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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:

**Laura Neumeister Wright with Casey August, Stephanie Faraci,
Levi McAllister, Christopher McAuliffe**

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Introduction

- ML Project Finance, Infrastructure and Natural Resources practice group
- M&A can be the entire transaction or one aspect of project work
 - M&A: project, company or asset
 - Joint ventures: to share in development, capital, tax benefits
 - Financing: debt and tax equity
 - Focus on the project

Helpful Notes

Project vs Project Company

- Typically the project is owned by special purpose entity (LLC) that has the sole purpose of owning the project
- Project company obtains permits and enters contracts

Project Lifecycle

- Development
- Construction
- Operation
- Decommissioning

Components of the Transaction: The Project

Due Diligence

- Significant diligence on permitting, site control, interconnection, offtake contracts, regulatory, tax (historical tax compliance as well as matters pertaining to generation of tax benefits), technology, resource assessment and project documents
- Independent experts

Getting to Closing

- Reps/warranties, closing deliverables and indemnities largely focus on project

Third Parties

- Project document counterparties, utility, gov't authorities, lenders/investors
- Many deliverables and consents

Goals aligned to have efficient, working project completed on schedule

Components of the Transaction: Debt

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.

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 must be structured with existing or future project finance facilities in mind.

Components of the Transaction: Tax Equity

Tax Equity Investments

- Tax benefits available for certain US renewable energy projects
- Investor generally must be considered a project owner for tax purposes to receive tax benefits
- Tax equity typically is a passive ownership interest
- Tax equity investments are typically highly structured in a manner intended to navigate a myriad of project-, structure- and investment-level tax issues to best support qualifying for US federal income tax benefits. Tax specialist involvement is critical for both “sponsors” (developers) and investors.
- Impact on subsequent sale of investor or sponsor (developer) interests.

Components of the Transaction: JVs

Equity JVs among Sponsors

- Capital-intensive projects often require consortium investments
- Equity sell-downs of construction phase projects
- JVs usually entered into at or immediately prior to financial close (FNTP)

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

Components of the Transaction: JVs

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

M&A: Project Sales / Acquisitions

Project M&A

- Sale or acquisition of a single project or portfolio of projects – usually through an equity transfer of a special purpose entity (DE LLC)
 - Early vs later stage (capitalized) developers
 - Consider stage of project: development, construction, operational
 - Platform acquisitions trend
- Asset sales (less common)

Company M&A

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

M&A: Project Sales / Acquisitions

Form of Transaction

- Purchase / sale with or without financing
- JVs
- Build-transfer-own

Transaction Considerations

- Due diligence
- Risk shifting
- Closing deliverables

M&A: Project Sales / Acquisitions

Change of Control / Assignment Restrictions

- Project Documents
- Permits and approvals
- Debt / Tax Equity
 - 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.
 - Tax equity consent / restrictions may be challenging.

Considerations: Site Control

Real Estate

- Diligence
 - Site control documents (leases, options to lease/purchase, deeds)
 - Title and survey
 - Site control review – validity of documents, site access, interconnection, site use restrictions, assignment rights, leasehold financing rights
- Closing Deliverables
 - Title and survey
 - Estoppels and SNDAs
 - Consents

Considerations: Permitting and Environmental

Can It Be Built/Operated and What Is the Risk

- Phase I ESAs: Reliance by Owner or Lessee; less than 180 days old, re-do if necessary
 - New Standard E1527-21 to be effective 5/13/2022
- Environmental considerations can limit development footprint
- Federal / state / local permits and approvals
 - Federal: NEPA; wetlands; endangered species; FAA; cultural resources; etc.
 - State: wetlands; soil erosion; endangered species; cultural resources
 - Local: conditional use permits; moratoriums; decommissioning
- Under development vs. built
- Technology-specific considerations (solar, wind, off-shore wind, hydro, etc.)

