

United States

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Creating collateral security packages

1 What types of collateral are available?

Since a project financing is typically structured through non-recourse or limited recourse loans, lenders can generally look only to the assets and cash flow of the project company for repayment and cannot make a claim against the project sponsor's assets. However, in US jurisdictions, all present and after-acquired property interests of the project company can be used as collateral. This includes real property interests such as fee simple interests, leasehold interests and easements, as well as a wide range of personal property interests, such as contracts, licences, equipment, receivables, bank accounts, securities and general intangibles, as well as the cash flow resulting from any of the above. In addition, it is also common for lenders to take security over the shares in the project company, which often allows the lenders a more practical means of enforcing on their collateral package.

2 How is a security interest in each type of collateral perfected and how is its priority established? Are any fees, taxes or other charges payable to perfect a security interest and, if so, are there lawful techniques to minimise them? May a corporate entity, in the capacity of agent or trustee, hold collateral on behalf of the project lenders as the secured party?

With limited exceptions, available collateral can generally be separated into two main categories, namely personal property and real property.

The Uniform Commercial Code (UCC) provides the framework for lenders and borrowers to grant, perfect and enforce most security interests over personal property. Security interests over real property must be established and perfected in accordance with the laws of the state in which the real property is situated.

Most personal property security interests that are subject to the UCC can be perfected by filing a financing statement in the state in which the debtor is incorporated. For project companies incorporated outside of the United States, UCC financing statements may be filed with the central filing office for the District of Columbia. There are, however, certain types of collateral that must be in control of the secured party in order for the secured party to ensure perfection. Perfection by control is required for certain types of collateral such as deposit accounts established through a depository. Generally perfection through control over depository accounts is achieved through a depository agreement that establishes the right of the secured party to exclusively control the accounts, though this right is often not triggered unless there is an event of default.

Security interests in real property are perfected by filing a mortgage or deed of trust in the state where the property is located. Typically, a mortgage instrument must describe the property and debt and identify both the mortgagee and mortgagor.

Priority is generally established by the party that is first in time to perfect a security interest over collateral. However, where perfection by control is permitted, a party having control of such collateral will generally have priority over a party that has only made a filing, regardless of when the relevant filing was made. There are also certain types of liens that are given priority as a matter of law, such as mechanics' liens and certain tax liens.

The fees for filing UCC financing statements vary from state to state, but are generally not significant in nature. Fees associated with filing a mortgage instrument also depend on the laws of the relevant state, and are often significant.

It is permissible for a corporate entity, in the capacity of agent or trustee, to hold collateral on behalf of the project lenders as the secured party. In the event of a bankruptcy of an agent or trustee holding collateral on behalf of secured parties, the collateral should be excluded from the estate, provided that the documentation establishing the role of the agent or trustee has been properly structured.

3 How can a creditor assure itself as to the absence of liens with priority to the creditor's lien?

There is no centralised national registry of mortgage interests or security interests in personal property. Lenders typically assure themselves as to the absence of liens by conducting searches of existing UCC filings, tax liens, judgments and bankruptcies in all relevant jurisdictions. There are private companies that specialise in conducting such searches on behalf of lenders, and the lenders in project financings typically have such searches conducted or updated as close as possible to the proposed closing date. To the extent a search reveals an existing lien, additional due diligence is necessary in order to determine the nature and extent of the underlying secured obligation and whether the lien has been terminated. In respect of real property, lenders typically rely on both lien searches and the purchase of title insurance to provide assurances of the priority of their lien.

4 Outside the context of a bankruptcy proceeding, what steps should a project lender take to enforce its rights as a secured party over the collateral?

Most security documents will include specific remedies that are available to the secured parties if there is an event of default.

Article 9, Part 6 of the UCC also sets out statutory remedies that are available to secured parties, regardless of what is specified in the relevant security documents. These statutory remedies include the right to collect certain liquid collateral such as accounts receivables, the right to repossess collateral, the right to sell or dispose of collateral and the right to retain collateral in total or partial satisfaction of the debt.

