and thermal infrastructure assets acquired from parent company NRG Energy.

TransAlta Renewables Inc.

Total funds raised*

C$346 M (US$323 M)

Target IRR

7.5% p.a.

Current Portfolio**

Canada	127 MW of hydro capacity (Akolkolex–10 MW, Appleton–1 MW, Belly River–3 MW, Bone Creek–19 MW, Galetta–2 MW, Misema–3 MW, Moose Rapids–1 MW, Pingston–45 MW, St Mary–2 MW, Taylor Hydro–13 MW, Upper Mamquam–25 MW and Waterton–3 MW)
	1,107 MW of wind capacity (Ardenville–69 MW, Blue Trail–66 MW, Castle River–44 MW, Cowley North–20 MW, Kent Hills 1–96 MW, Kent Hills 2–54 MW, Macleod Flats–3 MW, McBride Lake–75 MW, Melancthon 1–68 MW, Melancthon 2–132 MW, New Richmond–68 MW, Sinnott–7 MW, Soderglen–71 MW, Summerview 1–70 MW, Summerview 2–66 MW and Wolfe Island–198 MW)
USA	144 MW of wind capacity (Wyoming Wind–144 MW)

Summary

In August 2013, TransAlta Renewables raised C$221 million ($210 million) through an IPO on the Toronto Stock Exchange. It raised a further C$125 million ($113 million) from the secondary offering in April 2014. It will own, operate and acquire wind and hydro power-generation assets located in North America, primarily in Canada, from its parent company TransAlta Corporation.

Abengoa Yield plc.

Total funds raised*

$829 M

Target IRR

3.6% p.a.

Current Portfolio**

Brazil	An exchangeable preferred equity investment in Abengoa Concessoes Brasil Holding
Chile	87 miles of electric transmission lines
Mexico	300 MW of conventional power capacity
Peru	931 miles of electric transmission lines
Spain	100 MW of solar CSP capacity (Solaben 2–50 MW and Solaben 3–50 MW)
Uruguay	50 MW of onshore wind capacity (Palmatir–50 MW)
USA	560 MW of solar CSP capacity (Mojave–280 MW and Solana–280 MW)

Summary

In March 2014, Abengoa SA announced the confidential submission of a draft registration statement to the SEC relating to the IPO of Abengoa Yield. In June 2014, the firm announced that it raised $829 million from the listing of Abengoa Yield on the NASDAQ. In early June 2014, Abengoa then announced the commencement of the IPO for expected gross proceeds of approximately $600 million. Abengoa will own, manage and acquire renewable energy, conventional power and electric transmission lines and other contracted revenue-generating assets. It will initially focus on the US, Mexico, Peru, Chile, Uruguay and Brazil, as well as Spain. In the future, it intends to expand this presence to selected countries in Africa and the Middle East.

* Including proceeds from IPOs, secondaries and convertible notes
** As of June 2014

Pattern Energy Group Inc.

Total funds raised*

$938 M

Target IRR

6.25% p.a.

Current Portfolio**

Canada	557 MW of wind capacity (Grand–149 MW, St Joseph–138 MW and South Kent–270 MW)
Chile	115 MW of wind capacity (El Arrayan–115 MW)
USA	1,260 MW of wind capacity (Gulf Wind–283 MW, Hatchet Ridge–101 MW, Ocotillo–223 MW, Panhandle 1–218 MW, Panhandle 2–182 MW, Santa Isabel–101 MW and Spring Valley–152 MW)

Summary

In September 2013, Pattern Energy Group secured $352 million through an IPO on both NASDAQ and the Toronto Stock Exchange. It raised an additional $586 million in a follow-on offering in May 2014. Pattern Energy Group will own, operate and acquire wind power projects from Pattern Energy Group, which is the first pure-play wind power developer to launch a Yieldco.

NextEra Energy Partners LP

Total funds raised*

$406 M

Target IRR

6.25% p.a.

Current Portfolio**

Canada	207 MW of onshore wind capacity (Bluewater–60 MW, Conestogo–22.9 MW and Summerhaven–124.4 MW)
	40 MW of solar PV capacity (Moore–20 MW and Sombra–20 MW)
USA	492 MW of onshore wind capacity (Elk City–98.9 MW, Northern Colorado–174.3 MW, Perrin Ranch–99.2 MW and Tuscola Bay–120 MW)
	250 MW of solar PV capacity (Genesis–250 MW)

Summary

In April 2014, NextEra Energy announced the confidential submission of a draft registration statement to the SEC relating to the IPO of NextEra Energy Partners LP. At the end of June 2014, NextEra Energy Partners LP raised $406 million through an IPO on the New York Stock Exchange. The firm will own, operate and acquire wind and solar energy projects in the US and Canada from its parent company NextEra Energy.

* Including proceeds from IPOs, secondaries and convertible notes
** As of June 2014

f-6 *Planned Yieldcos in North America*

Source: Clean Energy Pipeline.

