Recent Developments in Public Utility, Communications and Transportation Industries

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VII. Finance, Mergers, and Acquisitions

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A. Introduction

In their efforts to find cost effective means to finance the improvement and restoration of utility infrastructure, various states and the District of Columbia continued to expand the uses of dedicated rate securitization in 2014 and 2015. The

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Securities and Exchange Commission (SEC) continued its efforts to increase transparency and accountability in the municipal securities markets. The use of the Yieldco structure as a growth driven investment vehicle continued to gain momentum in 2014 and 2015, and a number of significant merger transactions involving public utility companies were announced in that time frame.

B. Dedicated Rate Securitization Developments

1. California Water Utility Securitization Statutes

Although dedicated utility rate bonds have traditionally been used in the electric utility industry, California passed two statutes in 2013 and 2014 to permit their use by water utilities for water infrastructure projects. Assembly Bill 850, enacted in October 2013, will permit dedicated utility rate bonds to be issued to finance capital improvement projects of publicly owned water utilities.[1] To date, there have not been any transactions pursuant to the statute. In September 2014, California adopted another securitization statute for water utilities, this time addressing the specific needs of the Monterey Peninsula Water Management District.[2] Senate Bill 936 will permit California American Water Company to issue dedicated utility rate bonds to finance projects necessary to develop new sources of water supply for the Monterey Peninsula, including the potential construction of a desalination facility.

2. District of Columbia Undergrounding Project

In March 2014, the District of Columbia enacted the Electric Company Infrastructure Improvement Financing Act of 2014,[3] which permits the District of Columbia to issue up to $375 million of securitization bonds to finance, in part, the costs of construction of underground facilities to be used by Potomac Electric Power Company (Pepco) in connection with the undergrounding of certain electric power lines and facilities. The structure of the transaction authorized by the Act is different from traditional utility securitizations in that the issuer will be the District of Columbia itself, as opposed to a special purpose entity owned by the sponsoring utility. The bonds will be issued pursuant to an irrevocable financing order of the District of Columbia Public Service Commission (DCPSC), which will permit a dedicated charge to be included on the utility bills of substantially all Pepco customers for debt service on the bonds as well as associated financing costs.

The related financing order, issued by the DCPSC on November 24, 2014, contains the customary provisions found in utility securitization transactions, including a formulaic adjustment mechanism for the dedicated charges, as well as non-bypassability provisions. While the District of Columbia will be the issuer

1. Cal. Gov't Code § 6585 (2014).
2. Cal. Pub. Util. Code § 849 (2014).
3. Electric Company Infrastructure Improvement Financing Act of 2014, Act 20-290, DC (2014).

of the bonds and own the right, title, and interest in the dedicated charge, Pepco will act as servicer for the bonds, collecting the dedicated charges and, among other duties, requesting any required adjustments to the dedicated charges. On February 2, 2015, the DCPSC denied the application of certain intervenors for reconsideration of the Financing Order.[4]

3. Michigan Utility Securitization

In July 2014, Consumers 2014 Securitization Funding LLC, a special purpose entity wholly owned by Consumers Energy Company, issued $378 million of securitization bonds pursuant to an irrevocable financing order of the Michigan Public Service Commission (MPSC) in accordance with Michigan's utility securitization statute (2000 PA 142).[5] The issuance was Consumers' second utility securitization and marked a significant expansion of the types of costs that could be recovered using this financing mechanism. The MPSC financing order permits recovery of the remaining book value of seven coal-fired generating units and three smaller gas-fueled electric generating units, each of which is being retired by Consumers earlier than planned as a result of changes in environmental regulations. The MPSC found that the unrecovered book value associated with the referenced units qualifies for treatment as a regulatory asset and as a "qualified cost" in accordance with 2000 PA 142.[6]

4. Louisiana Securitizations

In August 2014, Entergy Louisiana, LLC (ELL) and Entergy Gulf States Louisiana, L.L.C. (EGSL), two wholly owned subsidiaries of Entergy Corporation that provide generation, transmission, and distribution service in Louisiana, completed separate offerings of system restoration bonds. Similar to two previous series of system restoration bonds issued in 2008 and 2010, the bonds were issued by a conduit municipal issuer, the Louisiana Local Government Environmental Facilities and Community Development Authority. The bonds were sold pursuant to separate financing orders of the Louisiana Public Service Commission (LPSC), issued in accordance with state enabling legislation.[7] The bonds are secured by system restoration property that includes the irrevocable right, created by the financing orders and vested solely in the Louisiana Utilities Restoration Corporation (the "borrower" of the bond proceeds and a political subdivision of the State of Louisiana), to impose, collect, and receive the nonbypassable consumption-based system restoration charge from all existing and

4. *See* Potomac Electric Power Co., Application for a Financing Order, Order No. 17797, DCPSC (Feb. 2, 2015).
5. S. 1253, 90th Leg. (Mich. 2000).
6. Consumers Energy Co., Application for Financing Order, Financing Order Case No. U-17473, 46, 47, Mich. PUC (Dec. 6, 2013).
7. Entergy Louisiana, LLC and Entergy Gulf States Louisiana, LLC, Joint Application for Recovery in Rates of Costs Related to Hurricane Isaac, Financing Order Nos. U-32764, U-32764-A, La. PSC (June 18, 2014).

future LPSC-jurisdictional electric customers of ELL or EGSL, as the case may be. The proceeds from sale of the bonds were loaned to the borrower and then transferred to ELL and EGSL, respectively, as non-shareholder capital contributions. ELL and EGSL used the cash to fund a portion of their storm damage reserves and fund recovery projects resulting from Hurricane Isaac.

5. Hawaii GEMS Program

In December 2014, the State of Hawaii Department of Business, Economic Development, and Tourism completed an offering of $150 million of Green Energy Market Securitization Bonds (GEMS Bonds).[8] The issuance of GEMS Bonds was conducted pursuant to a state statute enacted in June 2013 that provides for the on-bill financing of ratepayers' investment in clean energy technology infrastructure, such as solar panels. Unlike other utility securitizations that provide mutual benefit for utilities and their ratepayers, Hawaii's transaction is primarily for the benefit of those Hawaiians participating in a specific program to install clean energy technology. In contrast to traditional utility securitization structures, the proceeds of the GEMS Bonds were not provided to an electric utility, but instead deposited into a statutorily created Hawaii Green Infrastructure Special Fund.[9] This special fund is to be used by the state to make customer loans to finance investments in green energy technology infrastructure. The loans from the special fund are to be repaid through charges on the bills of customers obtaining the loans. Separately, the debt service on the GEMS Bonds is to be paid solely through the imposition of a "utility-wide non-bypassable surcharge" on customers of Hawaiian Electric Company, Inc., Hawaii Electric Light Company, Inc., and Maui Electric Company, Limited.[10] Neither the loans made from the special fund nor other assets of the loan program serve as security for the GEMS Bonds.

6. Amendments to SEC Regulation AB and Other 1934 Act Rules Impacting Dedicated Utility Rate Asset-Backed Bonds

The SEC adopted three new sets of rules implementing changes to regulations affecting issuances of asset-backed securities (ABS). The rules have been adopted pursuant to the Dodd-Frank Wall Street Reform and Consumer Protection Act.[11] The first set of these rules, known as Regulation AB II, adopted in August 2014, revises the disclosure requirements and offering process for registered ABS transactions.[12] A second set of regulations, adopted on the same day

8. *See* State of Hawaii Dep't of Business, Economic Development, and Tourism, Application for Financing Order, Decision, and Order No. 32494, Hawaii PUC (Dec. 1, 2014).

9. *See* State of Hawaii Offering Memorandum, at 21 (Nov. 4, 2014), *available at* http://emma.msrb.org/ER811923-ER631802-ER1033358.pdf.

10. *Id.* at 1.

11. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).

12. *See* Asset-Backed Securities Disclosure and Registration, SEC Release Nos. 33-9638, 34-72982 (2014).

as Regulation AB II, addresses credit rating agencies and third-party due diligence reports prepared in connection with ABS transactions.[13] Finally, in October 2014, the SEC adopted so-called skin-in-the-game rules to implement the credit risk retention requirements of Section 15G of the Securities Exchange Act of 1934, as amended (1934 Act)[14] for certain sponsors of ABS.[15]

These new rules will affect all ABS registered public offerings. At this time, the SEC has exempted Rule 144A[16] transactions under the Securities Act of 1933, as amended (1933 Act),[17] from the requirements of Regulation AB II, but noted that it may revisit this decision at a later date.[18] In addition, the credit rating agency and third-party due diligence reports rules will not apply to unregistered offerings by municipal issuers and certain "offshore" transactions.[19] While these new rules impose a considerable number of new disclosure and procedural requirements for ABS offerings, some of the more onerous regulations are generally not applicable to dedicated utility rate bonds.

a. Regulation AB II

Before addressing the new requirements that may affect dedicated utility rate bonds, it is important to note that one of the more significant changes to ABS public offerings from Regulation AB II, the requirement to disclose asset-level information, does not apply to offerings of dedicated utility rate bonds. The asset-level information rule, which takes effect on November 23, 2016, will only apply to ABS registered transactions backed by residential mortgage loans, commercial mortgage loans, auto loans, or lease resecuritizations of ABS transactions backed by any of these asset types, and debt securities.[20]

i. New Regulation AB Registration Statement Requirements

The most significant change resulting from Regulation AB II for issuers of dedicated utility rate bonds will be new forms of registration statements. For registration statements that become effective after November 23, 2015, issuers of ABS will be required to use the new ABS registration forms, Form SF-1 and Form SF-3.

