Recent Tax Law Changes Create New Opportunities for Leasing Wind Energy Property

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Recent changes in tax law make leveraged lease transactions far more attractive on paper than they were before the changes. However, changes in the economy and the financial industry and other changes in law counterbalance the favorable tax law changes and make it uncertain whether lease transactions will be used to finance new wind facilities.

By changing the structure of tax benefits associated with new wind energy property, recent amendments to federal income tax law make lease financing of wind energy property far more attractive than under prior law. The substantial tax benefits will provide a source of equity for lessors, but they may not be sufficient to override some of the other factors that have kept equipment lessors away from wind energy projects.

I The Old Regime: Production Credits

Partly because most wind property that generates electricity is not financially viable standing on its own, Congress has provided tax incentives for wind energy. Until the American Recovery and Reinvestment Act (ARRA) was enacted in February 2009, the incentives for larger projects were in the form of a "production tax credit" (PTC). A company that produced electricity from wind energy could claim a tax credit equal to a specified number of cents multiplied by the kilowatt hours of electricity produced by the taxpayer from qualified energy resources. The amount of the PTC per kilowatt hour in 2009 was 2.1 cents per kWh. The PTC is available during the 10-year period beginning on the date the facility is placed in service.

PTCs are of limited value for several reasons. First, the credits are available against regular income tax liability only. Like other business credits, they are not refundable. A startup wind energy company often has no income tax liability against which to claim the credit. Second, the credits cannot be transferred to a purchaser-lessor under a sale-and-leaseback transaction because only the producer of the electricity can claim a production tax credit. Third, the amount of the credit cannot be predicted with precision because it is indexed for inflation, adjusted based on a reference price for electricity, and dependent upon the number of kilowatts produced and sold to unrelated parties. Fourth, the credits are spread over 10 tax years; they are not available up front when they are most needed to pay for a facility.

Wind energy facility developers could resort to more exotic approaches for transferring or monetizing PTCs by entering into partnerships, sometimes called "flip partnerships," with entities that could use the credits. The tax-benefit purchaser would contribute cash to the partnership in exchange for approximately 99 percent of the profits for a specified period of time. In many cases, the facilities would not be expected to produce a profit, but the 99 percent profit allocation...
would entitle the tax-benefit purchaser to 99 percent of the PTCs. When the tax-benefit purchaser obtained a specified return consisting mostly of tax benefits, the profit-sharing percentages would flip to provide the original developer with most of the profits. Uncertainties relating to the tax consequences of these structures led the Internal Revenue Service (IRS) to provide a safe harbor for allocation of the credit by "wind farm" partnerships. The safe harbor helped a little, but the partnership arrangements still involve substantial tax and nontax risks, which made them inefficient tools for transferring tax benefits from startup companies that could not currently use them to taxpayers that could use them. ARRA markedly changed the landscape by permitting, under certain conditions, the owner of a facility that uses wind to produce electricity to claim an ITC for the facility in lieu of the PTC.

II Changes Made by ARRA

ARRA markedly changed the landscape by permitting the owner of a facility that uses wind to produce electricity (a "wind facility") and is placed in service before 2013 to claim an energy investment tax credit (ITC) for the facility in lieu of the PTC. The energy ITC is generally 30 percent of the cost of the eligible components of the facility. Eligible components include tangible personal property and other tangible property, other than a building or its structural components, if such tangible property is used as an integral part of the facility. The IRS has ruled that each wind turbine, together with its tower and supporting pad, is a separate qualified facility.

Tax law amendments in 2008 made "qualified small wind energy property" placed in service before 2017 eligible for a 30 percent energy ITC. Qualified small wind energy property is property that uses a wind turbine with a nameplate capacity of not more than 100kW to generate electricity. Unlike the PTC, the energy ITC is claimed when the facility is placed in service, rather than over the first 10 years. The owner of the facility claims the ITC, but the owner can elect to pass the credit through to the lessee. Thus, if a developer sells and leases back a facility within three months of it being placed in service, the purchaser can claim the energy ITC.

ARRA permits a person that places in service "specified energy property" to obtain a grant directly from the Secretary of the Treasury in lieu of the energy credit if the property is placed in service during 2009 or 2010 or, in the case of a wind facility, if placed in service before 2013 if construction began during 2009 or 2010. The term "specified energy property" includes a wind facility and qualified small wind property. The amount of the grant should equal the amount of the credit that could have been claimed. The Treasury Department has provided guidance on seeking grants. The guidance permits a lessor to claim the grant if the property is purchased and leased back within three months of being placed in service. Whether a credit or grant is claimed, the government effectively pays 30 percent of the cost of a wind facility or qualified wind property, but tax law reduces the depreciable basis of the facility by only half of the amount of the credit.

