

Sunny Dispositions: Modernizing Investment Tax Credit Recapture Rules for Solar Energy Project Finance After the American Recovery and Reinvestment Act

By Joel Meister*

Deployment of renewable sources of energy like solar panels is a capital-intensive business that requires significant investment in equipment and labor. Since 2006, U.S. federal policy has primarily encouraged the adoption of solar energy through an income tax credit. In the wake of economic losses stemming from the U.S. recession in 2008, tax credits were not immediately valuable to solar energy investors, and Congress responded by creating a temporary program known as the section 1603 Treasury Program in the American Recovery and Reinvestment Act (“ARRA”).¹ This program allowed a solar energy project developer to claim a cash grant from the federal government in lieu of a tax credit. The grant program provided a much-needed boost to the solar sector by providing a direct cash benefit and resulted in streamlined regulations governing the incentive. The cash grant program is now expired, and project developers are now coping with the tax credit’s more onerous tax rules that reduce liquidity in the market and increase the cost of financing solar energy equipment. This Article analyzes the implications of these constraints by first exploring the fundamentals of project finance and tax equity investments in renewable energy finance and explores how tax credit rules concerning recapture, or forfeiture, of the credit

generate unnecessary, costly friction between the parties providing financing. It also reveals how this friction is the unintended byproduct of the complex legislative history behind tax credits in the United States more than the consequence of thorough policy deliberation. The Article concludes by proposing a specific legislative solution that modernizes the tax credit’s recapture rules and further accelerates growth in the solar energy sector in a more cost-efficient manner.

A solar Investment Tax Credit (“ITC”) is currently available to businesses that install qualifying solar energy equipment, providing a dollar-for-dollar credit against federal tax liability in the taxable year in which the equipment is placed into service.² ITCs “lower the . . . cost of capital by reducing the effective acquisition cost of a capital asset.”³ The Energy Policy Act of 2005 created an ITC of 30% of the eligible cost of solar energy equipment.⁴ Congress subsequently revised and temporarily extended the 30% credit in 2008 through the end of 2016, and the solar ITC is currently set to return to a 10% credit on January 1, 2017.⁵ As the primary federal incentive for solar energy deployment, the Solar Energy Industries Association (“SEIA”) credits the ITC with “spurr[ing] unprecedented growth in the U.S. solar industry,”⁶ specifically doubling installed solar photovoltaic (“PV”) capacity in the first year that the incentive was available and propel-

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1. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (Feb. 17, 2009) [hereinafter ARRA].

2. 26 U.S.C. § 48 (2012).

3. STAFF OF JOINT COMM. ON TAXATION, 112TH CONG., BACKGROUND AND PRESENT LAW RELATING TO COST RECOVERY AND DOMESTIC PRODUCTION ACTIVITIES 68 (Feb. 27, 2012), available at <https://www.jct.gov/publications.html?func=showdown&id=4401>.

4. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (Aug. 8, 2005).

5. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (Oct. 3, 2008). On January 1, 2017, solar energy property will be eligible for the permanent 10% general business ITC. 26 U.S.C. § 48(a)(2)(A)(ii).

6. SOLAR ENERGY INDUS. ASS’N, THE CASE FOR THE SOLAR INVESTMENT TAX CREDIT (ITC) (May 17, 2013), available at <http://www.seia.org/sites/default/files/resources/The%20Case%20for%20the%20Solar%20Investment%20Tax%20Credit%2006.06.2013.pdf>.

ling a compound annual growth rate of 76%.⁷ The U.S. solar industry placed into service a mere 79 MW of solar PV in 2005⁸ but is expected to install an impressive 6,500 MW in 2014, which is enough electric generating capacity to power over one million average American homes.⁹ SEIA currently projects that over 12,000 MW will be installed in 2016 when the 30% ITC expires under current law.¹⁰

A company that claims the ITC may nonetheless be required to forfeit all or part of the credit if certain tax rules are not respected in the years following the solar project's construction. Beginning on the date that a solar project is placed in service, section 50 of the Internal Revenue Code requires complete or partial recapture of the tax credit in the first five years of service if the project "is disposed of, or otherwise ceases to be investment credit property with respect to the taxpayer."¹¹ Importantly, disposition does not just mean the sale of the equipment, but rather, "to transfer or otherwise relinquish ownership of property."¹² Although the credit is claimed in the year the asset is placed in service, the value of the credit vests 20% each year over the 5-year recapture period.¹³ For example, a tax credit of \$30 claimed in year 1 for a project with an eligible cost basis of \$100 will vest \$6 each year for 5 years. If the asset is sold or transferred in year 3, only \$18 has vested and \$12 in tax credits must be forfeited to the Internal Revenue Service ("IRS"). Rather than amend a previous year's tax return to reflect the recapture, the taxpayer increases his tax liability by the amount of the recaptured credit in the year the recapture event occurs.¹⁴ Recapture may even be triggered in transactions in which less than all of a taxpayer's interest in the equipment is transferred, as a taxpayer in a partnership will face recapture on his or her share of the claimed ITC if more than one third of his or her ownership interest in the project is transferred.¹⁵

I. Economic Benefit of the 1603 Treasury Program When 2008 Financial Crisis Renders ITC Less Valuable

Many renewable energy project developers are start-ups or early-stage companies whose taxable liabilities are not sufficient to immediately utilize the dollar-for-dollar value of the ITC.¹⁶ Developers often seek to monetize, or convert, the value of the tax benefit into cash by effectively bartering with third parties with sufficient tax liabilities to fund a portion of the project's initial construction costs through a capital contribution, or "tax equity" investment, in exchange for a share of the project's cash flow and nearly all of the tax benefits.¹⁷ Large financial institutions like national banks with significant, predictable tax liabilities historically invested in renewable energy projects,¹⁸ but the financial crisis of 2008 shook the renewable energy sector to its core. Some Wall Street companies were forced to permanently exit the tax equity market altogether while mounting losses ate away at surviving companies' profits and reduced their tax liabilities and need for credits or deductions.¹⁹ Based on industry surveys, the approximately twenty institutions actively investing in renewable energy in 2007 fell to approximately eight in 2008 and fell further to between four and six by early 2009.²⁰ Firms' diminished appetite for tax credits caused the overall market for renewable energy financing to decline more than 80% from its peak of \$6.1 billion in tax equity investments in 2007 to \$1.2 billion in 2009.²¹

Congress created the 1603 Treasury Program in 2009 through ARRA to fill the tax equity void and permit taxpayers to claim cash grants from the Treasury in lieu of the ITC that the taxpayer would otherwise claim.²² Treasury could have required the direct application of section 50 rules to determine instances in which grants must be forfeited, but ARRA provided subtle, but important, flexibility.²³ Specifically, ARRA Section 1603(f) required the U.S. Treasury

to apply rules similar to the rules of section 50. In applying such rules, if the property is disposed of, or otherwise ceases

7. SOLAR ENERGY INDUS. ASS'N, 2012 YEAR IN REVIEW EXECUTIVE SUMMARY 4 (Mar. 4, 2013), available at <http://www.seia.org/sites/default/files/resources/ZDgLD2dxPGYIR-2012-ES.pdf>.

8. SOLAR ENERGY INDUS. ASS'N & GTM RESEARCH, U.S. SOLAR MARKET INSIGHT: 2ND QUARTER 2010: EXECUTIVE SUMMARY 3 fig. 2-1 (2010), available at <http://www.seia.org/sites/default/files/us-solar-market-insight-report-q2-2010-120627095752-phapp02.pdf>.

9. SOLAR ENERGY INDUS. ASS'N & GTM RESEARCH, U.S. SOLAR MARKET INSIGHT: 2ND QUARTER 2014: EXECUTIVE SUMMARY 17 (2014), available at <http://www.seia.org/sites/default/files/3RsOY33pQeSMI14Q2.pdf>; see *What's in a Megawatt of Solar?*, SOLAR ENERGY INDUSTRIES ASS'N, <http://www.seia.org/policy/solar-technology/photovoltaic-solar-electric/whats-megawatt> (last visited July 2, 2014).

10. SOLAR ENERGY INDUS. ASS'N & GTM RESEARCH, U.S. SOLAR MARKET INSIGHT: 2ND QUARTER 2014: EXECUTIVE SUMMARY 18 fig. 2-10 (2014), available at <http://www.seia.org/sites/default/files/3RsOY33pQeSMI14Q2.pdf>.

11. 26 U.S.C. § 50 (2012).

12. *Rome I, Ltd. v. Comm'r*, 96 T.C. 697, 704 (1991) (finding nothing "in the statute or legislative history that gives the term 'disposition' something other than its plain meaning . . .").

13. 26 U.S.C. § 50(a)(1)(B).

14. 26 U.S.C. § 50(a)(1)(A).

15. 26 C.F.R. § 1.47-6(a)(2) (2013).

16. Sinae Han Robbins, *Future of Tax Equity Financing for Renewables*, TAX NOTES TODAY 427, 429 (Apr. 26, 2010).

17. KEITH MARTIN, SOLAR ENERGY INDUS. ASS'N, GUIDE TO FEDERAL TAX INCENTIVES FOR SOLAR ENERGY: VER. 6.0, at 7 (Apr. 5, 2012); SCOTT FISHER ET AL., U.S. P'SHIP FOR RENEWABLE ENERGY FIN., TAX CREDITS, TAX EQUITY AND ALTERNATIVES TO SPUR CLEAN ENERGY FINANCING 1 (Sept. 2011), available at <http://uspref.org/wp-content/uploads/2011/09/Tax-Credits-Tax-Equity-for-Clean-Energy-Financing.pdf>.

18. See PAUL SCHWABE, KARLYNN CORY & JAMES NEWCOMB, NAT'L RENEWABLE ENERGY LAB., RENEWABLE ENERGY PROJECT FINANCING: IMPACTS OF THE FINANCIAL CRISIS AND FEDERAL LEGISLATION 2-3 (July 2009), available at <http://www.nrel.gov/docs/fy09osti/44930.pdf>.

19. *Id.* at 3.

20. *Id.* at 4.

21. U.S. P'SHIP FOR RENEWABLE ENERGY FIN., ITC CASH GRANT MARKET OBSERVATIONS 4 (Dec. 2011), available at <http://uspref.org/wp-content/uploads/2011/07/US-PREF-ITC-Grant-Market-Observations-12.1.2011-v2.pdf>.

22. See ARRA, Pub. L. No. 111-5, § 1603, 123 Stat. 115 (Feb. 17, 2009).

23. JOHN C. LORENTZEN ET AL., WINSTON & STRAWN LLP, THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009: PAYMENTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS FOR RENEWABLE AND ALTERNATIVE PROJECTS 2 (July 2009), available at http://www.winston.com/siteFiles/Publications/Grant_in_Lieu_Guidance.pdf.

to be specified energy property, the Secretary of the Treasury shall provide for the recapture of the appropriate percentage of the grant amount *in such manner as the Secretary of the Treasury determines appropriate.*²⁴

Treasury's published 1603 guidance only calls for recapture "[i]f the applicant disposes of the property to a disqualified person or the property ceases to qualify as a specified energy property within five years from the date the property is placed in service."²⁵ In short, the 1603 guidance only contemplates "three narrow circumstances" with respect to recapture, specifically when there has been a "change in use," when "the project is permanently shut down," or when "the project or a partnership interest is transferred to a [disqualified person]."²⁶ The 1603 guidance states, "[s]elling or otherwise disposing of the property to an entity other than a disqualified person does not result in recapture provided the property continues to qualify as a specified energy property and provided the purchaser of the property agrees to be jointly liable with the applicant for any recapture."²⁷

The primary carryover from section 50 recapture rules is the requirement that 20% of the grant value vests each year over the 5-year recapture period.²⁸ Transaction attorneys quickly noted that this language reflected the Treasury's decision not to adopt a "strict incorporation" of all of section 50's requirements, with one prominent law firm describing the provision as "the most significant and helpful to project developers going forward."²⁹ During its initial drafting process, Treasury staff reviewed the recapture rules' legislative history and gathered feedback from lenders and transaction attorneys on the restrictions associated with the ITC.³⁰ Tax experts noted that the Treasury faced the difficult task of balancing tax precedent and economic necessity in a timely manner:

After Congress passed ARRA, Treasury had only a few months to structure a grant program that applied the rules of sections 45 and 48 while carrying out the underlying rationale of the act to provide grant money as quickly as pos-

sible. To accomplish that task, it had to dust off regulations that had not been in use since 1990 and loosen the existing ITC recapture and ineligible investor rules in a manner that promoted investment activity while still applying the overall mandates of those rules.³¹