The new forms are based largely on existing Forms S-1 and S-3. Pursuant to Regulation AB II, ABS offerings that qualify for shelf registration will be registered on Form SF-3 and all other ABS offerings will be registered on Form

13. *See* Nationally Recognized Statistical Rating Organizations, SEC Release No. 34-72936 (2014).

14. Securities Exchange Act of 1934, Pub. L. No. 112-158 (2012).

15. *See* Credit Risk Retention, SEC Release No. 34-73407. The Credit Risk Retention Rules were adopted jointly by the SEC and the Office of the Comptroller of the Currency, the Treasury, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, and the Department of Housing and Urban Development.

16. 17 C.F.R. § 230.144A.

17. Securities Act of 1933, Pub. L. No. 112-106 (2012).

18. *See* SEC, *supra* note 12, at 29.

19. *See* SEC, *supra* note 13, at instructions (e) and (f) to Rule 15Ga-2, at 650.

20. Although "debt securities" is not specifically defined in the adopting release, the 2010 proposing release referred to this asset class as "corporate debt." *See* SEC, *supra* note 12, at 55.

SF-1. To qualify for shelf registration, ABS offerings must meet certain shelf eligibility registrant requirements and new transaction requirements. The transaction requirements include: (1) a certification, at the time of each offering or takedown, by the chief executive officer of the depositor concerning the accuracy and adequacy of the disclosure; (2) a provision in the underlying transaction documents requiring a third-party review of the assets for compliance with the representations and warranties upon the occurrence of a specified level of defaults and a subsequent security holder action; (3) a provision in the underlying transaction agreements requiring repurchase request dispute resolution; and (4) a provision in the underlying transaction agreements obligating the issuer to disclose in a Form 10-D a request by an investor to communicate with other investors. These new transaction requirements replace the previous Form S-3 investment grade rating requirement and are not required by the new Form SF-1.[21]

Form SF-3 also has two registrant requirements. First, similar to Form S-3, the depositor, each issuing entity, and any affiliate of the depositor that is or was at any time during the twelve-month period prior to the date of filing of the registration statement a registrant with respect to a previous offering of ABS of the same asset class must have timely filed all required 1934 Act reports. Second, new requirements have been added that the depositor, each issuing entity, and any affiliate with respect to the same asset class must have timely filed all required CEO certifications described above and all transaction documents containing the required asset review, dispute resolution, and investor communications requirements described above during the preceding twelve months (and any stub period). Failure to provide the CEO certifications or transaction documents can be cured ninety days after the date the registrant makes all required filings.[22] An annual evaluation of the two registrant requirements is also imposed on registrants.[23]

ii. New Regulation AB II Prospectus Requirements

In addition to the new registration statement forms for ABS public offerings, Regulation AB II creates new prospectus requirements for shelf registration statements. New Rule 430D and an instruction to Form SF-3 require ABS issuers to file a single preliminary prospectus (without supplements) under new Rule 424(h) for each takedown from a shelf registration statement. The changes eliminate the traditional use of a base prospectus and prospectus supplement for registered ABS shelf transactions.[24] The new 424(h) preliminary prospectus must be filed with the SEC at least three business days prior to the first sale of securities in the offering.[25] In addition, should there be any material change to the information contained in a preliminary prospectus, such changes must be

21. *See id.* at 629–40.
22. *Id.* at 416.
23. *See* New Rule 401(g)(4); SEC, *supra* note 12, at 413.
24. *See* SEC, *supra* note 12, at 21.
25. *Id.* at 314.

filed with the SEC at least forty-eight hours before the date and time of the first sale.[26] The three business day waiting period should not significantly change the current marketing practices for dedicated utility rate bonds because the current practice is to have a "pre-marketing" period during which time the preliminary prospectus is available for investors to review.

iii. Filing Requirements of Final Documents as Exhibits

In a 2010 proposing release, the SEC originally proposed that all required exhibits, including final versions of transaction documents such as indentures, servicing agreements and other related documents, be filed and made part of the registration statement on Form SF-3 by the date the final prospectus is required to be filed pursuant to Rule 424.[27] In response to comments received, in a 2011 release, the SEC modified the proposal to require the documents be filed in substantially final form by the date the preliminary prospectus is required to be filed.[28] The final rule, however, reverts back to the 2010 proposal and requires exhibits with respect to an ABS offering on Form SF-3 to be on file and made part of the registration statement by the date the final prospectus is filed.

iv. Additional Regulation AB II Prospectus Disclosure Requirements

Regulation AB II also creates additional prospectus disclosure requirements including (1) additional disclosure concerning the originators; (2) the financial condition of parties contractually obligated to repurchase a pool asset for breach of a representation and warranty; (3) the economic interests maintained in the pool assets by the sponsor, servicers, and originators; (4) disclosure of any transaction agreements governing the modification of pool assets; (5) more detailed disclosure covering static pool information; and (6) additional instructions concerning the summary section of the prospectus.[29]

Because of the structure of a typical dedicated utility rate bond transaction, the nature of the underlying assets that back dedicated utility rate bonds, and the fact that neither the underlying assets nor the other collateral securing dedicated utility rate bonds is or will be a static pool of assets, complying with these additional disclosure requirements should not be difficult. However, after the new requirements come into effect in November 2015, sponsors of dedicated utility rate bond registered transactions will be faced with new, more onerous registration statement forms. As a result, some sponsors might consider public offerings using Form SF-1 (non-shelf) to avoid the CEO certification requirements or the use of the Rule 144A market as an alternative to the registered public market, given the new forms and even a moderate increase in disclosure requirements.

26. *Id.* at 318.
27. *See* SEC, *supra* note 21, at 247.
28. *See* SEC, *supra* note 12, at 444.
29. *Id.* at 517–31.

b. Credit Rating Agencies and Third Party Due Diligence

New rules for Nationally Recognized Statistical Rating Organizations (NRSRO) have been adopted, both amending the existing rules and introducing new rules for providers of third-party due diligence services for ABS. The new NRSRO rules apply to issuers and underwriters of both registered and unregistered offerings of rated ABS transactions (absent limited exemptions mentioned below). Included among these new rules is the requirement under Rule 15Ga-2[30] under the 1934 Act that issuers or underwriters of any NRSRO rated ABS transaction must furnish on EDGAR, five business days prior to the first sale, Form ABS-15G, containing the findings and conclusions of any "third-party due diligence report" obtained by the issuer or underwriter. "Third-party due diligence report" is defined in new Rule 17g-10[31] under the 1934 Act as any report containing findings and conclusions of any due diligence services performed by a third party. Rule 15Ga-2 applies regardless of whether the third-party due diligence report is made available to, or used by, the NRSRO.

Several commentators noted the rule, as initially outlined in the proposing release, could require the public disclosure of agreed upon procedures (AUP) letters prepared by accountants. In response, the SEC specifically exempted AUP letters that recalculate projected future cash flows due to investors or perform procedures that address other information included in the offering documents from the definition of "third-party due diligence report."[32] Rule 15Ga-2 did not, however, exempt AUP letters that compare loan tape to the loan file as had also been requested by commentators.