There are, however, certain limitations on the rights of lenders to exercise the statutory remedies set forth in the UCC. For example, although the UCC permits dispositions of collateral through

both public and private sales, secured parties must provide notice to the debtor and other secured parties before disposing of collateral and secured parties are prohibited from purchasing their collateral through a private sale, unless there is a recognised market for such collateral or it is the subject of a widely distributed price quotation.

Enforcement of security interests over real property is governed by state laws, which vary, but the two most common methods of enforcement are judicial and non-judicial foreclosure. Many states require judicial foreclosure, whereby a local court issues a judgment requiring the real property be sold at a public auction, with the proceeds going toward satisfying the underlying debt. In states that allow non-judicial foreclosure, it may be possible for a lender to sell the real property through a private sale without commencing judicial proceedings, but notice periods will generally apply and a non-judicial foreclosure will generally only be permitted where the mortgage instrument includes a clause giving the lender the power of sale outside judicial proceedings. In some states, debtors who have defaulted on a mortgage may have the right to redeem a property that is subject to foreclosure proceedings, either by repaying the lender all amounts owed (including interest and costs) prior to the completion of a foreclosure proceedings or, where permitted by statute, by paying the price paid for the real property in the foreclosure proceedings within a specified period following the completion of foreclosure proceedings.

- 5** How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the collateral? Are there any preference periods, clawback rights or other preferential creditors' rights (eg, tax debts, employees' claims) with respect to the collateral? What entities are excluded from bankruptcy proceedings and what legislation applies to them? What processes other than court proceedings are available to seize the assets of the project company in an enforcement?

Liquidation and reorganisation proceedings in the United States are governed by chapters 7 and 11, respectively, of the US Bankruptcy Code. Generally, the commencement of bankruptcy proceedings under the US Bankruptcy Code will result in an automatic stay that will pre-empt any other enforcement actions, including foreclosure proceedings under state law. Lenders can seek relief from the automatic stay in order to take specific actions against a debtor with the approval of the US Bankruptcy court.

Security interests granted or perfected within 90 days of a bankruptcy (or one year if granted to an insider) may be subject to avoidance if they are deemed preferential transfers that would enable the secured creditor to recover more than it would have received through the proceeds of a liquidation. Transfers made within a two-year look-back period prior to a bankruptcy may be classified as fraudulent transfer and may be subject to clawback if certain facts can be established, including that the company was insolvent at the time of the transfer, was rendered insolvent by the transfer or the intent of the transfer was to defraud creditors.

The claims of certain involuntary creditors such as employees and taxing authorities may be given preferential treatment in bankruptcy proceedings. Foreign creditors are given equal treatment to US creditors under the US Bankruptcy Code.

Foreign exchange issues

- 6** What are the restrictions, controls, fees, taxes or other charges on foreign currency exchange?

The United States does not impose exchange controls or taxes on the exchange of foreign currency. The US government, however, monitors large foreign exchanges and requires the persons involved in such transactions to make full and accurate disclosures of such transactions. Moreover, persons involved in such transactions should

consult the rules of the Office of Foreign Assets Control (OFAC), which impose economic and trade sanctions in certain instances.

- 7** What are the restrictions, controls, fees and taxes on remittances of investment returns or payments of principal, interest or premiums on loans or bonds to parties in other jurisdictions?

Foreign investors may generally remit US profits abroad. However, the Treasury Department imposes sanctions and embargoes on certain countries, companies and individuals, restricting payments and remittances to entities on its sanctions lists.

Dividends, interest, royalties, and service fees may be subject to US tax withholding at a rate of 30 per cent, unless certain conditions are satisfied or certain exemptions, such as treaty exemptions, apply.

- 8** Must project companies repatriate foreign earnings? If so, must they be converted to local currency and what further restrictions exist over their use?

US companies are not required to repatriate foreign earnings. However, profits realised in a foreign country may still be subject to taxation by the United States.

- 9** May project companies establish and maintain foreign currency accounts in other jurisdictions and locally?

