Legal Implications of Community Solar Securities and Tax Law Considerations

Prepared by K&L Gates LLP for the American Public Power Association

AMERICAN PUBLIC POWER ASSOCIATION
Powering Strong Communities

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The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. We represent public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ. Our association advocates and advises on electricity policy, technology, trends, training, and operations. Our members strengthen their communities by providing superior service, engaging citizens, and instilling pride in community-owned power.

Public Power Forward is an Association strategic initiative to help members address technological and regulatory changes reshaping their relationships with customers. We provide education and training on relevant issues and new technologies. We also develops tools to help members integrate distributed resources, energy efficiency, and demand response into their businesses and operations.

Introduction

This report is intended to provide a general overview of federal and general state securities and tax law considerations that may apply to community solar projects. Our goal is to familiarize American Public Power Association members with the general principles so that members may consider the principles in connection with any potential involvement, either direct or indirect, in a community solar project. This report does not purport to address every potential structure that could be implemented by a community solar project or a participating public power utility. While the report addresses state securities and tax laws from a general perspective, it does not address the law of any specific state.

We do not intend this report to constitute legal advice with respect to any specific matter or any specific transaction or possible structure.

This report speaks as of January 7, 2017. Any subsequent change in the law or any actions by any regulator could materially alter the information contained herein.

Typical Structures of Community Solar Projects

Community solar projects are arrangements in which multiple customers participate in and benefit from a solar facility. CSPs provide a simple and cost-effective means for electricity customers to acquire clean energy without having to bear the entire cost of purchasing or leasing a solar facility. While community solar expands customer access to solar energy and confers a host of ancillary benefits, it comes with potential risks.

CSP structures involving public power utilities generally fall into two broad models, shown on page 6.

In the third party owner (Model 1) structure, the CSP is owned by a third party and the public power utility's role is limited to purchasing power from the owner under a power purchase agreement. The public power utility then sells the power to customers. An owner of a CSP may also be a customer in connection with the power produced by the CSP, e.g., on a net metering basis.

CSPs are often owned by a partnership or a tax-exempt organization. Less common is for multiple owners to directly own a CSP in an unincorporated joint venture, i.e., as joint tenants.

The partners that own a CSP may be individuals, business entities, or tax-exempt organizations. As the partners — but not the partnership itself — may claim federal tax incentives arising from ownership of a solar facility, the composition of the partners will vary depending on their economic goals. The partners of a traditional community solar project are likely to be local resident individuals and small businesses or, in some cases, tax-exempt organizations to which local residents make donations to fund a solar facility development. The partners of an investor-driven structure[1] are more likely to be taxable corporations. In this case, the community feature of the solar development is more likely to be tied to customer incentives, as discussed below.

In some cases, a community or shared solar facility is funded, but not owned, by customers. In these models, the customer pre-pays the utility — sometimes referred to as a subscription —or pays the utility in arrears, for a right to power produced by CSPs that are either owned by third-party investors or by the utility itself. However, the customers do not have any legal right to the CSP itself.

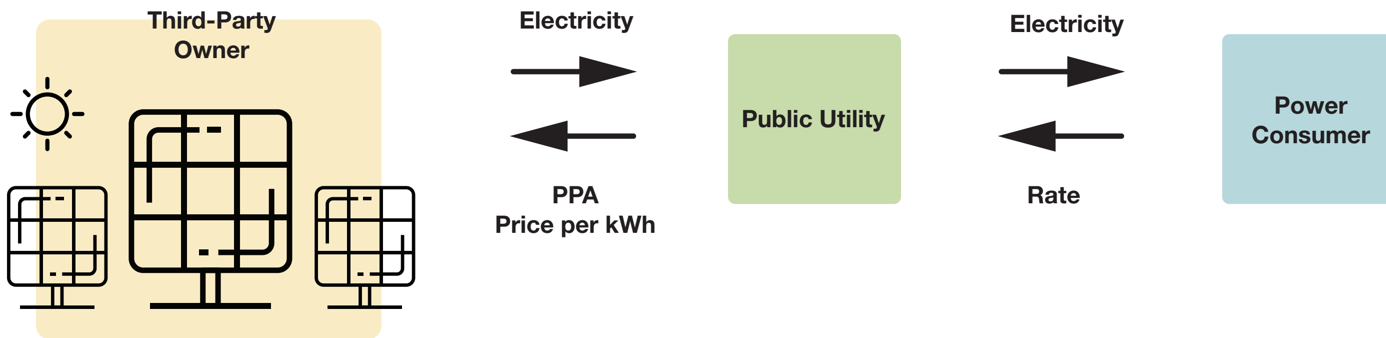
In the Model 2 structures, a public power utility owns some or all of the interests in a CSP and sells the power produced by the facility to customers.

In the 100 percent utility owner (Model 2.A.) structure, a public power utility owns all interests in a CSP. The public power utility may acquire a CSP directly or indirectly — by exercising an option to acquire the CSP under a PPA.

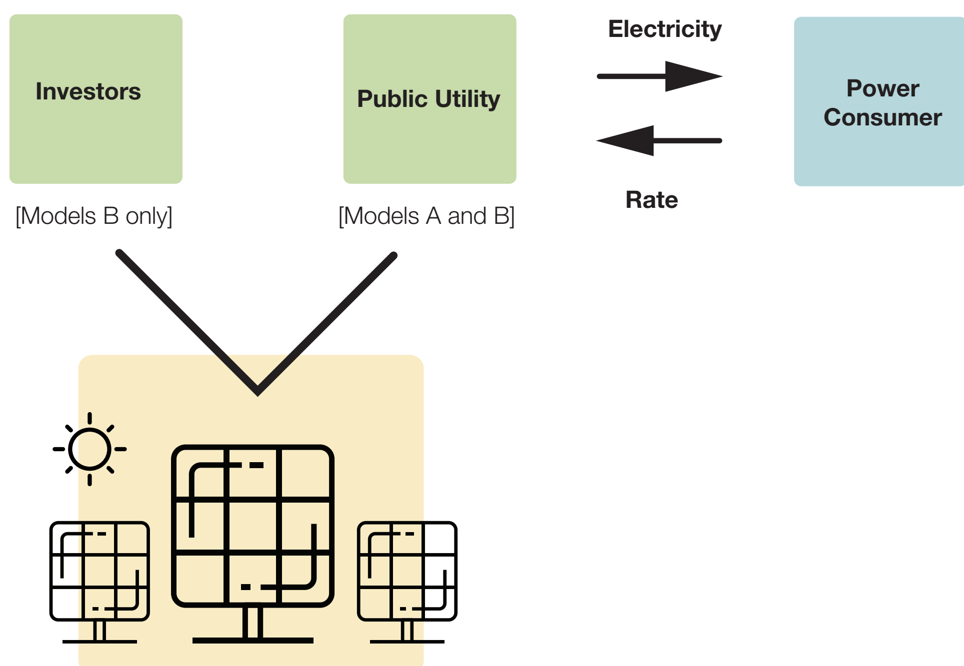
In the partial utility owner (Model 2.B.) structure, a public power utility owns some of the interests in a CSP, most likely as a partner of a partnership, as discussed above, or less frequently, as a joint tenant. When a public power utility owns a partial interest in a CSP, the same public power utility may also purchase the power produced by the CSP under a PPA with the partnership or with the other joint tenant(s). Also, as in the third party ownership structure, the owner of the CSP in which the public power utility has an interest may also be a customer in connection with the power produced by the CSP, e.g., on a net metering basis.

[1] The so-called "partnership flip" model is typically used when a CSP is primarily funded by taxable investors. In a partnership flip, federal incentives described below are typically allocated to the partners of a partnership that owns a solar facility at a 99% rate and then "flipped" to a 5% allocation after five years. This allows the taxable partners to benefit from the majority of the available federal tax incentives and then exit the partnership after the "recapture period" for the Investment Tax Credit. However, the partnership flip is subject to significant restrictions in the case of a partner that is a tax-exempt organization. Another variation that is popular with taxable investors is the so-called "lease pass-through." In this model, the owner/lessor of a CSP elects to "pass through" the ITC to the lessee of the solar facility. The lease pass-through provides additional options for allocating and maximizing the various tax and other incentives, but is often not suitable when a tax-exempt organization has an interest in either the lessor or the lessee.