Unregistered offerings by municipal issuers are exempt from Rule 15Ga-2.[33] In addition, Rule 15 Ga-2 does not apply to certain "off-shore" transactions.[34] These new NRSRO rules took effect June 15, 2015.[35]

c. Credit Risk Retention Rule

The final major rulemaking finalized during the fall of 2014 releases involved risk retention. Otherwise known as skin-in-the-game, the rule is designed to require sponsors of certain types of ABS to maintain at least a 5 percent economic interest in the credit risk of the securitized assets.[36] The rule will become effective December 24, 2015, with respect to asset-backed securities collateralized by residential mortgages and December 24, 2016, with respect to all other classes of

30. *See* SEC, *supra* note 13, at 362.
31. *See id.* at 384.
32. *See id.* at 399.
33. Although municipal issuers and underwriters are exempt from the requirement to furnish Form ABS-15G, the SEC notes that municipal issuers or underwriters are nonetheless subject to the statutory requirement and must make publicly available the findings and conclusions of any third-party due diligence report. *See id.*, instruction (h) to Rule 15Ga-2 at 650.
34. *See* SEC, *supra* note 13, at 650.
35. *Id.* at 1–2.
36. *See* Luis A. Aguilar, Commissioner, Sec. & Exch. Comm'n, Public Statement, Skin in the Game: Aligning the Interests of Sponsors and Investors, Oct. 22, 2014, *available at* http://www.sec.gov/News/PublicStmt/Detail/PublicStmt/1370543250034#.VOPRfy7081U.

asset-backed securities.[37] The SEC release adopting new risk retention requirements specifically exempts dedicated utility rate bonds.[38] In order to qualify for the dedicated utility rate securitization exemption, the bonds must be secured by an intangible property right to collect charges for the recovery of specified costs. Such specified costs must be authorized by an irrevocable financing order issued by a local public utilities commission. In addition, the financing order must provide that the utility acquires an intangible property right to charge, collect, and receive amounts necessary to provide for the full recovery of the specified costs determined to be recoverable and ensures that the charges are non-bypassable and will be paid by customers within the utility's historic service territory. Lastly, the exemption requires a guarantee that neither the state nor its agencies have the authority to rescind or amend the financing order.[39] For dedicated utility rate bond transactions that use a municipal transaction structure, the Dodd-Frank Act exempts all municipal transactions from any risk retention rule.[40]

C. Municipal Securities Market Developments

On March 10, 2014, the SEC announced the establishment of the Municipalities Continuing Disclosure Cooperation Initiative (MCDC), a self-reporting initiative regarding continuing disclosure for municipal bond issues.[41] MCDC invited issuers and obligated persons involved in the offer or sale of municipal securities (collectively, issuers[42]), as well as underwriters of such offerings, to voluntarily report to the SEC possible violations involving materially inaccurate statements in official statements relating to an issuer's prior compliance with the continuing disclosure provisions of Rule 15c2-12 under the 1934 Act.[43] Under Rule 15c2-12, any official statement used in a primary offering of municipal securities must disclose any instances during the previous five years in which the issuer failed to comply, "in all material respects," with its previous continuing disclosure commitments under the rule. In return, the SEC proposed to offer standardized enforcement settlement terms to self-reporting issuers and underwriters. The deadline for underwriters to self-report was September 9, 2014, while issuers had until December 1, 2014.[44]

A key issue with respect to MCDC is interpreting materiality in this context. The general legal meaning of "material" for disclosure is whether the misstated

37. *See* SEC, *supra* note 15, at 2.

38. *Id.* at 292.

39. *Id.*

40. 15 U.S.C. § 78o-11(c)(1)(G)(iii)(2014).

41. *See* SEC Division of Enforcement, Municipalities Continuing Disclosure Cooperation Initiative, *available at* http://www.sec.gov/divisions/enforce/municipalities-continuing-disclosure-cooperation-initiative.shtml#P13_1110.

42. Under MCDC, "issuer" includes not just governmental issuers, but conduit borrowers and other "obligated persons" as well.

43. 17 CFR 240.15c2-12.

44. *See* SEC Division of Enforcement, *supra* note 43.

or omitted information would be viewed by an investor as important in its decision to buy and hold the bond. The SEC has significant discretion as to whether it will recommend MCDC standardized settlement terms and it has not stated its views or announced any safe harbor on what types of noncompliance or accompanying disclosure may or may not be material. On July 8, 2014, the SEC announced its first MCDC settlement with a California school district issuer. Unfortunately, the settlement order does not give specific information regarding the issuer's noncompliance and is therefore not helpful in determining what kinds of failures the Commission considers material.[45]

MCDC does not expressly state a scope or time period for offering documents containing potentially inaccurate statements, but it is generally understood that the SEC's standard five-year statute of limitations for enforcement actions applies, which means that an issuer's scope of review includes bond offering documents during the past five years. Since Rule 15c2-12 requires disclosure of failures to comply with Rule 15c2-12 during the preceding five years,[46] this may require an issuer to go back as far as ten years to determine whether its compliance was accurately disclosed.

Under MCDC, the SEC Enforcement Division will recommend that an issuer receive an enforcement settlement under which the issuer consents to a "cease and desist" proceeding under applicable federal securities laws for negligence-based fraud. The issuer will not need to admit or deny the findings of the SEC. This settlement extends only to the issuer entity, not to individuals associated with an issuer entity. The SEC may settle with the issuer, but not necessarily with individuals at the issuer responsible for continuing disclosure compliance and official statement disclosure.

To be eligible for an MCDC settlement, an issuer must agree to do the following: (1) within 180 days of the SEC order, establish policies, procedures, and training regarding continuing disclosure; (2) comply with all existing continuing disclosure undertakings, including updating past delinquent filings within 180 days of the SEC order; (3) cooperate with any subsequent SEC investigation regarding the inaccurate disclosures, including the roles of individuals and other parties involved; (4) disclose clearly and conspicuously the settlement terms in any final official statement for a period of five years after the SEC order; and (5) provide the SEC with a compliance certification regarding the above undertakings on the one-year anniversary of the SEC order. For issuers that agree to these terms, the SEC will not seek payment of a civil penalty.[47]

MCDC also invites underwriters to "self-report" their participation in bond offerings in which final official statements contained materially inaccurate

45. *In the Matter of* Kings Canyon Joint Unified School District, Securities Act Release No. 9610 (July 8, 2014).

46. 17 C.F.R. § 240.15C2-12.

47. *See* SEC Division of Enforcement, *supra* note 43.

disclosure regarding issuer compliance with continuing disclosure agreements.[48] If an underwriter discovers potentially material disclosure inaccuracies, MCDC requires the underwriter to identify the issuer and bond issue, along with extensive detail about the offering.[49]

Civil penalties will be collected and capped at $500,000 for self-reporting underwriters. Those that actively underwrite hundreds of bond issues will be motivated to report as many issues as possible to avail themselves of the $500,000 cap on exposure.

In addition, as part of the settlement, the underwriter must undertake to: (1) retain an independent consultant, acceptable to the SEC staff, to conduct a compliance review and, within 180 days of the institution of proceedings, provide recommendations to the underwriter regarding the underwriter's municipal underwriting due diligence process and procedures; (2) within ninety days of the independent consultant's recommendations, take reasonable steps to enact such recommendations, although the underwriter may seek approval from the SEC staff to not adopt recommendations that the underwriter can demonstrate to be unduly burdensome; (3) cooperate with any subsequent investigation by the Division regarding the false statement(s), including the roles of individuals and/or other parties involved; and (4) provide the SEC staff with compliance certifications regarding the applicable undertakings by the underwriter on the one year anniversary of the date of institution of the proceedings.[50]

Encouraging self-reporting by both issuers and underwriters in a bifurcated time sequence creates a "prisoner's dilemma." If, for example, an underwriter reports an issuer and its disclosure, and the issuer has not self-reported the same issue, the SEC presumably can pursue an enforcement action against the issuer, seeking more severe penalties, including fines. In many instances, an issuer and underwriter may agree that a particular disclosure about past compliance, while potentially inaccurate, is not materially inaccurate and should not be reported under MCDC. For issuers and underwriters that would be eligible for MCDC but that do not self-report, any SEC enforcement actions outside of the MCDC initiative could result in its seeking remedies beyond those described in the initiative. For issuers, the SEC will likely recommend and seek financial sanctions. For underwriters, it will likely recommend and seek financial sanctions in amounts greater than those available pursuant to the MCDC initiative.[51]

48. In such instances, underwriters for these bond offerings may also have violated the antifraud provisions to the extent they failed to exercise adequate due diligence in determining whether issuers have complied with such obligations, and as a result, failed to form a reasonable basis for believing the truthfulness of a key representation in the issuer's official statement, i.e. the issuer's statements regarding its compliance with its continuing disclosure obligations.

49. SEC Division of Enforcement, Municipalities Continuing Disclosure Cooperation Initiative Questionnaire for Self-Reporting Entities, *available at* http://www.sec.gov/divisions/enforce/mcdc-initiative-questionnaire.pdf.

50. *See* SEC Division of Enforcement, *supra* note 43.

51. *Id.*

D. Yieldco Update

Over the past two years, the Yieldco corporate structure has gained in popularity among U.S. listed generators of power. The idea of the Yieldco is to place a portfolio of already operating projects in a new subsidiary and sell a portion of the shares of that subsidiary to the general public. The Yieldco typically owns and constructs projects with predictable and stable cash flows. These new subsidiaries are referred to as Yieldcos because they distribute most of their earnings through quarterly dividend payments.

Yieldcos are often structured as a C corporation with Class A common stock issued to the public and Class B common stock retained by the parent company, often referred to as the sponsor. But there is significant variance between ownership structures from one Yieldco to another, both in terms of voting rights of the Class A common stock and Class B common stock and the relative economics of each. The ownership of another popular structure—the master limited partnership (MLP)—is similarly split between two primary groups, the public and the sponsor. The public owns a certain percentage of the MLP as Common Units. The sponsor retains the portion of the MLP not sold to the public, as well as a 2 percent general partner interest in the MLP.

These structures are in contrast to a real estate investment trust (REIT). While the tax requirements of REITs are highly developed, their ownership structures are often relatively straightforward. A REIT must be formed under state law as an entity taxable for federal purposes as a corporation. For most publicly traded equity REITs, the public owns most, if not all, of the REIT's common stock. Finally, while Yieldcos are not as tax-efficient as REITs or MLPs, accelerated depreciation and tax credits or other types of tax benefits for renewable projects often help to reduce (or eliminate) taxes on distributions and shelter earnings.