Although the United States does not prohibit offshore accounts, such accounts may still be subject to taxation domestically. The Internal Revenue Service requires US persons with a financial interest in or signature authority over a foreign financial account with funds exceeding US\$10,000 to report such holdings by the end of June every year. Accounts of non-US entities controlled by a US company may also need to file a Report of Foreign Bank and Financial Accounts (FBAR). A filing is required if the funds in foreign financial accounts exceeded the IRS threshold at any point during the calendar year, and non-compliance can result in significant penalties.

Foreign investment issues

- 10** What restrictions, fees and taxes exist on foreign investment in or ownership of a project and related companies? Do the restrictions also apply to foreign investors or creditors in the event of foreclosure on the project and related companies? Are there any bilateral investment treaties with key nation states or other international treaties that may afford relief from such restrictions? Would such activities require registration with any government authority?

The US generally places very few restrictions on foreign investment. However, some restrictions do apply to the ownership of certain natural resources and production facilities. For example, deposits of certain natural resources, including oil, oil shale, coal and gas and lands containing such deposits that are owned by the United States may only be sold to US citizens or US entities. Similarly, licences for the construction and operation of facilities for the development, transmission or utilisation of power on land controlled by the federal government may only be issued to US citizens or US corporations.

Foreign investment or ownership in a project may also be subject to national security-based reviews and restrictions. Under the Foreign Investment and National Security Act of 2007, the Committee on Foreign Investment in the United States (CFIUS) holds the power of review for transactions involving foreign investment or control over a US business that may have an impact on US national security. CFIUS can recommend to the President of the United States to suspend, block, or renegotiate such a transaction. Since the power of CFIUS to review a transaction extends to where such a transaction could result in control by a foreign entity through

foreclosure or other means, restrictions may also apply in the event of foreclosure.

The US is party to a series of multilateral treaties that provide protections to foreign investors, such as the North American Free Trade Agreement (NAFTA) and the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA). The US has also recently concluded a host of bilateral free trade agreements with specific countries. Generally, registration with a government authority is not required for a foreign investor to benefit from these treaties.

- 11** What restrictions, fees and taxes exist on insurance policies over project assets provided or guaranteed by foreign insurance companies? May such policies be payable to foreign secured creditors?

While there are no overarching restrictions on insurance policies provided or guaranteed by foreign insurance companies, certain restrictions, conditions and tax implications may apply to the issuance of such policies. For example, a federal excise tax may be levied on the premiums paid to foreign insurance companies for certain types of insurance and reinsurance coverage. In addition, many states provide certain guarantees for insurance policies issued by insurers that meet state regulatory requirements and these guarantees may not be available for insurance policies issued by foreign insurance companies that are not deemed admitted to conduct business in the relevant jurisdiction.

- 12** What restrictions exist on bringing in foreign workers, technicians or executives to work on a project?

US companies are required to apply for work authorisations for foreign workers under the Immigration Reform and Control Act of 1986. US companies are also required to verify each worker's legal right to work in the United States and to maintain specified employment documentation for each new hire. Employers may sponsor foreign workers for a number of temporary visa categories, eligibility for which will depend on the experience and qualifications of the worker.

- 13** What restrictions exist on the importation of project equipment?

All imported equipment or products must be declared with the US Customs and Border Protection Agency. Customs duties or tariffs apply, but can, in some cases, be reduced or eliminated in accordance with the relevant trade agreement that governs the trade relationship with the exporting country. Under the Foreign Assets Control Act, there are import restrictions and bans on a series of countries and persons.

- 14** What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

The US government or any state government may seize private property without consent, provided that the private property owner receives just compensation under the doctrine of eminent domain. While the power of eminent domain is limited by the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, the US Supreme Court has recently expanded the definition of 'public use' regarding eminent domain. See *Kelo v City of New London*, 545 US 469 (2005).

In addition to the protections provided by the Fifth Amendment, many multilateral and bilateral investment treaties include expropriation provisions that offer protections to foreign investors.