TerraForm Power Inc.

Target IPO

$50 M***

Target IRR

TBD

Initial Portfolio

Canada	19.3 MW of solar PV capacity (SunE Perpetual Lindsay–15.5 MW and Undisclosed Distributed Generation Portfolio–3.8 MW)
Chile	101.2 MW of solar PV capacity (CAP(7)–101.2 MW)
UK	112 MW of solar PV capacity (Crucis Farm–16.1 MW, Norrington–11.2 MW, Says Court–19.8 MW, Stonehenge Operating–64.7 MW)
USA	291 MW of solar PV capacity (Alamosa–8.2 MW, Atwell Island–23.5 MW, California Public Institutions–13.5 MW, CalRENEW-1–6.3 MW, Enfinity–15.7 MW, MA Operating–12.2 MW, Nellis–14.1 MW, North Carolina Portfolio–26 MW, Regulus Solar–81.9 MW, Summit Solar Projects–19.6 MW, SunE Solar Fund X–8.8 MW, U S Projects 2014–46.5 MW and US Projects 2009-2013–15.2 MW)

Summary

In February 2014, SunEdison announced it had confidentially filed a draft registration statement with the SEC for a proposed stock offering of its Yieldco vehicle TerraForm Power Inc. In late May 2014, the firm filed a preliminary prospectus for the IPO that is expected to raise $50 million—a placeholder amount that may change. TerraForm Power Inc. will buy solar farms from SunEdison and other companies in the US and various international markets. In March 2014, TerraForm Power raised $250 million in term loan bridge financing from Goldman Sachs for the initial portfolio acquisition. In May 2014, the size of the bridge facility was increased to $400 million.

*** According to draft prospectus on 5/28/2014. The $50 million is a placeholder amount with the US Securities and Exchange Commission and may change.

Recent REIT Developments and Guidance

Another development in the last 18 months involves the use of "real estate investment trusts" or "REITs" to acquire renewable energy assets. A REIT is a special type of corporation formed for the purpose of holding real estate assets (including equity interests and interests in debt secured by real estate) and earning income therefrom. In order to qualify as such, a REIT must satisfy certain income and asset tests and distribute at least 90 percent of its taxable income to its shareholders. Assuming these requirements are met, a REIT generally will not be subject to a corporate-level tax. In order to reduce the cost of capital for, and attract investment in, renewable energy projects, there has been growing support for treatment of renewable energy assets as "real property" for purposes of the REIT rules. Real property includes land, inherently permanent structures and structural components.

Consideration: IRS View of REITS for Renewable Energy

In 2013, Hannon Armstrong publicly listed its REIT, Hannon Armstrong Sustainable Infrastructure Capital Inc. (HASI), and raised initially $167 million and $70 million in a subsequent round. HASI describes itself as a company that "makes debt and equity investments in sustainable infrastructure projects," focusing on "projects that increase energy efficiency, provide cleaner energy, positively impact the environment or make more efficient use of natural resources." In 2014, HASI reportedly made investments in and acquired more than 7,500 acres of land leased to three solar projects, the rights to payments from 11 additional land leases for a diversified portfolio of wind projects and a portfolio of 46 smaller payment streams from land leases on wind projects, with a total value of approximately $87 million. Although the IRS reportedly blessed HASI's REIT qualification in a private letter ruling, it is generally understood that neither the ruling request nor the ruling itself makes reference to whether renewable energy assets qualify as real property for REIT purposes, and, therefore, provides limited if any guidance to participants in the renewable energy space trying to determine whether renewable energy assets are good REIT assets.

There has, however, been some recent guidance in the form of proposed regulations issued by the IRS in May 2014. Although not as robust as some industry experts were hoping, the guidance in the proposed regulations provides a framework for analyzing whether renewable energy assets will qualify as real property and includes specific examples relating to solar energy property.

One example in the proposed regulations addressing a REIT that owns a solar energy site analyzes each distinct asset within the solar energy site separately and concludes that wiring and the mounts intended to hold the solar panels are inherently permanent structures, and, therefore, real property for REIT purposes. However, the solar panels themselves are found to be easily separated from the mounts and wiring, and, therefore, are not treated as real property for such purposes under the regulations. The proposed regulations provide an additional example where the facts are similar to the prior example except that the REIT's solar energy assets are either mounted on land adjacent to a solar-powered office building owned by the REIT or are permanently installed on the building's rooftop. Based on an analysis of various factors, including that the REIT owns both the solar

energy assets and the building, the regulations concluded that the solar energy assets are a structural component of the building, and, therefore, real property for REIT purposes.

The current administration's taking of an active legislative role in the renewable energy sector is a positive sign. It is possible that following the comment period for these proposed regulations, the final regulations will provide more generous guidance that will put the renewable energy sector on more equal footing with the oil and gas sectors. It should be noted, however, that treatment of renewable energy property as real property for REIT purposes may prevent such property from being eligible for five-year MACRS depreciation. In addition, real property characterization could cause non-US investors to be subject to certain additional US tax consequences pursuant to the provisions of the Foreign Investors Real Property Tax Act.