Upon review of the initial 1603 Guidance, one prominent law firm "commended" the Treasury for recognizing that, "even if the original investor disposes of its interest in the project, if the project continues to generate energy in the statutorily favored manner, the public policy goal of investment in a long-term asset has been achieved and recapture is not appropriate."³²

Following the release of the 1603 Guidance, the first grant for a solar energy project was awarded on September 1, 2009, and as of November 1, 2013, Treasury awarded \$5.152 billion for 90,178 individual solar projects.³³ Calculated from an award equal to 30% of the solar projects' eligible cost basis, private investment in these solar projects amounted to \$17.08 billion.³⁴ Nearly one-half of all solar projects installed from 2009 to Q1 2013 have relied on 1603 awards, as awards for solar projects comprise 4,027 MW of electric generating capacity³⁵ while the United States as a whole installed 8,923 MW of solar electric generating capacity in that same time frame.³⁶

II. Characteristics of Energy Project Finance

Fully understanding the implications of the industry transition from the temporary 1603 cash grant back to primary reliance on the ITC requires understanding that a developer would ideally incorporate multiple layers of capital to finance a renewable energy project rather than just rely on the ITC.³⁷ Project finance is a specific mode of financing popularized in the 1970s and 1980s for large infrastructure projects, especially in emerging markets.³⁸ It is an especially

24. ARRA § 1603(f) (emphasis added).

25. U.S. TREASURY, DEP'T OF THE FISCAL ASSISTANT SEC'Y, PAYMENTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, PROGRAM GUIDANCE 19 (rev. April 2011) [hereinafter 1603 GUIDANCE], available at [http://www.treasury.gov/initiatives/recovery/Documents/B%20Guidance%203-29-11%20revised%20\(2\)%20clean.pdf](http://www.treasury.gov/initiatives/recovery/Documents/B%20Guidance%203-29-11%20revised%20(2)%20clean.pdf).

26. KEITH MARTIN ET AL., CHADBOURNE & PARKE LLP, TREASURY ROLLS OUT CASH GRANT PROGRAM 2 (July 2009), available at <http://www.chadbourne.com/files/Publication/5e9e15bb-df44-41b5-ae10-b9f4ab024f77/Presentation/PublicationAttachment/9322d704-15d6-415c-8672-c64b2ca3403c/CashGrantProgram.pdf>. The definition of "disqualified person" is limited to a "federal, state or local government agency or instrumentality, an entity exempted from taxes under section 501(c) of the U.S. tax code, an electric cooperative or an Indian tribe." MARTIN, *supra* note 17, at 34; 1603 GUIDANCE, *supra* note 25, at 19.

27. 1603 GUIDANCE, *supra* note 25, at 20.

28. *See id.* at 19.

29. LORENTZEN ET AL., *supra* note 23, at 4.

30. Interview with Keith Martin, Partner, Chadbourne & Parke LLP, in Washington, D.C. (May 11, 2012); Interview with Sean Shimamoto, Partner, Skadden, Arps, Slate, Meagher & Flom LLP, in Washington, D.C. (May 16, 2012); MARTIN ET AL., *supra* note 26, at 2.

31. Noah Baer, *Does IRS Tax Credit Guidance Apply to the ARRA Grant?*, TAX NOTES TODAY (Apr. 27, 2010).

32. LORENTZEN ET AL., *supra* note 23, at 5.

33. U.S. TREASURY, DEP'T OF THE FISCAL ASSISTANT SEC'Y, OVERVIEW AND STATUS UPDATE OF THE § 1603 PROGRAM 1, 2 (Dec. 1, 2013), available at <http://www.treasury.gov/initiatives/recovery/Documents/Status%20overview.pdf> [hereinafter 1603 STATUS UPDATE].

34. 1603 Treasury Program, SOLAR ENERGY INDUSTRY ASS'N, <http://www.seia.org/policy/finance-tax/1603-treasury-program> (last visited Nov. 17, 2013).

35. 1603 STATUS UPDATE, *supra* note 33, at 2.

36. *See U.S. Solar Market Insight Report Q1 2013*, SOLAR ENERGY INDUSTRY ASS'N (2013), <http://www.seia.org/research-resources/solar-market-insight-2013-q3>; SOLAR ENERGY INDUS. ASS'N & GTM RESEARCH, U.S. SOLAR MARKET INSIGHT REPORT: 2012 YEAR IN REVIEW: EXECUTIVE SUMMARY 1-2 (2013), available at <http://www.seia.org/research-resources/us-solar-market-insight-2012-year-review>.

37. Keith Martin, Chadbourne & Park LLP, *For Alternative Energy Securitization, Growth Will Require Clear and Consistent Government Policy*, in STANDARD & POOR'S U.S. STRUCTURED CREDIT ROUNDTABLE 23, 25 (Feb. 16, 2010), available at <https://www.yumpu.com/en/document/view/11607696/for-alternative-energy-securitization-growth-will-dla-piper>.

38. CHRIS GROOBAY ET AL., WILSON SONSINI GOODRICK & ROSATI PC, PROJECT FINANCE PRIMER FOR RENEWABLE ENERGY AND CLEAN TECH PROJECTS (Aug. 2010), available at http://www.wsgr.com/PDFSearch/ctp_guide.pdf. *See also* E.R. YESCOMBE, PRINCIPLES OF PROJECT FINANCE (2002); SCOTT L. HOFFMAN, THE LAW AND BUSINESS OF INTERNATIONAL PROJECT FINANCE: A RESOURCE FOR GOVERNMENTS, SPONSORS, LAWYERS, AND PROJECT PARTICIPANTS (3d ed. 2007).

popular form of financial engineering in the energy sector broadly, because it is an attractive alternative to self-financing a project with cash or incurring debt, both of which show up on companies' balance sheets and can have negative financial consequences. In a typical project financing for an energy project, loan terms and the source of repayment are dependent solely on the projected future cash flow of the operating asset.³⁹

From the perspective of the developer and investors, "fully leveraged" project financing that incorporates as much project-level debt as possible can dramatically increase internal rates of return and free up capital for investment in other projects in the pipeline.⁴⁰ Because a project may operate for decades, most financings require a contracted long-term revenue stream that can be secured to ensure loan repayment over the term of the loan; in the energy context, a developer will often sign a power purchase agreement ("PPA") with a utility.⁴¹

A. Recourse vs. Non-Recourse Debt

A signature element of energy project financing, which the ITC recapture rules complicate, is the reliance on non-recourse debt. The developer, or project sponsor, will originate the project in a special purpose entity, often a limited liability company ("project company"), where the only collateral posted to cover the loan is the project company's assets.⁴² In the event of default,⁴³ the lender's claim is limited to the project company's assets and may not extend further to the assets of the sponsor's holding company.⁴⁴

In exchange for providing debt with no recourse against the sponsor, the lender attempts to shift risk to the developer by insisting on a "sealed system" of security arrangements" where "to the fullest extent possible, all project assets and revenues are sealed off from other creditors . . . to ensure they do not escape the system and jeopardize repayment of the debt."⁴⁵ In practice, the lenders will require a "comprehensive security package" in which all current and future assets of the project company will be pledged to the lender.⁴⁶ Counterparties with an ownership stake in the project must also pledge their equity interests and sign consents to collateral assignment to "ensure a seamless transition [of the assets] to the lender or subsequent owner" in the event that the lender must foreclose.⁴⁷ A sponsor may also bring in another lender

to provide an additional tranche project-level debt that will be secondary to the senior lender. When this subordinated debt is introduced, an "inter-creditor agreement will be negotiated . . . pursuant to which the senior lenders will obtain standard terms of subordination to ensure their senior lien and payment positions vis-à-vis the subordinated lenders and any unsecured creditors in the case of any Event of Default by the Project Company or its bankruptcy or insolvency."⁴⁸ The fundamentals of energy project financing thus rely on contractual obligations that require a transfer of energy equipment in a foreclosure scenario, which will be deemed a disposition under section 50 for ITC purposes and may trigger a recapture of the ITC if the transfer occurs within the first five years of the equipment being placed into service.

B. Tax Equity Financing

Project-financed deals were not common in the early days of the solar ITC even though project financing was common in the broader energy sector. Prior to creation of the 1603 Treasury Program, fewer than 10% of renewable energy transactions incorporated leverage.⁴⁹ Tax equity investors are a routine source of financing through the monetization of federal tax incentives.⁵⁰ Most tax equity transactions are variations of three structures.⁵¹ In a "sale leaseback," the developer "sell[s] the project to another company that can use the tax benefits and lease[s] it back."⁵² In a "partnership flip," the developer recruits "an institutional equity investor that can use the tax benefits as a partner to own the project . . . and allocate[s] 99 percent of the tax subsidies to the institutional investor in exchange for the capital to build the project."⁵³ In an "inverted pass-through lease," the developer "leases the project to a tax equity investor and elects to pass through the commercial tax credit . . . to the tax equity investor."⁵⁴

C. The Six Layers of Capital for Energy Financing

"Financing is the search for lowest cost capital."⁵⁵ Upon passage of ARRA, renewable energy developers had six layers of capital on which they could potentially rely. From least expensive to most expensive, the six layers were (1) a government

39. GROOBAY ET AL., *supra* note 38, at 1.

40. *Id.* at 3.

41. *Id.* at 2.

42. *Id.* at 4.

43. "Event of Default" is the legal term for the circumstance that allows project finance lenders to exercise their remedies under the financing documentation, including acceleration of the outstanding debt and foreclosure." *Id.* at 12. Default will be triggered by non-payment of fees, principal, or interest on the loan, but the scope of the loan agreement will also contemplate many non-payment obligations, including breaches of warranty, non-appealable negative legal judgments, failure to obtain permits, etc. *Id.*

44. *Id.* at 4.

45. Edward D. Einowski & Katherine A. Roek, *Risk Shifting Major Element in Project Finance for Renewables*, 24 NAT. GAS & ELECTRICITY 3, 5 (Oct. 2007).

46. GROOBAY ET AL., *supra* note 38, at 10.

47. *Id.* at 5.

48. *Id.* at 13.

49. Keith Martin, Chadbourne & Parke LLP, *Solar War Stories: From the Financial Front Lines*, in PROJECT FIN. NEWSWIRE 47, 51 (May 2012), available at http://www.chadbourne.com/files/Publication/33595324-e9f9-4c78-b284-993c23e71709/Presentation/PublicationAttachment/d6849213-1c27-49c4-a263-9a6393d3a2a1/project_finance_nw_may12.pdf.

50. MICHAEL MENDELSON ET AL., NAT'L RENEWABLE ENERGY LAB., THE IMPACT OF FINANCIAL STRUCTURE ON THE COST OF SOLAR ENERGY 1 (Mar. 2012), available at <http://www.nrel.gov/docs/fy12osti/53086.pdf>. In addition to the 30% ITC, the value of accelerated depreciation equals approximately 26% of the cost of the project. See also MARK BOLINGER, LAWRENCE BERKELEY NAT'L LAB., FINANCING NON-RESIDENTIAL PHOTOVOLTAIC PROJECTS: OPTIONS AND IMPLICATIONS 6 (Jan. 2009), available at <http://eetd.lbl.gov/ea/ems/reports/lbnl-14110e.pdf>.

51. MARTIN, *supra* note 17, at 3.

52. KEITH MARTIN, SOLAR ENERGY INDUS. ASS'N, GUIDE TO FEDERAL TAX INCENTIVES FOR SOLAR ENERGY: VER. 4.1, at 24 (Sept. 11, 2009).