Fiscal treatment of foreign investment

- 15** What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

There are few tax incentives or other incentives provided preferentially to foreign investors or creditors. While no federal taxes apply to loans, mortgages or other security documents for the purposes of effectiveness or registration, some states do levy taxes on security documents (particularly mortgages) for such purposes.

Government authorities

- 16** What are the relevant government agencies or departments with authority over projects in the typical project sectors? What is the nature and extent of their authority? What is the history of state ownership in these sectors?

US federal agencies share responsibility with state and, in some cases, local agencies for regulating projects. The agencies with authority to regulate a project will depend on the jurisdiction and the industry involved. Natural resources, transportation, energy and telecommunications are regulated by federal agencies such as the US Department of Energy, the US Department of Transportation, the Environmental Protection Agency (EPA), the Federal Communications Commission (FCC) and the Federal Energy Regulatory Commission. The nature and extent of their authority rests on the Constitution, federal statutes, state statutes, and the respective scope of Chevron deference. See *Chevron USA Inc v Natural Resources Defense Council Inc*, 467 US 837 (1984). Federal statutes, federal regulations, state statutes, state regulations and case law have shaped the nature and extent of the authority of the relevant federal agencies. The federal government and state governments have held varying levels of ownership in these sectors over time in various forms through direct control, public corporations, joint ventures, and closely-scrutinised regulation.

Regulation of natural resources

- 17** Who has title to natural resources? What rights may private parties acquire to these resources and what obligations does the holder have? May foreign parties acquire such rights?

The federal government, state governments and private citizens may all hold title to land, oil, gas and mineral rights in the United States. There are variations as to how such titles are held under respective state laws. Title to the surface rights over a parcel of land does not necessarily imply ownership of all natural resources below the surface of such land, as surface rights and mineral rights are treated as separate legal estates in many states within the United States. The obligations imposed on the holder of a mineral estate will vary depending on the jurisdiction and may depend on whether the mineral estate or the surface estate is considered the dominant estate. In some states, mineral rights may be deemed to be abandoned if they are not developed within a certain time period.

There are certain restrictions on the foreign ownership of natural resources. For example, deposits of oil, gas and many types of minerals and lands owned by the United States that contain such deposits may only be acquired by US citizens or US entities.

In the US, Native American tribes are classified as 'domestic dependent nations', meaning that they exercise qualified sovereignty over their tribal lands and the natural resources associated with such lands. Tribal agreements with outside entities are governed by both state and federal law. US case law has gradually sharpened the scope of tribal sovereignty. Accordingly, rights to natural resources within tribal lands may be affected by the rights of Native American tribes within the United States.

18 What royalties and taxes are payable on the extraction of natural resources, and are they revenue- or profit-based?

The US federal government does not impose any blanket taxation on the extraction of natural resources, though there is a federal excise tax applicable to the production of coal. The federal government does impose fixed royalties on the natural resources extracted under federal leases, which have varied in amount over time. Royalties imposed under state leases will vary depending on the resource and the jurisdiction. Income taxes or corporate taxes may also apply to profits made from the extraction of natural resources.

19 What restrictions, fees or taxes exist on the export of natural resources?

Exports of natural resources usually require prior approval from the respective federal regulatory agency. For example, the Department of Energy must approve exports of natural gas.

Legal issues of general application

20 What government approvals are required for typical project finance transactions? What fees and other charges apply?

The government approvals required for a project finance transaction will depend on the industry involved and the jurisdiction of the project. Typically, project finance transactions will require approvals on the federal, state and local level. For example, electric power projects are regulated at the federal level by FERC as well as at the state level. FERC is responsible for regulating all wholesale sales of electric power and state authorities have responsibility for regulating electric power generation, transmission and distribution assets. Projects will also typically be required to obtain environmental approvals at the federal, state and local level.

21 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Pursuant to article 9 of the Uniform Commercial Code, security over most types of personal property must be perfected through filing a UCC financing statement in the relevant jurisdiction.