Challenge: Institutional Investors v. Yieldcos

Institutional investors such as insurance companies and pension funds have ramped up their renewable energy investment activities during the past three years. Institutional investors announced 38 acquisitions of renewable energy assets valued at $2.5 billion across the US and Canada, significantly more than the 13 assets totaling $219 million acquired in 2011, according to deals tracked by Clean Energy Pipeline.

Most recently, it was reported that Caisse de dépôt et placement du Québec had acquired a 24.7 percent equity interest in Invenergy Wind, one of the largest developers of wind energy assets, in June 2014. This follows reports of significant other investment and funding of approximately $500 million provided by Caisse to the same sponsor in 2013. Other active institutional investors in the US renewable energy sector include Liberty Mutual, Fiera Axium Infrastructure and Union Labor Life Insurance Company.

However, the emergence of Yieldcos, which have much lower return requirements, are creating challenges for institutional investors. As shown in the chart on page 8 (see ***ƒ*-5**), Yieldcos have targeted IRRs in the three to seven percent range, which is significantly less than the traditional return requirements of some institutional investors. As more Yieldcos come to the market, it will be interesting to see the extent to which institutional investors' appetite for renewable energy investment opportunities wanes.

While Yieldco investments have not as of yet treaded directly on the types of investments made by REITs, it will be interesting to see if the apparently insatiable appetite of Yieldcos will eventually make them competitors of REITs for the more readily identifiable real estate components of renewable energy assets.

Challenges at the State Level

"State regulators will be looking to the investment community to understand what structures are feasible."

Kimberly Frank | Kaye Scholer LLP | Electricity Markets and Regulation/FERC

Concern for health and environmental welfare has prompted many states to implement policies supporting investment in renewable generation. States typically rely on renewable portfolio standards, requiring utilities to procure renewable energy credits equivalent to some percentage of load. Some states have tackled sizable renewable investment needs directly, through competitive solicitations administered by regulatory commissions that award long-term power purchase agreements or REC contracts.

State initiatives involving competitive procurements for significant renewable investment may now be at risk after two courts decided that the Maryland and New Jersey programs to develop new generation impermissibly regulated in the area of wholesale energy rates[1]. The courts held that the states unlawfully set wholesale rates, a domain reserved exclusively to the Federal Energy Regulatory Commission by the Federal Power Act.

If these cases are upheld on appeal, states will have fewer tools to support investment in large renewable projects.

Despite this potential setback, states will continue to play a significant role in encouraging investment in renewable generation. In addition to their own policy priorities, states are central to implementation of the US Environmental Protection Agency's carbon-reducing Clean Power Plan. This proposed rule anticipates that states will achieve their carbon reduction targets through investment in renewable generation and other measures.

1 *See PPL Energyplus, LLC v. Hanna*, 977 F. Supp. 2d 372 (D.N.J 2012), *appeal pend'g PPL EnergyPlus v. Solomon*, No. 13-4330 (3d Cir. argued Mar. 27, 2014); *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013), *aff'd*, No. 13-2419 (4th Cir. June 2, 2014).

National Interest in Foreign Investors

When foreign persons are involved in investing in renewable energy, the investment may be subject to a review by the Committee on Foreign Investment in the United States (CFIUS), a committee chaired by the Department of Treasury comprising multiple cabinet-level departments and agencies of the US government. CFIUS reviews transactions that may result in control of a US business by a foreign person to determine whether the transaction raises national security concerns.

CFIUS interprets the term "national security" broadly, and so a transaction among private entities for commercial purposes may nonetheless have a nexus to national security that is of interest to CFIUS. For this reason, and because CFIUS has authority to impose mitigating measures on parties to a transaction that raises national security concerns, foreign investors are well advised to preemptively notify CFIUS of a transaction potentially within its jurisdiction. Once CFIUS clears the transaction, CFIUS generally may not revisit it.

If a transaction involves "critical infrastructure," CFIUS will view the transaction as having a nexus to US national security. The CFIUS regulations define "critical infrastructure" as "a system or asset ... so vital to the United States that the incapacity or destruction of the particular system or asset ... would have a debilitating impact on national security."

Some of the factors CFIUS will look into to determine if a transaction in the energy sector involves critical infrastructure include:

- The system or asset's relationship to widely distributed power grids;
- The proximity of the property involved to sensitive US government activities—regardless of the subject matter of the transaction. In a 2012 case, CFIUS effectively caused the Chinese purchaser of an Oregon wind farm to divest the acquired assets due to the wind farm's proximity to a US naval aircraft training range; and
- Possible alternative applications of the technology used in the energy system or asset that may implicate national security.

In calendar year 2012, the most recent year for which data is publicly available, 10.8 percent of the transactions that CFIUS reviewed involved utilities. Most of these transactions involved electric power generation, transmission and distribution.

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