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Tax Reform and Renewable Energy: Planning Techniques, 100% Expensing, BEAT, Tax Credits and Interest Deduction Limitations

WEDNESDAY, JANUARY 16, 2019

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

David K. Burton, Partner, **Mayer Brown**, New York

Eli M. Katz, Partner, **Latham & Watkins**, New York

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TAX REFORM AND RENEWABLE ENERGY: PLANNING TECHNIQUES, 100% EXPENSING, BEAT, TAX CREDITS AND INTEREST DEDUCTION LIMITATIONS

Strafford Webinar on January 16, 2019

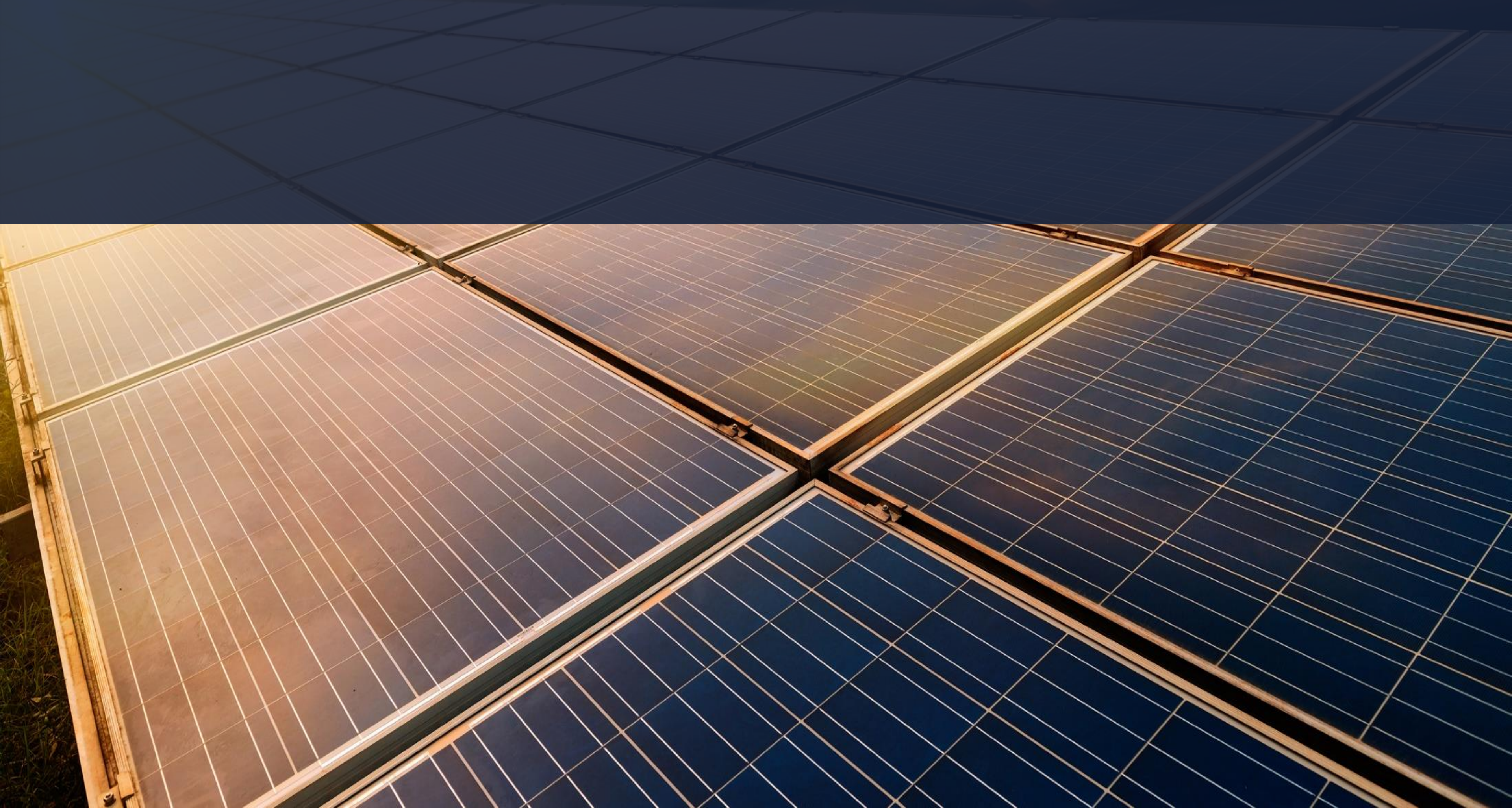
David Burton
Mayer Brown LLP
dburton@mayerbrown.com
212.506.2525

Eli Katz
Latham & Watkins LLP
eli.katz@lw.com
212.906.1620

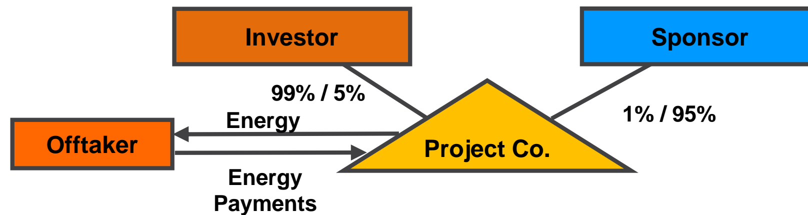
Agenda

- Tax equity background
  - Specific solar considerations
- Key provisions of the new tax law impacting renewable energy projects
  - Impact of the reduction in corporate tax rate and elimination of the AMT
  - Implications of BEAT on renewable energy
  - Interest expense deduction limitation rules enacted by tax reform
  - Limitation on net operating losses (NOLs) after tax reform
- Phase down/out of each of the renewable energy investment tax credit (ITC) and energy production tax credit (PTC)
- Start of construction rules and issues
- Tax reform impact on renewables M&A
- Repowering
- Tax basis step-ups
- Appendix: Sale-leaseback

TAX EQUITY BACKGROUND – PARTNERSHIP FLIP



Partnership Flip Structure – Rev. Proc. 2007-65



- Project typically is financed with some combination of sponsor equity and investor equity and, in some cases, debt
  - Investor acquires interest in project company for cash
  - Investor typically makes an up-front investment, although, investor in a PTC deal also may make pay-as-you-go payments (i.e., PAYGO)
- Investor initially is allocated as much as 99% of tax items (PTC or ITC and depreciation) and subsequently "flips" down to as little as 5% after achieving a specified after-tax IRR

Partnership Flip Structure – Sharing Ratios

	Pre-Flip Period [1]		Post-Flip Period	
	Investor	Sponsor	Investor	Sponsor
Pre-Tax Cash	30%	70%	5%	95%
Tax Credits	99%	1%	5%	95%
Taxable Income/ Loss	99%	1%	5%	95%

- The ultimate objective is to allocate tax benefits to a party that can use them most efficiently
- There are many variations of the basic structure and what is represented above is more consistent with a PTC deal

Solar Tax Equity – Specific Issues

- Solar projects are eligible for ITC
- ITC is claimed on the tax return in placed in service year but is subject to recapture for five years
  - Transfer of asset or transfer of equity in project company triggers ITC recapture
  - A partner’s transfer triggers recapture of only that partner’s allocable share of ITC
  - Decrease in a partner’s partnership interest by more than 1/3rd causes recapture for that partner
- ITC causes tax basis reduction equal to 50% of ITC
  - Corresponding decrease to capital accounts and outside basis
- ITC belongs to taxpayer who owned asset on placed in service date
  - In the case of a partnership, the taxpayer is the partnership and the ITC belongs to the partners on the placed in service date
  - In a sale-leaseback, the ITC can be transferred to the lessor 90 days after placed in service
  - In an inverted or pass-through lease, the ITC on the placed in service date can be passed through from lessor to lessee

Solar Tax Equity – Specific Issues (Cont.)