Typically, mortgages or deeds of trust over real property must be recorded in the jurisdiction where the real property is situated. As a general matter, with the exception of certain real estate documents (which often must be notarised and include certain language required by the local filing office), the financing and project documents are not subject to legal formalities such as notarisation or apostillation.

22 How are international arbitration contractual provisions and awards recognised by local courts? Is the jurisdiction a member of the ICSID Convention or other prominent dispute resolution conventions? Are any types of disputes not arbitrable? Are any types of disputes subject to automatic domestic arbitration?

The US is a member of the ICSID Convention, the New York Convention and the Panama Convention.

The Federal Arbitration Act (FAA) implements the New York Convention and the Panama Convention and promotes arbitration. If the arbitration is of a commercial nature, a foreign party or property situated abroad is involved or there is some reasonable relationship with a foreign state, the international arbitration provisions of the FAA will apply. If these conditions are not met, the FAA's domestic arbitration provisions will apply.

Parties may be excluded from recourse to arbitration in certain criminal and family law matters, in disputes where civil penalties may apply and in certain employment and civil rights matters.

23 Which jurisdiction's law typically governs project agreements? Which jurisdiction's law typically governs financing agreements? Which matters are governed by domestic law?

It is typical for project agreements to be governed either by the laws of the state in which the project is situated or by New York law.

Given the extensive experience of New York courts in hearing cases involving financing agreements and the well-established case law in this area, financing agreements are most often governed by New York law.

Security documents, such as mortgages, may be required to be governed by the law in which the secured property is located.

24 Is a submission to a foreign jurisdiction and a waiver of immunity effective and enforceable?

The submission to a foreign jurisdiction is enforceable.

Waivers of sovereign immunity are also enforceable pursuant to the Foreign Sovereign Immunities Act.

Environmental, health and safety laws

25 What laws or regulations apply to typical project sectors? What regulatory bodies administer those laws?

A typical project will be subject to regulations at the federal, state and local level, with each jurisdiction able to adopt its own regulations as long as they do not conflict with those of the level above.

Certain projects, including those receiving a loan guarantee from the US Department of Energy, may be subject to an environmental assessment under the National Environmental Policy Act.

Projects may also be subject to various statutes primarily administered by the Environmental Protection Agency (EPA), such as the Clean Air Act, the Clean Water Act, the Safe Drinking Water Act, the Resource Conservation and Recovery Act, the Toxic Substances Control Act and the Oil Pollution Act.

Many federal environmental laws also delegate administration and enforcement responsibilities to state agencies and additional state and local regulations may apply.

Project companies

26 What are the principal business structures of project companies? What are the principal sources of financing available to project companies?

Project companies are typically formed as special purpose vehicles that are structured to be 'bankruptcy remote'. It is common for a project company to be formed as a joint venture between two or more entities. Project companies are often incorporated as limited liability companies or as limited partnerships.

There are multiple sources of financing available for project companies, and projects are often financed through multiple sources. Bilateral or syndicated commercial bank loans are a major source of financing, but financing may also be available from a variety of other sources, including private equity investors, the 'term loan B' market or through the issuance of debt or equity securities, which are typically structured as Rule 144A/Regulation S project bonds or 4(a)(2) private placements. Financing for certain projects may also be available through government programmes such as the federal Department of Energy Loan Guarantee Program or various state-administered clean energy funds and municipal bond programmes.

Update and trends

The project finance market in the United States remained strong in 2013, and that trend continued into 2014. While overall market strength remained the norm for project finance in 2013 and 2014, the US project finance market continues to change and reinvent itself. For instance, the market continues to search for, and develop, new funding sources to fill the funding gaps that have been left as European commercial banks (traditionally, the most active lenders in the project finance space) exit the market or take fewer or smaller positions in project finance loans in response to the liquidity and capital restraints imposed by Basel III. Although the market continues to see solid overall activity from the commercial banks as a whole, with Japanese, Canadian and US regional banks filling some of the funding gap left by the European commercial banks, the market has also seen increased activity in the term loan B and project bond markets.