Yieldcos have significant flexibility in the types of assets that can be owned. Yieldcos may own, operate, and acquire numerous types of contracted renewable and conventional generation and thermal infrastructure assets. MLPs must have at least 90 percent of their income deemed to be qualifying income under Section 7704 of the Internal Revenue Code. Qualifying income includes income and gains derived from the transportation, processing, storage, and marketing of crude oil, natural gas, and products thereof. The REIT structure also has strict limitations on the types of assets that may be held at the REIT. Among other distribution and income tests, at least 75 percent of the value of a REIT's assets at the end of each calendar quarter must consist of real estate assets and certain other passive assets.

A Yieldco and the sponsor typically enter into right of first offer agreements with respect to additional projects owned by the sponsor or future projects to be contributed to the Yieldco by the sponsor. At the same time, the Yieldcos often retain the right to acquire additional projects from third parties.

1. NRG Yield, Inc.

NRG Yield, Inc. raised $468 million,[52] including the exercise of the underwriters' greenshoe option, in July 2013 by selling Class A common stock representing a 34.5 percent interest in a portfolio of certain conventional and solar projects, thermal facilities, and small cogeneration facilities. The Yieldco raised another $548.6 million[53] in July 2014, thereby increasing the public's interest in the Yieldco to 43.6 percent. At the time of the second offering, the portfolio of generation included four natural gas or dual-fired facilities, ten utility-scale solar and wind generation facilities, and two portfolios of distributed solar facilities that collectively represent 1,914 net megawatts. Each of these assets sells substantially all of its output pursuant to long-term, fixed price off-take agreements. The average remaining contract duration of these off-take agreements was approximately seventeen years as of June 30, 2014. The Yieldco also owns thermal infrastructure assets with an aggregate steam and chilled water capacity of 1,346 net megawatt thermal equivalents and electric generation capacity of 123 net MW. The Class A common stock of NRG Yield, Inc. is traded on the New York Stock Exchange.

NRG Yield, Inc. does not expect to owe significant federal income taxes for its first ten years of operation. This period could be further extended if the Yieldco acquires additional renewable projects. The result is that there will be no taxes taken out at the corporation with distributions to shareholders treated as returns of capital until the shareholders recoup their investments.[54]

NRG Energy, Inc. granted NRG Yield, Inc. a right of first offer for the first five years to make bids on six different projects that were put into service between 2013 and 2014.

2. Pattern Energy Group Inc.

Pattern Energy Group Inc. raised $352 million in net proceeds in September 2013 on the sale of its Class A common stock representing a 36.8 percent interest in eight wind farms with a total owned capacity of 1,041 MW in the United States (including Puerto Rico), Canada, and Chile.[55] In May 2014, Pattern Energy, together with certain selling shareholders, raised another $490.5 million in proceeds.[56] At the time of the second offering, the portfolio of assets had grown to 1,434 MW. Pattern Energy listed its Class A common stock simultaneously on the NASDAQ Global Exchange and the Toronto Stock Exchange.

52. NRG Yield, Inc., Form 424(b)(4) (July 16, 2013), *available at* http://www.sec.gov/Archives/edgar/data/1567683/000104746913007639/a2216031z424b4.htm.

53. *Id.*

54. *Id.*

55. Pattern Energy Group Inc., Form 424(b)(1) (Sept. 26, 2013), *available at* http://www.sec.gov/Archives/edgar/data/1561660/000119312513380934/d597019d424b1.htm.

56. Pattern Energy Group Inc., Form 424(b)(4) (May 8, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1561660/000119312514190929/d715360d424b4.htm.

Pattern Energy has a right of first offer for the first five years to make bids on any projects in the 3,000 MW development pipeline that its sponsor, Pattern Energy Group LP, informs the Yieldco it plans to sell. Pattern Energy Group LP further agreed not to compete with the Yieldco for acquisitions of generation and transmission projects for as long as the Yieldco retains a right of first offer over Pattern Energy Group LP projects.[57]

3. Abengoa Yield plc

Abengoa Yield plc raised $681.9 million in net proceeds in June 2014 on the sale of ordinary shares representing a 30.1 percent interest in 710 MW of renewable energy generation, 300 MW of conventional power generation, and 1,018 miles of electric transmission lines. Abengoa Yield plc, incorporated in England and Wales, listed the ordinary shares on the NASDAQ Global Select Market.

Abengoa's sponsor, Abengoa, S.A., which is listed on the Madrid Stock Exchange and the NASDAQ Global Select Market, is an engineering and clean technology company with operations in more than fifty countries. Abengoa, S.A. promotes sustainable development projects, including delivering new methods for generating power from the sun, developing biofuels, producing potable water from seawater, and efficiently transporting electricity. Abengoa, S.A. agreed to grant the Yieldco a right of first offer on any proposed sale, transfer, or other disposition of any of Abengoa S.A.'s contracted renewable energy, conventional power, electric transmission, or water assets in operation and located in the United States, Canada, Mexico, Chile, Peru, Uruguay, Brazil, Colombia, and the European Union for a period of five years following the consummation of the June 2014 offering.

On January 15, 2015, Abengoa Yield plc announced the pricing of an underwritten public offering of 9,200,000 ordinary shares of Abengoa Yield plc by means of a secondary public offering by the selling shareholder, Abengoa, S.A., at a price of $31 per share.[58] The selling shareholder received all proceeds from the offering, in the total amount of $285.2 million, less expenses and underwriters' discounts.

4. NextEra Energy Partners, LP

Also in June 2014, NextEra Energy Partners, LP raised $381.1 million in net proceeds in the sale of common units, representing limited partner interests, that included a 17.4 percent interest in a portfolio of 989.6 MW of contracted renewable energy projects in North America.[59] The projects in the initial portfolio were all contracted under long-term contracts that have a capacity-weighted

57. Pattern Energy Group Inc., Form 424(b)(1) (Sept. 26, 2013), *available at* http://www.sec.gov/Archives/edgar/data/1561660/000119312513380934/d597019d424b1.htm.

58. Abengoa Yield plc, Form 424(b)(4) (Jan. 15, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1601072/000119312515012977/d832817d424b4.htm.

59. NextEra Energy Partners, L.P., Form 424(b)(4) (June 26, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1603145/000119312514253742/d696235d424b4.htm.

average remaining contract term of approximately twenty-one years. The common units trade on the New York Stock Exchange.

Under a right of first offer agreement, NextEra Energy Resources, LLC granted the Yieldco a right of first offer on certain projects in the event it decided to sell such projects. The term of the right of first offer is six years from the completion of the offering.

5. TerraForm Power, Inc.

In July 2014, TerraForm Power, Inc., an affiliate of SunEdison, Inc., raised $463.9 million in net proceeds in the sale of Class A common stock representing a 19.9 percent interest in a portfolio of 807 MW of solar projects located in the United States, Canada, the United Kingdom, and Chile.[60] The projects have long-term power purchase agreements with a weighted average (based on MW) remaining life of twenty years. The Class A common stock trades on the NASDAQ Global Select Market.

The Yieldco entered into a support agreement with SunEdison, Inc. that requires SunEdison to offer additional qualifying projects from its development pipeline by the end of 2016. These projects are projected to generate an aggregate of at least $175 million of cash available for distribution during the first twelve months following the qualifying projects' commercial operations dates. Further, the support agreement with the sponsor grants the Yieldco a right of first offer with respect to any solar projects located in the United States, Canada, the United Kingdom, and Chile that SunEdison decides to sell during the six-year period following the offering.

On November 26, 2014, TerraForm Power, Inc. completed the sale of a total of 11,666,667 shares of its Class A common stock in a private placement to certain investors for an aggregate purchase price of $350 million ($30 per share).[61] Further, on January 15, 2015, TerraForm Power, Inc. announced the pricing of its underwritten public offering of twelve million shares of its Class A common stock at a price to the public of $29.33 per share.[62]

6. Sol-Wind Renewable Power, LP

Sol-Wind Renewable Power, LP was formed as an MLP-like structure to own, acquire, invest in, and manage operating solar and wind power generation assets. The company filed a Form S-1 registration statement with the SEC on December 23, 2014.[63] Sol-Wind's structure differs from other renewable Yieldco

60. TerraForm Power, Inc., Form 424(b)(4) (July 17, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1599947/000119312514273144/d672387d424b4.htm.

61. TerraForm Power, Inc., Form 8-K (Nov. 21, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1599947/000159994714000036/a8-kitemsxpipeclosing.htm.

62. TerraForm Power, Inc., Form 424(b)(4) (Jan. 15, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1599947/000119312515013530/d827022d424b4.htm.

