



Rev. Proc. 2007-65:
IRS Guidance on Partnership Flip Structures

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Overview

- How did we get here?
- What are the safe harbor requirements?
- What does this mean for LFG?

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How Did We Get Here? (1992-2004)

- Section 45 adopted in 1992
- Originally limited to wind and closed-loop biomass – poultry litter added in 2000
- Partnership structures developed in wind industry
- Similar structures developed under section 29/45K

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How Did We Get Here? (2004-2007)

- Section 45 expanded to new fuel types in 2004
- Taxpayers sought guidance from the IRS on application of section 45 to partnerships
- IRS announced “no-rule” position on section 45 and partnerships in 2006 (Notice 2006-88)
- IRS announced safe harbor for wind partnership deals in October 2007 (Rev. Proc. 2007-65)

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Requirements of Safe Harbor

- Wind deals only
- Deals with capital contributions (not sales)
- Minimum Partnership Interests
- Minimum Investment
- Purchase and Sale Rights
- Guarantees and Loans
- 704(b) Allocation Rules

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Minimum Partnership Interests

- Developer must have at least a 1% interest in all material partnership items
- Investor must have an interest in all material partnership items equal to at least 5% of the investor's maximum interest

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Minimum Investment

- Investor must have invested at all times at least 20% of its total capital contributions
- At least 75% of contributions must be fixed
- Investor may not be protected against loss by developer or other persons related to the project
- Developer may not lend investor funds to invest or guarantee a loan to the investor

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Purchase and Sale Rights

- Neither developer nor investor may have a right to purchase the project, any project assets or any interest in the project company at less than fair market value
- Developer may not have a right to purchase the project at any time earlier than 5 years after it is placed in service
- Neither the developer nor the project company may have any put rights

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Guarantees and Loans

- No person may guarantee the investor the right to any allocation of section 45 credits
- The project company must bear the risk that the available wind resource is not as great as anticipated or projected
- Third-party hedges (e.g., weather derivatives) are allowed
- Take or Pay contracts are not allowed

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704(b) Allocation Rules

- Section 45 credits must be allocated in accordance with Treas. Reg. § 1.704-1(b)(4)(ii)
- This means production tax credits must be allocated in the same manner as gross receipts from sales of electricity

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Outside of Safe Harbor?

- Safe harbor requirements “are not intended to provide substantive rules and are not to be used as audit guidelines”
- IRS will “closely scrutinize” any partnership that does not meet all the requirements of the safe harbor

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Impact on LFG

- Safe harbor does not apply to LFG projects
- Concepts may apply and are generally conservative
- Reduce cost of capital?

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Thank You!

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