Considerations: Energy Regulatory

Regulatory Approvals

- Federal Energy Regulatory Commission
 - Change of Control Authorizations
 - Rate Filing Requirements
 - Exempt Certifications (i.e. Qualifying Facilities and/or Exempt Wholesale Generators)
- State public utility commissions
- ERCOT
- Nuclear Regulatory Commission (for nuclear generation/sites – must remain under control of U.S. persons)

Considerations: Energy Regulatory

- Equity and financing transactions involving gas and/or electric companies can require prior regulatory approvals and post-closing filings.
 - Timely consideration of these issues can assist in identifying needed approvals, establish a timeline for approvals, and address regulatory challenges to closing and post-closing operations.
 - FERC exercises broad jurisdiction over electric sector mergers, acquisitions, securities transactions and “dispositions”
 - Consider: Will transaction involve an acquisition or sale of interests in one or more “Electric Entities” or the utility assets of such entities? Bankruptcy and receivership included.
 - Electric Entity: owns, controls, manages or operates ANY electric power production or transmission or utility/distribution facilities, and includes ANY electric power marketer or energy supplier.
- Primary concern is the need for pre-consummation FERC approval under Section 203 of the FPA.

Considerations: Energy Regulatory Legal Issues – Section 203

- One Section, Two Doorways
 - Section 203(a) includes two different subsections that cause Section 203 jurisdiction to attach to different classes or persons and transactions – but if a person or transaction is covered by either, the same substantive requirement apply.
 - 203(a)(1)
 - Direct or indirect control
 - Substantial majority of filings
 - Public Utility buys existing generator
 - Public Utility buys any interest in another Public Utility
 - 203(a)(2)
 - Applies when buyer is already a “holding company”
 - Some blanket authorizations available
 - Standards of review under 203(a)(1) and 203(a)(2) are identical
- 10% and \$10M floors (sometimes)

Considerations: Energy Regulatory Policies concerning review of applications under section 203

(a) The Commission has adopted a Policy Statement on its policies for reviewing transactions subject to section 203. That Policy Statement can be found at 77 FERC ¶61,263 (1996). The Policy Statement is a complete description of the relevant guidelines. Paragraphs (b)-(e) of this section are only a brief summary of the Policy Statement.

(b) *Factors Commission will generally consider.* In determining whether a proposed transaction subject to section 203 is consistent with the public interest, the Commission will generally consider the following factors; it may also consider other factors:

- (1)** The effect on competition;
- (2)** The effect on rates; and
- (3)** The effect on regulation.

(c) *Effect on competition.* Applicants should provide data adequate to allow analysis under the Department of Justice/Federal Trade Commission Merger Guidelines, as described in the Policy Statement and Appendix A to the Policy Statement.

(d) *Effect on rates.* Applicants should propose mechanisms to protect customers from costs due to the merger. If the proposal raises substantial issues of relevant fact, the Commission may set this issue for hearing.

(e) *Effect on regulation.*

- (1)** Where the affected state commissions have authority to act on the transaction, the Commission will not set for hearing whether the transaction would impair effective regulation by the state commissions. The application should state whether the state commissions have this authority.
- (2)** Where the affected state commissions do not have authority to act on the transaction, the Commission may set for hearing the issue of whether the transaction would impair effective state regulation.

(f) Under section 203(a)(4) of the Federal Power Act (16 U.S.C. 824b), in reviewing a proposed transaction subject to section 203, the Commission will also consider whether the proposed transaction will result in cross-subsidization of a non-utility associate company or pledge or encumbrance of utility assets for the benefit of an associate company, unless that cross-subsidization, pledge, or encumbrance will be consistent with the public interest.

Considerations: Energy Regulatory Immunities and Exemptions

- Lengthy list
 - [18 C.F.R. 292.601(c), 18 C.F.R. § 33.1(c)]
- Internal reorganizations of equity interests
- 203(a)(2) blanket authorization for independent generation acquisitions of independent generation [18 C.F.R. § 33.1(c)(8)]
 - Misleading; many of these transactions are still subject to Section 203(a)(1) filings
- Publicly-traded issuers [18 C.F. R. § 33.1(c)(9),(10),(14),(15); FPA Section 203 Supplemental Policy Statement, 122 FERC ¶ 61,157 p.4 (2008).]
 - Unclear and non-explicit regulatory treatment
 - 20% cap on widely-traded issuances has been stated but does not appear in regulations
 - Buyer eligibility
 - Investor blanket authorization filings
 - Universally valuable?
 - Effect of a Fund “missing” obtaining a blanket authorization