Model 1:
Public Utility Acting Solely as Power Purchaser Under PPA



Model 2:
Public Utility As Owner of Solar Facility



Model 2.A. Public utility owns 100% of the solar electricity generation assets.

Model 2.B. Public utility owns an interest in solar electricity generation assets through a joint venture (typically, a partnership). In Model B, the public utility would typically also be the power offtaker under a PPA. Model B structures with taxable investors are rare due to restrictions on federal tax incentives.

Securities and Community Solar Projects

A critical legal issue faced by a community solar project participant that wants to offer interests to third parties is compliance with securities regulations. A security is a financial instrument issued by a corporation, government, or other entity that offers evidence of debt or equity. Securities include traditional financial instruments such as notes, stocks, and bonds, but may also include investment contracts and interests or participation in any profit-sharing agreement.[2]

The U.S. Securities and Exchange Commission was created to maintain a fair and orderly market for buying and selling of securities. If a financial instrument is considered a security, the instrument and its offering are subject to the SEC's rules and regulations. Federal securities law has two major compliance components related to securities offerings: (i) registration requirements and (ii) disclosure requirements. Depending on the jurisdiction, CSPs also may face similar compliance components under state securities laws.

How SEC Rules May Apply

Regardless of how a CSP is structured, the organizers of and participants must consider how the securities laws treat interests in the CSP — whether they take the form of direct ownership in the CSP, an interest in the power produced by the CSP, or even a credit billing arrangement. For simplicity, any arrangement entered into by CSP participants (as offeror and offeree) is referred to herein as a CSP contract, although no written contract may actually govern the arrangement.

Depending on how the operator, the CSP, and/or the CSP contracts are structured, the SEC could potentially deem a CSP contract to be a security under the Securities Act of 1933.[3] If a CSP contract is deemed a security, the party offering the CSP contract to the participant must comply with federal securities law, which is likely to result in a substantial investment of time and money.

The SEC has not formally announced a general position on whether CSP contracts are deemed securities and has not enacted any rules specifically addressing CSP contracts. However, the SEC has addressed one specific CSP example through its no-action letter process, and has also provided non-binding statements regarding its views on which CSP contracts may not be subject to SEC rules.

In 2011, the SEC's Division of Corporate Finance issued a no-action letter regarding a CSP operated by CommunitySun, LLC.[4] CommunitySun, through its legal counsel, requested that Corp Fin confirm that it would not recommend that the SEC take any enforcement action if CommunitySun offered CSP contracts under their outlined plan.[5] In the request, CommunitySun's CSP was compared to an interest in a condominium/cooperative association project, which the SEC has previously determined does not constitute a security. In granting the no-action request (i.e., in indicating that the Division of Corporate Finance would not recommend SEC enforcement), the letter stated that "[a]ny different facts or conditions might [result in] a different conclusion" and that the lack of enforcement "does not express any legal conclusion on the question presented."[6] Therefore, any CSP structure that differs from the CommunitySun structure, even slightly, might not be able to rely on this no-action letter in taking a position that its CSP contract is not a security.

In a 2014 meeting with staff of the SunShot Initiative of the Department of Energy, SEC staff indicated that if the primary purpose of a customer's entry into a CSP contract is to purchase energy and/or reduce energy costs, rather than achieve a financial return — such as traditional interest or dividends — the CSP contract would likely not be considered to be a security subject to the SEC's rules and regulations.[7]

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[2] *See* 15 U.S.C. §77b(a)(1).

[3] *See id.*

[4] Response from Michael J. Reedich, Special Counsel, Div. of Corp. Fin., to CommunitySun, LLC (Aug. 29, 2011) (available at https://www.sec.gov/divisions/corpfin/cf-noaction/2011/communitysun082911-2a1.htm).

[5] Letter from CommunitySun, LLC to Office of Chief Counsel, Div. of Corp. Fin., SEC, (Aug. 29, 2011) (available at https://www.sec.gov/divisions/corpfin/cf-noaction/2011/communitysun082911-2a1-incoming.pdf).

[6] Response, *supra* note 3.

[7] Cutting Edge Capital, *Buying Into Solar Power, No Roof Access Needed — But is it a Security?* (Jul. 1, 2014), https://www.cuttingedgecapital.com/buying-solar-power-roof-access-needed-security.

While, to our knowledge, the SEC has not taken any enforcement action against any community solar developers, operators, or involved utilities, the risk of enforcement and the consequences remain. Particularly in light of the change in presidential administration in January 2017 (accompanied by the appointment of a new slate of cabinet members and a new head of the SEC), the regulatory landscape with respect to securities enforcement and renewable energy is unclear. In order to minimize potential risk, parties involved in CSPs tend to structure the CSP and/or the CSP contracts in a manner that either minimizes any appearance of the offering of securities or fits within an exemption to the registration requirements of the SEC's rules.

If a potential CSP developer would like to establish that it is on safe footing under federal securities laws, it could engage legal counsel to request no-action relief from the SEC, similar to CommunitySun. It is possible that, if the SEC receives numerous no-action requests based on similar legal issues, it will issue broader public guidance that would be generally applicable.

Consequences of Non-Compliance

If the SEC classifies a CSP contract as a security, and the issuer is not otherwise exempt from the SEC's registration requirements, the potential cost related to securities compliance can be significant. Federal securities law has two major compliance components related to securities offerings: (i) registration requirements and (ii) disclosure or antifraud requirements.

First, if the SEC deems a CSP contract a security, the contract offeror must comply with all registration requirements before it may offer a CSP contract to the public, unless the offeror is an issuer that is exempt from the registration requirements, such as a political subdivision of state or a non-profit organization, or if the offering is exempt from the registration requirements.[8] Preparing, filing, and obtaining SEC approval of a registration statement can be exceedingly costly and time consuming.

Second, all offerors, including any that are exempt from registration requirements, must comply with disclosure provisions required under federal law. Disclosure provisions require full and accurate disclosure of all material information regarding the respective security.[9] Required disclosures generally include a description of the offeror's business and securities being offered, audited financial statements, and risk factors relating to the security being offered. The SEC also has strong antifraud rules that make any omissions or untrue statements of material fact unlawful.[10]

If an offeror markets a security without registering, where required, or providing the required disclosures, the SEC can pursue an enforcement action against it. An enforcement action can result in a cease-and-desist order, substantial monetary penalties, disgorgement of funds received from participants, and even criminal penalties in certain circumstances.[11] In addition, a purchaser may have a right to sue the seller for any violations of the disclosure requirements, and make seek to rescind the transaction.[12] To limit time, costs, and liability, an operator should structure its relationships with users to minimize the likelihood that a security exists. Costs associated with compliance with exemption requirements will vary depending on the exemption, but costs are generally more manageable when a contract does not involve registration.

If an existing project is later found not to be in compliance with SEC rules, it could be subject to claims by both the SEC and by private CSP contract participants. However, with respect to private civil claims under the antifraud provisions of the Securities Act, a one-year statute of limitations applies beginning from the time of discovery, as well as a three-year statute of repose, which applies from the time of the offering.[13] SEC enforcement actions that seek civil

[8] *See* 15 U.S.C. § 77f.

[9] *See* 15 U.S.C. § 78(j); 17 CFR § 240.10b-5.

[10] *See id.*

[11] *See* 15 U.S.C. § 77h-1.

[12] 15 U.S.C. § 77l.

[13] 15 U.S.C. § 77m.

financial penalties are limited to a five-year statute of repose beginning from the time of the violation.[14] A recent federal circuit court case has held that this same five-year limitation period also applies to requests for injunctive relief and disgorgement claims,[15] but historically the SEC and other circuit courts have taken the position that those types of claims are not subject to a limitations period.[16] Because a "circuit split" now exists on this issue, potential CSP participants should be aware that, while private rights of action and SEC actions for monetary penalties may be time-limited, an open question exists about whether the SEC's rights to pursue disgorgement and injunctions are subject to time limitations or whether the SEC may pursue those remedies in perpetuity.

Structuring Projects to Address Compliance

CSP participants commonly use two approaches to address compliance with the SEC's rules: (i) structure a CSP contract to avoid being classified as a security, or (ii) structure the CSP and/or CSP contract to fit within an exemption to SEC registration requirements.

CSP participants often attempt to avoid securities laws by carefully structuring their CSP contracts in ways that are likely to fall outside the definition of a security.

