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M&A ACADEMY

**Don't Waste Your Energy:
What You Need to Know About
Conventional and Renewable M&A Deals**

Speakers:

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What is Project Finance?

“Long term financing of physical projects based on projected cash flows from the project as opposed to the balance sheet of the project sponsors”

- ML Project Finance, Infrastructure and Natural Resources practice group
 - Focus on U.S. power projects today
- M&A is essential component to project financing
 - Development and M&A
 - Joint ventures
 - Financing: debt and tax equity

What is Project Finance?

Development and M&A

- **Development**

- Critical if project is to repay the financing
- Significant diligence on permitting, site control, interconnection, offtake contracts, regulatory, tax (structuring and credits), technology, resource assessment and project documents
- Part of power M&A is negotiating project documents

- **Project and Company M&A**

- Project M&A
 - Sale or acquisition of a single project or portfolio of projects – usually through an equity transfer
 - Often done in connection with project financing
- Company M&A
 - Sale or acquisition of the development company for a project developer

What is Project Finance?

Upstream Equity Investments and Joint Ventures

- **Equity JVs among Sponsors upstream from a Project Company**
 - Capital-intensive projects often require consortium investments among two or more equity investors
 - Equity sell-downs of construction phase projects (especially large conventional power projects due to capital requirements)
 - Usually entered into at or immediately prior to financial close
- **Considerations for Joint Governance and Control**
 - LLC agreements (most common entity type)
 - Major decisions/decisions requiring unanimous or majority vote of members
 - Change of control provisions – must work in conjunction with project financing agreements
 - Equity contributions and capital calls – in construction-stage projects, only required through COD as required backstop to financing

What is Project Finance?

Upstream Equity Investments and Joint Ventures

- **Joint Ventures in Development or Operating Projects or Portfolios**
 - Often two members, one with day-to-day construction or operation management capability and one with more extensive capital resources or financial management expertise
 - Governance, decision-making, deadlock provisions become key for ongoing life of the JV
 - Equity contributions and capital calls – in operating projects, negotiated provisions relating to budgets and requirements to make equity contributions
- Each structure often requires an M&A transaction for the acquisition by one or more entities of equity interests

What is Project Finance?

Debt

- **Project Finance debt facilities** = “non-recourse” or “limited recourse” debt
 - Lenders’ recourse in a borrower event of default is foreclosure on the assets of the project and equity interests in the project company (rather than the resources of the project’s owners)
 - Lending against the value of the long-term revenue streams of a project (not just the value of the physical assets)
- Each energy or infrastructure related M&A deal has to be structured with existing or future project finance facilities in mind
- **Change of Control and restrictions** on transfer are key considerations in M&A deals for energy/infrastructure projects
 - Will debt be paid off at closing and project(s) purchased free and clear of liens?
 - Will debt be assumed by purchaser? If so, lender consent will be required.

What is Project Finance?

Tax Equity

- **Tax Equity Investments**

- Tax benefits available for renewable energy projects
- Investor invests in project in exchange for tax benefits
- Tax equity is passive ownership interest
- Specific steps need to be taken to qualify for tax benefits – involve your tax specialist!

Players and Projects

- **Participants in Power M&A**

- Financial investors (private equity, infrastructure funds, pension funds)
- Strategic investors
- Foreign investors
- Utilities

Types of Power M&A

- **Traditional Power M&A Transaction**
 - Conventional power / renewable / storage
 - Single asset / portfolio
 - Development / construction / operating projects
- **Other Power M&A Transactions**
 - Regulated utilities
 - Transmission utilities
 - Competitive retail businesses
 - Decommissioning sales

Power M&A Structure

- **Project M&A**

- Sale or acquisition of a single project or portfolio of projects
- Usually through an equity transfer of a SPV – do not want to seek consent to transfer project assets
 - Only asset is project(s)
 - No employees
- Often done in connection with project financing

- **Company M&A**

- Sale or acquisition of the development company for a project developer

Development vs Operating M&A

- **Stages of Development**

- Development
- Construction
- Operational
- Retirement / repowering / decommissioning

- **Transaction Considerations**

- Due diligence
- Risks
- Third party approvals
- Design-build-sale transactions

Components of a Transaction

- **Regulatory Approvals**

- Federal Energy Regulatory Commission
- State public utility commissions
- Nuclear Regulatory Commission (for nuclear generation/sites – must remain under control of U.S. persons)

- **Other Approvals / Restrictions**

- Hart-Scott-Rodino (antitrust)
- Committee on Foreign Investment in the U.S. (for foreign investors)
- Federal Communications Commission (radio licenses used for operations)

Components of a Transaction

- **Real Estate**
 - Site control (development projects)
 - Owned property
 - Leased property
 - Easements/rights of way
- **Permitting/Environmental**
 - Federal / state / local permits and approvals
 - Environmental considerations
- **Tax Considerations**
 - Tax credits
 - Other tax considerations

Key Diligence Considerations

- **Project Agreements:**

- Engineering, procurement and construction agreement (EPC)
- Power purchase agreement (PPAs)/offtake
- Fuel supply/capacity agreement
- Operations & maintenance agreement (O&M Agreement)
- Asset management agreement (AMA)
- Energy management agreement (EMA)
- Equipment long-term service agreement (LTSA)
- Interconnection agreement

Key Diligence Considerations

- **Other Considerations**

- Risk policies and hedging
- Regulatory compliance and permitting
- Financing and credit support
- Environmental
- Real estate
- Employees, benefits and labor (if applicable)
- Tax