Considerations: Energy Regulatory

What About Passive Investment

- Multiple classes and proceedings
- Tax Equity and Similar Matters: FERC's AES Creative / EquiPower standard
[18 C.F.R. § 33.1(c)(2)(i); *Starwood Energy Group Global, L.L.C.*, 153 FERC ¶ 61,332 (2015); and cases cited therein, including *AES Creative Resources, L.P.*, 120 FERC ¶ 61,239 (2009).]
- Tax Equity interest M&A transactions
 - *Ad Hoc Renewable Financing* declaratory order [161 FERC ¶ 61,010 (2017)]
- Purely passive fund investors (LPs), co-investors, fund entities are disregarded for FERC M&A and immediately related purposes
- Fund GPs, managers, advisers are NOT disregarded, and normally control is attributed to these non-passive actors
- *Starwood* precedent cited several times in this year's transactions
[*Starwood Energy Group Global, L.L.C.* (2015)]

Considerations: Energy Regulatory

What Other Regulatory Issues?

- Rate filings
 - Market-Based Rate Filings vs. Approvals
 - Ongoing compliance obligations
- Representations, Warranties, and Covenants
 - Effective filings and/or approvals
 - Non-Public Investigation Status
- What about ERCOT?

Tax Considerations

General M&A tax considerations

Conventional Power

Renewable Energy

- Context: shovel-ready project, turnkey project (e.g., “build-transfer”), tax equity investment, sale of interest in project subject to a tax equity investment
- Appropriate risk allocation for project, investor and “structure” tax issues
 - Impact on tax benefits: Wind PTC or ITC; Solar ITC; Accelerated Depreciation

Considerations: Other Regulatory

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)
- Import / Export

Considerations: Project Agreements

Project Agreements are negotiated with M&A and financing in mind

- Engineering, procurement and construction agreement (EPC)
- Supply agreements
- 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

Recent Developments on Power M&A

Indemnities / Representation & Warranty Insurance

- Many power M&A transactions still have a traditional indemnification structure
- No indemnity structures and representation and warranty insurance becoming more common

Tax Insurance Policy

Recent Developments on Power M&A

Tariffs and Supply Chain

- Supply chain delays
- Solar tariffs
- Withholding / Release orders for solar modules

COVID-19

- Conventional power slowdown
- Renewable power markets remain strong

Recent Developments on Power M&A

New Technology

- Offshore wind
- Storage
- RNG
- Hydrogen

Types of Transactions

- Move toward clean energy and sustainability goals (ESG)
- Transmission projects
- Platform acquisitions (renewables)

Laura Neumeister Wright



Partner

Chicago

+1.312.324.1174

New York

+1.212.309.6744

laura.neumeisterwright@morganlewis.com

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 (onshore and offshore), solar and other renewable assets.

Casey S. August



Partner

Philadelphia

+1.215.963.4706

casey.august@morganlewis.com

Casey S. August's practice focuses on US federal tax planning and implementation matters. Representing clients across industries, he advises on structuring and documentation issues for mergers and acquisitions, energy project financings, joint venture collaborations, and intellectual property transfers. Casey also counsels clients on issues involving choice of entity and cross-border structuring and planning, as well as on IRS private letter ruling submissions and securities filings.

Stephanie L. Faraci



Associate

Boston

+1.617.341.7817

stephanie.faraci@morganlewis.com

Stephanie Faraci advises institutional lenders, developers, property owners and operators, retail and office tenants, REITS, and clients in the sports industry in all aspects of complex commercial real estate transactions, including the acquisition, disposition, financing, development, and leasing of office, retail, mixed-use, industrial and multi-family properties, and sports stadiums and facilities. She has counseled clients in ground lease transactions, joint venture arrangements, corporate governance matters, and project finance and energy transactions.