- Solar tax equity is structured a bit differently than wind tax equity
- Flip dates must come after recapture period, but still far shorter than wind deals
- TE is smaller portion of capital structure
- ITC causes decrease in tax equity's capital account
- Structuring techniques to mitigate TE's negative capital account & resulting "deficit restoration obligation" (DRO)
  - Election to slow down depreciation (e.g., 12-year straight-line)
  - Allocations down and then back up in first year of profit
    - Flip downs to 67% after year 1: 99-67-99 structure
  - Income allocations to reverse TE's negative capital account (i.e., DRO) can be expensive to sponsor in terms of "tax distributions" or delayed flip

KEY PROVISIONS OF TAX REFORM

Corporate Rate Reduction

- Corporate rate drops from 35% to 21% effective 1/1/18
  - Means at a high level that corporations are paying 40% less tax, so there is less tax appetite in the tax equity market
    - Tax equity market remains well supplied
  - Reduces the value of depreciation to corporations but does not impact the value of tax credits (so long as the corporation owes enough tax to use them)
- Corp Alternative Minimum Tax (AMT) is eliminated
  - Means corporations do not have to be concerned about AMT limiting their ability to use PTCs after the fourth year of the project's operation or 200% declining balance depreciation deductions

New Tax Rates – Choice of Entity

- Sponsor platforms largely held in pass-through entities
  - Decision may depend on “GrowthCo” Vs. “YieldCo” model;
  - Will the Corporate Tax Rate stay at 21%?
  - Foreign earning assets should be held through US C Corporations (e.g., organized in Delaware)

Comparison of Prior Law and Post-Act Federal Effective Tax Rates Applicable to Corporations and Pass-Through Entities*

	Prior Law		New Law	
	Corporation	Partnership	Corporation	Partnership
Business Income	$100	$100	$100	$100
§199A Deduction	-	-	-	Up to 20%
Taxable Income	$100	$100	$100	$80
Tax Rate	35%	39.6%	21%	37%
Entity Net Income	$65	$60.40	$79	$70.4
Tax Rate on Corporate Dividend	20%	-	20%	-
Owner Net Income	$52	$60.40	$63.20	$70.40
Effective Tax Rate	**48%**	**39.6%**	**36.8%**	**29.6%**

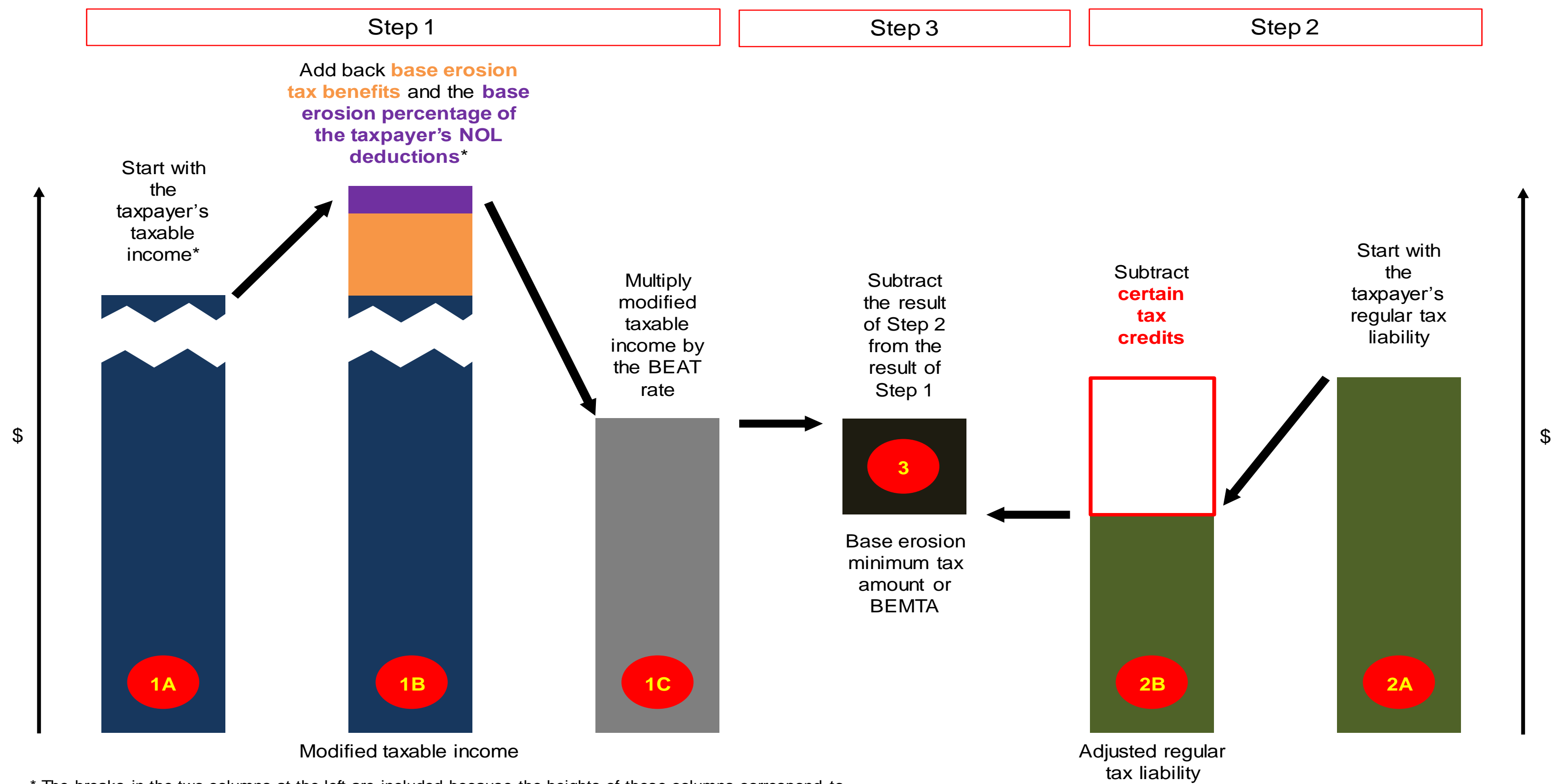
* Figure omits the impact of the 3.8% Medicare surtax, which applies to corporate and REIT dividends and, in some cases, pass-through income (such as that relating to a passive activity). It is assumed that the owners of the corporation or partnership are not corporations.

BEAT Basics

- **Section 59A** enacted by Tax Reform
  - Functions as a minimum income tax that requires certain corporate taxpayers to pay as tax at least a specified percentage of their taxable income, as modified to exclude certain deductions that are deemed to constitute base erosion tax benefits
  - Designed to limit the tax benefits of payments made by corporate taxpayers subject to US income tax to affiliates that are not subject to US tax, or are subject to a reduced rate via income tax treaty, as a result of receiving the payments

- **Basic Formula**: "applicable taxpayers" must pay the "base erosion minimum tax amount" (BEMTA), which equals the *excess*, if any, of (1) the "base erosion and anti-abuse tax rate" (BEAT rate) *multiplied* by the applicable taxpayer's "modified taxable income" *over* (2) the applicable taxpayer's "adjusted regular tax liability"

BEAT Basics: BEMTA Visualized



Through 2025, 20% of energy tax credits (PTC and ITC) and low income housing tax credits are subtracted. After 2025, all tax credits are subtracted.