Recent Developments on Power M&A

- **Indemnities / Representation & Warranty Insurance**

- Indemnity structures vary by
 - Participants
 - Technology
 - Stage of development
- Many power M&A transactions still have a traditional indemnification structure
- No indemnity structures and representation and warranty insurance becoming more common

Recent Developments on Power M&A

- **COVID-19**

- Conventional power slowdown
- Renewable power markets remain strong
- Supply chain, permitting and construction delays
- “Material adverse effect” clauses
 - Pandemic carve outs
 - More MAE litigation likely

- **American Jobs Plan**

- Tax credit benefits
- Transmission projects
- Other impacts

Recent Developments on Power M&A

- **New Technology**

- Storage
- Offshore wind
- RNG
- Hydrogen

- **Renewable Growth**

- Move toward clean energy and sustainability goals
- Tax credit benefits
- Transmission projects
- Other impacts

Laura Neumeister Wright



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Laura Neumeister Wright focuses her practice on project finance and development of renewable energy generation projects. She advises sponsors and financing sources, including developers, private equity and financial institutions, in the acquisition/sale, development, construction, operation, and financing of wind, solar and other renewable assets.

Michael A. Müller



Partner

Boston

Michael A. Müller represents developers, lenders, government entities, and equity investors in connection with the development, financing, acquisition, and disposition of energy and infrastructure projects. He regularly counsels clients on all aspects of the development, construction, and financing of power production assets. Mike also advises clients on corporate matters including mergers and acquisitions involving natural gas, ethanol, hydroelectric, solar, wind, biomass, battery storage, and other alternative energy projects, and in connection with transportation, transmission, telecommunications, and other infrastructure projects.

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Kathryn J. Ostman represents equity investors, sponsors, lenders, developers, and utilities in connection with project finance, project development, and general corporate transactions related to electrical generation and infrastructure projects. She counsels clients through the development, construction, operation, acquisition, divestiture, and financing of natural gas, nuclear, wind, solar, and other alternative energy projects. Katie also represents companies in corporate and finance matters, including mergers and acquisitions (M&A), joint ventures, and debt and equity financings.

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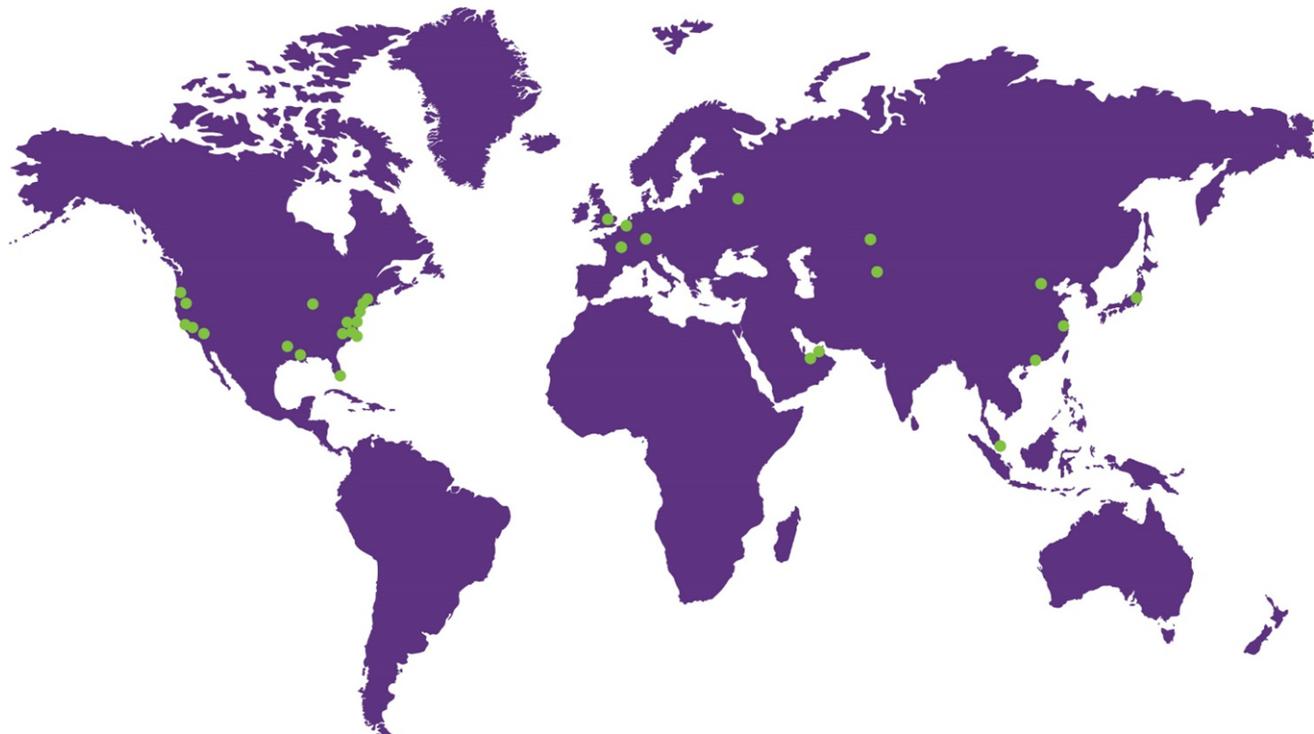
Melanie Campbell represents a diverse clientele of Fortune 500 companies and public and privately held businesses on a broad range of corporate and transactional matters, including US and cross-border mergers and acquisitions, secondary offerings, corporate governance, real estate transactions, and debt and equity financings. She also represents equity investors, sponsors, lenders, and developers in connection with project finance, project development, and general corporate transactions related to electrical generation, and infrastructure projects. Melanie counsels clients through the development, construction, operation, acquisition, divestiture, and financing of wind and solar energy projects.

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