53. *Id.*

54. *Id.*

55. Martin, *supra* note 49, at 51.

grant through the 1603 Treasury Program, (2) government-guaranteed debt through the Department of Energy Loan Guarantee Program, (3) commercial debt, (4) tax equity, (5) subordinated debt, and (6) true equity.⁵⁶ The two lowest-cost options, the 1603 Treasury Program and federal loan guarantees, are no longer available, which leaves commercial debt and equity from the private sector to fill the gap.⁵⁷ In September 2011, the pre-tax cost of tax equity capital to a developer was approximately 13%, in contrast to a historic low of 9% at the peak of investment in 2007 and higher than 15% in 2009 at the height of the recession.⁵⁸ As previously discussed, subordinated debt is more expensive because it is second in line to senior lender and the risk of non-payment is higher.⁵⁹ Project or development equity is normally the most expensive, because investors only receive a return after debt and tax equity obligations are satisfied.⁶⁰ In late 2011, development equity investors required estimated returns between 8% and 15%.⁶¹ Optimizing the capital structure is increasingly important for the most cost-competitive financing of renewable energy projects.⁶² According to a recent analysis of financing structures by the National Renewable Energy Laboratory (“NREL”), the ability to layer debt with tax equity in the transaction, versus an equity-only financing, significantly decrease the levelized cost of energy (“LCOE”) for solar projects up to 50%.⁶³ In sum, it is to the benefit of the project developer and the ultimate purchaser of the renewable energy electricity to be able to cost-effectively incorporate debt into the project, because debt, in theory, translates into a lower cost of financing.

D. Negative Impacts of the Recapture Rule for Early Dispositions: Illiquidity Impedes the Development of a Secondary Market for Solar Assets

Adding debt to a transaction in practice, however, is a more difficult task. Prior to creation of 1603, developers, lenders, and investors had yet to establish market terms to efficiently address concerns over recapture risk, and a “period of sorting out” is underway.⁶⁴ To understand recapture risk, it is important to consider at the outset, “many

investors have little interest in assets that cannot be sold at short notice for net asset value.”⁶⁵ Solar projects’ recapture issues cause considerable “headaches”⁶⁶ for parties actively seeking highly liquid investments.⁶⁷ As explained by one industry expert, “There is option value in being able to sell an asset whenever you want. Frequently this is called the liquidity premium, where a more liquid property has more value.”⁶⁸ The illiquid ITC prohibits the transfer of projects, which “limits the fungibility that is necessary for the development of a viable secondary market.”⁶⁹ For example, the sunset of stimulus-era programs enabled a robust opportunity for mergers and acquisitions (“M&A”) in renewable energy projects as “developers look for ways to raise capital to drive development” and larger established companies with strong balance sheets look to diversify their energy holdings.⁷⁰ Interest in project sales would also be accelerated by economically distressed tax equity investors “similarly looking to exit their positions to raise cash.”⁷¹ A 2012 industry survey reported solar PV as the most preferred sector for acquisitions among renewable energy technologies.⁷² Yet with the exception of 1603 projects not subject to limits on early disposition, ITC recapture rules will prohibit the sale of solar projects already placed in service for the first five years, discouraging M&A activity in projects with successful operational histories that may be most appealing to investors.⁷³ This also constrains developers who may wish to raise capital for subsequent projects and tax equity investors that need to exit their investments.

Some may argue this concern is over-stated since solar companies like SolarCity and NRG Energy have been able to obtain financing through secondary markets since 1603’s expiration by spinning off solar projects through securitizations and yield companies, which are publicly-traded corporations created to hold operating energy projects.⁷⁴ In both cases, however, all evidence suggests both companies were

56. *Id.*

57. MINTZ LEVIN COHN FERRIS GLOVSKY & POPEO PC, RENEWABLE ENERGY PROJECT FINANCE IN THE U.S.: 2010-2013 OVERVIEW AND FUTURE OUTLOOK 45-46 (Jan. 2010) [hereinafter MINTZ LEVIN].

58. FISHER ET AL., *supra* note 17, at 2–3.

59. GROOBEY ET AL., *supra* note 38, at 13.

60. Paul Schwabe, *Peeling the Onion: The Layers of Capital Structures*, NREL PROJECT FINANCE BLOG (Oct. 25, 2010, 7:19 AM), <https://financere.nrel.gov/finance/content/peeling-onion-layers-capital-structures>.

61. MINTZ LEVIN, *supra* note 57, at 11.

62. Gloria Gonzalez, *Focus on “Soft Costs” Could Help US Solar Compete Without Federal Subsidy-Developers*, ENVTL. FIN. (June 25, 2012), <http://www.environmental-finance.com/news/view/2587>.

63. LCOE is “an economic assessment of the cost of the energy-generating system including all the costs over its lifetime: initial investment, operations and maintenance, cost of fuel, cost of capital.” *Simple Levelized Cost of Energy (LCOE) Calculator Documentation*, NAT’L RENEWABLE ENERGY LABORATORY, http://www.nrel.gov/analysis/lcoe_documentation.html (last visited Nov. 12, 2013). It is the price, expressed in a net present value of cents per kWh, “at which energy must be sold to break even over the lifetime of the technology.” *Id.*

64. Telephone Interview with Ed Feo, Managing Dir. and Co-Managing Partner, USRG Renewable Finance (Mar. 15, 2012).

65. STEFAN LINDER & MICHEL DI CAPUA, BLOOMBERG NEW ENERGY FIN., RE-IMAGINING SOLAR FINANCING 16 (June 4, 2012), [available at https://www.bnef.com/WhitePapers/download/84](https://www.bnef.com/WhitePapers/download/84).

66. *Id.* at 24.

67. *Id.* at 16.

68. E-mail from Matthew Meares, Dir. of Project Fin., Amonix, Inc., to author (Aug. 11, 2011, 1:29 AM) (on file with author).

69. BIPARTISAN POLICY CTR., REASSESSING RENEWABLE ENERGY SUBSIDIES 11 (Mar. 2011), [available at http://bipartisanpolicy.org/sites/default/files/BPC_RE%20Issue%20Brief_3-22.pdf](http://bipartisanpolicy.org/sites/default/files/BPC_RE%20Issue%20Brief_3-22.pdf).

70. Holly Fletcher, *Renewable M&A Set for Steady Flow*, POWER INTELLIGENCE (Dec. 23, 2011), <http://www.powerintelligence.com/ArticleFeature/2954203/Mergers-and-Acquisitions/Renewable-M-A-Set-For-Steady-Flow.html>.

71. ELLEN S. FRIEDMAN, NIXON PEABODY LLP, NEW OPTIONS FOR RENEWABLE ENERGY FINANCING 5 (July/Aug. 2009), [available at http://www.nixonpeabody.com/linked_media/publications/RenewableEnergy_ExecutiveCounsel_EllenFriedman.pdf](http://www.nixonpeabody.com/linked_media/publications/RenewableEnergy_ExecutiveCounsel_EllenFriedman.pdf).

72. KPMG, GREEN POWER 2012: THE KPMG RENEWABLE ENERGY M&A REPORT 29 (May 18, 2012), [available at http://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Documents/PDF/Advisory/Green-Power-2012-Web-copy.pdf](http://www.kpmg.com/UK/en/IssuesAndInsights/ArticlesPublications/Documents/PDF/Advisory/Green-Power-2012-Web-copy.pdf).

73. 26 U.S.C. § 50 (2012).

74. Holly Fletcher, *Game On: SolarCity Targets Regular Securitization Cash Flow*, POWER INTELLIGENCE (Nov. 22, 2013), [http://www.powerintelligence.com/Article/3282433/Default/Game-On-SolarCity-Targets-Regular-Securitization-Flow.html?ArticleId=3282433#UwzL1_ldXtI; Form 10-Q SEC Filing, NRG YIELD \(Nov. 12, 2013\), <http://investor.nrgyield.com/phoenix.zhtml?c=251846&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbnmcueG1sP2lwYWdlPTkyMj1OTA->](http://www.powerintelligence.com/Article/3282433/Default/Game-On-SolarCity-Targets-Regular-Securitization-Flow.html?ArticleId=3282433#UwzL1_ldXtI; Form 10-Q SEC Filing, NRG YIELD (Nov. 12, 2013), http://investor.nrgyield.com/phoenix.zhtml?c=251846&p=irol-SECText&TEXT=aHR0cDovL2FwaS50ZW5rd2l6YXJkLmNvbS9maWxpbnmcueG1sP2lwYWdlPTkyMj1OTA-)

dependent on projects that received 1603 cash grants.⁷⁵ These recent developments strongly suggest that developers will continue to struggle with market illiquidity for projects utilizing the ITC as long as the section 50 recapture rules remain in place.

E. Inter-Creditor Friction Increases Transaction Costs

The profile of a tax equity investor is very similar to subordinated debt, requiring a certain return but standing second in line to the senior lender.⁷⁶ Unlike a pure subordinated lender, though, tax equity investors face the additional risk that foreclosure could trigger recapture of tax benefits.⁷⁷ As a result, “the most significant cost of tax equity . . . is that it makes obtaining project level debt more difficult.”⁷⁸ Due to the friction generated between parties, investors often request a forbearance agreement, also known as a “standstill period” whereby the lender covenants “to forbear from foreclosing on a significant portion of its collateral if the project defaults.”⁷⁹ This is seen as an “accommodation” by lenders to give the investor protection and comfort to take part in the transaction.⁸⁰

The difficulty in negotiating forbearance and inter-creditor agreements can consume a considerable amount of time and money for all parties involved.⁸¹ Some lenders report that recapture risk alone can consume 3 months or more.⁸² Delays often occur when the tax equity investor or legal counsel are relatively inexperienced with the ITC recapture rules and the scenarios, such as foreclosure, in which credit forfeiture is triggered. Back-and-forth negotiations may be required to address the investor’s concerns. If the investor or counsel are not comfortable with the basic mechanics of the structuring, negotiations over recapture risk can “threaten to scuttle the entire deal,” the lender bears the cost of that inexperience in educating the investor on how the risks may be minimized.⁸³

Even if the parties understand the nature of the recapture risk, the parties may nonetheless disagree over what forbearance terms are even appropriate for an inter-creditor agreement. Tax equity investors will often request forbearance for at least the full 5-year vestment period, whereas lenders providing debt on a non-recourse basis will want to retain the right to foreclose on the project assets to safeguard its securi-

ty.⁸⁴ Many lenders see forbearance as “violating the premise of the debt’s pricing,” because the “grand deal for cheap debt” is a lender’s right to take control of the project in the event of default.⁸⁵ Chris Diaz of Seminole Financial Services compares the negotiating process to struggling with a Rubik’s Cube when one side’s color is properly configured but the rest of the cube is completely mismatched:

Each party will offer recapture terms perfectly consistent with its own interests, but it will cause problems for the other sides of the transaction. The tax equity investor wants to hold the lender’s feet to the fire, but it is difficult to get a lender comfortable giving up his only remedy of foreclosure for five years. Ultimately, they must try to find a middle ground, and it is an arduous process.⁸⁶

If a compromise is reached, costly revisions to other project documents are often necessary to conform the ultimate terms.⁸⁷ A single institution could hypothetically provide both debt and tax equity for a single project.⁸⁸ However, these combined offerings are rare occurrences despite the perceived alignment of benefits from dealing with a single party.⁸⁹ In reality, combined offerings may present similar challenges, as separate business units within the company may have separate negotiating counsel and the debt portion may be structured for subsequent sale to other investors.⁹⁰ Either way, the original counter-parties must anticipate inter-creditor and forbearance issues.

F. Increased Cost Threatens Optimal Capital Structuring and PPA Clearing Price

Like other risk factors in a transaction, the ease or difficulty with which parties address ITC recapture may determine the success or failure of the entire project. Recounting a 15 MW solar PV project that fell apart because the parties could not find agreement, one leading project finance attorney described the unfortunate consequences that developers struggle to avoid:

When debt walks [away from the transaction], optimal capital structuring has not been achieved. Unreasonable forbearance terms from either party can blow up a deal, and recapture risk causes that friction. The unfortunate alternative is relying on tax equity alone, which is more expensive, lowers the developer’s return, and ultimately increases the cost of the power contract. It is a ridiculous reason not to do a deal and holds back many quality projects from moving forward.⁹¹

mRFNFUT0wJlNFUT0wJlNRREVTQz1TRUNUSU9OX0VOVEISRSZzdWJzaWQ9NTc%3d.

75. *Id.*

76. Schwabe, *supra* note 60.

77. 26 U.S.C. § 50(a)(1)(A).

78. FISHER ET AL., *supra* note 17, at 3.

79. Sosi Biricik & Lindsay Herrell, *Forbearance Agreements in Wind Farm Financing*, NORTH AMERICAN WINDPOWER (Mar. 2009), available at http://www.lw.com/upload/pubContent/_pdf/pub2581_1.pdf.

80. *Id.*

81. Keith Martin, Chadbourne & Parke LLP, *Cost of Capital: 2014 Outlook*, in PROJECT FIN. NEWSWIRE 1, 1-2 (Feb. 2014), available at <http://www.chadbourne.com/files/Publication/5731f0f7-ec72-4938-8554-5340e1589f0b/Presentation/PublicationAttachment/0c57b87e-070d-4dd1-87b4-37488821b00e/pfn0214.pdf>.