Impact of BEAT

- Most tax equity investors have stayed in the market
  - New entrants have exceeded those who departed
  - Some have shifted to a syndication business model
- Limited impact on tax equity pricing
- Foreign-parented tax equity investors most likely to be impacted
- Some deals "price in" BEAT as an alternative computation of an "After-Tax IRR" to ensure the TE's return is not too low after BEAT
- Some deals factor BEAT into sizing the TE investment
- Due to BEAT's treatment of tax credits starting in 2026, BEAT is more of an issue for wind PTC deals due to 10-year PTC stream v. ITC in placed in service year
- Impact of recent regulations still being worked out by the market

100% Bonus Depreciation Rules

- 100% expensing (i.e., "bonus" depreciation) is available for wind and solar property that is (i) new (but see below), (ii) acquired after September 27, 2017, and (iii) placed in service after September 27, 2017, and before January 1, 2023
  - 20% annual phase down for property placed in service in 2023 or later; full phase out (i.e., no bonus) for property placed in service in 2027 or later
  - For property acquired before September 27, 2018: (i) 50% for property placed in service before January 1, 2018; (ii) 40% for property placed in service in 2018; (iii) 30% for property placed in service in 2019; and (iv) 0% for property placed in service after 2019
    - Property is not treated as acquired after the date on which a "written binding contract" is entered into for such acquisition
  - Special rules apply to *used* property acquired after September 27, 2017

100% Bonus Depreciation Rules (Cont.)

- Used property that is acquired after September 27, 2017, is eligible for 100% bonus depreciation if the following requirements are met:
  - The property has not been used by the taxpayer (or any member of taxpayer's consolidated group) at any time prior to such acquisition
  - The taxpayer does not acquire the property from certain related persons
    - A partnership is considered related to a partner that owns more than 50% of the capital interest or profits interest therein
  - The taxpayer does not take a carryover basis in the property (e.g., through a contribution to a partnership)
- The cost of used property does not include the basis of any other property already held by the taxpayer (e.g., exchanged basis)

100% Bonus Depreciation Rules (Cont.)

- Special Partnership Items
  - Section 704(c) remedial allocations are not eligible for bonus depreciation
  - Section 734(b) basis adjustments (i.e., step-ups resulting from distributions in excess of a partner's outside basis) are not eligible for bonus depreciation
  - Section 743(b) basis adjustments (i.e., step-ups resulting from a transfer of a partnership interest) are generally eligible for bonus depreciation
    - The transferee partner must still satisfy the acquisition requirements with respect to the partnership property to which the adjustment relates (e.g., not impermissibly related to the transferor, no carryover basis, etc.)
    - The transferee partner must not have previously had a "depreciable interest" in the portion of the partnership property deemed acquired
    - Prior use of the partnership property by the partnership is not relevant

Tax Reform Impact on Tax Equity: Bonus Depreciation

- A small number of projects can be structured with 100% bonus depreciation election, even though the benefit is probably marginal
- Key structuring challenges include
  - Tax equity investor's Section 704(b) "capital account" constraints (increasing the amount of "DRO" reduces the amount of loss reallocations)
  - Tax equity investor suspended losses in "outside basis" (Section 704(d))
- Wind projects tend to be better candidates for bonus depreciation due to higher starting outside basis of the tax equity investor

Bonus Depreciation – Cheat Sheet

- 100% expensing on almost all assets through 2022
- Gradual phase-out through 2026

Bonus Depreciation Rates Under Tax Reform		
Placed in Service Year	Bonus Depreciation Percentage	
	Personal Property (i.e., not Real Estate or Intangibles)	Longer Production Period Property and Certain Aircraft
Portion of Basis of Qualified Property Acquired on or before Sept. 27, 2017		
Sept. 28, 2017 – Dec. 31, 2017	50%	50%
2018	40%	50%
2019	30%	40%
2020	None	30%*
2021 and thereafter	None	None
Portion of Basis of Qualified Property Acquired after Sept. 27, 2017		
Sept. 28, 2017 – Dec. 31, 2022	100%	100%
2023	80%	100%
2024	60%	80%
2025	40%	60%
2026	20%	40%
2027	None	20%**
2028 and thereafter	None	None

* 30% applies to the adjusted basis attributable to manufacture, construction, or production before January 1, 2020, and the remaining adjusted basis does not qualify for bonus depreciation. 30% applies to the entire adjusted basis of certain aircraft placed in service in 2020.

**20% applies to the adjusted basis attributable to manufacture, construction, or production before January 1, 2027, and the remaining adjusted basis does not qualify for bonus depreciation. 30% applies to the entire adjusted basis of certain aircraft placed in service in 2027.

Limit on Interest Deductibility

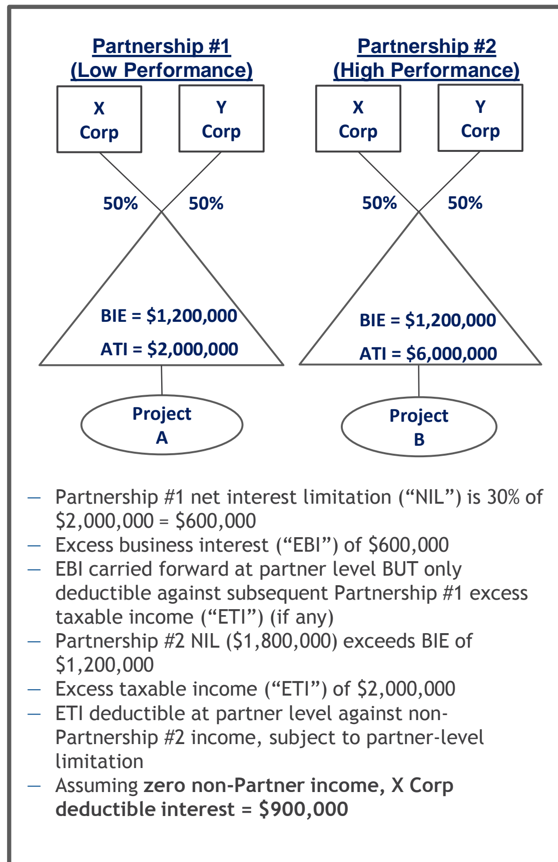
- Prior to Tax Reform, interest paid or accrued by an entity engaged in a trade or business was deductible in the computation of taxable income (subject to certain limitations such as, for example, the so-called "earnings stripping rule")
- For tax years beginning after Dec. 31, 2017, subject to certain exceptions there is a limit on all net "business interest expenses" provided in § 163(j)
  - For purposes of this limitation, ATI is determined in a manner similar (but not identical) to EBITDA (i.e., earnings before interest, taxes, depreciation and amortization) for taxable years 2018 through 2021
- There is a disallowance of a deduction for net interest business expense in excess of 30% of the business's "adjusted taxable income" (ATI)

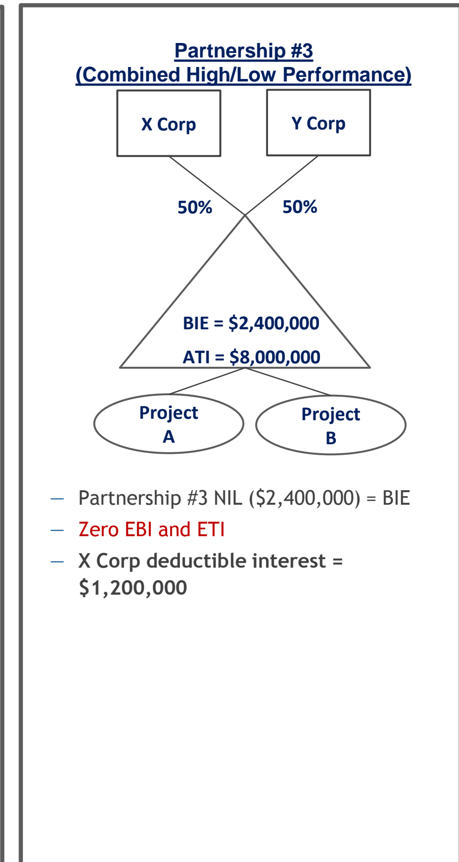
Limit on Interest Deductibility (Cont.)