III Tax Benefits to Facility Owners

A Sale-and-leaseback transactions

A leveraged sale and leaseback works essentially as follows. Within three months of when the original owner/developer places in service a new facility, the original owner/developer sells the facility to a lessor. The lessor often borrows funds on a nonrecourse basis to pay a portion of the purchase price and pays a portion with its own funds (its investment). The lessor then leases the property back to the owner/developer (now the lessee) for a substantial portion of the useful life of the property. The lease rate or rent is usually set at a level sufficient to cover debt service and to provide an economic return (i.e., a return determined without regard to the tax benefits) to the lessee. Rental payments may be level or may increase over time. The lessee is often given an option to extend the lease by paying fair market value rent. The lessee also is often given an option to purchase the property at the end of the lease term for fair market value or at an estimate of fair market value at the end of the lease as estimated at the beginning of the lease term.

These types of transactions are often attractive for several reasons. The lessor is willing to make an investment in the
property from its own funds because the lessor anticipates tax benefits and expects the property to have residual value at the end of the lease term. This means that the debt incurred will be significantly less than the cost of the property, which makes it easier to find debt financing.

A sale-and-leaseback transaction may be attractive to a lessee because the lessee transfers tax benefits that it cannot use immediately. By transferring those benefits, the lessee is able to get equity into the project (the lessor's investment), which then enables the project to be financed. The lessee, which can recover almost all of its investment in the project through the sale, pays less in rent than it would have paid had it been able to finance the entire cost of the project.

Lessors may be attracted to sale-and-leaseback transactions because they can claim substantial tax benefits without passing all of that benefit back to the lessee through reduced rents. In most cases, the lessor is looking at a small expected return on its investment (after taking into account the residual value of the property) without taking into account the tax benefits and a substantially greater return after taking into account tax benefits. Sale-and-leaseback transactions may look very attractive to lessors when the tax benefits are very substantial, as they are in the case of wind energy property with a 30 percent energy ITC and five-year MACRS cost recovery life.

With lenders looking for very substantial equity investments in projects before lending, the use of tax benefits to generate equity investment becomes very important. The generous tax benefits here should cause a lessor to be willing to kick in more than the 30 percent that it gets back immediately. A lessor may borrow less than 60 percent of the cost of the project, which may make financing more viable.

The lessee pays less in rent than it would have paid had it been able to finance the entire cost of the project.

B IRS "Guidelines"

1 Minimum unconditional "at risk" investment

The Guidelines require the lessor to have a minimum unconditional "at risk" investment in the leased property when the lease begins, throughout the entire lease term, and at the end of the lease term. The minimum investment must be an equity investment incurred to purchase the property. When the property is first placed in service, the minimum investment must be at least 20 percent. That requirement should be easy for a wind energy property lessor to satisfy because the lessor will be quickly reimbursed for its equity investment by claiming a 30 percent energy ITC.

The Guidelines state that the lessor must not be entitled to a return of any portion of the minimum investment through any arrangement, directly or indirectly, with the lessee or a related party. Leases of this type typically include tax indemnities. The lessee indemnifies the lessor against loss of tax benefits attributable to acts or omissions of the lessee. As discussed below, certain acts of a lessee could result in the recapture of the energy ITC. Under a typical indemnity, the lessee would be required to reimburse the lessor for the lost credit and any tax liability attributable to the indemnity payment. Potential tax indemnity payments are generally not characterized as returns of minimum investment.

The Guidelines indicate that the minimum investment is retained throughout the entire lease term if the excess of the cumulative payments required to have been paid by lessee over the disbursements required to have been paid by or for the lessor do not exceed the sum of (1) any excess of the initial equity investment over 20 percent of the cost of the property and (2) the cumulative pro rata portion of the projected profit from the transaction (exclusive of tax benefits). This requirement should not be difficult to meet.