Levi McAllister



Partner

Washington, DC

+1.202.739.5837

levi.mcallister@morganlewis.com

Levi McAllister advises clients in the electric power, natural gas, and petrochemical sectors of the energy industry concerning regulatory compliance, asset development, and transactional matters. Levi addresses regulatory provisions administered by the Federal Energy Regulatory Commission (FERC), the Commodity Futures Trading Commission (CFTC), and state public utility commissions. He also counsels clients seeking to reduce their carbon footprints on federal and state regulatory issues arising in the development, acquisition, divestiture, and merger of energy infrastructure assets, focusing on electric vehicle (EV) infrastructure, energy storage resources, distributed energy resources, and utility-scale generating assets.

Christopher J. McAuliffe



Partner

Princeton

+1.609.919.6619

christopher.mcauliffe@
morganlewis.com

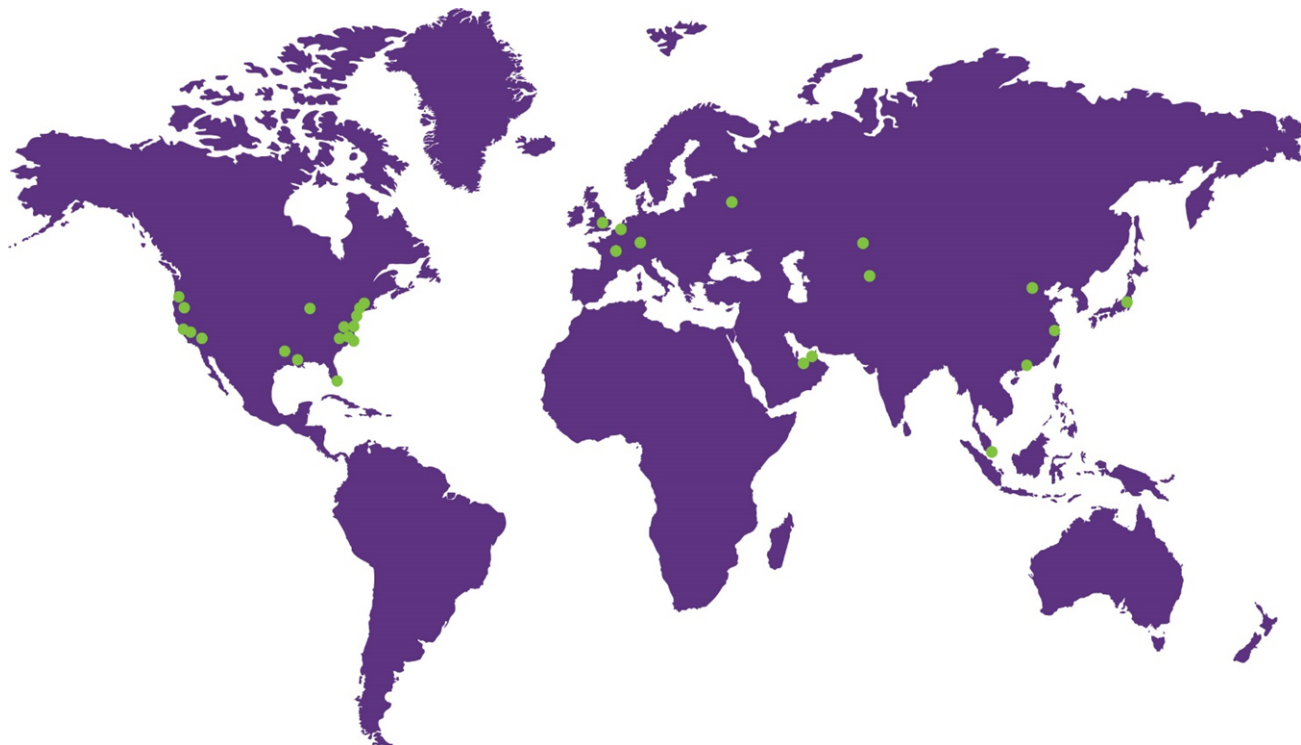
Christopher J. McAuliffe counsels clients on obtaining environmental approvals for new development, climate change laws, and compliance with water pollution control and air pollution control requirements. He also advises clients on solid and hazardous waste, site remediation, brownfields, natural resource damages, and environmental cleanup cost recovery matters. Chris brings to his practice experience gained while working as vice president of environmental, litigation, and employment in the law department of a large energy company.

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