- All tax equity partnerships with debt at the project level (i.e., “forward” debt) will be subject to this restriction due to a drafting legislative glitch
  - Back-levered debt is not an issue for the tax equity investor but may be an issue for the sponsor/borrower
- The term “interest” for purposes of the 30% ATI limit includes interest on all forms of indebtedness (e.g., PIK notes, currency notes, OID, Section 467 interest, etc.) and guaranteed partnership payments
- Disallowed Interest Deductions
  - Carried forward indefinitely and treated as interest in later taxable years
  - Beginning in 2022, ATI is determined in a manner similar to EBIT (i.e., earnings before interest and taxes (so that depreciation and amortization reduce the ATI limit the 30% is applied to))
  - Beginning in 2022 the interest limitation will have a greater negative impact

Limits on Interest Deductions -Partnerships

- Each partnership computes its own interest limitation
- Disallowed interest waits for future income from same partnership

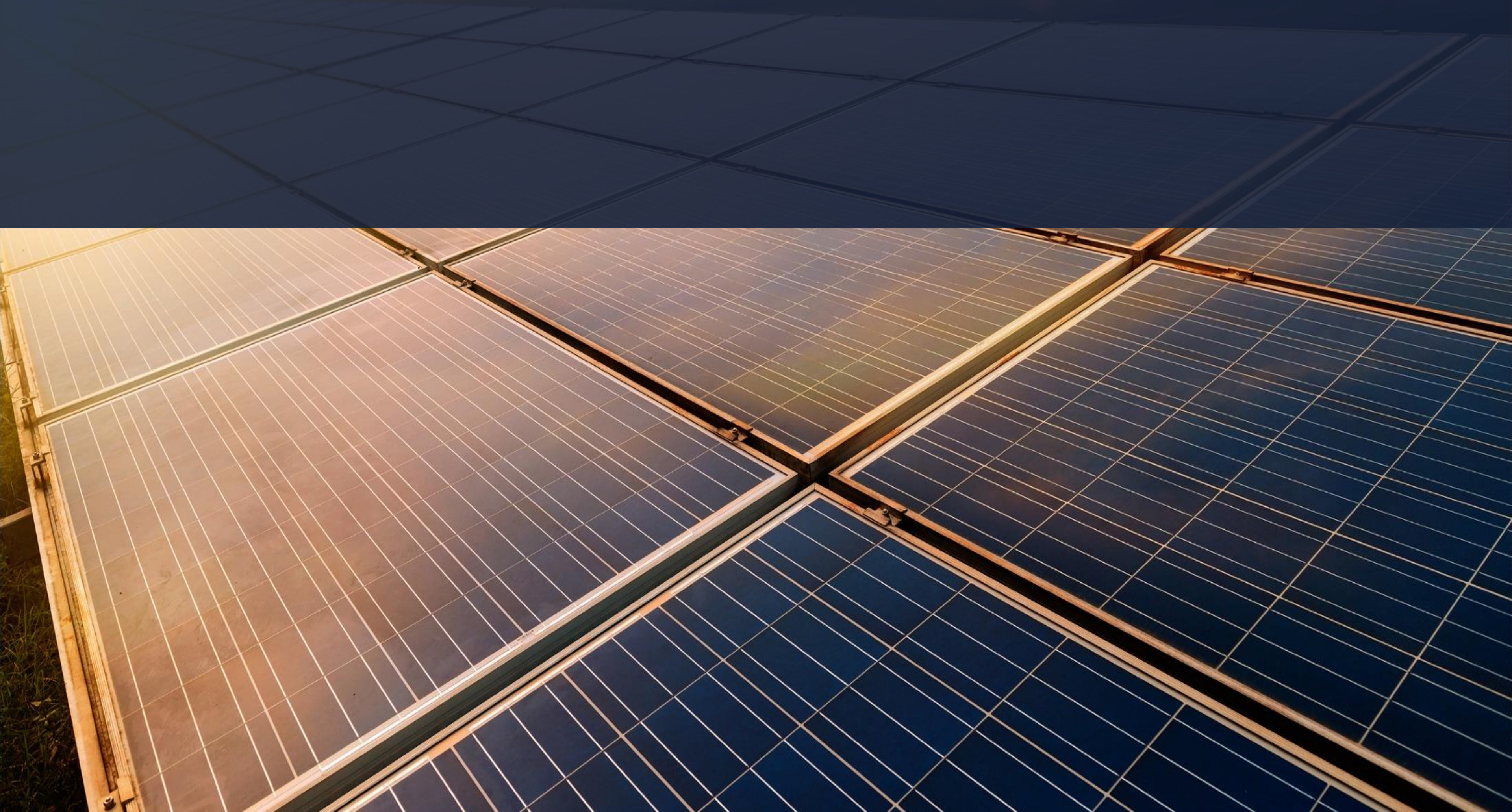




Net Operating Loss Carryforward Changes

- Prior to the Act, net operating losses (NOLs) could be carried back 2 years and carried forward 20 years
- Net Operating Loss Changes:
  - NOLs can no longer be carried back
  - NOLs can now be carried forward indefinitely but can only be used to offset 80% of taxable income, with an adjustment in later years that takes into account the 80% taxable income limitation

TAX CREDIT PHASE OUT/DOWN RULES

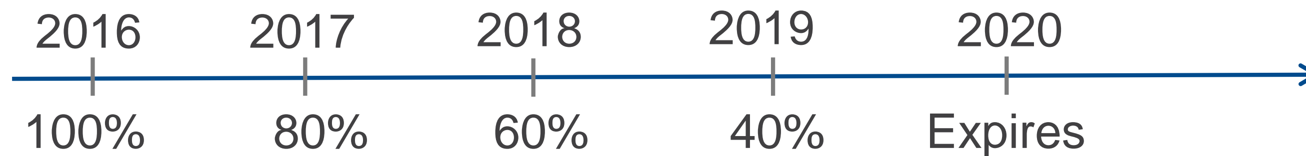


Tax Credit Phase-Out/Down Summary

- Solar investment tax credit (ITC) continues to be 30% with phase down to 10% from 2019 to 2023 based on the "start of construction" date
- Wind production tax credit (PTC) continues to be a ten-year stream at 2.4 cents per kWh for projects that started construction in 2016 or earlier
  - For projects that "start construction" in 2017, the PTC is 80% of 2.4 cents, 60% in 2018, 40% in 2019 and then expires
  - The PTC for new and operating projects continues to be eligible for inflation adjustments that since 1992 have increased it 60% (1.5 to 2.4 cents)
- The Bipartisan Budget Act of 2018 extended the 30% ITC for fuel cells, small wind, and solar lighting with a phase down from 2019 to 2023 based on the "start of construction" date
- The Budget Act also extended the 10% ITC for combined heat and power and microturbine facilities, so long as they start construction before 2022