82. Telephone Interview with Chris Diaz, Senior Vice President, Renewable Energy, Seminole Fin. Servs. (Mar. 15, 2012); Telephone Interview with Michael Midden, Co-Head of Energy, Dexia Credit Local (Apr. 5, 2012).

83. Telephone Interview with Chris Diaz, *supra* note 82.

84. *Id.*

85. Telephone Interview with Michael Midden, *supra* note 82.

86. Telephone Interview with Chris Diaz, *supra* note 82.

87. Telephone Interview with Michael Midden, *supra* note 82.

88. *E.g.*, AES SOLAR, AES SOLAR AND MET LIFE ANNOUNCE THE FINANCING AND START OF CONSTRUCTION OF ITS ILLUMINA PROJECT (Sept. 2011), available at http://www.aes.com/pub-sites/sites/GLOBAL/content/live/02013915b0333013094ad1bf6006fde/1033/Illumina_Press_Release_-_Final_-_Sept_2011.pdf.

89. Martin, *supra* note 49, at 52.

90. Telephone Interview with John Marciano III, Associate, Chadbourne & Parke LLP (June 26, 2012).

91. Telephone Interview with Ed Feo, *supra* note 64.

Debt “significantly increases the risk profile of the transaction for the tax equity investor.”⁹² Compensating for this increased risk and the illiquid nature of the investment, the tax equity investor will require a higher return with a significant yield premium that increases the cost of capital for the developer.⁹³ The premium charged for combining tax equity and debt is a function of the extended “sausage-making” that may be required to convene multiple parties with varied interests in a single transaction.⁹⁴ For the few investors that have agreed to project-level debt in the past, they charged premiums of 2–3%.⁹⁵ A January 2012 report estimated that tax equity investors required after-tax returns in the range of 7.5–12%, compared to 9.5–16% for leveraged PV projects.⁹⁶ Yield premiums for leveraged transactions were around 7.25%.⁹⁷ A January 2014 industry roundtable estimated that current yields for solar projects are in the range of 8–9%, whereas adding debt will push the required investor return higher to the low-to-mid-teens.⁹⁸

Even a 2% premium has a significant impact on the LCOE. For a hypothetical PV plant, NREL calculated the LCOE increases by \$0.025 per kWh of electricity for sale leaseback transactions and \$0.05 per kWh for partnership flips.⁹⁹ In February 2012, industry leaders roughly approximated that for every 1% increase in the cost of capital, the price for the PPA for electricity increases by approximately \$0.015 per kWh, ultimately leading to higher costs for the party purchasing the power.¹⁰⁰ In short, recapture friction between lenders and tax equity investors increases costs to a solar transaction and ultimately forces the consumer to pay a higher price for solar electricity.

G. 1603 Minimizes Recapture as a Risk Variable

Under 1603 rules, the costs associated with recapture friction are almost entirely eliminated, because transfer of property is allowed as long as it is not to a disqualified person.¹⁰¹ A bank is not a disqualified person and would therefore be able to foreclose on a project without triggering recapture of the ITC claimed by the tax equity investor.¹⁰² It should be noted that a larger issue is the potential for investors in a 1603 deal to be prevented from receiving their target yield

if the bank forecloses on the project before their pre-determined exit.¹⁰³ In that case, the lender and tax equity investor would negotiate a more straightforward forbearance on the full project until the investor’s internal rate of return is reached, but allow the bank to foreclose on the developer’s interest in the project in the meantime and “take over day-to-day control of the project.”¹⁰⁴

As a result of differing recapture provisions in the 1603 Treasury Program, standard market forbearance terms have yet to emerge for ITC-based transactions.¹⁰⁵ Some prominent investors in the renewables sector are of the opinion that a “broad market consensus” never existed, explaining why “. . . the tax equity market remains dominated by deals that do not have debt.”¹⁰⁶ For many banks, ITC recapture may determine whether a deal is even possible, rather than just determine the pricing of the tax equity.¹⁰⁷ Some will simply refuse to entertain project proposals incorporating debt. For those that will move forward on a deal, forbearance terms may vary between one- and 6-year forbearance periods. In the small number of leveraged deals that occurred across renewable energy technologies in 2006 and 2007 prior to the recession, investors and sponsors could only negotiate forbearance for non-monetary defaults.¹⁰⁸

One solution often mentioned is for the lender to grant some level of forbearance with an extended cure period. The lender agrees to provide notice to the tax equity investor in an event of default, and the investor has the right to cure, or resolve, the deficiency.¹⁰⁹ Cure rights may distinguish non-monetary defaults from monetary defaults in which the developer is unable to meet its debt service obligation.¹¹⁰ In some instances, the lender may provide no forbearance for a monetary default but will forbear under other default events, such as when technical problems with the system temporarily halt or reduce system output.¹¹¹ A normal 15-day cure period may be extended to 60 or 90 days.¹¹² Mandatory consultations with lenders may be required within 30 days.¹¹³ In most cases, the tax equity investor will cure by funding the developer’s debt service shortfall.¹¹⁴ Lenders are likely to limit the number of cures on a default, and once the cure rights expire, the lender may foreclose. Despite these lender requirements, developers relying on the ITC may nonetheless feel stronger market

92. Keith Martin, Chadbourne & Parke LLP, *Trends in Tax Equity for Renewable Energy*, in PROJECT FIN. NEWSWIRE 27, 27–29 (Jan. 2009), available at <http://www.chadbourne.com/files/Publication/810dde60-3c78-4a9a-9c5d-a5fae8014b4f/Presentation/PublicationAttachment/51fc06c5-1407-48ac-9dff-a605de0f58e1/pfn0109.pdf>.

93. MENDELSON ET AL., *supra* note 50.

94. Keith Martin, Chadbourne & Parke LLP, *Mock Tax Equity Negotiation*, in PROJECT FIN. NEWSWIRE 32, 34 (July 2010), available at <http://www.chadbourne.com/files/Publication/747fa2c3-ebe5-425b-8114-407bc2e2a7dd/Presentation/PublicationAttachment/30b573ec-b30c-448d-9964-4330375a249e/pfn0710.pdf>.

95. FISHER ET AL., *supra* note 17, at 3.

96. MINTZ LEVIN, *supra* note 57, at fig. 3-2.

97. Martin, *supra* note 49, at 30; E-mail from Matthew Meares, Dir. of Project Fin., Amonix Inc., to author (June 20, 2011, 10:56 PM) (on file with author).

98. Martin, *supra* note 81, at 2.

99. MENDELSON ET AL., *supra* note 50, at 23-24.

100. Martin, *supra* note 49, at 51.

101. Martin, *supra* note 94, at 34-35.

102. *Id.*

103. *Id.*

104. *Id.* In the wind context, see Sosi Biricik & Scott Morris, *Government Recapture Rights Under ARRA’s Renewable Energy Grant Program*, 4 N. AM. CLEAN ENERGY 96 (Sept.–Oct. 2010), available at http://www.lw.com/upload/pubContent/_pdf/pub3740_1.pdf.

105. Telephone Interview with Albert Luu, Dir. of Structure Fin., SolarCity (Mar. 15, 2012).

106. Martin, *supra* note 81, at 2.

107. Telephone Interview with Albert Luu, *supra* note 105.

108. Telephone Interview with Michael Midden, *supra* note 82.

109. *Id.*

110. *Id.*

111. *Id.* But in non-monetary defaults, an open question is the terms under which a party can prove the technical issue in question is cureable, which requires parties to anticipate and negotiate an acceptable, independent third party to provide technical review. *Id.*

112. Telephone Interview with Chris Diaz, *supra* note 82.

113. Telephone Interview with Michael Midden, *supra* note 82.

114. Telephone Interview with Albert Luu, *supra* note 105.

pressure to forge more favorable terms for investors in order to attract the relatively smaller pool of tax equity players, which could take some lenders out of consideration and ultimately lead to a less competitive market.

III. Eliminating Early Disposition as a Recapture Event Is Consistent With Legislative Treatment of Federal Tax Credits

The success of the 1603 Treasury Program suggests elimination of early disposition as a recapture event could modernize the solar ITC and yield significant public policy benefits fully consistent with both the original legislative intent of the ITC and more recent legislative treatment of other tax credits.

A. Legislative History of the ITC and Recapture Rules

I. ITC Origins

The ITC was originally designed as a policy mechanism for broad economic stimulus. An ITC proposal originated in work by economist E. Cary Brown.¹¹⁵ The Revenue Act of 1962¹¹⁶ created a 7% ITC that Congress intended to “encourage modernization and expansion of the Nation’s productive facilities and to improve its economic potential by reducing the net cost of acquiring new equipment, thereby increasing the earnings of the new facilities over their productive lives.”¹¹⁷ The ITC would provide a direct offset against companies’ tax liabilities to stimulate investment by “reduc[ing] the cost of acquiring depreciable assets,” “increas[ing] the expected profit from their use,” and “increas[ing] the funds available for investment.”¹¹⁸ Allowable credit for any taxable year was not to exceed \$25,000 of taxpayer’s liability plus 25% of the amount in excess of \$25,000.¹¹⁹ The allowable credit was calculated by the expected useful life of the property and no credit was allowed for property with an expected life of less than four years.¹²⁰

“The incentive effect [was] concentrated on new investment.”¹²¹ The credit, originally under section 38 of the Internal Revenue Code, was primarily for machinery and equipment, but applied to all “tangible personal property, or other tangible property (not including a building or structural components) if such other property was used as an integral part of manufacturing, production, or extraction, or of furnishing transportation, communications, elec-

trical energy, gas, water, or sewage disposal services, or as a research or storage facility.”¹²² Upon signing the Revenue Act of 1962 into law, President Kennedy described the ITC as a policy mechanism to “provide added stimulus to investment in machinery and equipment, and give American firms tax treatment which compares favorably with their competitors in world markets.”¹²³

Although concentrated on new investment, Congress nonetheless extended a limited credit to used property that was newly acquired due to “the greater dependence of small business on used property.”¹²⁴ Thus, it was possible for multiple parties to separately claim an ITC on a single asset if the asset was purchased by a separate party that did not originally operate the asset. The extension of the ITC to used property was limited to \$50,000 in each taxable year.¹²⁵

2. Genesis of ITC Recapture Rules

The Revenue Act of 1962 required complete or partial recapture of the credit if “during any taxable year any property is disposed of, or otherwise ceases to be [investment credit] property with respect to the taxpayer, before the close of” the recapture period.¹²⁶ In the Kennedy Administration’s initial proposal to Congress in 1961, Secretary of Treasury C. Douglas Dillon outlined a credit recapture rule to establish “safeguards against the quick turnover of property” and prevent “two types of abuse.”¹²⁷ Specifically, recapture on any early disposition would deter “repeated purchases and resales of properties merely to get additional tax benefits.”¹²⁸ In theory, businesses could be motivated to engage in asset “churning” merely for the tax benefits rather than to put equipment to productive economic use.¹²⁹ Second, Dillon argued a recapture rule would preclude “the purchase of extra equipment . . . merely for purposes of resale to others who did not qualify.”¹³⁰ The proposal excepted recapture for asset dispositions upon termination of a business.¹³¹

The discussion draft bill that originally emerged in the House of Representatives featured a recapture framework clouded by “much uncertainty.”¹³² Any early disposition or cessation of the qualifying property within 6 years of being placed into service would result in the asset being “excluded from qualified investment back in the year in which the

115. Robert E. Rosacker & Richard W. Metcalf, *United States Federal Tax Policy Surrounding the Investment Tax Credit: A Review of Legislative Intent and Empirical Research Findings Over Thirty Years (1962-1991)*, 9 AKRON TAX J. 59, 62–63 (1992).

116. Revenue Act of 1962, Pub. L. No. 87-834, § 2, 76 Stat. 960 (1962).

117. H.R. REP. NO. 87-2508 (1962), reprinted in 1962 U.S.C.C.A.N. 3732, 3734 (Conf. Rep.).

118. H.R. REP. NO. 87-1447, at 8 (1962).

119. Revenue Act of 1962 § 46.

120. *Id.*

121. H.R. REP. NO. 87-1447, at 8.

122. Revenue Act of 1962 § 48(a)(1)(B).

123. Statement by Pres. John F. Kennedy, Statement on Signing Revenue Act of 1962 (Oct. 16, 1962), available at <http://www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-041-012.aspx>.