63. Sol-Wind Renewable Power, LP, Form S-1 (Dec. 23, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1616330/000104746914010077/a2222463zs-1.htm.

structures. In the typical Yieldco, the public entity is a corporation that owns a partnership. In the Sol-Wind structure, the public entity is a partnership that owns a corporation. In addition, most established Yieldcos have ties to a larger, more established parent sponsor. In the Sol-Wind structure, the company's general partner, Sol-Wind LLC, will manage its operations.[64] The general partner, a special purpose entity created for this purpose, has a non-economic interest in Sol-Wind Renewable Power, LP. Unlike the shareholders in a publicly traded corporation, the common unit holders of Sol-Wind Renewable Power, LP will not be able to elect the general partner or its directors.[65] A potential downside of the Sol-Wind structure is that, similar to an MLP, the public investors in the company will receive an IRS Schedule K-1 for U.S. federal income tax purposes.

The initial portfolio of projects consists of 184.6 MW of capacity with eleven solar projects and one wind project in California, Texas, Massachusetts, New Jersey, Colorado, Montana, Canada, and Puerto Rico.[66] Sol-Wind is focused on acquiring assets from middle-market developers, defined as solar projects between 100 kW and 5 MW of nameplate capacity and wind assets between 1 MW and 10 MW of nameplate capacity.[67]

Sol-Wind announced the postponement of its initial public offering on February 11, 2015.[68]

E. Tender Offer Developments

On January 23, 2015, the staff of the Division of Corporation Finance of the SEC issued a no-action letter providing that it would not recommend enforcement action with respect to a five business day timeline for tender or exchange offers for non-convertible debt securities meeting specified criteria.[69] The no-action letter supersedes the prior no-action letters of the SEC for abbreviated offering periods in non-convertible debt tender offers.[70] As a result, debt tender offers will no longer be eligible for the previous seven-to-ten calendar day tender offer relief and must either comply with the requirements for the five business day tender offer under the January 23 no-action letter or else be conducted as a twenty business day tender offer.

There are very specific criteria that must be satisfied for a tender or exchange offer to be eligible to be conducted as a five business day offer. Certain of the criteria[71] include that the offer:

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Amanda Levin, *Sol-Wind Renewable Power Postpones IPO*, Deal, Feb. 13, 2015, *available at* http://www.thedeal.com/content/energy/sol-wind-renewable-power-postpones-ipo.php.

69. SEC No-Action Letter, Cahill Gordon & Reindel LLP (Jan. 23, 2015).

70. *Id.*; *see also* Goldman, Sachs &Co. (Mar. 26, 1986); Salomon Brothers Inc. (Mar. 12, 1986); Salomon Brothers Inc. (Oct. 1, 1990).

71. Note also that the five-day period is not available for offers if

(1) be made by the issuer, its direct or indirect wholly owned subsidiary, or a parent company that owns 100 percent of the issuer;
(2) must be for "any and all" debt securities of a class or series;
(3) not be made in connection with a consent solicitation;
(4) be announced via a widely disseminated press release disclosing the basic terms of the offer and containing a hyperlink or website address allowing holders to obtain copies of the offering documents (Immediate Widespread Dissemination), prior to 10:00 a.m., Eastern time, on the first business day of the offer and, if the issuer is a reporting company, including "voluntary filers," under the 1934 Act, the press release announcing the offer must be furnished in a Current Report on Form 8-K;
(5) provide for communication by Immediate Widespread Dissemination at least five business days prior to the expiration of the offer of any change in the consideration being offered in the offer and at least three business days prior to expiration of any other material change to the offer, in each case at or prior to 10:00 a.m., Eastern time, on the first day of such five or three business day period, as applicable; and, if the issuer or offeror is a reporting company under the 1934 Act, including a "voluntary filer," describe any change in the consideration being offered in a Current Report on Form 8-K filed with the SEC prior to 12:00 noon, Eastern time, on the first day of the aforementioned five business day period;
(6) not be financed with the proceeds of any indebtedness incurred to finance all or a portion of the consideration in the offer if such indebtedness (a) has obligors, guarantors or collateral that the targeted securities do not have, (b) has a weighted average life to maturity less than that of the subject debt securities, or (c) is otherwise senior in right of payment to the targeted securities;
(7) provide for withdrawal rights that are exercisable (a) at least until the earlier of the expiration of the offer and if the offer is extended, the tenth business day after commencement and (b) at any time after the sixtieth day after commencement if the offer has not yet been consummated;
(8) must be for cash and/or "Qualified Debt Securities" (defined to be identical securities to those sought in the tender, other than maturity, interest rate, interest payment/record dates, and redemption provisions, and that have interest payable only in cash and a longer weighted average life to maturity); and

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(1) the targeted securities are in default or the issuer is in default under any other indenture or material credit agreement; or
(2) the issuer is in bankruptcy or insolvency proceedings, has commenced soliciting consents for a "pre-packaged" bankruptcy proceeding or if its board of directors has authorized restructuring discussions; or (i) made in anticipation of or in response to, or concurrently with, a change of control or other type of extraordinary transaction involving the issuer, such as a merger, reorganization or liquidation or sale of all or substantially all of its consolidated assets, (ii) made in anticipation of or in response to other tender offers for the issuer's securities, (iii) made concurrently with a tender offer for any other series of the issuer's securities made by the issuer (or a subsidiary or parent company) if the effect of

such offer would be to add obligors, guarantors or collateral or shorten the weighted average life to maturity of such other series or (iv) commenced within 10 business days after the first public announcement or the consummation of the purchase, sale or transfer by the issuer or any of its subsidiaries of a material business or amount of assets that would require *pro forma* financials pursuant to Article 11 of Regulation S-X.

(9) must be open to all record and beneficial holders of such debt securities; provided, to the extent it is an exchange offer (and thereby made with Qualified Debt Securities), the exchange must be restricted to existing holders who are either Qualified Institutional Buyers (as defined in Rule 144A under the 1933 Act) and/or non-US persons (within the meaning of Regulation S under the 1933 Act) and holders who are not so eligible must be provided a concurrent offer to receive cash for their securities approximating the value of the Qualified Debt Securities being offered.

The five business day requirement of the new no-action letter is not, in effect, much shorter than the seven-to-ten calendar day period under the prior no-action relief. As noted in the January 23 no-action letter, five business days in many cases will require a seven calendar day period.[72] While much of the focus of the January 23 no-action letter has been the shortened period, it is arguably not the most significant change. A very significant change, however, is that the new no-action position applies regardless of the rating of the target debt securities. This is a departure from the no-action letters by the staff of the SEC providing for seven-to-ten calendar day tender offers only with respect to investment grade debt.[73] According to the January 23 no-action letter, the decision to eliminate this distinction was based in part on the fact that in many cases, the holders of non-investment grade securities are more likely to be sophisticated institutional investors.

To qualify, the offer must be made for any and all of the targeted securities. Because "waterfall" tender offers are by their nature contingent offers, based on the priority level of targeted series and the amount of consideration remaining in the waterfall, waterfall tenders would not qualify for the five-day tender offer period. Similarly, because the Dutch auction tender or exchange always is an offer for less than all of the outstanding series, tenders, and exchanges structured as a Dutch auction would not qualify.

F. Announced Transactions

1. UIL Holdings Corporation and Philadelphia Gas Works

On March 3, 2014, UIL Holdings Corporation announced it would acquire the assets and certain liabilities of Philadelphia Gas Works (PGW) from the City of Philadelphia for an initial purchase price of $1.86 billion in cash, subject to

72. For purposes of the January 23 no-action letter, a business day for a five business day tender offer would be any day, other than Saturday, Sunday, or a federal holiday, and a five business day tender offer would be treated as having commenced on the first business day on which the tender offer is made if the "Immediate Widespread Dissemination" occurs at or prior to 10:00 a.m. Eastern. The last day of the tender offer would be treated as a business day if expiration occurs on or after 5:00 p.m. Eastern.

73. *See* Goldman, Sachs & Co. (Mar. 26, 1986); Salomon Brothers Inc. (Mar. 12, 1986); Salomon Brothers Inc. (Oct. 1, 1990).

adjustment (the acquisition).[74] UIL entered into a 364-day bridge term loan agreement on March 28, 2014, in an aggregate principal amount of up to $1.9 billion for the purpose of financing the acquisition.[75] UIL intended to permanently finance the acquisition through the issuance of long-term debt and equity.[76]

UIL, based in New Haven, Connecticut, is the parent company of the United Illuminating Company, the Southern Connecticut Gas Company, Connecticut Natural Gas Corporation, and the Berkshire Gas Company. UIL serves more than 700,000 electric and natural gas utility customers in Connecticut and western Massachusetts. PWG is the largest municipally owned natural gas utility in the United States, managing a distribution system of approximately 6,000 miles of gas mains and service pipes. It serves approximately 500,000 customers in the City of Philadelphia.