Tax Credit Phase Out for Wind Projects

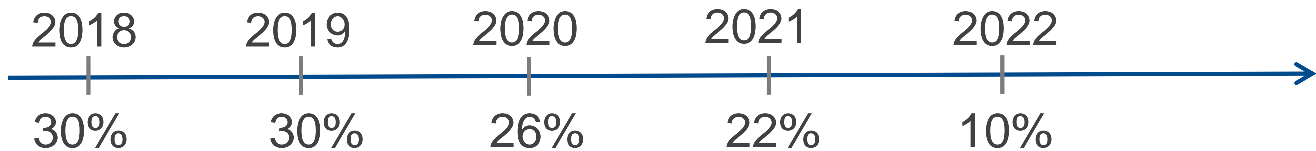
- Wind projects qualify for the § 45 PTC at rate of $0.024/kWh (that will continue to be periodically adjusted by the IRS for inflation);
  the credit will ramp-down based on when the project starts construction based on the following schedule:



- Alternatively, wind projects have the option to claim the 30% ITC, across the same timeframe; ITC for a wind project would be subject to the same ramp-down schedule (i.e., a project that started construction in 2019 will qualify for a 12% ITC => 30% * 40%)

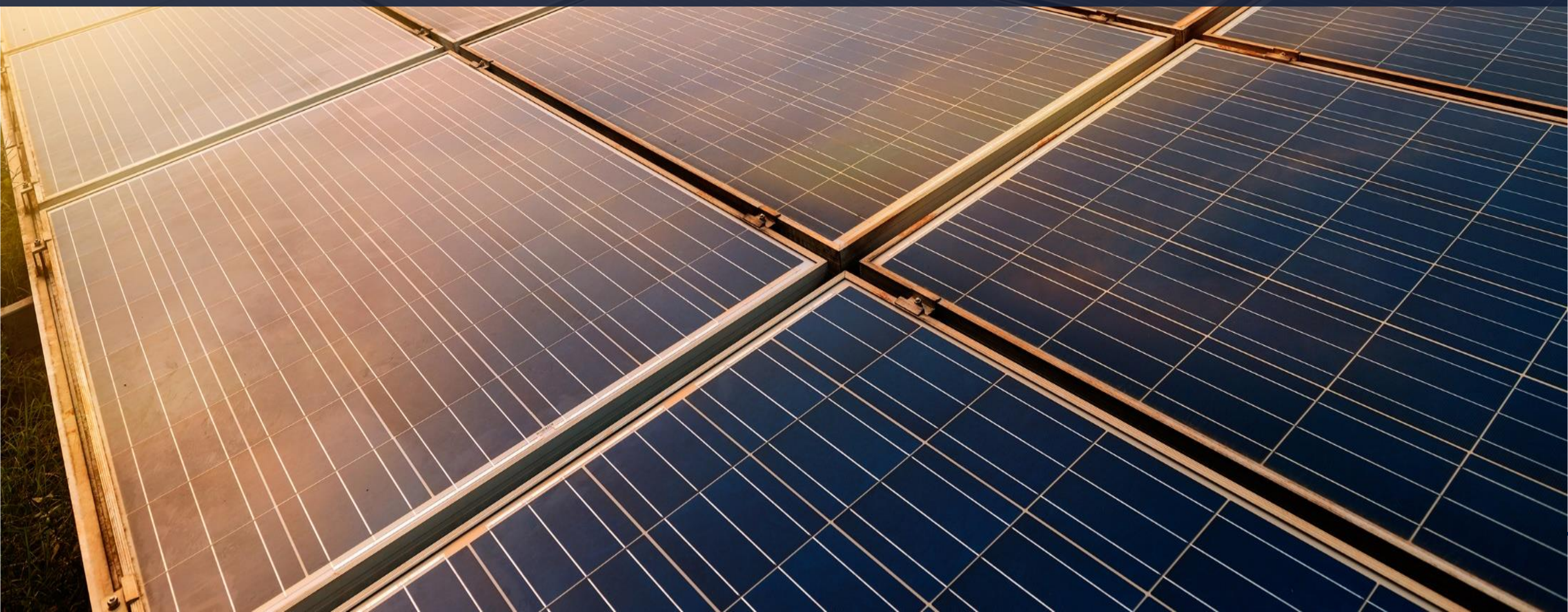
Tax Credit Declining to 10% for Solar

- The § 48 ITC for solar ramps down in accordance with the following schedule for the start of construction:



- To qualify for more than a 10% § 48 ITC, a project must be placed in service by the end of 2023, regardless of its start of construction date
  - Wind, unlike solar, does not have a placed in service statutory deadline, but the IRS's guidance created a "soft" deadline (discussed below)

TAX CREDIT ELIGIBILITY: IRS START OF CONSTRUCTION GUIDANCE



Start of Construction Guidance – IRS Guidance for Solar and Wind

- Renewable energy tax credits determined by when the project started construction
- IRS issued Notice 2016-31 for Wind and Notice 2018-59 for Solar:
  - Projects have until December 31 of the year that included the fourth anniversary of the start of construction date to be "placed in service" (e.g., if construction started on a wind project in June 1, 2016, then project must be in service by December 31, 2020) to avoid "continuous" work/construction requirement