The Supreme Court in SEC. v. Howey provided a four-part test for analyzing whether a contract is deemed a security.[17] The court held that a security exists if there is a contract or arrangement whereby (i) a person invests money (ii) in a common enterprise (iii) with an expectation of profits (iv) solely or primarily based on the efforts of others.[18] All four requirements must be met, and the absence of one element means that the arrangement is not a security. Whether or not a CSP contract is considered a security depends on the characteristics of the CSP, the terms of the contract, and the expectations of the participants. Below are characteristics that a CSP participant may include to avoid the appearance of its CSP contract being deemed a security.

Investment of Money

First, most offerors of CSP contracts take certain steps to avoid the appearance that participant payments are investments. Regardless of what a CSP contract is titled, offerors usually try to avoid the usage of terms associated with securities. The Supreme Court, in United Housing Foundation, Inc. v. Forman, has stated that the title given to a contract, such as stock, interest, or subscription, is not dispositive of whether a security exists, but the determination is based on the economic realities of the transaction as applied in light of the substance.[19] However, terms associated with security connotations may create an expectation that the arrangement is an investment, with rights traditionally associated with securities. CSP contract offerings of stock or shares are less common than subscriptions. It is better for any marketing, promotional, and billing materials related to a CSP to refrain from using any statements suggestive of an investment or other moneymaking opportunity.

Second, the more a CSP contract is structured as an arrangement to finance part of a project for a future return, the more likely it is to be deemed an investment. To avoid this, many CSP operators do not accept payments from customers before becoming a functional power producing operation. Lack of initial customer payments may make development difficult, but it would limit the appearance of a traditional financing arrangement.

Third, the Supreme Court has held that a security does not exist "when a purchaser is motivated by a desire to use

[14] 28 U.S.C. § 2462; *Gabelli v. SEC,* 133 S. Ct. 1216 (2013).

[15] *S.E.C. v. Graham,* No. 14-13562 (11th Cir. 2016).

[16] *Riordan v. SEC,* 627 F.3d 1230 (D.C. Cir. 2011) (citing *Zacharias v. SEC,* 569 F.3d 458 (D.C. Cir. 2009)); *SEC v. Rind,* 991 F.2d 1486 (9th Cir. 1993)

[17] *SEC v. W. J. Howey Co.,* 328 U.S. 293 (1946).

[18] *Id.*

[19] *United Housing Foundation, Inc. v. Forman,* 421 U.S. 837, 851-52 (1975).

or consume the item purchased."[20] Therefore, offerors tend to structure CSP payments similar to a traditional purchase of non-solar electricity, which is the purchasing of an item, as it makes the payment less likely to be viewed as making an investment of money. If a user agrees to purchase power — either from a utility purchasing power from a CSP under a PPA or, less commonly, from the CSP itself — and pay a specific, generally applicable rate for the solar power used and the user is billed periodically based on past usage, this appears to be more like a traditional power purchase arrangement and less like a security. If a customer has the opportunity to pay upfront in return for an undetermined amount of solar power over an undetermined period of time, which could potentially result in the acquisition of power having a value in excess of the initial amount paid, this appears less like a traditional power purchase arrangement and more like a security. Therefore, it may be advantageous to structure CSP contracts to resemble traditional customer purchase contracts of non-solar electricity.

Common Enterprise

A common enterprise is a venture in which customer benefits from a contract are intertwined with and depend on the efforts, expertise, and success of others such as the CSP operator and/or other customers.

To reduce the likelihood that the SEC would classify a CSP as a common enterprise, CSP marketing materials often avoid emphasizing the relationship between solar power production and the participation or number of other customers or the success of the operator in managing the CSP.

When a user owns an intangible interest (e.g., a percentage of the output of a CSP) or a portion of a tangible object (e.g., a portion of a solar array), but is not required to play a substantial role in the operation or management of the CSP, it presents the appearance of a common enterprise because it results in a benefit without any ongoing personal effort.

Many CSPs attempt to limit or avoid offering intangible or tangible interests in CSPs and manage marketing materials to avoid the appearance of a common enterprise. However, this is difficult to implement outside of a situation where a customer does not have any contractual relationship with the CSP itself (e.g., where a customer simply agrees to pay a green pricing rate for power purchased by a utility from a CSP). Any tangible or intangible interest in a CSP itself is likely to meet the common enterprise test, and therefore the offeror must rely on the fact that one of the other Howey criteria is not met to avoid classification of the CSP contract as a security.

Expectation of Profits

The Supreme Court in Forman held that a contract was not a security when it lacked common features of a security.[21] The features the court noted were: (1) the right to receive dividends contingent on an apportionment of profits; (2) negotiability; (3) transferability; and (4) the ability to appreciate.[22] The more a CSP contract emulates these common security features, the more likely it is that the contract will be deemed to have an expectation of profits.

First, the right to receive dividends contingent on an apportionment of profits is a common feature of certain securities.[23] CSPs often avoid any ongoing or periodic profit return, similar to dividends, that are provided to customers based on the financial success of the CSP. One way to avoid this is for the CSP contract to involve steady, preset returns — e.g. bill credits or direct allocations of power — that are tied to the participants' relative contributions to the CSP, rather than the success or output of the CSP.

If a customer's CSP share has produced more output than the customer has used and the customer is able to earn a return from the overage, it could be construed as a dividend or profit. Therefore, some CSP contract structures place caps on credits (such as limiting bill credits from a CSP to 40 percent of a customer's monthly usage) and others place general prohibitions on returns to a customer based on their negative net usage.

[20] *Id.* at 852-53.

[21] *Id.*

[22] *Id.*

[23] *Id.*

Second, the more readily a customer can sell or transfer, in whole or in part, a CSP contract or interest in a CSP, the more likely it is that the contract will be deemed to involve an expectation of profits. The ability to sell an interest for its present value is a common trait of securities, as there is the potential for the interest to appreciate in value and for the investor to monetize that appreciation. Therefore, transferability of interests in a CSP is typically either prohibited or permitted only in limited circumstances (such as upon sale of a house that has a CSP contract in place) and for a set price that does not permit the original or future user to realize any appreciated value of the contract.

If a participant can terminate a CSP contract, the other parties have an obligation to purchase that participant's interest at an appreciated price and this could create an expectation of profits. However, if the participant's interest is repurchased at a value not exceeding the price paid, this diminishes the concern. It could also include a liquidation of a CSP where participants are entitled to receive liquidation proceeds exceeding the value they have put in. A court may still consider a price below the initial investment as appreciation if the original purchaser received benefits over the value of the difference in resale or redemption costs and original price. To avoid these possible profits, CSP operators often limit any right of redemption or resale.

Aside from the common features mentioned in Forman, alternative methods may be implemented to remove the concept of a profit from CSP contracts. For example, participants may receive an item instead of a profit. As noted above, a security does not exist "when a purchaser is motivated by a desire to use or consume the item purchased."[24] To focus on an item in lieu of profits, materials about the CSP tend to focus on nonmonetary value, such as the energy produced/received or societal benefits. Referring to customer benefits as energy credits instead of using a term associated with money (e.g., tax reduction, discount, or reimbursement) would strengthen this concept.

By structuring CSP contracts to be considered unprofitable, a CSP contract may be considered to avoid an expectation of profits. If a project does not provide an investor with an expectation that the benefits received will exceed the investor's initial investment, then no expectation of profits has occurred. Often, utilities charge a premium for solar energy, commonly known as green pricing, destroying any expectation of profit. For example, Ellensburg Renewable Energy Park, the nation's first CSP, provides solar power at a rate of "$3 above and beyond [non-solar] rates and charges."[25] A CSP contract may offer solar power at a fixed cost exceeding the current cost for non-solar power, but if the cost of non-solar power increases over time such that the solar fixed cost represents a discount, then the expectation of profits increases, particularly if this feature is marketed to the CSP contract participant. CSP contracts and any interest in a CSP should not be marketed, promoted, or billed as an investment or an opportunity for users to make money or buy power for less than the normal market rate for non-solar power.

The expectation of profits aspect of the Howey test is perhaps the easiest prong to structure around to avoid the appearance of a security.

Efforts of Others

If the benefits under the CSP contract are derived solely or primarily from the efforts of individuals other than the purchaser under the CSP contract, the contract is more likely to be considered a security. The purchaser participant under a CSP contract typically relies solely or primarily upon the efforts of others to operate, manage, and administer the CSP. Most participants do not have the right to exercise practical control over managerial decisions of a CSP; however, some CSPs are organized to allow all users to be involved in day-to-day management and decision-making.