On December 4, 2014, UIL announced it had officially terminated its agreement to purchase PGW.[77] While the transaction had the support of Philadelphia's mayor, the PUC,[78] and PUC commissioners,[79] the City Council rejected the deal on the grounds that the agreement did not adequately address concerns about rate and bill increases or the maintenance of employee benefits and wages. The Council was also concerned about the potential negative effect on the city's low-income residents and the city[80] and noted that the Council's exclusion from earlier discussions regarding the sale impaired its ability to give input and prejudiced the deal's approval.[81] The local Utility Workers Union also opposed the deal because of its potential impact on collective bargaining and future benefits.[82]

Since July 16, 2014, UIL had had the right to terminate the purchase agreement because the Philadelphia City Council had not enacted an ordinance approving the Acquisition on or before July 15, 2014. The purchase agreement would have terminated automatically on December 31, 2014 if the City Council still had not enacted an approving ordinance by that date. Despite negative feedback from the City Council and its failure to endorse the sale at its October 27th meeting,[83] UIL had expressed hope that the deal might still be approved before

74. Press Release, UIL Holdings Corp., UIL Holdings to Acquire Philadelphia Gas Works Operations (Mar. 3, 2014), *available at* http://phx.corporate-ir.net/phoenix.zhtml?c=102834&p=irol-newsArticle_Print&ID=1905166&highlight=.

75. UIL Holdings Corp., Form 8-K (Apr. 3, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1082510/000114036114015614/form8k.htm.

76. Press Release, UIL Holdings Corp., UIL Holdings to Acquire Philadelphia Gas Works Operations (Mar. 3, 2014), *available at*: http://phx.corporate-ir.net/phoenix.zhtml?c=102834&p=irol-newsArticle_Print&ID=1905166&highlight=.

77. UIL Holdings Corp., Form 8-K (Dec. 4, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1082510/000114036114044222/form8k.htm.

78. ENERGY FIN. DAILY at 3 (Dec. 24, 2014).

79. *Id.*

80. *Id.*

81. *UIL drops bid to buy Philadelphia Gas Works*, ENERGY DAILY (Dec. 8, 2014).

82. ENERGY FIN. DAILY at 3 (Dec. 24, 2014).

83. UIL Holdings Corp., Form 8-K, dated October 28, 2014, *available at* http://www.sec.gov/Archives/edgar/data/1082510/000114036114039274/form8k.htm.

the December 31, 2014 deadline.[84] However, UIL exercised its termination rights in advance of the contract expiration date once it became clear that an ordinance would not be forthcoming, as the Acquisition failed to make it onto the agenda for the last possible council meeting.[85]

2. Exelon Corporation and Pepco Holdings, Inc.

Exelon Corporation and Pepco Holdings, Inc. (PHI) announced on April 30, 2014, that they had entered into a definitive agreement to combine the two companies in an all-cash transaction.[86]

The transaction is subject to the satisfaction or waiver of specified closing conditions, including the approval by the holders of a majority of the outstanding shares of common stock of PHI and the receipt of regulatory approvals from the Federal Energy Regulatory Commission, the Federal Communications Commission, the DCPSC, the Maryland Public Service Commission, the Delaware Public Service Commission (DPSC), the New Jersey Board of Public Utilities, and the Virginia State Corporation Commission, as well as the expiration or termination of the applicable waiting period under the Hart–Scott–Rodino Antitrust Improvements Act of 1976 (HSR).[87]

The shareholders of PHI approved the transaction on September 23, 2014. The Virginia State Corporation Commission approved the transaction on October 7, 2014,[88] followed by the FERC on November 20, 2014.[89] On December 22, 2014, the U.S. Department of Justice (DOJ), which had requested additional documentation and information in connection with Exelon and PHI's HSR filing, allowed the waiting period under HSR to expire without taking any action with respect to the merger.[90] The DOJ, however, has not advised the companies that it has concluded its investigation.

The Maryland PSC hearings began on February 9, 2015.[91] In a March 20, 2015, filing, Exelon and PHI asked for an extension in order to provide additional time

84. UIL Holdings Corp., Form 8-K, dated November 10, 2014, *available at* http://www.sec.gov/Archives/edgar/data/1082510/000114036114041045/form8k.htm.

85. "UIL Withdraws $1.86B Takeover Bid for Philadelphia Gas Works," SNL Financial, December 4, 2014.

86. Press Release, Pepco Holdings, Inc., Exelon to Acquire Pepco Holdings, Inc., Creating the Leading Mid-Atlantic Electric and Gas Utility (Apr. 30, 2014), *available at* http://www.pepcoholdings.com/library/templates/Interior.aspx?Pageid=87&id=6442454881.

87. Pepco Holdings, Inc., Form 10-Q for the quarterly period ended June 30, 2014, *available at* http://www.sec.gov/Archives/edgar/data/8192/000119312514290113/d738980d10q.htm.

88. Press Release, Exelon Corporation, State Corporation Commission of Virginia Approves Merger of Exelon and Pepco Holdings Inc. (Oct. 8, 2014), *available at* http://www.exeloncorp.com/newsroom/pr_20141008_EXC_VAMergerApproval.aspx.

89. Press Release, Exelon Corporation, FERC Approves Merger of Exelon and PHI Holdings Inc. (Nov. 21, 2014), *available at* http://www.exeloncorp.com/Newsroom/Pages/pr_20141121_EXC_PHIFERCapproval.aspx.

90. Pepco Holdings, Inc., Form 8-K (Dec. 22, 2014), *available at* http://www.sec.gov/Archives/edgar/data/1135971/000157104914007392/t1402513_8k.htm.

91. MPSC hearing schedule, *available at* http://167.102.231.189/important-update-exelon-phi-merger-hearing-schedule/.

for parties to file testimony and for the Maryland PSC to conduct evidentiary hearings to consider and evaluate settlements reached within the merger docket.[92] The Maryland PSC delayed its deadline to issue a decision to May 8, 2015.

The DCPSC held hearings between February 9 and February 13 to determine whether the transaction is in public interest.[93] In New Jersey, a settlement agreement with the NJBPU staff was reached.[94] On February 11, 2015, the settlement was approved by the NJBPU.[95] On February 13, 2015, Exelon and PHI announced that they have reached a settlement agreement with the DPSC staff and other intervenors in the DPSC's review of the merger.[96] The agreement remains subject to the approval of the DPSC.

3. PPL Corp. and Riverstone Holdings LLC

On June 9, 2014, PPL Corporation (PPL) and Riverstone Holdings LLC announced a definitive agreement to form a new, publicly traded independent power producing company through a combination of their merchant power generation businesses. The new company will be named Talen Energy Corporation.

To achieve the combination, PPL will contribute its wholly owned subsidiary, PPL Energy Supply, LLC to Talen Energy and distribute Talen Energy common stock to PPL shareowners in a tax-free spinoff transaction. Immediately following the spinoff, Riverstone will contribute its merchant generation business to Talen Energy in exchange for shares of Talen Energy common stock. Upon completion of the transactions, holders of PPL common stock will own 65 percent of Talen Energy and Riverstone will own 35 percent.[97] PPL will have no continuing ownership interest in, control of, or affiliation with Talen Energy; PPL's shareowners will receive a number of Talen Energy shares at closing based on the number of PPL shares owned as of the spinoff record date.[98]

Talen Energy is expected to be listed on the New York Stock Exchange. It will own and operate a mix of 15,320 megawatts of generating capacity and be the third largest investor-owned independent power producer in the United States. Talen Energy will be led by PPL's current executive vice president

92. Exelon Corp. and Pepco Holdings, Inc., Notice of Further Modification of Procedural Schedule, Case No. 9361, Md. PSC (Mar. 23, 2015).

93. *In the Matter of the* Joint Application of Exelon Corp., Pepco Holdings, Inc., Potomac Electric Power Co., Exelon Energy Delivery Co., LLC, and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction, Public Notice in FC No. 1119, DCPSC (2015).

94. Pepco Holdings, Inc., Form 8-K, dated January 14, 2015, *available at* http://www.sec.gov/Archives/edgar/data/8192/000157104915000219/t1500011_8k.htm.

95. Pepco Holdings, Inc., Form 8-K, dated February 11, 2015, *available at* http://www.sec.gov/Archives/edgar/data/8192/000157104915001021/t1500327_x1-8k.htm.

96. ENERGY FIN. DAILY at 6 (Feb. 16, 2015).

97. PPL Corp., Form 8-K (June 9, 2014), *available at* http://www.sec.gov/Archives/edgar/data/922224/000092222414000063/form8k.htm; *see also* Press Release, PPL Corp., PPL, Riverstone to Form One of the Nation's Largest Independent Power Producers (June 9, 2014), *available at* https://lge-ku.com/newsroom/articles/2014/06/10/ppl-riverstone-form-one-nations-largest-independent-power-producers.