124. H.R. REP. NO. 87-1447, at 9.

125. Revenue Act of 1962 § 48(c)(2).

126. *Id.* § 47(a)(1).

127. D. Douglas Dillon, *Detailed Explanation of the President’s Recommendations Contained in His Message on Taxation*, Testimony submitted to the House Ways & Means Committee, 184, 190 (May 3, 1961).

128. *Id.*

129. Thomas W. Giegerich, *The Monetization of Business Tax Credits*, 12 FLA. TAX REV. 709, 779 (2012).

130. Dillon, *supra* note 127, at 259.

131. *Id.* at 259–60.

132. Richard M. Gaberman, *Federal Tax Legislation*, 3 B.C. L. REV. 232, 236 (1962).

credit was taken.”¹³³ The rules would be subject to a 3-year statute of limitations beginning on the tax return filing date for the year in which the recapture event occurred.¹³⁴ The rule would also permit discretionary enforcement of the provision.¹³⁵

The recapture language that emerged in the final House and Senate bills rejected conferring discretionary enforcement powers to the Treasury.¹³⁶ The ultimate text approved by Congress is what exists today in section 50.¹³⁷ The bills’ accompanying committee reports only stated the recapture rules were designed “to guard against a quick turnover of assets by those seeking multiple credits.”¹³⁸ The report stated that, “property [would] be considered disposed of whenever it is sold, exchanged, transferred, distributed, involuntarily converted, or disposed of by gift.”¹³⁹ Subsequent regulations promulgated by the Treasury would clarify that “the term ‘disposition’ includes a . . . transfer upon the foreclosure of a security interest.”¹⁴⁰ The rules were described as a “special adjustment” to ensure the equipment’s actual useful life, in the hands of the taxpayer, aligned with the expected useful life when the credit was initially claimed.¹⁴¹ By requiring an increase in the tax collected in the year of the recapture event without charging interest, Congress limited the recapture rule exceptions to a “transfer of property by reason of the death of the taxpayer or in the case of corporations where a successor corporation ‘stands in the shoes’ of the predecessor corporation” and holds the property for the remainder of the recapture period.¹⁴²

3. Subsequent Legislative History Concerning the ITC

Before the first ITC for energy property was created, the ITC would be suspended,¹⁴³ terminated,¹⁴⁴ reinstated,¹⁴⁵ increased,¹⁴⁶ and extended¹⁴⁷ by Congress. Throughout this process, recapture rules related to early disposition remained unchanged.¹⁴⁸ The Tax Reduction Act of 1975 increased the

investment credit to 10%.¹⁴⁹ “As an aid to small businesses,”¹⁵⁰ the cap on used property was later increased to \$100,000.¹⁵¹

In the Revenue Act of 1978, Congress permanently extended the ITC for new property at 10% and permanently extended the ITC for used property, but capped the limit at \$100,000.¹⁵² In the Energy Tax Act passed that same year, Congress enacted two tax credits. The first was a 10% residential energy credit for individual homeowners to apply to their personal income tax liability, capped at \$2,200 and limited only to solar energy property that heated water.¹⁵³ In designing the ITC, the statute neither applied the provisions of section 47 nor created new recapture provisions. Instead the credit was limited to solar energy property “the original use of which begins with the taxpayer . . . which can reasonably be expected to remain in operation for at least 5 years.”¹⁵⁴ Thus, a homeowner’s sale of the energy property would not trigger recapture, because the “original use” language barred solar property from receiving multiple credits as new and used property, which was allowed under the original investment credit in 1962.¹⁵⁵ The second credit created in the legislation was a new 10% business ITC under section 46.¹⁵⁶ By placing the new ITC within the existing statute, Congress applied the “general rules for applying the regular investment credit,” which included the section 47 recapture provisions related to early dispositions.¹⁵⁷

Legislation in 1980 made the residential energy ITC permanent¹⁵⁸ and finally expanded the scope of technologies qualifying for the credit to include solar energy equipment that generates electricity.¹⁵⁹ In the Economic Recovery Tax Act of 1981, Congress eliminated the expected useful life of property to determine the amount of credit that could be claimed.¹⁶⁰ If the property qualified for Accelerated Cost Recovery System recovery periods of five, 10, or 15 years, the taxpayer could claim 100% of the investment credit.¹⁶¹ The legislation also increased the used property ITC cap to \$150,000.¹⁶² Congress ultimately combined the various investment tax credits in 1984 into a single “general business credit.”¹⁶³ In the Tax Reform Act of 1986, Congress terminated the ITC in order to “finance the substantial reduction

133. STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, 90TH CONG., GENERAL EXPLANATION OF COMMITTEE DISCUSSION DRAFT OF REVENUE BILL OF 1961 RELEASED FOR INFORMATION AND STUDY 10 (Comm. Print 1961).

134. *Id.*

135. *Id.* Enumerated factors for Treasury to consider included, but were not limited to, (1) “the relationship of the taxpayer to the transferee or lessee,” (2) “subsequent use of the property,” (3) “the frequency of the disposition of the assets,” and whether the transfer or lease serves a bona fide business purpose.” *Id.*

136. See generally Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960 (1962).

137. See 26 U.S.C. § 50 (2012).

138. S. REP. NO. 87-1881, at 18 (1962), reprinted in 1962 U.S.C.C.A.N. 2359, 2376.

139. *Id.* at 148–49.

140. 26 C.F.R. § 1.47–2(a)(1) (2013).

141. H.R. REP. NO. 87-1447, at 8 (1962).

142. S. REP. NO. 87-1881, at 18–19.

143. Pub. L. No. 89-800, 80 Stat. 1508 (1966).

144. Tax Reform Act of 1969, Pub. L. No. 91-172, 83 Stat. 487 (1969).

145. Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497 (1971).

146. Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 26 (1975).

147. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976).

148. See *supra* notes 143–47.

149. Tax Reduction Act of 1975, 89 Stat. 26.

150. STAFF OF JOINT COMM. ON INTERNAL REVENUE TAXATION, 94TH CONG., SUMMARY OF TAX REDUCTION ACT OF 1975 4 (Comm. Print 1975).

151. Tax Reform Act of 1976, 90 Stat. 1520.

152. Revenue Act of 1978, Pub. L. No. 95-600, 92 Stat. 2763 (1978).

153. Energy Tax Act of 1978, Pub. L. No. 95-618, § 101, 92 Stat. 3174 (1978).

154. *Id.*

155. Revenue Act of 1962, Pub. L. No. 87-834, 76 Stat. 960 (1962).

156. Energy Tax Act of 1978, 92 Stat. 3174.

157. Energy Tax Act of 1978 § 301(a).

158. Technical Corrections Act of 1979, Pub. L. No. 96-222, § 2, 94 Stat. 194 (1979).

159. Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, § 202, 94 Stat. 229 (1980).

160. Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 211, 95 Stat. 172 (1981).

161. *Id.*

162. *Id.* § 213.

163. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 473, 98 Stat. 494 (1984).

in tax rates¹⁶⁴ and eliminate “economic distortion caused by the existence of the regular credit.”¹⁶⁵ Although Congress terminated the credit, the bill “left intact the statutory ITC framework,” including the recapture rules under section 47.¹⁶⁶ “The primary rationale for this action appears related to non-repeal of the historic buildings credit.”¹⁶⁷

In the Revenue Reconciliation Act of 1990, Congress reanimated the ITC and, in an effort to “rid the Code of expired and obsolete provisions,”¹⁶⁸ reorganized the tax code rules concerning the ITC and removed all credits with the exception of the Historic Rehabilitation Credit under section 47, the Energy Credit under section 48, and a Reforestation Credit under section 48.¹⁶⁹ Recapture rules and other eligibility requirements moved from the former section 48 to section 50.¹⁷⁰

Congress extended the energy credit in the Tax Extension Act of 1991¹⁷¹ and permanently extended the credit in 1992 at a rate of 10%.¹⁷² Congress also created a new production-based incentive under section 45 known as the Production Tax Credit (“PTC”),¹⁷³ which would permit a project owner to claim an inflation-adjusted tax credit of 1.5 cents per kWh of electricity generated from qualifying property in a taxable year for a period of 10 years after the project was placed into service.¹⁷⁴ Congress briefly moved solar energy property to the PTC¹⁷⁵ before creating a separate business solar investment tax credit in the Energy Policy Act of 2005 and increasing the rate to 30%.¹⁷⁶

The Section 48 ITC was extended for one year in 2006¹⁷⁷ and extended for eight years in the Emergency Economic Stabilization Act of 2008¹⁷⁸ before ARRA created the 1603 Treasury Program to award grants in lieu of the ITC.¹⁷⁹ Congress extended the 1603 Treasury Program for one year in December 2010,¹⁸⁰ which expired on December 31, 2011.¹⁸¹

164. Donald T. Williamson & David W. Pijor, *Income Tax Credits: The Investment Credit*, TAX MANAGEMENT, 191-5TH, BUREAU OF NATIONAL AFFAIRS, Jan. 5, 1998, at A-20.

165. STAFF OF JOINT COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 98 (Comm. Print 1987).

166. *Id.* at 150.

167. Rosacker & Metcalf, *supra* note 115, at 59–60.

168. Williamson & Pijor, *supra* note 164, at A-38.

169. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101–508, § 11813, 104 Stat. 1388 (1990).

170. *Id.*

171. Tax Extension Act of 1991, Pub. L. No. 102–227, 105 Stat. 1686 (1991).

172. Energy Policy Act of 1992, Pub. L. No. 102–486, 106 Stat. 2776 (1992).

173. 26 U.S.C. § 45(a) (2012).

174. *Id.*

175. American Jobs Creation Act of 2004, Pub. L. No. 108–357, 118 Stat. 1418 (2004).

176. Energy Policy Act of 2005, Pub. L. No. 109–58, 119 Stat. 594 (2005).

177. Tax Relief and Health Care Act of 2006, Pub. L. No. 109–432, 120 Stat. 2922 (2006).

178. Emergency Economic Stabilization, Energy Improvement and Extension, and Tax Extenders and AMT Relief Acts of 2008, Pub. L. No. 110–343, 122 Stat. 3765 (2008).

179. ARRA, Pub. L. No. 111–5, § 1603, 123 Stat. 115 (Feb. 17, 2009).

180. Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, Pub. L. No. 111–312, 124 Stat. 3296 (2010).

181. *Id.*

B. Judicial Application of Recapture Rules and Interpretation of Legislative Intent

Although the ITC is no longer under section 38 of the IRC, the extensive body of law concerning former section 38 property still applies. Solar energy property eligible for the ITC is subject to recapture for voluntary transfers of property to creditors or in bankruptcy proceedings within the recapture period.¹⁸² Recapture is also triggered in cases of involuntary transfers of the property, including foreclosure of the property and foreclosure of ownership interest in the property. In *Millar v. Commissioner*, a creditor’s satisfaction of an outstanding loan through foreclosure of the debtor’s pledged ownership interest in a subchapter S corporation triggered partial recapture of credit claimed on section 38 property owned by the corporation.¹⁸³ In *Bremer v. Commissioner*, disposition by foreclosure sale by creditors of resort hotel property constituted a recapture event.¹⁸⁴ Similarly, in *Lang v. Commissioner*, a taxpayer’s transfer by warranty deed of section 38 property to its creditor in satisfaction of the taxpayer’s indebtedness constituted a recapture event.¹⁸⁵

In *Bremer*, the Tax Court asserted that “the ‘quick-turnover’ type situation” was not intended by Congress “to exclusively define” the recapture rule’s scope but rather provide merely an illustration of a scenario requiring its application.¹⁸⁶ The court concluded that “Congress intended no such restriction but rather contemplated broad application” of the recapture rule.¹⁸⁷ Yet, the court also contended that the recapture rules are not “a penalty provision” but an “adjustment mechanism” which requires that “the actual useful life of section 38 property comport with the estimated useful life.”¹⁸⁸ The early disposition constraint was, therefore, a means to maintain the administrative accuracy of the investment credit. This conclusion is understandable given the early legislative history pegging the ITC to the expected useful life of the asset. Nonetheless, Congress even relaxed this requirement over time as legislators decided to align the ITC with recovery periods under accelerated depreciation.¹⁸⁹

Other court opinions emphasized the disposition rule’s role of deterring tax abuses through premature bailouts. In *Charbonnet v. United States*, the Fifth Circuit concluded that risk-free tax benefits were central to the purpose of the recapture rules when it affirmed in 1972 the government’s deter-

182. *Mueller v. Comm’r*, 60 T.C. 36, 47 (1973) (concluding the “broad language” of the recapture statute as applied by the Senate Finance Committee report “manifests an intention to include within its scope” transfers of an asset to a bankruptcy trustee); *Lang v. Comm’r*, 46 T.C. 976 (1982) (holding a taxpayer’s transfer by warranty deed of Section 38 property to its creditor in satisfaction of the taxpayer’s indebtedness constitutes a recapture event).