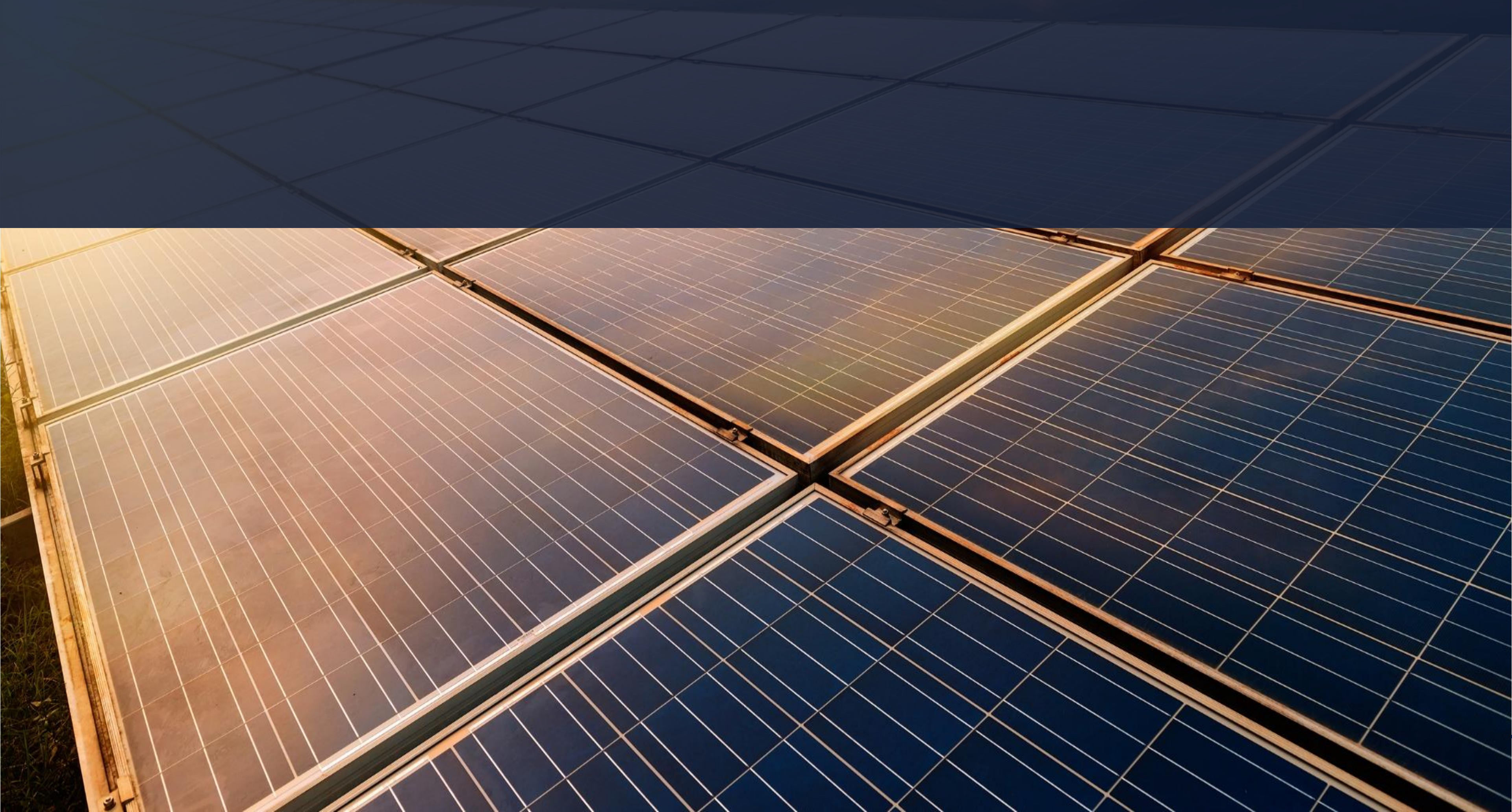
IRS Start of Construction Guidance

- Two methods to start construction:
  - Commence "physical work of a significant nature" or
  - Incur at least 5% of the cost of the project
    - Must take delivery of equipment purchased with 5% within 3.5 months of payment (e.g., April 15 if pay on December 31)
    - But must take delivery in same year if vendor provides debt financing
- Both methods generally follow the Treasury Cash Grant guidance but with some key differences
- No minimum level of work was required in order to meet the "physical work of a significant nature" requirement
  - Qualifying work – operational road construction, digging turbine foundations, manufacturing a **customized step-up transformer** or manufacturing other equipment not held in inventory by the manufacturer
  - Work not done by the project owner directly must be performed pursuant to a “binding written contract,” which has certain highly technical requirements
  - Look-Through Rule – EPC contractor can satisfy 5% safe harbor for project owner if EPC contractor and project owner have a binding written contractor (EPC contractor effectively finances 5% safe harbor for project owner)

Start of Construction– Market Impact

- Analysts estimate over 40GW of wind was safe harbored in 2016
  - 80% PTCs paid for by lower equipment costs + higher capacity factors
  - 60% - no clear line of sight – but industry is optimistic
- How liberal will the industry (tax equity) interpret the start of construction rules
  - Start-stop-start
  - Foot-faults in payments/delivery/contract mechanics
  - Going outside the 4-year window
    - Continuous efforts
    - Continuous construction
    - Anticipated excusable disruptions
- Solar ITC ramp down will depend on:
  - Ability of industry to find viable start of construction strategies
  - IRS/courts reactions to wind safe-harboring techniques

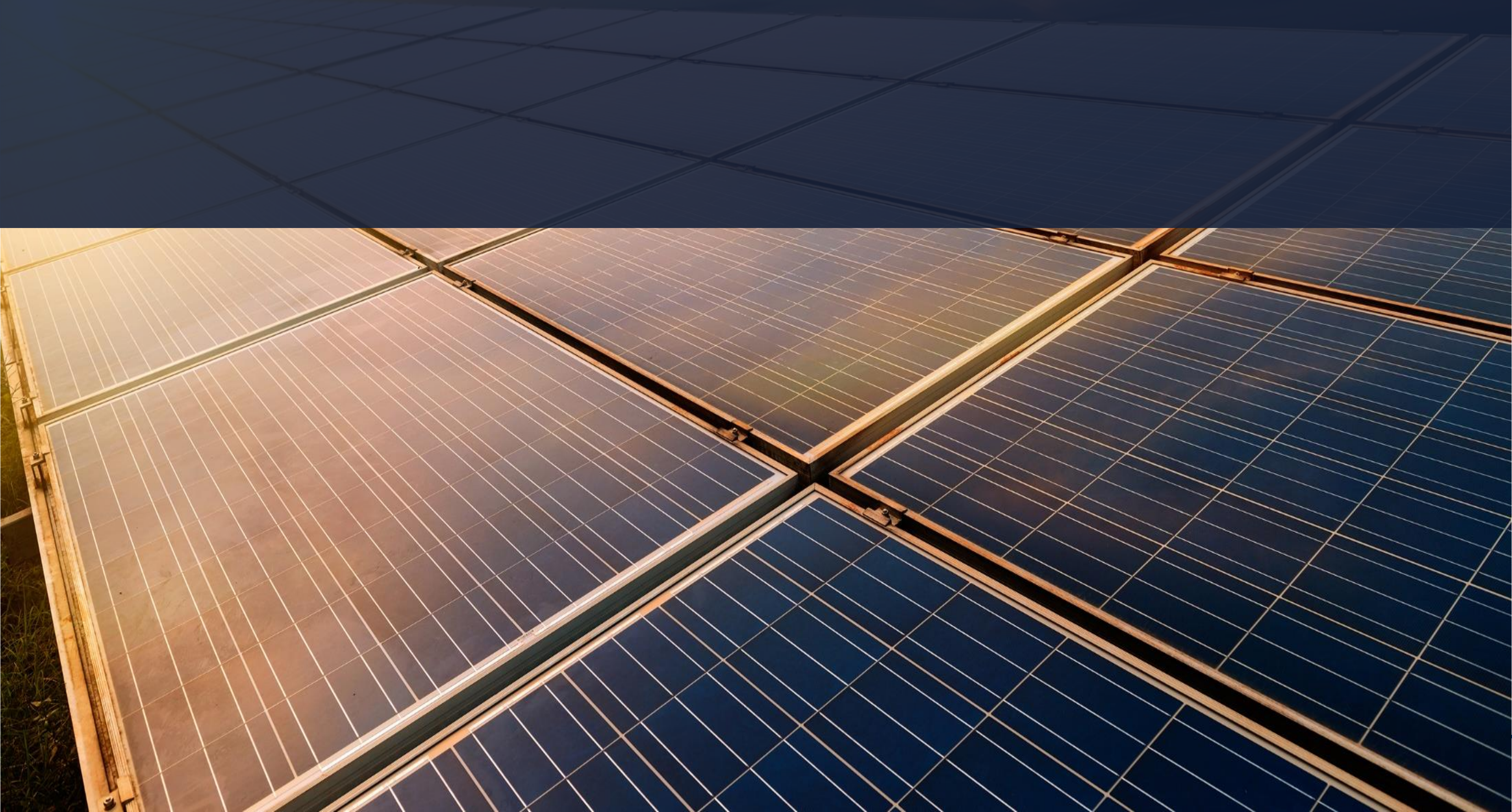
TAX REFORM IMPACT ON RENEWABLES M&A



Impact on Renewables M&A

- Buyers – aim for step-up in basis and full expensing
  - Expensing when buying partnership interests should be achievable
- Corporate sellers generally sell at corporate level to avoid tax on difference between tax basis (taking into account accelerated deprecation) and FMV of assets
- Corporate/blocker sellers may sell assets – if purchase price premium covers its taxes
  - Lower tax rate to sellers balanced against immediate buyer expensing
- Cost segregation of purchased assets becomes more important
  - Allocate value to contracts or goodwill?
- Acquisition debt – structured to comply with 30% limitation
  - Partnership /Asset level debt
  - Foreign or domestic borrowers
- Lower taxes on assets sold/separated that are held in corporate form.
  - More important to DD - interest and NOL carryforwards and offshore cash/earnings