98. PPL Corp., Form 10-Q for the quarterly period ended Sept. 30, 2014, *available at* http://www.sec.gov/Archives/edgar/data/55387/000092222414000132/form10q.htm.

and CFO Paul Farr. Farr was named president of PPL Energy Supply on June 10, 2014, in order to facilitate the transition.[99] It is expected that the spinoff will allow PPL to focus on the regulated utilities it owns and operates.[100]

The transaction is subject to receipt of certain regulatory approvals by the Nuclear Regulatory Commission (NRC), the FERC, and the DOJ. Approval from the Pennsylvania Public Utility Commission was received on March 11, 2015.[101] An additional condition under the agreement is the availability, subject to certain conditions, of at least $1 billion of undrawn capacity, excluding any letters of credit or other credit support measures posted in connection with outstanding energy marketing and trading transactions under a Talen Energy (or its subsidiaries) revolving credit or similar facility.[102] There is no requirement for PPL shareholder approval.[103]

To mitigate concerns regarding Talen Energy's ability to exercise market power in a certain submarket, the parties had planned to divest approximately 1,300 megawatts of generation in the submarket at issue.[104] However, PJM's independent market monitor still objected, stating that it would significantly increase concentration in certain already-highly concentrated energy markets and the proposed divestiture would not alleviate the anticompetitive effect of the transaction. In light of this objection, the FERC conditioned its approval on the establishment of additional mitigation measures.[105] On January 27, 2015, PPL and Riverstone agreed that Talen Energy will divest certain generating assets and limit PJM energy market offers from its retained assets to cost-based offers. The specific assets to be sold (within one year of closing) will be determined after the transaction closes.[106] PPL and Riverstone also agreed not to sell the units to market participants owning over 10 percent of the installed capacity in the region.[107] FERC determined that the proposed transaction satisfied the rest of its merger approval requirements.[108]

The transaction was expected to close in the second quarter of 2015.[109]

99. PPL Corp., Form 8-K (Dec. 18, 2014), *available at* http://www.sec.gov/Archives/edgar/data/922224/000092222415000006/form8k.htm and Press Release, PPL and Riverstone Accept FERC's Additional Mitigation Measures (Jan. 27, 2015), *available at* http://www.sec.gov/Archives/edgar/data/922224/000092222415000006/form8k-exhibit99_1.htm.

100. *Id.*

101. PPL Corp., Form 8-K (Mar. 11, 2015), *available at* http://www.sec.gov/Archives/edgar/data/922224/000092222415000018/exhibit99_1.htm.

102. PPL Corp., Form 10-Q for the quarterly period ended Sept. 30, 2014, *available at* http://www.sec.gov/Archives/edgar/data/55387/000092222414000132/form10q.htm.

103. PPL Corp., Form 8-K, *supra* note 99.

104. PPL Corp. and RJS Power Holdings, LLC Application to the FERC for Approval Pursuant to Section 203 of the Federal Power Act, Docket No. EC14-112-000 (July 15, 2014); PPL Corp. and RJS Power Holdings, LLC Supplement to Application for Approval Pursuant to Section 203 of the Federal Power Act, Docket No. EC14-112-000 (Aug. 29, 2014).

105. PPL Corp. and RJS Power Holdings, LLC, 149 FERC ¶ 61,260 (2014).

106. PPL Corp., Form 8-K, *supra* note 99.

107. *Talen Energy Owners OK Mitigation Measures*, PLATTS MEGAWATT DAILY, Jan. 30, 2015.

108. ENERGY FIN. DAILY at 1 (Dec. 22, 2014).

109. PPL Corp., Form 10-K for the year ended Dec. 31, 2014, *available at* http://www.sec.gov/Archives/edgar/data/55387/000092222415000016/form10k.htm.

4. Wisconsin Energy Corp. and Integrys Energy Group, Inc.

On June 23, 2014, Wisconsin Energy Corp. (WEC) and Integrys Energy Group Inc. announced that they had entered into a definitive agreement for WEC to acquire Integrys. The transaction is valued at $9.1 billion. The combined company will be named WEC Energy Group, Inc. (WECEG). Integrys shareholders will receive common stock at a fixed exchange ratio of 1.128 WEC shares plus $18.58 in cash per Integrys share (total consideration is valued at $71.74 per Integrys share). Upon closing, Integrys shareholders will own approximately 28 percent of WECEG.[110] The companies anticipated closing in the summer of 2015.

WEC, based in Milwaukee, serves more than 1.1 million electric customers in Wisconsin and Michigan's Upper Peninsula and 1.1 million natural gas customers in Wisconsin. WEC has nearly $15 billion of assets, 4,300 employees, and approximately 40,000 stockholders. Integrys is a diversified energy holding company with regulated natural gas and electric utility operations serving customers in Illinois, Michigan, Minnesota, and Wisconsin.[111] The combined entity is projected to have a regulated rate base of $16.8 billion in 2015, serve more than 4.3 million customers, and operate over 100,000 miles of distribution lines. It will also hold a 60 percent stake in American Transmission Co. (ATC), a federally regulated electric transmission company. WECEG will be headquartered in Milwaukee with operating headquarters in Chicago, Green Bay, and Milwaukee.[112]

On October 14, 2014, WEC and Integrys each filed with the SEC a definitive joint proxy statement in connection with the proposed merger.[113] The transaction has been approved unanimously by the board of directors[114] and shareholders of both companies.[115] HSR, DOJ, Federal Trade Commission, and FERC approvals have already been received.[116]

In August 2014, filings were made with the Public Service Commission of Wisconsin (WPSC), the Illinois Commerce Commission (ICC), the MPSC and the Minnesota Public Utilities Commission (MPUC).[117] In January 2015,

110. Press Release, Wisconsin Energy Corp., Wisconsin Energy to Acquire Integrys Energy Group for $9.1 Billion in Cash, Stock, and Assumed Debt—Creating a Leading Midwest Electric and Gas Utility (June 23, 2014), *available at* http://www.wisconsinenergy.com/ieg/wec_ieg_news release.htm.

111. *Id.*

112. Information Package, Wisconsin Energy to Acquire Integrys Energy Group (June 2014), *available at* http://www.wisconsinenergy.com/ieg/062314_WEC_IEG.pdf.

113. Wisconsin Energy Corp., Form 424(b)(3) (Oct. 14, 2014), *available at* http://www.sec.gov/Archives/edgar/data/783325/000104746914008288/a2221707z424b3.htm.

114. Wisconsin Energy Corp., Form 8-K (June 22, 2014), *available at* http://www.sec.gov/Archives/edgar/data/783325/000110465914047564/a14-15883_18k.htm; *see also* Press Release, *supra* note 105.

115. Wisconsin Energy Corp., Form 8-K (Nov. 21, 2014), *available at* http://www.sec.gov/Archives/edgar/data/783325/000110465914082749/a14-25022_18k.htm and Integrys Energy Group Inc., Form 8-K (Nov. 21, 2014), *available at* http://www.sec.gov/Archives/edgar/data/916863/000091686314000051/tegspecialmeeting8k.htm.

116. Wisconsin Energy Corp., Form 10-K for the year ended Dec. 31, 2014, *available at* http://www.sec.gov/Archives/edgar/data/783325/000010781515000040/wec1231201410-k.htm.

117. ENERGY FIN. DAILY at 5 (Jan. 22, 2015).

WPSC staff stated that they were having difficulty assessing whether the transaction satisfied the state's approval criteria of being in the best interests of utility customers, investors, and the public.[118] They put forth several conditions, including dividend restrictions, barring WECEG from seeking recovery of transaction costs, and limiting WECEG's interest in ATC. Several intervenor groups in Wisconsin opposed the transaction or requested conditions on its approval. Initial briefs were due on March 30, 2015,[119] and the WPSC was expected to vote by April 16, 2015,[120] unless the commission decided to grant motions to extend the procedural schedule.[121]

In addition, testimony of the ICC filed on January 15, 2015, indicated that it still had some concerns regarding aspects of the merger. Initial briefs were filed on March 27, 2015,[122] and the ICC was expected to render a decision by July 6, 2015.[123] However, on March 24, 2015, the City of Chicago and Illinois attorney general asked the ICC to delay a decision pending the outcome of a state investigation into alleged mismanagement and fraud in a gas pipeline replacement program by an Integrys subsidiary.[124] If granted, the extension would push back the deadline for ICC action to October 6, 2015.[125]

On March 12, 2015, WEC and Wisconsin Electric Power Company entered into an amended and restated settlement agreement with the Michigan attorney general, MPSC staff, and the Tilden Mining Company and Empire Iron Mining Partnership to resolve objections from these parties.[126] A schedule has been set for testimony from MPSC staff, as well as for briefs and rebuttals, with a target date of May 7, 2015, for preliminary findings[127] and June 15, 2015, for a decision.[128]

On February 5, 2015, the MPUC delayed a decision and requested additional information on the status of regulatory proceedings in the other states and at the FERC. The MPUC was expected to revisit the application in early May.[129]

Since the announcement of the acquisition, Integrys and its board of directors, along with WEC, have been named as defendants in lawsuits brought on behalf of proposed classes of Integrys shareholders. The complaints allege, among other

118. Testimony of Kevin W. O'Donnell, CFA Nova Energy Consultants, Inc., Docket 9400-YO-100, Wis. PSC (Mar. 12, 2015).

119. ENERGY FIN. DAILY at 4 (Apr. 2, 2015).

120. Wisconsin Energy Corp., Form 425, dated Feb. 6, 2015, *available at* http://www.sec.gov/Archives/edgar/data/783325/000110465915007388/a15-3977_1425.htm.