183. *Millar v. Comm’r*, 34 T.C.M. (CCH) 542, 549 (1975), *rev’d on other grounds*, 577 F.2d 212 (3d Cir. 1978); *see also Moudy v. C. I. R.*, 59 T.C.M. (CCH) 280, 283 (1990) (finding creditors’ repossession of machine property for which credit was claimed triggered credit recapture).

184. *Bremer v. Comm’r*, 66 T.C. 360, 364 (1976).

185. *Lang*, 46 T.C.M. at 976.

186. *Bremer*, 66 T.C. at 366.

187. *Id.*

188. *Id.*

189. *See Economic Recovery Tax Act of 1981*, Pub. L. No. 97–34, § 211, 95 Stat. 227 (1981).

mination of ITC recapture after a taxpayer reduced his or her ownership interest below 66% in a former subchapter S corporation that claimed an investment tax credit on section 38 property.¹⁹⁰ The court asserted that “Congress evidently was concerned with abuse of the credit by shareholders bailing out prematurely.”¹⁹¹ The court noted that “[b]y bailing out early, the taxpayer reaps a tax benefit without himself suffering the risk throughout the estimated useful life. To plug this loophole the Commissioner promulgated Treas. Reg. § 1.47-4.”¹⁹²

In the eyes of the Fifth Circuit, it was not enough that the corporate entity remained invested in the property for “domestic economic stimulus.”¹⁹³ By merely disposing of one’s interest, the court argued the taxpayer runs afoul of the “considered economic decision[s]” Congress wished to encourage and results in an “overall investment pattern [that] does not fully satisfy the ends of the investment credit and, in Congress’ estimation, merits partial recapture of credit.”¹⁹⁴ More recently, the Tax Court surmised in *Historic Boardwalk Hall, LLC v. Commissioner* that the recapture statute “demonstrates an anticipation of repurchase and creates a disincentive . . . [as] a means to police early dispositions and created a deterrent to a premature buyout.”¹⁹⁵

In contrast to the Fifth Circuit’s interpretation of the legislative history, recapture rules in the broader context of the original investment credit statute in 1962 more likely contemplated a general check on abuse through multiple claims of tax benefits for a single substantive investment. In *Long v. United States*, the Sixth Circuit noted that one of the reasons for concerns about tax credit abuse was the fact that a credit was available for new and used property.¹⁹⁶ The Court further noted that Congress restricted the used property credit to property purchased at arm’s length.¹⁹⁷ Also, former section 48(c) excluded from the used property definition property used “by a person who used such property before such acquisition.”¹⁹⁸ In *United Telecommunications, Inc. v. Commissioner*, the Tenth Circuit noted that “Congress was

not oblivious to the necessity for preventing multiple credits The purpose of [former Section 47] was to obviate quick turnovers of assets by those who were seeking to make *excessive use of multiple credit.*”¹⁹⁹ In this case, the court considered separate tax incentives subsidizing the same investment decision.²⁰⁰ The Court sought to prevent the cost of construction assets from being used twice for investment tax credit purposes: first, when the construction equipment was placed in service and second, as part of the basis of the new self-constructed section 38 property when that asset was placed in service.²⁰¹

C. Congressional Inertia and Tax Credit Recapture Rules

Policy treatment of the ITC can be characterized by an “on-again, off-again history” of tax code alterations due to competing notions of “social objectives, equity concerns, administrative matters, and macro-economic goals.”²⁰² The scope of the ITC increasingly narrowed to specific sectors of the economy over the last five decades, yet the same recapture rules were pegged to the ITC throughout its modifications, expansions, repeals, and resuscitations.²⁰³ Thus, the original language regarding early disposition remains to this day, despite the fact that used solar energy property, for example, is not eligible for the credit.²⁰⁴ The current section 48 solar ITC incorporated the residential ITC’s statutory language concerning property eligibility to limit the credit allowance to solar energy property to when “the construction, reconstruction, or erection of which is completed by the taxpayer, or (ii) which is acquired by the taxpayer if the original use of such property commences with the taxpayer.”²⁰⁵ The ITC for solar energy property is only available to the taxpayer that first places the new solar energy property into service.²⁰⁶

I. Section 45 Production Tax Credit

Consideration of other tax credit frameworks, within and outside renewable energy, suggests Congress could revise its approach to recapture rules for solar energy property. The section 45 PTC for wind and geothermal project development does not struggle with a similar tax credit recapture constraint for dispositions.²⁰⁷ Unlike the ITC, the PTC is a credit claimed by the project owner for a period of 10 years after the project is placed into service.²⁰⁸ PTCs immediately vest as the electricity is generated and the developer is free

190. *Charbonnet v. United States*, 455 F.2d 1195, 1199 (5th Cir. 1972).

191. *Id.*

192. *Id.* at 1198.

193. *Id.* at 1199.

194. *Charbonnet*, 455 F.2d at 1199; *see also* *Ranier v. United States*, 871 F.2d 607, 610–11 (6th Cir. 1989) (applying *Charbonnet* to deny exempting taxpayer from recapture liability even when a subsequent purchaser of corporate shares agrees to pay for any ITC recapture liability if property owned by the corporation for which a credit had been claimed is sold before the end of the useful life and the sale price for the corporate shares is reduced at the outset to reflect the potential recapture amount); *Giovanini v. United States*, 9 F.3d 783, 789 (9th Cir. 1993) (quoting *Charbonnet* in affirming judgment for taxpayer where merger of S corporation into C corporation resulted in taxpayer’s interest shrinking by 80% but where taxpayer “continues to participate as a shareholder” and “risk-taker” in the venture which owns the assets on which credit was claimed).

195. *Historic Boardwalk Hall, LLC v. Comm’r*, 136 T.C. 1, 34 (2011).

196. *Long v. United States*, 652 F.2d 675, 681 (6th Cir. 1981).

197. *Id.*

198. 26 C.F.R. § 1.48–3(a)(2)(i) (2013); *see also* *Holloman v. Comm’r*, 551 F.2d 987, 988 (5th Cir. 1977) (finding that “denial of investment credit to taxpayers where the same person has used the property before and after its acquisition was intended to prevent abuse of the investment credit provisions when there has been no real change in ownership or use of the property.”).

199. *United Telecomm., Inc. v. Comm’r*, 589 F.2d 1383, 1389 (10th Cir. 1978) (emphasis added) (holding that the capitalized costs of construction equipment for which an investment credit was previously claimed could not be added to the eligible costs basis of constructed property that would also be eligible for an investment credit.); Rev. Rul. 81-1, 1981-1 C.B. 18.

200. *United Telecomm.*, 589 F.2d at 1389.

201. *Id.*

202. *Rosacker & Pijor*, *supra* note 115, at 62-63.

203. *See generally* 26 U.S.C. § 50 (2012).

204. 26 U.S.C. § 48(a)(3)(B)(i)–(ii) (2012).

205. *Id.* § 48(a)(3)(B).

206. *Id.* § 48(a)(3)(B)(i)–(ii).

207. 26 U.S.C. § 45 (2012).

208. *Id.* § 45(a).

to sell or transfer the asset at any point.²⁰⁹ A subsequent purchaser would then be free to claim the cash flows and subsequent PTCs for the remainder of the 10-year period.²¹⁰ Importantly, lender foreclosure does not trigger recapture of PTCs.²¹¹ For wind, closed-loop biomass, and geothermal sources, the PTC rate is 1.5 cents per kWh, adjusted for inflation to 2.3 cents per kWh in 2013.²¹² For open-loop biomass, landfill gas, trash, qualified hydropower, or marine and hydrokinetic sources, the adjusted rate is 1.1 cents per kWh in 2013.²¹³

2. Section 42 Low-Income Housing Tax Credit

Congress created the section 42 Low-Income Housing Tax Credit (“LIHTC”) in the Tax Reform Act of 1986.²¹⁴ LIHTCs are awarded based on a formula incorporating the eligible cost of construction and the number of low income housing units maintained in a property each year over a period of 15 years, known as the “compliance period.”²¹⁵ The taxpayer may claim 100% of the possible credits in an accelerated manner in the first 10 years, after which the developer is still subject to recapture if the housing property falls out of compliance in the last five years.²¹⁶ Congress created new recapture rules within section 42 rather than imposing new section 50 rules.²¹⁷ Although the recapture amount for the ITC is determined by the unvested portion of the credit, noncompliance with LIHTC requirements triggers recapture of any accelerated portion of the credit plus interest.²¹⁸ After 10 years, the status of the LIHTC, therefore, becomes analogous to the ITC for solar energy property, because the full value of the credit was claimed by a certain taxable year, yet recapture could be triggered for an additional five years.

Originally, a housing developer claiming LIHTC credits was unable to sell or transfer the housing property to another party at any point within the compliance period unless the taxpayer (1) posted a bond with the Treasury for the full value of the remaining tax credits subject to potential recapture and (2) it was “reasonably expected that such building will continue to be operated as a qualified low-income building for the remainder of the compliance period

...”²¹⁹ If the taxpayer transferred his or her interest before the end of the compliance period, the bond would be forfeited to the federal government.

The Housing and Economic Recovery Act of 2008²²⁰ eliminated the recapture bond requirement.²²¹ This bipartisan piece of legislation had support from Republicans and Democrats since 2003.²²² Specifically, the language eliminated the recapture bond and required that the amended LIHTC recapture rules “shall not apply solely by reason of the disposition of a building (or an interest therein) if it is reasonably expected that such building will continue to be operated as a qualified low-income building for the remaining compliance period with respect to such building.”²²³ In essence, “[i]f the buyer of the property intends to step into the shoes of the seller and continue operating the property as a low-income housing project, there is no recapture of previously claimed credits.”²²⁴ A subsequent memorandum from the IRS in 2011 would confirm this also applies even in the case of foreclosure as long as the building continues to operate as qualified low-income housing facility.²²⁵

Prior to tax reform in 1986, the low-income housing sector was perceived as enabling “aggressive tax shelter market[s]” developed by wealthy private individuals.²²⁶ LIHTC recapture provisions were a response to regulators’ concern that housing developers would claim the tax credit benefit, shirk their compliance responsibilities, and then evade the threat of IRS recapture by transferring ownership to a straw party entity with minimal financial resources.²²⁷ In a letter supporting modification to the recapture rules, industry representatives expressed concern that the recapture bond placed an “unnecessary and expensive requirement” on developers.²²⁸ Moreover, it impeded liquidity by creating an impediment to movement into and out of the investor market.²²⁹ An industry survey found that 50% of respondents indicated that the recapture holding period was a “significant factor” in their decision to cease investing in low-income housing projects.²³⁰

Housing developers felt that “investors with shorter time horizons may be willing to invest in LIHTC projects.”²³¹ The

209. MARK BOLINGER ET AL., LAWRENCE BERKELEY NAT’L LAB & NAT’L RENEWABLE ENERGY LAB., PTC, ITC, OR CASH GRANT? AN ANALYSIS OF THE CHOICE FACING RENEWABLE POWER PROJECTS IN THE UNITED STATES 11 (Mar. 2009), available at <http://eetd.lbl.gov/ea/emp/reports/lbnl-1642e.pdf>.

210. *Id.*

211. *See id.* at 1 figs. 1–2.

212. Credit for Renewable Electricity Production, Refined Coal Production, and Indian Coal Production, and Publication of Inflation Adjustment Factors and Reference Prices for Calendar Year 2013, 78 Fed. Reg. 20,176, 20,176–77 (Apr. 3, 2013).

213. *Id.*

214. Pub. L. No. 99-514, § 252, 100 Stat. 2085 (1986).

215. 26 U.S.C. § 42(c)(2) (2012). *See* Rochelle E. Lento & Daniella Graceffa, *Federal Sources of Financing*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT (May 31, 2011).