For example, CommunitySun, which sought and received a no-action letter from the SEC, organized its CSP as a condominium association.[26] CommunitySun's no-action request

[24] *Id.* at 852-53 (1975).

[25] *See Renewable Energy Rate Information,* City of Ellensburg (last visited Jan. 7, 2017), https://ci.ellensburg.wa.us/index.aspx?nid=589.

[26] *See* Response, *supra note* 3.

emphasized owner involvement and customer control over the CSP's day-to-day operations. Similar involvement would likely result from a CSP's organization as a cooperative or a member-managed limited liability company.[27] Under these arrangements, marketing efforts tend to emphasize involvement of customers in the project. However, owner-managed operations can become unwieldy if many participants are involved. Participants may not want the burden of an active role in the operation or management of the CSP.

The Supreme Court made it more difficult to avoid classification as a security through direct participation in the management of the CSP when it held that, if profits accrue "primarily" or "substantially" from the efforts of others, the final prong of the Howey test is met.[28] If profits accrue from factors other than the efforts of the CSP operator and customers (even if they are involved in the operations), such as fluctuating solar energy prices or efficiency of the solar array, the efforts of the operator and/or CSP could be considered "ministerial" or "administrative" and of limited significance.[29]

It is difficult to avoid the efforts of others prong, as it is often not practical or feasible for CSPs to organize in a manner where the involvement of investors is significant.

In the last decade, operators of CSPs have been very creative in their efforts to avoid falling within the scope of securities laws. However, courts — in other contexts — have focused on the economic substance and the specifics of an arrangement to determine if the investors need the protections of securities laws. If an action arising from a CSP were to come before the courts or the SEC, similar focus should be anticipated. Consequently, each CSP arrangement will be judged on its specific facts, using the elements described above. As the SEC has not provided definitive guidance in this area, there is risk in relying solely on the arrangement being excluded from the definition of a security.

SEC Exemptions

Because it is difficult to be certain that a CSP contract would not be classified as a security, many CSP participants attempt to minimize the impact of SEC compliance by using an exempt issuer or by fitting a CSP arrangement within an SEC exemption. However, compliance with exemption requirements often restricts the ability to offer CSP arrangements to customers based on the exemption or, as discussed below, the ability of the offeror to obtain certain tax incentives.

Issuer Exemptions

An offeror that meets the requirements of an issuer-based exemption does not need to comply with the SEC's registration requirements. However, any offering by an exempt issuer must still satisfy the SEC's disclosure requirements intended to eliminate fraud, which prohibit material misstatements or omissions of material facts in connection with an offering. Therefore, any marketing materials or other information provided to potential participants must be accurate and complete so as not to be misleading.

There are two issuer exemptions that are relevant to CSPs, particularly those involving public power utilities: (i) offerings by political subdivisions of state, and (ii) offerings by non-profit organizations.

A security issued by a political subdivision of a state or a public instrumentality of a state is exempt from security registration.[30] For purposes of this report, we have assumed that public power utilities are political subdivisions of state, and therefore, public power utilities that participate in CSPs (including under the third party owner or 100 percent utility owner structures) are typically able to contract with customers without SEC registration.

[27] *See Robinson v. Glynn,* 349 F.3d 166, 174 (4th Cir. 2003) (member-managed LLC ownership not deemed a security).

[28] See, e.g., *SEC v. Int'l Loan Network, Inc.,* 968 F.2d 1304, 1308 (D.C. Cir. 1992) (holding that investors expecting to accrue profits "predominately" from the efforts of others satisfy the third prong of the Howey test); *SEC v. Glenn W. Turner Enters., Inc.,* 474 F.2d 476, 482 (9th Cir. 1973), cert. denied, 414 U.S. 821 (1973) (noting "the word 'solely' should not be read as a strict or literal limitation on the definition of an investment contract, but rather must be construed realistically, so as to include within the definition those schemes which involve in substance, if not form, securities").

[29] *SEC v. Life Partners, Inc.,* 87 F.3d 536, 549 (D.C. Cir. 1996).

[30] *See* 15 U.S.C. § 77c(a)(2).

A security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, or reformatory purposes and not for pecuniary profit, and no part of the net earnings of which inures to the benefit of any person, private stockholder or individual, is exempt from securities registration.[31] Therefore, non-profit organizations involved in the CSP would be able to contract with customers without SEC registration.

Offering Exemptions

While most offering exemptions do not remove disclosure requirements, they avoid the costly and time-consuming expenses of SEC registration (although they are still not free from expense). Listed below are the exemptions that may apply to CSPs.

Intrastate Offerings under Section 3(a)(11)[32]

The intrastate exemption applies to offerings that are confined to one state, meaning that they must be promoted by in-state issuers to in-state residents.[33] The current rules provide an exemption for issuers offering securities in a state where it is both organized and doing business.[34] Effective April 20, 2017, a new rule will provide an exemption to an issuer offering securities to residents of the state of its principal place of business, without also requiring the issuer to be organized in that state.[35] The law is based on the notion that state securities laws are sufficient to regulate intrastate offerings.

This option has been readily used by current CSPs. The costs of state securities law compliance will vary depending on the jurisdiction, but local law sometimes exempts CSP projects from securities law compliance.[36]

[31] *See* 15 U.S.C. § 77c(a)(4).

[32] 15 U.S.C. § 77c(a)(11).

[33] *See id.*

[34] 17 C.F.R. § 230.147.

[35] SEC Release No. 33-10238; 34-79161 (Oct. 26, 2016) (available at https://www.sec.gov/rules/proposed/2015/33-9973.pdf).

Private Placements under Section 4(a)(2)[37]

Section 4(a)(2) under the Securities Act provides that a transaction that does not involve a public offering is exempt from the SEC's registration requirement.[38] In general, for this private placement exemption to be available, participants under the CSA contract must:

A. either have enough knowledge and experience in finance and business matters to be "sophisticated investors" (able to evaluate the risks and merits of the investment), or be able to bear the investment's economic risk;

B. have access to the type of information normally provided in a prospectus for a registered securities offering; and

C. agree not to resell or distribute the securities to the public.

Regulation D under the Securities Act includes multiple rules providing "safe harbors" under the private placement exemption.[39] If an issuer complies with the requirements of a "safe harbor," the offering is deemed to be a private placement and therefore exempt from SEC registration requirements. In lieu of SEC registration requirements, companies must electronically file a "Form D," which is a brief notice including basic details about the offering and company, and which becomes publicly available on the SEC's website.[40] Typically, the security may not be resold unless registered with the SEC and there is a prohibition on general solicitation and advertising the security.[41]

[36] *See infra,* Question 5; University Park Solar Website, http://www.universityparksolar.com/documentation.htm (last visited Oct. 25, 2016) (Maryland CSP's intrastate offering).

[37] 15 U.S.C. § 77d(a)(2).

[38] *Id.*

[39] 17 CFR § 230.501 et seq.

[40] *See* Form D, SEC (available at https://www.sec.gov/about/forms/formd.pdf).

[41] *See* 17 CFR § 230.502(d).

There are four primary private placement exemptions under Regulation D applicable to CSPs: (i) Rule 506(b); (ii) Rule 506(c); (iii) Rule 504; and (iv) Rule 505.

Rule 506(b) allows offerings to accredited investors and a limited number of non-accredited investors to be exempted from registration.[42] Rule 506(b) does not limit the amount of money that an organization can raise, but prohibits marketing the security by means of general solicitation or advertising. The company may sell securities to an unlimited number of accredited investors — banks, investment companies, corporations, and individuals with a net worth of at least $1,000,000 or with an annual income of at least $200,000 (or $300,000 jointly with spouse) and up to 35 non-accredited purchasers. However, the non-accredited purchasers, either alone or with a representative, must be sophisticated — have sufficient knowledge and experience in financial and business matters to evaluate the merits and risk of the security.

The offeror must give non-accredited investors disclosure documents that contain the same information that is provided in registered offerings, and must make available representatives to answer investor questions.

Audited financial statements are generally required. For most offerors, if audited financials cannot be obtained without unreasonable effort or expense, only an audited balance sheet must be provided. One advantage of Rule 506(b) is that, if its requirements are met, there is no further obligation to comply with registration requirements of applicable state securities laws because they are specifically pre-empted under the National Securities Market Improvements Act of 1996 (NSMIA); however, any anti-fraud provisions of state securities laws are still applicable.