121. ENERGY FIN. DAILY at 4 (Jan. 22, 2015).

122. ENERGY FIN. DAILY at 4 (Apr. 2, 2015).

123. ENERGY FIN. DAILY at 5 (Jan. 22, 2015).

124. Illinois Gas Pipe Probe Threatens Wisconsin Energy-Integrys Merger, ENERGY DAILY, Mar. 25, 2015.

125. ENERGY FIN. DAILY at 1 (Mar. 25, 2015).

126. Wisconsin Energy Corp., Form 8-K (Mar. 12, 2015), *available at* http://www.sec.gov/Archives/edgar/data/107815/000110465915019483/a15-6765_18k.htm.

127. ENERGY FIN. DAILY at 6 (Jan. 22, 2015).

128. Wisconsin Energy Corp., Form 425 (Feb. 5, 2015), *available at* http://www.sec.gov/Archives/edgar/data/783325/000110465915007388/a15-3977_1425.htm.

129. Wisconsin Energy Corp., Form 425 (Feb. 6, 2015), *available at* http://www.sec.gov/Archives/edgar/data/783325/000110465915007388/a15-3977_1425.htm.

things, that Integrys board members committed a breach of fiduciary duty by failing to maximize the value to Integrys' shareholders, that WEC aided and abetted these breaches, and that the joint proxy statement contains material misstatements and omissions. Some of these cases were dismissed. On November 12, 2014, the parties entered into a memorandum of understanding that provides the basis for a complete settlement of the remaining actions. It was expected to be presented to the court for approval in the second quarter of 2015.[130]

5. Cleco Corp. and Macquarie Infrastructure and Real Assets

Cleco Corporation, a public utility holding company and owner of the regulated electric utility Cleco Power LLC announced on October 20, 2014, that it had entered into a definitive agreement to be acquired by a group of North American long-term infrastructure investors led by Macquarie Infrastructure and Real Assets and British Columbia Investment Management Corporation, together with John Hancock Financial and other infrastructure investors. The agreement values Cleco at approximately $4.7 billion, including approximately $1.3 billion of assumed debt.[131]

Under the terms of the agreement, the new owners will acquire all outstanding shares of Cleco for $55.37 per share in cash. This price represents approximately a 15 percent premium to Cleco's closing price of $48.27 on October 17, 2014, the last trading day prior to the announcement of the agreement.[132] The transaction is subject to various closing conditions, including the approval of Cleco shareholders, the approval of the LPSC and the FERC, and the expiration or termination of the waiting period under HSR.

A special meeting of shareholders of Cleco was held on February 26, 2015, in Pineville, Louisiana, to obtain shareholder approval of the merger agreement. Cleco received approval of the merger agreement by a vote of approximately 77 percent of shares of common stock entitled to be cast.[133]

The transaction was expected to close in the second half of 2015.

6. Hawaiian Electric Industries, Inc. and NextEra Energy, Inc.

In December 2014, NextEra Energy, Inc. and Hawaiian Electric Industries, Inc. entered into merger agreement valued at $4.3 billion.[134] Hawaiian Electric

130. Wisconsin Energy Corp., Form 8-K (Nov. 12, 2014), *available at* http://www.sec.gov/Archives/edgar/data/783325/000110465914079425/a14-24290_18k.htm.

131. Press Release, Cleco Corp., Cleco Enters Agreement to be Acquired by North American Investor Group Led by Macquarie Infrastructure and Real Assets and British Columbia Investment Management Corporation (Oct. 20, 2014), *available at* http://investors.cleco.com/phoenix.zhtml?c=82212&p=irol-newsArticle&ID=1979148.

132. *Id.*

133. Cleco Corp., Form 10-K for the year ended Dec. 31, 2014, *available at* http://www.sec.gov/Archives/edgar/data/18672/000108981915000019/cnl-12312014x10k.htm.

134. Press Release, NextEra Energy, Inc., NextEra Energy and Hawaiian Electric Industries to Combine (Dec. 3, 2014), *available at* http://www.nexteraenergy.com/news/contents/2014/120314.shtml.

operates three separate utility grids on Hawaii, Maui, and Oahu. Upon completion of the transaction, Hawaiian Electric will become the third principal business within NextEra, along with Florida Power & Light Company and NextEra Energy Resources, Inc. It will continue to operate out of its headquarters in Honolulu and retain its local management team. The two parties have also stated that there will be no involuntary reductions in Hawaiian Electric labor force for at least two years. As part of their application for approval from the Hawaii Public Utilities Commission (HPUC), filed on January 29, 2015, the parties committed not to file for a general rate base increase for at least four years after the transaction closed.[135] In addition, NextEra has also promised the HPUC that it will not pledge any Hawaiian Electric assets as collateral for any securities of NextEra and keep Hawaiian Electric's debt separate from NextEra's other subsidiaries.[136] Environmental and solar interests have asked the HPUC to postpone any decision until Hawaiian Electric establishes its master plan for how it, among other items, will integrate solar into its grid. Over 10 percent of Hawaiian Electric's residential customers have installed rooftop solar.[137]

As part of the transaction, NextEra would assume $1.7 billion of Hawaiian Electric's debt. In addition, in connection with the sale, Hawaiian Electric announced that it would spin off ASB Hawaii, the parent company of American Savings Bank (ASB). The spin-off of ASB is expected to be tax free to Hawaiian Electric's shareholders and would be completed immediately prior to, and contingent upon, the final merger between NextEra and Hawaiian Electric.[138]

The transaction is subject to approval from the HPUC, the FERC, and the shareholders of Hawaiian Electric. In addition, the merger is conditioned on the expiration of the waiting periods under HSR, the effectiveness of SEC registration statements, and the spinoff of ASB.[139] Both Hawaiian Electric and NextEra anticipate the transaction to be completed within approximately twelve months.

7. UIL Holdings Corporation and Iberdrola USA

On February 25, 2015, UIL announced that it had entered into a definitive merger agreement with Iberdrola USA under which Iberdrola will acquire UIL to create a newly listed U.S. publicly traded company.[140]

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135. Press Release, NextEra Energy, Inc., NextEra Energy and Hawaiian Electric File Joint Application with the Hawaii Public Utilities Commission Outlining Benefits of Proposed Merger for Advancing a More Affordable Clean Energy Future for Hawaii (Jan. 29, 2015), *available at* http://www.nexteraenergy.com/news/contents/2015/013015.shtml.

136. *UPDATE: NextEra, HEI Urge Hawaii to OK Merger So 'Utility Of The Future' Can Be Planned*, ENERGY FINANCE DAILY, Feb. 3, 2015 at 6, *available at* https://www.snl.com/InteractiveX/article.aspx?CDID=A-30917558-10034&KPLT=4.

137. *Id.*

138. *Id.*

139. Press Release, NextEra Energy, Inc., NextEra Energy and Hawaiian Electric Industries to Combine (Dec. 3, 2014), *available at* http://www.nexteraenergy.com/news/contents/2014/120314.shtml.

140. Press Release, Iberdrola USA, Iberdrola USA to Combine with UIL to Create a Leading, Diversified Publicly Traded Company Based in the Northeast (Feb. 25, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1082510/000110465915014105/a15-5457_1425.htm.

In connection with the merger, each issued and outstanding share of common stock of UIL will be converted into the right to receive one share of common stock of the newly listed company and $10.50 in cash. After the merger, former holders of UIL's common stock will own approximately 18.5 percent of the newly listed company.[141]

Iberdrola USA, a subsidiary of Spanish energy company Iberdrola, S.A., is an energy services and delivery company serving about 2.7 million customers throughout upstate New York and New England. The combined entity will have a rate base of approximately $8.3 billion and expects to invest $6.9 billion in regulated electric and gas infrastructure and other capital expenditures over the next five years. Iberdrola and UIL will continue to have offices in New Haven, Connecticut; Massachusetts; Maine; and New York.[142]

UIL's current president and chief executive officer, James P. Torgerson, will become the company's CEO upon closing and will lead a U.S.-based leadership team drawn from among the UIL and Iberdrola business leadership.[143]

The agreement has been unanimously approved by the boards of directors of both companies but is subject to regulatory approval by the Massachusetts Department of Public Utilities, the Connecticut Public Utilities Regulatory Authority, the FERC, and the Committee on Foreign Investment in the United States.[144] It is also subject to UIL shareholder approval and other customary closing conditions. The transaction is expected to close by the end of 2015.

141. UIL Holdings Corp., Form 10-K for the year ended Dec. 31, 2014, *available at* http://www.sec.gov/Archives/edgar/data/1082510/000114036115009017/form10k.htm.

142. Press Release, *supra* note 135.

143. *Id.*

144. Iberdrola USA, Form 425 (Feb. 26, 2015), *available at* http://www.sec.gov/Archives/edgar/data/1082510/000110465915014508/a15-5457_3425.htm.