216. STAFF OF JOINT COMM. ON TAXATION, 99TH CONG., GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1986, at 98 (Comm. Print 1987).

217. 26 U.S.C. § 42(j).

218. *Id.* § 42(j)(2).

219. 26 U.S.C. § 252 (2012).

220. Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, 122 Stat. 2654 (2008).

221. H.R. 1468, 109th Cong. (2005).

222. H.R. 3610, 108th Cong. (2003); S. 2689, 108th Cong. (2003).

223. 26 U.S.C. § 42(j)(6)(A).

224. Amanda Talbot, *Recapture Exposed*, 1 NOVGRADAC J. TAX CREDITS 1 (Oct. 2010), available at http://www.novoco.com/journal/2010/10/novogradac_jtc_2010-10_pc_pg37.pdf.

225. I.R.S. Gen. Couns. Mem. 201146016 (Oct. 18, 2011).

226. Fred H. Copeman & Robert Rozen, *Coalition Continues to Pursue Revision to Recapture Bond Requirements*, 14 LIHTC MONTHLY REP. 1 (Dec. 2003), available at http://www.novoco.com/low_income_housing/news/article_of_month/article_of_month_1203.pdf.

227. 150 CONG. REC. S8475 (daily ed. July 20, 2004) (statement of Sen. Lincoln).

228. *Id.* at S8477 (letter of support for H.R. 3610).

229. Terence Kimm, *Reznick Responds: Doing Deals Under the New Law*, AFFORDABLE HOUSING FIN. (Oct. 8, 2008), <http://www.housingfinance.com/news/100808-reznick-responds.htm>.

230. ERNST & YOUNG, LOW-INCOME HOUSING TAX CREDIT INVESTMENT SURVEY 18 (Oct. 8, 2009), available at <http://www.enterprisecommunity.com/servlet/servlet.FileDownload?file=00P30000007ZuC7EAK>.

231. Glenn A. Graff et al., *Federal Stimulus Legislation Promoting Affordable Housing*, in THE LEGAL GUIDE TO AFFORDABLE HOUSING DEVELOPMENT 184 (May 31, 2011).

Local Initiatives Support Corporation, the parent company of one of the leading national syndicators of low-income housing tax credits, described the recapture bond change as a measure to stimulate additional investment and increase liquidity in the market by removing an unnecessary rule.²³² Introducing the bill on the floor of the Senate, Senator Blanche Lincoln said that “[t]hese changes will improve the overall efficiency of the housing program and ensure that more dollars actually flow into affordable housing.”²³³

Robert Rozen of Washington Council Ernst & Young co-managed the Recapture Bond Coalition’s advocacy effort to revise the recapture bond requirement but noted that industry saw value in the rules as a “fundamental requirement” that is very important to motivate investors to remain in compliance.²³⁴ An industry report in 2010 estimated an aggregate foreclosure rate of 0.62% by property count since Congress enacted the credit.²³⁵ Industry representatives and policymakers both argued the very small foreclosure rate demonstrated that the requirement was no longer necessary yet imposed higher costs on the industry.²³⁶ Senator Maria Cantwell argued in a floor statement that “the bill eliminates unneeded inefficiencies in the tax laws that serve no public policy purpose.”²³⁷ The bill’s authors included two modifications to “provide the [IRS] with the information necessary to ensure that all recapture liabilities are timely paid.”²³⁸ First, an enhanced reporting requirement would require the owner of a housing property to notify former owners and the IRS of a recapture event.²³⁹ Second, a disposition of the property would automatically extend the statute of limitations for any potential liability to three years after the Secretary of the Treasury is notified of noncompliance.²⁴⁰

By removing the bond requirement and retaining the reasonable expectation language, the current recapture rules governing low-income housing are very similar in effect to the rules promulgated for the 1603 Treasury Program. The taxpayer is free to sell the asset or transfer his or her interest provided that the asset continues to remain eligible property throughout the compliance period for the credit claimed. In

the case of low-income housing, the parties include various covenants in contracts that the property will remain in compliance and assign responsibility for any noncompliance that may occur in the future and include various covenants to ensure the housing proper.²⁴¹ In a similar fashion, financing agreements involving a 1603 award would include covenants and guarantees by project owners that the asset would not be transferred to a disqualified investor, which would render the property ineligible for the underlying ITC.²⁴²

IV. Positive Impacts Resulting From Modernization of the Early Disposition Rule

2014 is an appropriate time to consider modernizing the section 48 ITC recapture rules for solar energy property in a manner that is consistent with the original intent of the incentive. The IRS rules provide boundaries by which the federal government deters tax fraud. However, the recapture rules were written long ago to apply to a much broader range of economic transactions and the disposition requirement is a constraint on the solar industry. “ITC rules have the effect of decreasing liquidity for projects that have been placed in service, which reduces the universe of investors willing to invest in the first place.”²⁴³ Unlike the original design of the Revenue Act of 1962, the current statutory framework denies any credit for used solar energy property.²⁴⁴ Furthermore, tax equity is an established investment practice developed by the private sector to facilitate policy outcomes prescribed by Congress. Each investment in a project or series of small projects results in a return to the investor consisting of cash and tax benefits, which is a far cry from the asset churning originally contemplated by Congress when businesses could apply the credit broadly to numerous capital expenditures. One could imagine that relaxed recapture rules may motivate an institution to attempt to recycle its capital and finance multiple solar projects until its federal tax liability approaches zero. However, the history of the LIHTC recapture rules is instructive, as no evidence has emerged since the recapture policy change of 2008 to suggest that comparable modifications to the solar ITC rules would incite abusive behavior. Furthermore, reductions in tax liability should be considered along with the long-term tax revenues generated by increased private sector investment in infrastructure projects.²⁴⁵

232. LOCAL INITIATIVES SUPPORT CORP., HOUSING CREDIT MODERNIZATION BECOMES LAW 1 (July 30, 2008), available at http://www.lisc.org/docs/news/073008_HR3221_LIHTC_summary.pdf.

233. 150 CONG. REC. S8475–76 (daily ed. July 20, 2004) (statement of Sen. Blanche Lincoln).

234. See Interview with Robert Rozen, Partner, Washington Council, Ernst & Young, in Washington, D.C. (Mar. 29, 2012).

235. REZNICK GROUP PC, THE LOW-INCOME HOUSING TAX CREDIT PROGRAM AT YEAR 25: A CURRENT LOOK AT ITS PERFORMANCE 9 (Aug. 2011), available at http://www.reznickgroup.com/sites/reznickgroup.com/files/papers/reznick-group_lihtc_survey_2011.pdf.

236. Interview with Robert Rozen, *supra* note 234 (“Policymakers recognized investors should not be impeded from transferring their interest in a project. A more liquid secondary market would create a more efficient market for affordable housing investors and developers. The longer the holding period, the harder it is for an investor to commit capital. So by facilitating a secondary market, the repeal of the recapture rule helps unlock capital from investors concerned about the long holding period.”).

237. 154 CONG. REC. S1139 (daily ed. Feb. 25, 2008) (statement of Sen. Maria Cantwell).

238. 150 CONG. REC. S8476 (daily ed. July 20, 2004) (statement of Sen. Blanche Lincoln).

239. *Id.*

240. *Id.*

241. Tax Credit Group of Marcus & Millichap, *Tax Credit Recapture Risk: Structuring the Sale of Your LIHTC Asset*, in SECTION 42 REVIEW 1, 1 (2009), available at <http://www.teg-mm.com/newsletter/TCGNewsletter2-Q409.pdf>.

242. Telephone Interview with Ed Feo, *supra* note 64.

243. *Id.*

244. See generally 26 U.S.C. § 50 (2012).

245. See CONNIE CHERN, U.S. P’SHIP FOR RENEWABLE ENERGY FIN., PAID IN FULL: AN ANALYSIS OF THE RETURN TO THE FEDERAL TAXPAYER FOR INTERNAL REVENUE CODE SECTION 48 SOLAR ENERGY INVESTMENT TAX CREDIT (ITC) (July 12, 2012), available at http://www.uspref.org/images/docs/SC_ITC-Payback_July_12_2012.pdf (calculating that over the 30-year expected life of a commercial solar energy system, standard lease and PPA financing structures “deliver a nominal 10% internal rate of return (IRR) to the federal government on the federal investment tax credit (ITC),” such that a \$300,000 claimed tax credit yields a \$677,627 nominal benefit to the federal government). Import-

With respect to project debt, the legislative history does not indicate that the original recapture rules were designed to deter leveraging transactions. It is unlikely that removing early disposition as a recapture event would lead to “promiscuous behavior” on the part of developers, since the addition of debt to a transaction is fundamentally motivated by the optimal capital structuring of the project’s economics.²⁴⁶ Yet, it is clear that a revision would make it easier for developers to add debt to project transactions and reduce their overall cost of capital. For example, some established tax equity investors currently have a policy against adding debt to tax equity funds for distributed generation projects due to the added complexity, the headaches associated with negotiating forbearance provisions, and the fact it puts the investor in a worse collateral position relative to an unlevered transaction.²⁴⁷ Developers in the commercial and residential rooftop market view affordable access to debt capital markets and the resulting lower overall cost of capital as a key component to increasing the adoption of solar and making solar more affordable for the average consumer.²⁴⁸ Some companies fully expect residential funds to tap debt financing for cheaper capital if Congress eliminated early disposition as a recapture event.²⁴⁹

Modernization would also reduce a significant barrier for nontraditional investors who would be concerned about the five-year ownership requirement or possible friction with lenders. Many point to Google as the poster child for corporations with large tax liabilities using their balance sheet to supply the tax equity historically provided by Wall Street firms.²⁵⁰ As of November, 2013, Google claims to have invested over \$1 billion in renewable energy, including investments in 2 GW of electric generating assets.²⁵¹ Despite Google’s success in this area, there is a steep learning curve for even the most profitable companies if their business has little to do with energy.²⁵² Analysis by Bloomberg New Energy Finance found corporations “reluctant to take on tax

equity,” because solar and wind investments are usually a departure from “core business,” and because most companies “do not have a dedicated in-house team to grapple with the complexities of tax equity or to assess project risks of renewable assets.”²⁵³

Senior Department of Energy officials convened a meeting of developers and investors in March, 2012 to shorten that learning curve and “spur more corporations to follow in Google’s step.”²⁵⁴ Along with leading renewable energy tax and project finance attorneys, nearly eighty representatives from the largest companies in the United States were invited, including Exxon Mobil Corp. and Walt Disney Co.²⁵⁵ Despite enthusiasm in the press and in the Obama Administration, new investors are unlikely to emerge quickly, if at all. A meeting attendee noted that IRS audit risk and financial statement risk are two general challenges impeding many corporations from moving into tax equity, but the third risk of ITC recapture is uniquely perplexing within a corporate hierarchy.

A corporation’s risk tolerance decreases substantially the further it moves away from its core business and expertise. It requires months in educating the various stakeholders in a large corporation that must ultimately sign off on the very notion of tax equity investments. There are so many tax-specific risks that scare a conventional corporate tax department ITC recapture can be especially acute in the education process, because it is often seen internally as a risk variable over which the tax equity investor has no control. Removing ‘early disposition’ as a recapture event would fundamentally alter the risk profile, especially for first-time or relatively new investors.²⁵⁶

Interviews with experienced counsel, developers, and investors reflect an overwhelming consensus that elimination of the early disposition constraint would reduce this perceived risk for tax equity investors and make them more comfortable with transactions incorporating debt at the project level.²⁵⁷

Finally, modernizing the recapture rules will facilitate the introduction of new tax structures that typically involve asset transfers between entities. For example, some

tantly, this benefit to the federal government is “independent of, and additive to the numerous other benefits of solar projects, including job creation, energy independence, the preservation of natural resources and the health benefits of cleaner air.” *Id.* at 1.

246. Telephone Interview with Ed Feo, *supra* note 64.

247. Telephone Interview with Albert Luu, *supra* note 105.

248. *Id.*

249. *Id.*

250. Joel Kirkland, *Cash-Rich Companies Begin to Make Renewable Energy Investments*, N.Y. TIMES (Aug. 18, 2011), <http://www.nytimes.com/cwire/2011/08/18/18climatewire-cash-rich-companies-begin-to-make-renewable-e-3023.html>. Chevron Corporation announced in February 2012 that it would pursue similar tax equity investments in solar energy projects in the range of 3-20 MW, but it has yet to announce its first investment as of the date of this writing. Benjamin Romano, *Oil Giant Chevron to Invest Tax Equity in US Solar Projects*, RECHARGE (Feb. 1, 2012), http://www.rechargenews.com/business_area/finance/article300993.ece.