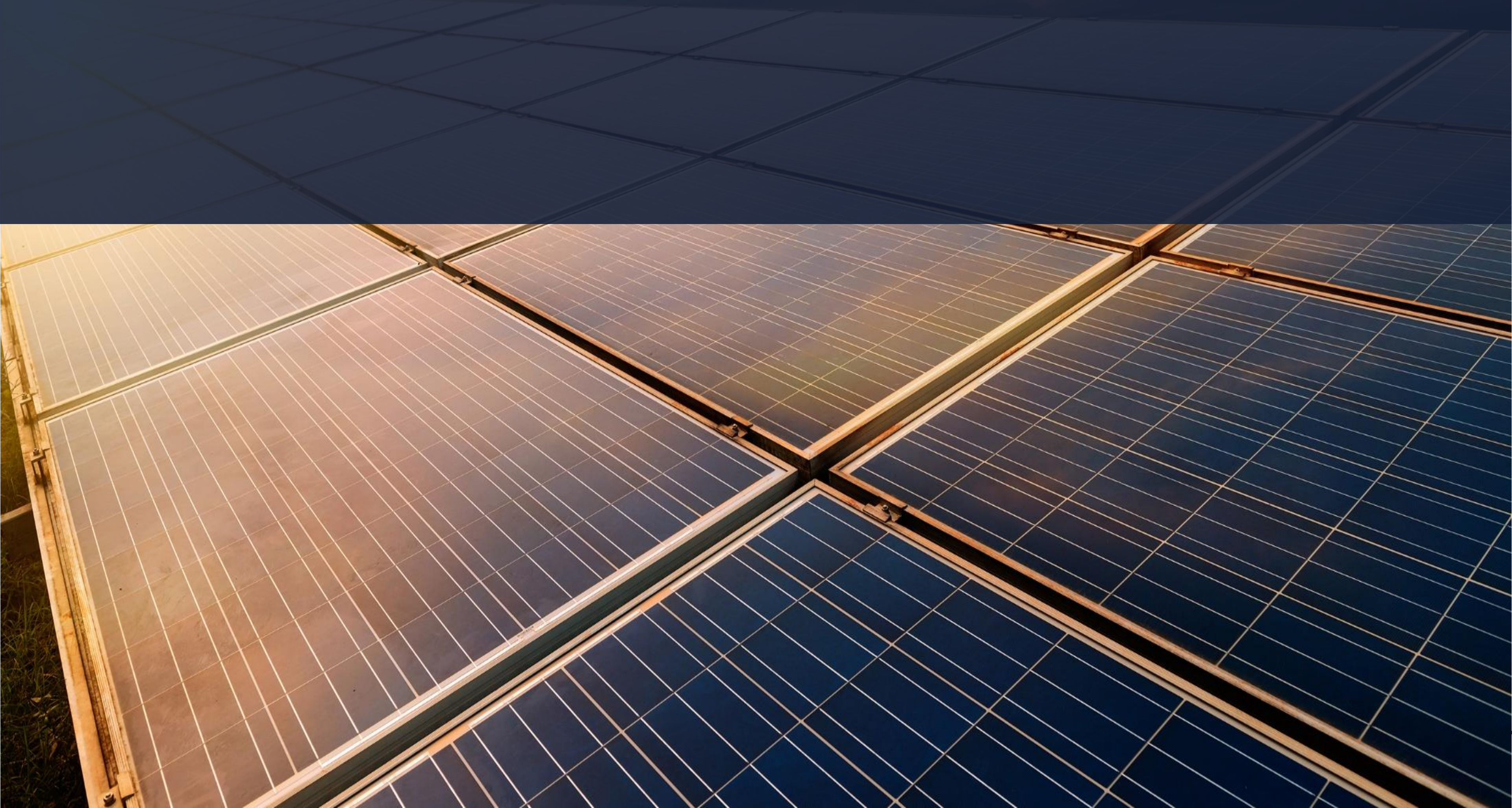
REPOWERING



Repowering

- Repowering older assets may requalify them for PTC or ITC
  - IRS 80/20 test
  - Valuation issues
  - $500-$700 per kW
  - Full repowering vs. key equipment replacement
  - Offtake contracts – hedges
  - 100% PTC or less
- Tax equity appetite largely driven by turbine suppliers
- Tax risk allocation still being worked out by market
  - Use of replaced parts
  - Indirect costs
  - Business purpose requirements
  - Paygo mechanics

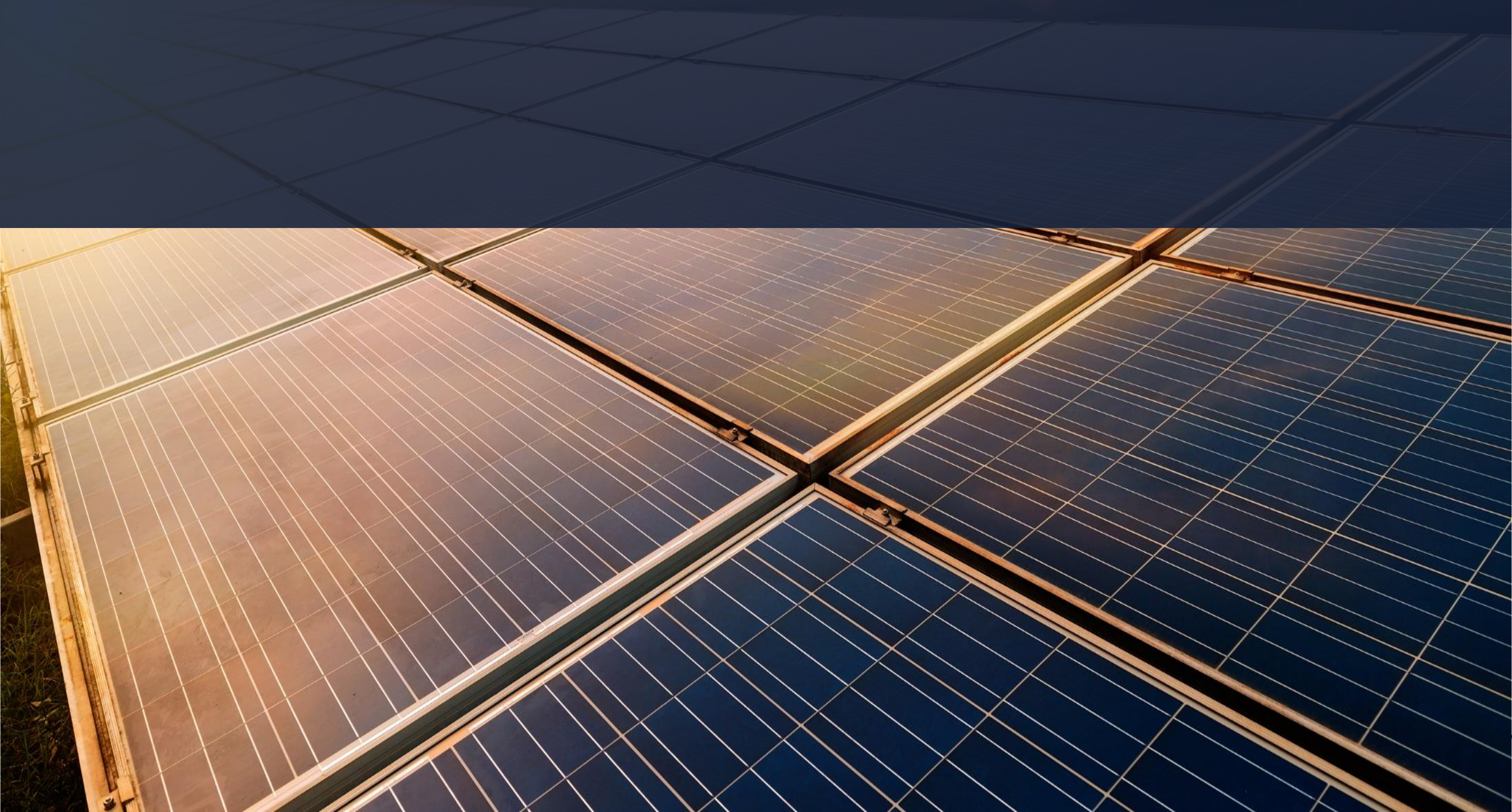
STEP-UPS IN TAX BASIS



Step-Ups in Tax Basis

- Almost all Solar deals involve some amount of ITC step-up
  - 20% "developer fees" if using a Developer Services Agreement or an "entrepreneurial incentive" in "cost" approach valuation
  - Fees on top of fees
  - Cash Grant litigation – current developments
- Step-up risks are largely borne by sponsor
- Role of appraiser
- Allocating value to Power Purchase Agreements
- Sponsor should control basis indemnity disputes with the IRS