To meet the minimum investment requirement at the end of a lease, the lessor must demonstrate that the estimated fair market value at the end of the lease term is at least 20 percent of the original cost of the property. For these purposes, fair market value is determined without taking into account inflation or deflation and after subtracting from such value any cost the lessor would incur for removal and delivery of possession of the property to the lessor at the end of the lease term. This is a manageable requirement especially since it does not prohibit fair market value lease renewals or lessee purchase options at fair market value at the end of the lease.
The minimum investment Guideline also requires that the remaining useful life at the end of the lease term be at least the longer of one year or 20 percent of the originally estimated useful life of the property. Thus, the initial lease term must be less than 80 percent of the original useful life of the property. The lease term includes all renewal and extension terms other than renewals and extensions at the option of the lessee at fair market rental value at the time of the renewal or extension. This is also a manageable requirement.

2 Purchase and sale rights

The biggest thorn in the side of leasing is often the Guideline restriction on providing the lessee with a purchase option at less than fair market value at the time the right is exercised. Despite this Guideline, many leveraged leases provide the lessee with a purchase option based on expected fair market value. In addition, a lessee may be provided with an early buyout option at an amount approximating expected fair market value. Sometimes, the option prices are set at significant levels, but below expected fair market value. These deviations from the Guidelines are generally not sufficient to cause a sale-and-leaseback transaction to be recharacterized as a financing. Case law indicates that when a purchase option is more than nominal and not clearly a bargain, a fixed purchase option should not adversely affect lease characterization. The Guidelines require the lessor to demonstrate that "it expects to receive a profit from the transaction apart from the value" of the strictly financial benefits.

3 No lessee loans or guarantees

The Guidelines prohibit the lessee from making loans to the lessor or guaranteeing obligations of the lessor. This Guideline does not prevent the lessor from pledging the lease to support its obligations under the loan.

4 Profit requirement

The Guidelines require the lessor to demonstrate that "it expects to receive a profit from the transaction apart from the value of or benefits obtained from tax deductions, allowances, credits and other tax attributes arising from [the] transaction." The Guidelines indicate that this requirement is met if:

- (1) the sum of the amount required to be paid by the lessee to or for the lessor over the lease term and the value of the residual interest exceeds the sum of the aggregate disbursements required to be paid by or for the lessor in connection with the ownership of the property and the lessor's investment in the property (the "overall profit test"); and
- (2) the aggregate amount required to be paid to or for the lessor over the lease term exceeds by a reasonable amount the aggregate disbursements required to be paid by or for the lessor in connection with the ownership of the property ("positive cash flow test"). A lease of wind property can be structured to meet these requirements, but a lease meeting these requirements is unlikely to provide a satisfactory financial result to the lessee unless the property is expected to have a relatively high residual value at the end of the lease term. In this regard, the positive cash flow test is less problematic than the overall profit test.

Suppose that the lessor makes a 40 percent equity investment and leases a wind facility for 80 percent of the useful life of the investment. If the rent is set at a rate slightly higher than the debt service and any other expenses that the lessor expects to incur with respect to the facility, the positive cash flow test will be satisfied. The lessee will be paying slightly more than what it paid if it had incurred debt to acquire the property at a 40 percent discount in exchange for using it for only 80 percent of its useful life.

The overall profit test is much harder to satisfy because the wind energy property may not be inherently profitable; that is why the credit is provided in the first place. The overall profit test would require the lessee to pay back over the term of the lease the excess of the equity investment over the expected residual value in addition to covering the lessor's debt service. Unless the residual value is high and the lessee has little interest in the residual, the lessee effectively loses most
of the benefit associated with transferring the credit to the lessor.

Arguably, the requirement to take the credit into account in the overall profit test is inconsistent with the purpose of the credit. The credit is essentially a government subsidy to cause taxpayers to make an investment that they otherwise would not have made. That is, it allows an investor to acquire property that on its own would not otherwise yield an economic profit or an adequate economic profit. Therefore, it seems unfair to expect the lessor to recognize an economic profit. As the U.S. Court of Appeals for the Ninth Circuit stated in a case involving the lease of alternative energy property for which federal and state governments provided tax incentives, "If the government treats tax-advantaged transactions as shams unless they make economic sense on a pre-tax basis, then it takes away with the executive hand what it gives with the legislative. A tax advantage such as Congress awarded for alternative energy investments is intended to induce investments which otherwise would not have been made."\(^{31}\)