251. *Renewable Energy*, GOOGLE, <http://www.google.com/green/energy/investments> (last visited Nov. 12, 2013). Notable solar tax equity investments include a \$280 million investment in distributed rooftop solar projects installed by SolarCity and a \$168 million investment in a utility-scale CSP project developed by BrightSource Energy. *Id.*

252. Interview with Sean Shimamoto, *supra* note 30; see also MICHEL DI CAPUA ET AL., BLOOMBERG NEW ENERGY FIN., THE RETURN—AND RETURNS—OF TAX EQUITY FOR US RENEWABLE PROJECTS 5 (2011), available at http://reznickgroup.com/sites/reznickgroup.com/files/papers/taxequity_reznickgroup_wp_112011.pdf.

253. DI CAPUA ET AL., *supra* note 252, at 5. California utility Pacific Gas & Electric briefly entered the market in 2010, but CEO Anthony Earley shut down its tax equity investment unit in late 2011 following a deadly, high-profile pipeline explosion that prompted the “need to be focused on our utility.” Mark Chediak & Andrew Herndon, *PG&E Not Seeking More Solar Tax-Equity Deals*, CEO Earley Says, BLOOMBERG (Dec. 13, 2011, 4:54 PM), <http://www.bloomberg.com/news/2011-12-13/pg-e-not-seeking-more-solar-tax-equity-deals-ceo-earley-says.html>.

254. Liz Hoffman, *Tax Equity Financing Lures Corporations to Renewables*, LAW360 (Mar. 6, 2012, 3:33 PM), <http://cdn.akingump.com/images/content/9/3/v4/9302/Tax-Equity-Financing-Lures-Corporations-To-Renewables.pdf>.

255. Ryan Tracy, *Renewable Firms Seek Tax-Equity Partners*, WALL ST. J., Feb. 11, 2012, at B3, available at <http://online.wsj.com/news/articles/SB10001424052970203646004577215163265069078>.

256. Telephone Interview with Jonathan Batarseh, Senior Dir., Domestic Tax, The Shaw Group (May 10, 2012).

257. See, e.g., *id.*; Telephone Interview with Ed Feo, *supra* note 64; Telephone Interview with Chris Diaz, *supra* note 82; Telephone Interview with Albert Luu, *supra* note 105; Telephone Interview with Michael Midden, *supra* note 82; Interview with Sean Shimamoto, *supra* note 30.

in the investment and policy community consider Master Limited Partnerships (“MLP”) to be a promising new vehicle to facilitate financial innovation by providing to renewable energy developers a type of business formation, currently only available to traditional fossil fuel sectors, which is generally considered to offer a lower cost of capital.²⁵⁸ Investment from the public capital markets would allow for structured financing to supplement traditional project finance lending for a number of renewable energy technologies.²⁵⁹

Under current law,²⁶⁰ MLPs may issue ownership interests, referred to as units, through a public exchange and in a manner very similar to publicly traded stocks. However, as a pass-through partnership, tax is only levied on the individual partners’ ownership interests.²⁶¹ In this way, MLPs avoid double taxation at the corporate and shareholder level. In June, 2012, Senator Chris Coons of Delaware introduced the MLP Parity Act to amend section 7704(d) of the Internal Revenue Code to include among the list of qualifying income sources all renewable energy technologies under sections 45 and 48 and certain biofuels.²⁶²

If permitted by legislation, MLPs would likely take the form of an exit MLP, a development MLP, or a hybrid of the two.²⁶³ In the case of the former, an energy company would develop wind or solar projects and exit direct project ownership by transferring the operating assets to an MLP in which public investors would purchase units. In the latter, the developer would convert its own corporate form to an MLP and offer ownership interests to the public. Both scenarios require that assets be freely transferable. Unlike wind projects, however, transfer of a solar asset to an MLP within five years of being placed in service would constitute a recapture event under section 50.²⁶⁴ In addition, some have suggested amending passive loss rules and other regulations to allow MLPs to pass through the tax benefits of the ITC to individual unit-holders.²⁶⁵ Assuming these changes were also passed by Congress, these unit-holders could trigger recapture of their pro rata share of the ITC if they were to sell or transfer more than one-third of their ownership inter-

est in the partnership.²⁶⁶ In this scenario, the ITC recapture rules would fundamentally interfere with the mechanics of the partnership, which is designed to be a liquid vehicle for retail investors.

Finally, the basic freedom to sell or transfer ownership of a solar asset in itself provides option value to developers who may wish to sell projects to raise capital for planned development. Revising the recapture rules “would certainly allow for a robust after-market” for solar projects, which was a positive, albeit temporary, result of the 1603 rules.²⁶⁷

V. Revising Section 50 and Barriers to Recapture Modernization

Just as Congress focused on the desired policy outcome of the credit when revising the LIHTC in 2008, Congress should revise section 50 for solar energy property to permit growth in the industry. The following suggested amendment to section 50(a)(4) could serve as a starting point for legislative text:

For purposes of this subsection, the increase in tax under this subsection shall not apply to an energy credit claimed for qualified energy property described in Section 48(a)(3)(A)(i) solely by reason of the disposition of the energy property (or an interest therein) if it remains qualified energy property and there is no change in use as a consequence of the disposition for the remaining recapture period with respect to such energy property.

Refocusing the recapture rules for solar energy property to the scope of use would more closely align the credit with the policy intent of promoting the construction of solar energy property to generate electricity. This statutory construction would deter the discarding of property in asset churning schemes by requiring the taxpayer and subsequent owner to maintain the property’s status as qualifying solar energy equipment used to “generate electricity, to heat or cool (or provide hot water for use in) a structure, or to provide solar process heat” under section 48.²⁶⁸

In exchange for recapture modernization, Congress could apply comparable safeguards established for 1603 and the LIHTC. For example, the revised recapture rules could explicitly prohibit sale to disqualified persons as defined under 1603.²⁶⁹ To address concerns over so-called straw party schemes previously envisioned in the LIHTC context, legislation could establish identical reporting requirements with an extended statute of limitations.²⁷⁰ This would not

258. Felix Mormann & Dan Reicher, *How to Make Renewable Energy Competitive*, N.Y. TIMES (June 1, 2012), http://www.nytimes.com/2012/06/02/opinion/how-to-make-renewable-energy-competitive.html?_r=2&ref=opinion; Matt Daily, *Analysis: Solar Firms Seek New Financing as Subsidies Fade*, REUTERS (June 21, 2012), <http://in.reuters.com/article/2012/06/21/us-solar-financing-idINBRE85K16520120621>.

259. See ALEX KOVACHEVA & MICHEL DI CAPUA, BLOOMBERG NEW ENERGY FIN., MASTER LIMITED PARTNERSHIPS FOR US RENEWABLES: PANACEA OR PIE IN THE SKY? 1–2, 6 (Jan. 2012); MOLLY F. SHERLOCK & MARK P. KEIGHTLEY, CONG. RESEARCH SERV., R41893, MASTER LIMITED PARTNERSHIPS: A POLICY OPTION FOR THE RENEWABLE ENERGY INDUSTRY 9 (2011).

260. 26 U.S.C. § 7704 (2012).

261. *Id.*

262. Press Release, Office of Senator Chris Coons, Senators Coons, Moran Introduce Bill to Spark Investment in Renewable Energy Projects (June 7, 2012), available at <http://www.coons.senate.gov/newsroom/releases/release/senators-coons-moran-introduce-bill-to-spark-investment-in-renewable-energy-projects>.

263. KOVACHEVA & DI CAPUA, *supra* note 259, at 8.

264. 26 U.S.C. § 50 (2012).

265. W. BRUCE BULLOCK ET AL., MAGUIRE ENERGY INST., LEVELING THE PLAYING FIELD: THE CASE FOR MASTER LIMITED PARTNERSHIPS FOR RENEWABLES 18 (2012), available at http://www.awea.org/newsroom/upload/SMU_MLP_WhitePaper.pdf.

266. 26 U.S.C. § 50.

267. Interview with Billy Lee, President, Bright Plain Renewable Energy, in Washington, D.C. (Mar. 9, 2012).

268. 26 U.S.C. § 48(a)(3)(A)(i) (2012).

269. A more open question for legislators’ consideration is a statutory construction that permits governments and tax-exempt entities to purchase the solar asset within the first five years. Although this deviates from 1603’s restrictions on disqualified persons, significant public policy benefits could result from making it easier for schools, local governments, and other non-profit entities to “go solar.” For example, reduced utility bills allow some budget-constrained schools to retain teachers and academic programs. See Jim Carlton, *The Enlightened Classroom*, WALL ST. J., June 18, 2012, at R3.

270. Alternatively, Congress could mimic 1603 and require the seller and purchaser to accept joint and several liability for any future recapture.

be administratively infeasible for the solar industry, which already complies with more detailed reporting requirements for the 1603 Treasury Program.²⁷¹ The taxpayer claiming a 1603 grant must certify to Treasury on an annual basis for five years under penalty of perjury that “the property has not been disposed of to a disqualified person and that the property continues to qualify as specified energy property.”²⁷²

Politicization of any industry presents significant challenges to bipartisan policymaking on Capitol Hill. The bipartisan effort to revise the LIHTC recapture bond requirement could serve as a model approach for the solar ITC. The Recapture Bond Coalition emphasized support for its proposal from both sides of the political aisle²⁷³ and a bipartisan vote in Congress.²⁷⁴ The current commercial ITC for solar energy property within the Energy Policy Act of 2005 was passed by an overwhelmingly bipartisan act of Congress and signed into law by a Republican president.²⁷⁵ Modernizing the recapture rules would not carve out a new incentive but merely optimize tax law for increased solar investment in a manner similar to the LIHTC. Fundamentally, solar ITC recapture rules could move members of Congress beyond political battles over ARRA and present a reasonable, less contentious modification to the underlying tax credit.

VI. Conclusion

Solar companies accustomed to the 1603 Treasury Program since 2009 should thoroughly consider the implications of ITC recapture rules as the industry shifts away from the grant program. There is a general consensus within the solar industry that all interested parties will benefit from a more liquid market where there are more active investors, lower cost of capital, and continuing financial innovation. Looking ahead, the solar industry will continue to grow due to the overwhelming success of the section 48 ITC, but its pace of development is hampered by tax credit recapture rules written for a different tax incentive designed for a different economy in a different era. Absent a legislative fix, a return to project financings subject to ITC recapture rules will result in a relatively illiquid market for solar assets and suppress the development of a viable secondary market. Counsel should prepare for these rules to cause friction amongst counter-parties and developers should thoughtfully review how the associated increase in transaction costs may negatively impact a project’s capital structuring and LCOE. Acknowledging the industry’s bright future by modernizing section 50 recapture rules to allow for disposition of solar energy property within the five-year recapture period will ensure the ITC continues to facilitate such innovation and industry growth.

271. U.S. TREASURY DEP’T OF THE FISCAL ASSISTANT SEC’Y, PAYMENTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, TERMS AND CONDITIONS 2 (2009), available at <http://www.treasury.gov/initiatives/recovery/Documents/energy-terms-and-conditions.pdf>.

272. *Id.*; see also U.S. TREASURY DEP’T OF THE FISCAL ASSISTANT SEC’Y, PAYMENTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, SAMPLE ANNUAL PERFORMANCE REPORT AND CERTIFICATION (2009), available at <http://www.treasury.gov/initiatives/recovery/Documents/ANNUAL%20PERFORMANCE%20REPORT%20AND%20CERTIFICATION%20-2.pdf>.

273. Copeman & Rozen, *supra* note 226.

274. *Foreclosure Prevention Act of 2008: Vote Number 186*, U.S. SENATE (July 26, 2008), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=2&vote=00186; *Foreclosure Prevention Act of 2008: Vote Number 186*, U.S. HOUSE OF REPRESENTATIVES (July 23, 2008), <http://clerk.house.gov/evs/2008/roll519.xml>.

275. *Energy Policy Act of 2005: Vote Number 213*, U.S. SENATE (July 29, 2005), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00213; *Energy Policy Act of 2005: Roll Call Vote 445*, U.S. HOUSE OF REPRESENTATIVES (July 28, 2004), <http://clerk.house.gov/evs/2005/roll445.xml>.