These two markets have provided a critical source of funding for projects in the US, particularly, in the case of the term loan B market, for projects that are subject to certain risks that are beyond the appetite of the commercial bank market. Despite providing a critical source of funding for projects, both the term loan B market and the project bond market have some significant limitations. With certain recent exceptions, term loan B transactions tend to be more expensive and of shorter length than those available in the commercial bank market and project finance sponsors lack the relationship with the term loan B lenders that they typically have with their commercial banks – accordingly, project sponsors typically fear that amendments and waivers will be more difficult on a term loan B transaction. Limitations of the project bond market include less flexible draw mechanics, which make project bonds less useful during the construction phase of a project and a more complex amendment and waiver process (particularly in Rule 144A/Regulation S project bond transactions).

Given the reduced activity in the commercial bank market and the limitations of the term loan B and project bond markets, project sponsors have been seeking new sources of capital. It is beyond the scope of this analysis to identify all of the various sources of new capital or to address any of them in great depth; accordingly, we will

briefly touch on one source of capital that saw significantly increased activity in 2013 and the beginning of 2014, namely, the ‘YieldCo’.

Although not a new structure, YieldCos emerged in the project finance space as sponsors began to explore sponsor-managed public vehicles as a source of capital for new and existing projects. In addition to the market issues identified above, owners of renewable energy assets have begun searching for new sources of capital in order to:

- replace a dwindling number of tax equity players;
- offset downward price pressure exerted by certain large-scale buyers of renewable energy assets; and
- take advantage of the low yields currently accepted by certain classes of public investors.

A basic YieldCo structure involves formation of the YieldCo as either a state law corporation or a state law limited partnership. The YieldCo’s only asset is the operating company that owns cash generating renewable energy assets contributed by the sponsor. The sponsor owns interests in the operating company and controls the YieldCo, which is a publicly owned vehicle. Certain of the principal advantages and strengths of the YieldCo structure include: a YieldCo can take advantage of accelerated tax depreciation and other tax benefits to greatly decrease corporate-level income taxes and provide an income stream similar to that of a publicly traded Master Limited Partnership (MLP); a YieldCo, although subject to corporate-level tax on its income, can provide tax deferral for sponsors and other asset owners who are willing to contribute their assets to the public company in exchange for equity rather than selling those assets in exchange for cash; and because there are no tax requirements related to its assets or operations, a YieldCo is more flexible than either a REIT or an MLP.

The emergence of the YieldCo has proved an interesting trend in the project finance market. As with all relatively new structures, it continues to change and improve to address concerns and issues raised by it – whether it becomes a permanent fixture in the project finance market remains to be seen.

Public-private partnership legislation

27 Has PPP enabling legislation been enacted and, if so, at what level of government and is the legislation industry-specific?

More than 30 states and Puerto Rico have enacted some sort of PPP enabling legislation. The legislation varies from state to state, although PPP legislation in many states is focused on the transportation sector. Other states broadly permit PPP contracts across various industries (eg, roads, power production, rail, water purification, etc).

In certain circumstances, federal law may authorise PPP contracts for specific industries even where no state legislation exists. For example, although New York has not adopted PPP legislation, the Port Authority of New York and New Jersey has federal authority to structure its projects as PPPs.

PPP – limitations

28 What, if any, are the practical and legal limitations on PPP transactions?

Practical and legal limitations vary by state, especially given that there are still a number of states without any PPP-enabling legislation.

PPP has generally lagged in the US as compared to Europe and this may be attributable to practical issues such as the higher borrowing costs associated with PPP projects, due to the fact that borrowing is generally more costly for private entities as compared to



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government entities and the risk that PPP projects will be subject to litigation, particularly where the relevant enabling legislation is new or relatively untested.

PPP – transactions

29 What have been the most significant PPP transactions completed to date in your jurisdiction?

Some of the significant PPP projects that have recently been completed in the US include the Goethals Bridge Replacement project

in New York, the Port of Miami Tunnel in Florida, the Midtown Tunnel Project in Virginia and the Chicago Skyway in Illinois.

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