Rule 506(c), which implements Title II of the Jump Start Our Business Startups (JOBS) Act,[43] removes the prohibition on general solicitation or advertising that applies under Rule 506(b) if all purchasers of the securities are accredited investors and the issuer takes reasonable steps to verify that the purchasers are accredited investors. Reasonable steps to verify can include, but are not limited to, reviewing tax returns and bank statements. However, these steps can be perceived as intrusive by potential investors, which makes reliance on this rule less desirable to many potential CSP participants.

The SEC recently clarified that a Rule 506(c) offering may immediately follow a completed offering under Rule 506(b) without concern about losing the exemption for the Rule 506(b) offering due to the use of general solicitation or advertising in the Rule 506(c) offering.[44] This allows an issuer to take advantage of both exemptions.

Another exemption allows for offerings up to $5,000,000 (as of January 20, 2017) within any 12-month period to be exempt from registration under Rule 504 of Regulation D.[45] There is a prohibition on general solicitation or advertising of the offering; however, there is an exception to the prohibition if one of the following conditions is met:

A. the offeror registers the offering exclusively in states that require a publicly filed registration statement and delivery of a substantive disclosure document to investors;

B. the offeror registers and markets the offering in a state that requires registration and disclosure delivery and also markets in a state without those requirements, so long as the offeror delivers the disclosure documents required by the state where the offeror registered the offering to all purchasers (including those in the state that has no such requirements); or

C. the offeror sells exclusively according to state law exemptions that permit general solicitation and advertising, so long as the offeror sells only to accredited investors.

Rule 505 of Regulation D provides an exemption for offerings of securities under $5,000,000 in any 12-month period.[46] However, although Rule 505 is technically avail-

[42] *See* 17 C.F.R. § 230.506(b).

[43] *See* 17 C.F.R. § 230.506(c).

[44] Securities Act Compliance & Disclosure Interpretations, Question 256.34 (last updated Dec. 8, 2016) (available at https://www.sec.gov/divisions/corpfin/guidance/securitiesactrules-interps.htm).

[45] SEC Release No. 33-10238; 34-79161 (Oct. 26, 2016) (available at https://www.sec.gov/rules/proposed/2015/33-9973.pdf). Immediately prior to January 20, 2017, the maximum offering amount was $1,000,000. See 17 C.F.R. § 230.504(b).

[46] *See* 17 CFR § 230.505.

able, it will be repealed effective May 22, 2017, in light of the increase to the maximum offering amount available under Rule 504.[47] A Rule 505 offering is available to an unlimited number of accredited investors and no more than 35 non-accredited investors.[48] Non-accredited investors do not need to satisfy the sophistication or wealth standards associated with other exemptions. There is a general prohibition on soliciting or advertising the securities. Audited financial statements are usually required. For most offerors, if audited financials cannot be obtained without unreasonable effort or expense, only an audited balance sheet must be provided. Offerors must provide non-accredited investors with information equivalent to that used in registered offerings. For accredited investors, the issuer may determine what information to provide, as long as it complies with the SEC's antifraud rules.

All of the foregoing exemptions have been implemented by at least one CSP. Some exemptions are more common than others, but the usage of an exemption depends on the geographic restrictions of the CSP, the amount necessary to finance the CSP, the time available to raise those funds, and the investors accessible to the CSP.

Crowdfunding under Title III of the JOBS Act[49]

On May 16, 2016, Title III of the JOBS Act came into effect, and exempted certain crowdfunding transactions from SEC registration.[50] Under Title III, an issuer may raise an offering limited to $1,000,000 in any 12-month period from ordinary, non-accredited investors.

There are certain restrictions and requirements that must be met for a crowdfunding offering to be eligible for this exemption. The main restriction limits how much an investor may invest based on their income or net worth. If an individual's income or net worth is less than $100,000, the investment cannot exceed the greater of $2,000 or 5% of the individual's annual income or net worth —whichever is lower. If both an individual's annual income and net worth are equal to or more than $100,000, the investment cannot exceed 10% of the lesser of the annual income or net worth of such individual.

Further restrictions include limitations on the resale of unregistered securities and limits on advertising. While general solicitation and advertising are largely prohibited, they are permitted through the intermediary crowdfunding website's platform.

Crowdfunding under Title III has the potential to result in considerable disclosure requirements. Disclosure of certain financial information is required and an audit and review of financial statements may be required depending on the amount being offered. The offeror must disclose the price of the security and the method of determining the price, the targeted offering amount, a description of the company's financial condition, a description of the offeror's business and the use of proceeds from the offering, and other information about the offeror's management and any related party transactions.

It is unclear whether Title III offerings are viable given the limited offering amount and the extensive disclosure requirements and resulting costs.

Impact of State Securities Laws

Compliance with state securities law is as important as compliance with federal law. Even if a CSP is exempt from federal securities laws, state securities laws may still apply. State laws vary widely and a community solar developer should consult an attorney prior to operation in any jurisdiction. For a basic understanding, below are some notable differences between federal and state securities laws.

First, states may have different tests to determine if a contract is a security. For example, many states use a risk capital test, instead of or in addition to the Howey test, to determine if a contract is a security.[51] This test replaces the

[47] SEC Release No. 33-10238; 34-79161 (Oct. 26, 2016) (available at https://www.sec.gov/rules/proposed/2015/33-9973.pdf).

[48] *See* 17 CFR § 230.505(b)(2)(ii).

[49] *See* 15 U.S.C. § 77d(a)(6).

[50] *Id.*

[51] *See Silver Hills Country Club vs. Sobieski,* 361 P.2d 906 (Cal. 1961) (set forth the risk capital test).

expectation of profits element with a "valuable benefit of some kind,"[52] so unprofitable investments like green pricing models that would not meet the Howey test, may be considered securities under state law because they provide some valuable benefit.

State securities laws may result in additional requirements and liability for offerors. For example, under Washington state law, directors, officers, and employees are personally liable for violation of state securities disclosure requirements.[53]

Some state laws even contradict federal law. For example, NSMIA expressly restricts the amount of regulation individual states can impose on offerings relying on the Rule 506(b) safe harbor. Most states only require the Form D to be filed with the state and, sometimes, an additional fee to be paid. However, the State of New York's Martin Act continues to require a separate, complex form to be filed, in violation of NSMIA.

The nuances of state statutes vary significantly, and prior to operating a CSP, operators should carefully plan their structure and procedures.

Not all state securities laws act as barriers to CSPs; some states have taken affirmative steps to accommodate the growth of CSPs. For example, Oregon and Vermont have taken measures to exempt CSP contracts from state securities registration requirements.

In March 2014, Senate Bill 1520 created new provisions in Oregon law that exempt renewable energy cooperative corporations (associations organized as cooperative corporations under Oregon law to develop and operate facilities to generate electricity from renewable energy resources[54]) from securities registration requirements.[55] The law notes that issuance of stock or certificates that show membership or members' respective entitlements to assets, reserves, or dividends are exempt.[56] The definition of renewable energy resources includes solar electricity generation facilities.[57]

Similarly, in July 2014, the Commissioner of Vermont's Department of Financial Regulation issued an order that allowed certain CSP transactions to be exempt from state securities registration.[58] The exemption, known as the SUN Exemption, exempts the following arrangements:

i CSP contracts in which the investor is a business entity, state or local government, agency or branch of a state or local government, government-owned entity, or local school board; or

ii Projects that meet one of the following three circumstances:

   a. No upfront financing or purchase of solar panels is required, payments are made in installments that are reasonably (but not necessarily evenly) spread out over the life of the CSP contract, and the contract may be terminated with minimal expense or notice;

   b. An upfront payment is required to finance the CSP or a solar panel is purchased, the customer receives comprehensive disclosure materials (including certain prescribed disclosures) before entering into the CSP contract, and the customer can assign their interest without penalty or sell it back to the CSP operator; or

   c. The project involves 10 or fewer customers who have a pre-existing relationship (e.g., neighbors, friends, relatives) as long as the CSP is not marketed using any form of general solicitation or advertising.

The SUN Exemption takes into account the level of risk associated with a potential transaction when prescribing the

[52] *Id.*

[53] RCW §21.20.430(3).

[54] ORS 59.025(12).