APPENDIX: LEASING OPPORTUNITIES



Leasing Transactions – Post Tax Reform

- Lease transactions may be useful to:
  - Avoid § 163(j) interest limitations by substituting rental deductions for interest deductions;
    - § 163(j) limited to "interest paid or accrued on indebtedness"
    - If lease is a "true lease" payments from lessee are rent for tax purposes
    - No material restrictions on using related parties or US entities (foreign owners cannot use expensing provision)
    - No comparable limit on rental deductions
  - Enable tax-efficient parties to qualify for 100% expensing
    - Lease financing for new assets
    - Sale-leaseback for used assets – but some limitations:
      - No related party sales
      - No basis carryover transactions (§§ 721/351)

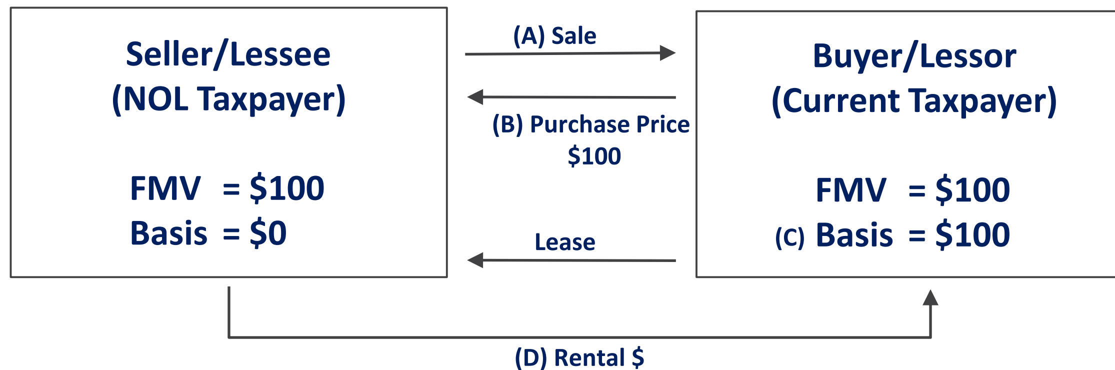
Leasing – Preliminary Observations

- Companies in NOL positions are best positioned for sale-leasebacks of low basis assets;
  - Leases to tax-exempts do not qualify for expensing
- Lease financing to avoid 163(j) limitations:
  - Sale of low basis asset triggers immediate tax
  - Trade future depreciation deductions for current rental expense
  - Long recovery period assets (and/or high basis assets) likely to be most attractive
  - Using leasing as a form of partial acquisition financing for 163(j) limited portfolio

Leasing – Preliminary Observations

- Sale-leaseback may produce tax arbitrage when high basis/long recovery period are sold
  - Partial gain on sale
  - Immediate expensing to buyer/lessor
  - Magnified by corporate rate sellers (21%) and pass-through buyers (29.6%)
- Sale to affiliates with/without leasebacks may be possible
  - Avoid more than 50% related party rule
  - Possible use of affiliated partnership to enable seller to retain control of asset

Leasing – Basic Illustration #1 (NOL Taxpayer)



A. Sale for $100
B. Taxable gain fully offset by NOLs
C. Buyer depreciates $100 basis in year of purchase = $21 tax savings (or $29.6 tax savings if pass-through taxpayer)
D. Ongoing rental payments (rent prepayment to pay down exposure; § 467)

SPEAKER BIOGRAPHIES

David K. Burton
Partner
Mayer Brown LLP
Direct: +1 212.506.2525
dburton@mayerbrown.com

David K. Burton is a partner in Mayer Brown's New York office and a member of the Tax Transactions & Consulting practice. He leads Mayer Brown's Renewable Energy group in New York. He advises clients on a wide range of US tax matters, with a particular emphasis on project finance and energy transactions. In addition, he also advises clients on tax matters regarding the formation and structuring of domestic and offshore investment funds.

David has extensive experience structuring tax-efficient transactions, such as sale-leasebacks, flip partnerships, pass-through leases and other structures, for the acquisition and financing of renewable energy assets.

Earlier in his career, David was the managing director and senior tax counsel at GE Energy Financial Services (GE EFS), one of the world's leading investors in energy projects. At GE EFS, David oversaw all of the tax aspects for more than $21 billion in global energy projects from structuring transactions to accounting for taxes to formulating tax policy initiatives. During his tenure at GE EFS, the division's investments in wind, solar, hydro, biomass and geothermal power grew to $6 billion, making GE EFS the largest tax-advantaged energy investor in the United States. Before joining GE EFS, David was a tax lawyer at GE Capital and primarily focused on aircraft and equipment leasing and financing and asset acquisitions.

David has been recognized by *Chambers USA* 2018 in the area of Projects:
Renewables & Alternative Energy. He was named to A Word About Wind's "Legal Power List 2018 & 2016 and in 2016 received an award from the Burton Foundation for legal writing excellence for his article "How Can a Renewable Energy Plan be Sold for a Capital Gain".

David received his BA magna cum laude from Ithaca College in 1993 and his JD cum laude from the Georgetown University Law Center in 1996, where he was on the staff of *The Tax Lawyer*.

He is co-editor of the firm's blog www.TaxEquityTimes.com.

Eli M. Katz
Partner
Latham & Watkins LLP
Direct: +1 212.906.1620
eli.katz@lw.com

Eli Katz is a partner in the New York office of Latham & Watkins and a member of the firm's Tax Department. Mr. Katz has extensive experience assisting clients on a wide range of complex transactions, including those in the renewable energy and financial sectors. His practice is focused on energy tax incentives, project development and financing, capital raising and deployment structures, mergers and acquisitions, and leasing transactions both internationally and in the United States.

Mr. Katz has repeatedly been recognized by *The Legal 500 US* for his work in Project Finance and Tax, as well as recommended by *Chambers USA* for Nationwide Projects in Renewables & Alternative Energy.

Prior to joining Latham, Mr. Katz was vice president and tax counsel at GE Energy Financial Services.

Publication Highlights

- New IRS Rules for Tax Credits Slows the Wind Market, *Project Finance News*, July 2016
- How Yieldcos are Re-Shaping the Tax Equity Market, *Power Finance & Risk*, January 2015
- Yield Cos: Where to Next?, *Project Finance NewsWire*, November 2014
- Solar Securitizations, *Project Finance NewsWire*, September 2014

Speaking Engagements

- Investing in US Renewables, Toronto, 2013
- Wall Street Green Summit XII, New York, 2013
- The Return of Tax Equity - Crucial Financing Piece, New York, 2013