[55] S. Res. 1520, 2014 Leg., 77th Sess. (Or. 2014) (available at https://olis.leg.state.or.us/liz/2014R1/Downloads/MeasureDocument/SB1520/Enrolled).

[56] *Id.*

[57] ORS 59.025(12); ORS 757.600(27)(1).

[58] Order 14-023-S, Dept. of Fin. Reg., State of Vt., In re the Vermont Solar / Utility No-Action ("Sun") Exemption (July 21, 2014)(available at http://www.dfr.vermont.gov/sites/default/files/S.U.N.%20Securities%20Exemption%2014-023-S.pdf).

level of simplicity or burden associated with compliance with the exemption.

The regulator's order indicated, "a reasonable expectation of profits exists when the cumulative value of net metering credits is anticipated to exceed the amount of money or other value an Investor commits to an Issuer."[59] Therefore, a state securities regulator has affirmed that such an arrangement per se meets the expectation of profits prong of the Howey test. Other states may look to this in interpreting their own securities regulations.

Complying with state securities laws continues to be a critical factor for CSPs. Potential CSP developers in other states should consider whether to lobby the state legislature to enact state-specific exemptions governing CSPs based on the Oregon and Vermont models.

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[59] *Id.*

Tax Incentives for Community Solar Projects

Federal Income Tax Incentives

The Section 48 Investment Tax Credit is available to certain owners of and indirect investors in CSPs. The tax credit for CSPs is 30 percent[60] of the qualified basis of the facility — generally, the cost of tangible assets used to produce electricity. The ITC claimed will reduce the taxpayer's remaining basis (and thus available depreciation deductions) in the qualified property by one-half of the ITC claimed, i.e., 15 percent of the qualified property's basis. The ITC is available only with respect to CSPs for which construction begins prior to 2022. Specific requirements apply to determine when construction begins and, in some cases, safe harbors may be available. In addition, the ITC is subject to forfeiture in case of the disposition of the CSP or certain indirect interests in the CSP during the five years immediately following the date on which the facility is placed in service and available for commercial use.

Accelerated bonus depreciation of 30-50 percent[61] may also be available in the year a solar facility is placed in service. The remaining basis would be depreciated using the methods generally applicable to the facility.

In light of the results of the November 2016 election, the new Congress is expected to make material changes to the Internal Revenue Code and it is not clear how or whether the ITC will be impacted.

Limitations Applicable to Individuals

There are various restrictions, such as the passive activity loss rules,[62] which may limit an individual's ability to take advantage of the ITC and depreciation deductions. These rules can significantly restrict the economic benefits of many individuals considering an ownership interest in a CSP.

Limitations Applicable to TEOs

Tax-exempt organizations, which may include government agencies and instrumentalities such as public power utilities, may not claim the ITC or federal depreciation deductions. In addition, if a TEO is a partner in a partnership that owns a CSP, the total ITC and depreciation deductions available to all partners will be reduced. In some cases, the total ITC available will be reduced by more than the share of the ITC that would be allocated to the TEO and depreciation deductions will be delayed. The ITC and depreciation deductions will also be limited in the case of a TEO lessee of a CSP. The ITC and depreciation deductions may also be limited in some cases when a TEO is the offtaker of power produced by a CSP, a lessor or lessee of a CSP, or a lessor of land on which a CSP is located. Therefore, it is very important to carefully structure CSP contracts when a TEO, including a public power utility, will have an interest in the CSP, the land under the CSP, or the power produced by it.

In some cases a TEO may nonetheless own a solar facility. A donation to a TEO for the purpose of acquiring or developing a community solar facility may be deductible under Code Section 170 as a charitable donation, if the donor's contribution is not a payment for power produced by the facility.

State Incentives

Tax Incentives

Many states offer income, property, and sales and use tax incentives associated with CSPs. States also provide exemptions or exclusions from income, property, and/or sales and use tax for nonprofits or government entities that apply

[60] It should be noted that certain incentives, including non-taxable grants and tax-exempt bond financing, obtained with respect to the same qualified property may reduce a taxpayer's basis in the qualified property for purposes of calculating the ITC.

[61] Property placed in service by December 31, 2017 may be eligible for 50% bonus depreciation; property placed in service in 2018 may be eligible for 40% bonus depreciation; and property placed in service in 2019 may be eligible for 30% bonus depreciation.

[62] An individual that does not "materially participate" in a trade or business may use losses, including ITC and depreciation deductions, that arise from that trade or business only to offset "passive" income, i.e., income arising from trades or businesses in which the individual does not materially participate. Since many individuals have limited passive income, in many cases an individual investor in a community solar project will be able to use the ITC and depreciation deductions only in respect of their investment to offset income arising from that investment. Any losses remaining when the investor transfers their interest in a taxable transaction may then be applied against other income, including non-passive income.

regardless of the availability and applicability of solar-specific incentives. The nature and scope of state tax incentives varies widely by state. The structure and ownership of a CSP greatly affects the eligibility and amount of the incentive.

Several states provide income tax incentives such as tax credits — similar to ITCs — based on the amount of investment in solar energy systems or deductions available to taxable entities. Most credits are capped at a certain threshold, either per solar panel installation or for the total investment. Some states provide other limitations, such as maximum or minimum capacity output requirements or restrictions on use of the solar power — e.g., the credits may only be available for panels that are used for commercial or for residential use. Some of these incentives were drafted for general purchases of residential or commercial solar panels for individual use and may not initially appear to be available in connection with community or shared solar installations. However, taxpayers may still take advantage of some of these incentives if the investment is appropriately structured.

States also provide sales tax incentives, including full or partial exemptions for purchases of photovoltaics and other solar energy systems. These exemptions vary widely by state based on the type of systems that qualify, the applicability to local sales taxes, treatment of labor and intangible costs, the incentive structure, and the incentive amount, among others.

States and local governments also offer property tax incentives for solar facilities, including exemptions or special assessments. Some incentives are authorized by state statute, while others are less visible and are akin to off the book incentives that are separately negotiated with localities.

There may be other state or local level gross receipts or other utility taxes that may apply.

Non-Tax Incentives

In addition to tax incentives, some states offer non-tax incentives such as rebates, grants, credits, and production-related payments. Some states also provide favorable policies to encourage community solar. These programs are often subject to restrictions such as production maximums, membership minimums, locations, restrictions on use, caps, and origin of equipment.

For example, Washington offers the Renewable Energy Cost Recovery Incentive Payment Program that provides payments for energy generated from renewable generating systems based on the number of kilowatt hours produced. The program applies to CSPs. However, there are restrictions on obtaining the incentive, including restrictions on where the CSP is located and which entities are eligible for participation.[63]

As with the state tax incentives, the ownership and structure of a CSP could greatly impact the amount of incentive available to participants in or owners of a CSP or preclude them from eligibility entirely.

Applicability of State Incentives to Solar Models

In the third party owner structure, the third-party CSP owner would generally be the party eligible to claim state and local sales and use tax, property tax, and state income tax incentives to the extent the owner is a taxable entity. Sales and use tax incentives are generally available on the purchase of solar equipment, and thus, the owner would typically receive the benefit of the incentive. Similarly, property tax incentives are generally applicable to the property owner. State income tax incentives normally require some level of investment to qualify. Thus, the owner would be eligible to qualify for the state income tax incentives to the extent the owner pays tax — and is not a tax-exempt entity — and meets other restrictions for qualification.

The CSP owner and/or customers may also be eligible for state-specific financial incentives, including rebates, grants, credits, and production-related payments. Customers of

[63] *See,* e.g., WAC 458-20-273, Part IV (402), Part II, (207) "Single-owned systems, meaning systems owned by individuals, businesses, and a local government entity that is not in the light and power business, must be located on the property owned by the same person that owns the system. Thus a single-owned system must have a unity of ownership between the owned property on which the system is located and the owned system." For community solar projects, the property on which the renewable energy system is located must be either owned by a hosting local governmental entity or owned or leased by the utility that owns the system." WAC 458-20-273(203) also provides that "a state governmental entity, a federal governmental entity, or a tribal governmental entity cannot participate in the incentive payment program," although individual members of a community solar project may still qualify for the incentive.

solar-powered electricity may also be eligible for additional financial incentives such as net metering or credits.

In the 100 percent utility owner structure, many states exempt public power utilities owned by government instrumentalities from income, sales, use, and/or property tax.[64] Thus, the utility may not be eligible for solar-specific incentives. However, the utility may still take advantage of certain tax incentives if the project is structured specifically to obtain the benefit of state tax incentives.[65] Non-tax incentives may also be available. Customers may be eligible for both tax and non-tax incentives, including production-related payments and net metering.[66]

The beneficiaries of state incentives under the partial utility owner structure are substantially similar to the beneficiaries under the third party owner structure. However, there may be additional restrictions on and qualification for state incentives based on the specific structure.

Due to the varied and complex nature of state tax and other financial incentives, each state's specific law must be analyzed in depth to ensure that a CSP is structured in the most optimal way to take advantage of all available incentives.

[64] Restrictions and limitations may apply and vary by state.

[65] Income tax incentives may apply in the context of pass-through credits, similar to Oregon's Business Energy Tax Credit ("BETC"), although the BETC credit specifically has expired.

[66] For example, the City of St. George Energy Services Department, a municipal utility, and Dixie Escalante Electric collaborated to offer the SunSmart program to customers in Utah. Utah state income tax law allows residents who purchased shares in in the project (representing 1 KW of solar) to claim the State's Renewable Energy Systems Tax Credit on their personal income tax return.

Considerations for Community Solar Projects

Desired Role in the CSP Structure

A public power utility must determine what role it will play in the CSP — sole owner, partial owner, or power purchaser under a PPA.

A 100 percent public power utility owner cannot claim federal tax incentives associated with the CSP, but may be able to get some state incentives. However, a 100 percent public power utility owner that is a political subdivision of a state is exempt from the SEC's securities registration requirements.

If a utility wishes to participate as an owner of the facility in partnership with third parties, the taxable co-owners may be eligible to claim federal incentives (see the "partnership flip" and "lease pass-through" structures discussed earlier in this report). However, at least initially, the CSP itself would then be subject to the SEC's registration requirements for any securities it offers.

Therefore, it is difficult to structure an arrangement that receives favorable treatment under both the tax and securities laws when a public power utility is directly a CSP owner. The utility must determine whether it is more advantageous to structure based on available tax incentives or favorable securities law treatment.

An option that could result in favorable treatment under both tax and securities law is the third party owner structure, where the public power utility merely participates as a purchaser of power from the CSP. This includes a situation where the utility offers CSP contracts in the form of direct arrangements with customers — including those customers who have no direct relationship with the CSP itself, such as the Sacramento Municipal Utility District's "SolarShares" program. The CSP itself could then be designed to maximize the available tax benefits, but either would not participate as an offeror of securities, or would structure an offering of securities to fit within an applicable exemption.

Motivations of Potential Investors

Motivations of potential investors who are customers may include environmental consciousness, potential savings on electricity bills, ownership interest in solar, or support of a nonprofit's mission. For a customer whose primary motivation is environmental consciousness, nearly every structure that a CSP could take would be appealing. However, for a customer who is only looking to save on bills, it would be difficult to structure a CSP contract that is not a security as the cost savings could potentially be considered a profit — the issuer, if not exempt, would be subject to the securities laws and need to seek an offering exemption or otherwise register the securities. A donation to a non-profit would not give rise to securities issues, but does not provide the customer with an ongoing direct benefit.

Circumstances of Potential Customer-Investors

If the participant that enters into a CSP contract with a customer is not an exempt issuer, it must consider the number and financial circumstances of potential customers to determine whether complying with an SEC registration exemption is practical. For example, certain exemptions limit the number of non-accredited investors that can participate in an offering, and sometimes even those non-accredited investors must have a certain level of financial sophistication in order to participate. Further, the crowdfunding exemption limits the amount that a customer could invest depending on the individual's income and/or net worth.

Financing and Feasibility

The amount of financing needed to pursue a project can limit the availability of SEC registration exemptions. For example, crowdfunding limits offerings to $1,000,000 in a 12-month period, and effective as of January 20, 2017, Rule 504 limits offerings to $5,000,000 in a 12-month period. Even if these overall dollar limitations provide sufficient capital, the limitations on individual investments under the crowdfunding exemption would require a substantial number of customers to participate to raise the desired level of funds, absent a larger investor that would participate in a partnership flip or lease pass-through arrangement. Rule

506(b) permits an unlimited offering amount but restrains the number of non-accredited investors that can participate and requires disclosures to non-accredited investors akin to a registered offering.

Compliance Burdens and Costs

Even if SEC registration can be avoided, there is typically a cost associated with compliance with an offering exemption, particularly where non-accredited investors are involved. Neither an issuer exemption nor an offering exemption relieves the CSP participant from the obligation to provide fair and accurate disclosures about the CSP and the CSP contract. State law compliance requirements vary from state to state and could involve significant disclosure-related costs even if a federal exemption is available. However, these expenses could be outweighed by the value that the CSP brings to the participants, the community, and the environment. Potential participants and their appetite for bearing compliance costs associated with the securities laws will vary from project to project.

The charts that follow overview the benefits available to the public power utility and to customers in relation to the basic CSP structures outlined in this report, as well as the applicable securities registration aspects.

Get Help from Financial and Legal Advisors

As this report emphasizes, each CSP is different, and there is no universal guidance from regulators, or a magic structure that fits all models. It is important to seek advice from appropriate financial, accounting, tax and legal advisors before pursuing a project. The outcome of each case is likely to be different. A potential CSP participant could engage legal counsel to request no-action relief from the SEC, perhaps sparking more broadly applicable guidance from the SEC on this topic.

Federal & State Incentives, SEC Registration Requirements Public Power Utility Perspective

	Community Solar Model		
	Model 1: Third-Party Owner	**Model 2.A. 100 percent Public Power Utility Ownership**	**Model 2.B. Partial Public Power Utility Ownership**
Who claims federal incentives?			
ITC	**Owner** claims all ITC. The ITC is not available to tax-exempt organizations that directly or indirectly own solar facilities. A tax-exempt partner in a partnership that owns a solar facility can complicate ITC availability for taxable partners.	**Not available.**	**Taxable co-owners** of a solar facility may claim ITC. However, a public power utility partner in a partnership that owns a solar facility can complicate ITC availability for taxable partners.
Depreciation	**Owner** claims all depreciation. Depreciation deductions are not available to tax-exempt organizations that directly or indirectly own solar facilities. A tax-exempt partner in a partnership that owns a solar facility can complicate depreciation deductions for taxable partners.	**Not available.**	**Taxable co-owners** of a solar facility may claim depreciation deductions. However, a public power utility partner in a partnership that owns a solar facility can complicate depreciation deductions for taxable partners.
Charitable donation	**Donors** to a tax-exempt owner may claim charitable donation only if contribution is not a prepayment for power.	**Not applicable.**	**Donors** to a tax-exempt co-owner may claim charitable donation only if contribution is not a prepayment for power.
Who claims state incentives?			
Net Metering (including virtual)	Customer	Customer	Customer
Non-Tax Financial Incentives (including Production Incentives and Grants	**Varies.** Typically owners and/or customers are entitled to incentives such as grants and production incentives.	**Varies.** Typically owners and/or customers are entitled to incentives such as grants and production incentives. Public power utility ownership of the solar project can affect eligibility and qualification requirements for certain incentives.	**Varies.** Typically owners and/or customers are entitled to incentives such as grants and production incentives.

Federal & State Incentives, SEC Registration Requirements Public Power Utility Perspective

	Community Solar Model		
	Model 1: Third-Party Owner	**Model 2.A. 100 percent Public Power Utility Ownership**	**Model 2.B. Partial Public Power Utility Ownership**
Who claims state incentives?			
Income Tax Incentives	**Owners** of solar equipment may be entitled to income tax incentives, including tax credits, to the extent the owner pays state income tax (and is not a tax-exempt entity). State tax laws and incentives vary by state.	**Typically not available.** State tax laws and incentives vary by state. Each state's incentives should be carefully analyzed.	**Typically, taxable co-owners** of a solar facility may claim income tax incentives. States may impose particular procedural requirements for qualification depending on the structure and entity type. State tax laws and incentives vary by state.
Property Tax Incentives	**Owners** of solar facilities may be entitled to property tax incentives such as exemptions or special assessments. State tax laws and incentives vary by state.	**Typically not applicable.** Exceptions may apply. State tax laws and incentives vary by state. Each state's incentives should be carefully analyzed.	**Owners** of solar facilities may be entitled to property tax incentives such as exemptions or special assessments. State tax laws and incentives vary by state.
Sales/Use Tax Incentives	**Owners** (purchasers) of solar equipment may be entitled to a full or partial exemption from sales tax for purchases of qualifying equipment. State tax laws and incentives vary by state.	**Owners** (purchasers) of solar equipment may be entitled to a full or partial exemption from sales tax for purchases of qualifying equipment to the extent they are not already exempt from sales tax. State tax laws and incentives vary by state.	**Owners** (purchasers) of solar equipment may be entitled to a full or partial exemption from sales tax for purchases of qualifying equipment. State tax laws and incentives vary by state.
What is subject to SEC registration requirements?			
Public power utility issuer (assuming categorized as a political subdivision of a state)	CSP contracts offered by the utility but related to the CSP (e.g., purchases of power from the utility, which in turn purchases the power from the CSP) **exempt**	Issuer **exempt**	CSP contracts offered by the utility but related to the CSP (e.g., purchases of power from the utility, which in turn purchases the power from the CSP) **exempt**
Other for-profit (e.g., facility owner) issuer, including a for-profit utility	Issuer is **not exempt;** offering-based **exemption required** or if not available, registration required	Issuer is **not exempt;** offering-based **exemption required** or if not available, registration required	Issuer is **not exempt;** offering-based **exemption required** or if not available, registration required

In the Investor/Utility Owned model, the customer participates by acquiring from a utility rights to power produced by a solar facility or similar methods that do not involve customer ownership of a CSP. The tax benefits are generally the same as those discussed above.

In the Customer Owned model, the customers typically own a CSP as joint tenants (i.e., all customers own an undivided interest in the entire facility) or as partners in a partnership that owns the CSP. Alternatively, the CSP may be owned by a TEO to which customers donate (as noted in the table, a taxpayer may deduct a donation to a TEO only if the donation is not prepayment for power produced by the TEO's solar facility). In some cases, customers may own distinct portions of a facility, e.g., one or more panels. However, since the ITC may not be available in that type of model, it is not favored. This model should be distinguished from the case in which a customer contracts with a utility to purchase the power produced by one or more panels that are owned by a third-party or the utility (e.g., virtual net metering). In that case, the customer is not the owner of the panels and the ITC may be available to the owner.

The Lease Pass-Through model is available to either customer or third-party lessors (see the Investor/Utility Owned and Customer Owned models for applicable consequences). The lessee is typically a partnership owned by a taxable entity that can benefit from the ITC, e.g., a local bank or other business.

Federal & State Incentives, SEC Registration Requirements
Customer Perspective

	Community Solar Models			
	Investor/Utility Owned	**Customer Owned: Taxable Customer**	**Customer Owned: TEO Customer**	**Lease Pass-Through: Customer or Third-Party Owned**
Who claims federal incentives?				
ITC[67]	**Owner** claims all ITC.	**Owner** claims all ITC.	**Not available.**	**Lessee** claims all ITC.
Depreciation[68]	**Owner** claims all depreciation.	**Owner** claims all depreciation.	**Not available.**	**Lessor** claims all depreciation.
Charitable donation	**Donors** to a TEO owner may claim charitable donation only if contribution is not a prepayment for power.	**Not applicable.**	**Donors** to a TEO owner may claim charitable donation only if contribution is not a prepayment for power.	**Donors** to a TEO owner may claim charitable donation only if contribution is not a prepayment for power.
Who generally claims state incentives?				
Net Metering (including virtual)	**Customer.**	**Customer.**	**Customer.**	**Customer.**
Non-Tax Financial Incentives (including Production Incentives and Grants)	**Varies.** Typically owners and/or customers may be entitled to incentives such as grants and production incentives.	**Varies.** Typically owners and/or customers may be entitled to incentives such as grants and production incentives.	**Varies.** Typically owners and/or customers may be entitled to incentives such as grants and production incentives.	**Varies.** Typically owners and/or customers may be entitled to incentives such as grants and production incentives.
Income Tax Incentives	**Owners** of solar projects may be entitled to income tax incentives, including tax credits, to the extent the owner pays state income tax (and is not a tax-exempt entity). State tax laws and incentives vary by state.	**Owners** of solar projects may be entitled to income tax incentives, including tax credits. State tax laws and incentives vary by state.	Typically **not available.** State tax laws and incentives vary by state. Each state's incentives should be carefully analyzed.	**Varies.** Typically owners of solar projects may be entitled to income tax incentives, including tax credits. Ownership and the availability of pass through incentives may vary by state. State tax laws and incentives should be analyzed to determine eligiblity.

[67] The ITC is not available to TEOs that directly or indirectly own solar facilities. A TEO partner in a partnership that owns a solar facility can complicate ITC availability for taxable partners.

[68] Depreciation deductions are not available to TEOs that directly or indirectly own solar facilities. A TO partner in a partnership that owns a solar facility can complicate depreciation deductions for taxable partners.

Federal & State Incentives, SEC Registration Requirements
Customer Perspective

	Community Solar Models			
	Investor/Utility Owned	**Customer Owned: Taxable Customer**	**Customer Owned: TEO Customer**	**Lease Pass-Through: Customer or Third-Party Owned**
Who generally claims state incentives?				
Property Tax Incentives	Typically **Owners** of solar facilities may be entitled to property tax incentives such as exemptions or special assessments. State tax laws and incentives vary by state.	Typically **Owners** of solar facilities may be entitled to property tax incentives such as exemptions or special assessments. State tax laws and incentives vary by state.	Typically **owners** of solar facilities may be entitled to property tax incentives such as exemptions or special assessments. States may exempt property owned by certain TEOs (with exceptions and conditions) notwithstanding the availability of solar incentives. State tax laws and incentives vary by state.	**Varies.** State law varies with respect to the treatment of solar facilities as real or personal property, whether the lessor or lessee is responsible for property tax (or property tax on improvements), and how exempt owners are treated (to the extent applicable). This affects eligibility for incentives. Each state's incentives and property tax law should be carefully analyzed.
Sales/Use Tax Incentives	**Owners** (purchasers) of solar equipment may be entitled to a full or partial exemption from sales tax for purchases of qualifying equipment if the owner pays sales (i.e., is not exempt). State tax laws and incentives vary by state.	**Owners** (purchasers) of solar equipment may be entitled to a full or partial exemption from sales tax for purchases of qualifying equipment. State tax laws and incentives vary by state.	**Owners** (purchasers) of solar equipment may be entitled to a full or partial exemption from sales tax for purchases of qualifying equipment. Some states provide separate exemptions for sales to certain TEOs (with exceptions and conditions). State tax laws and incentives vary by state.	Typically **lessor** (purchaser) of solar equipment may be entitled to a full or partial exemption from sales tax for purchases of qualifying equipment if the owner pays sales (i.e., is not exempt). However, state tax law with respect to treatment of leases varies by state. Each state's incentives and law regarding the taxability of leases should be analyzed to determine eligibility.

[a, b] As discussed above, the ITC and depreciation will generally be limited in case of a tax-exempt or government power purchaser, lessee, or owner (directly or indirectly). In addition, if a tax-exempt or government organization is a ground lessor, the ground lease should be reviewed by a tax lawyer. In addition, individuals are generally subject to limitations on how and when they may claim the ITC and depreciation deductions.

Federal & State Incentives, SEC Registration Requirements Customer Perspective

	Community Solar Models			
	Investor/Utility Owned	**Customer Owned: Taxable Customer**	**Customer Owned: TEO Customer**	**Lease Pass-Through: Customer or Third-Party Owned**
Is SEC registration required?				
	If the issuer is a public power utility or an organization meeting the SEC's definition of a not-for-profit organization, likely **NO.** Otherwise, an offering-based **exemption is required** or if not available, registration is required.	Based on typical structures involving direct customer ownership, likely an offering-based **exemption is required** or if not available, registration is required. If the issuer is a public power utility or an organization meeting the SEC's definition of a not-for-profit organization, likely **NO.**	Based on typical structures involving direct customer ownership, likely an offering-based **exemption is required** or if not available, registration is required. If the issuer is a public power utility or an organization meeting the SEC's definition of a not-for-profit organization, likely **NO.**	Based on typical structures involving direct customer ownership, likely an offering-based **exemption is required** or if not available, registration is required. If the issuer is a public power utility or an organization meeting the SEC's definition of a not-for-profit organization, likely **NO.**

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