The overall profit test should not be an insurmountable obstacle to a sale-and-leaseback transaction on wind energy property. First and foremost, the Guidelines are just guidelines; they are not requirements. The Revenue Procedure promulgating the Guidelines specifically states: The guidelines set forth in this revenue procedure clarify the circumstances in which an advance ruling recognizing the existence of a lease ordinarily will be issued solely to assist taxpayers in preparing ruling requests and the Service in issuing advance ruling letters as promptly as practicable. These guidelines do not define, as a matter of law, whether a transaction is or is not a lease for federal income tax purposes and are not intended to be used for audit purposes.\(^{32}\) (emphasis added)

A tax advisor should be able to examine the leveraged lease transaction as a whole and consider whether it meets the traditional criteria for having economic substance. Do benefits and risks of ownership transfer to the lessor? They should if the lease term is no more than 80 percent of the useful life of the property, the lessee does not have a discounted purchase option, the lessor does not have a "put" or other tool to shift the risk associated with the residual value, and the lessor has substantially all of the rights that it needs at the end of the lease term to sell the property to a party that can use it. While some court cases may provide authority for being able to take tax benefits into account in determining profitability (or that failure to earn a pre-tax profit is not fatal),\(^{33}\) some lessors may be concerned about the Guideline or (as discussed below) legislation enacting the economic substance doctrine. This could reduce the pool of lessors or result in risk premiums being built into rental rates.

While the grant-in-lieu of credit remains available, the lessee may be able to claim the grant before engaging the sale-and-leaseback transaction.\(^{34}\) The lessee might then sell the property to the lessor for 70 or 75 percent of the cost of construction, maintaining that the fair market value should be discounted because of the lack of availability of the credit or grant-in-lieu of the credit. The lessee would have to determine whether the value of the five-year MACRS depreciation of the purchase price is sufficient to justify a 20 percent equity investment.

5 Limited-use property

As noted above, the Guidelines require the expected residual value of the property at the end of the lease term to be at least 20 percent of the cost of the property and the lease term to not exceed 80 percent of the useful life of the property. These requirements are intended to ensure that the lessor has not transferred the use of the property to the lessee for substantially its entire useful life. A lease could effectively transfer use of property to the lessee for all of its useful life despite the lease term and sufficient expected residual value (determined as if the property were used by the lessee) because the lessee is the only person that realistically could be expected to use the property at the end of the lease term. Such property is known as "limited-use" property. The Guidelines indicate that the IRS will not issue rulings on whether purported leveraged leases of limited-use property are leases for tax purposes.\(^{35}\)

Property may be limited-use property because it can only be operated if the operator knows trade secrets or has access to other special rights and the lessee has not committed to reveal the secrets or license the secrets or other rights at the end of the lease term. Limited-use property also includes immovable property or hard-to-move property (i.e., the cost of disassembling and reassembling it exceeds the expected value of the property)\(^{36}\) if the property cannot be used by
another person unless it is moved.

In the case of a wind mill and turbine, at the end of the lease term, the lessor would have to have sufficient rights to be able to access and operate the property. For example, if the facility is on land of the lessee, the lessor would need a ground lease of the land (or easement or license, depending on the jurisdiction) that extends beyond the lease term for the expected useful life of the property (or possibly, if shorter, at least 25 percent of the original facility-lease term). The lessor would need sufficient rights to continue to connect the facility to the grid for the same period of time. This could be accomplished with agreements to provide access to then existing transmission lines for fair market value.

The IRS has published nonbinding guidelines (technically, guidelines for ruling requests) for leveraged leases (the "Guidelines"). It is instructive to examine how the Guidelines would apply to a leveraged lease of a wind facility eligible for substantial tax benefits (or a grant-in-lieu of the tax benefits).

**C Factors that make leverage leasing challenging**

Although the tax incentives for wind energy property appear to make leveraged lease financing economically viable, other factors may prevent leveraged lease transactions of wind facilities or make them less attractive. Leveraged leases require lessors with income tax liabilities, lenders willing to lend on a nonrecourse basis, and lenders willing to lend for appropriate terms. In addition, the risks to the lessor must be minimized to keep the risk premium embedded in lease rates to a minimum. The grant-in-lieu of credit program eliminates the need for some facility owners to use leases to monetize the credit. Proposed legislation adds uncertainty to planning of future leveraged lease financings for property with generous tax benefits.

A successful, tax-motivated leveraged lease requires a lessor that has tax liability to absorb tax benefits. The economic downturn has cut the number of companies earning profits and paying taxes. Tax incentives to help bring the country out of the recession may also be reducing tax liability. Thus, the number of corporations that have the ability to absorb tax benefits has declined. Not all corporations that have significant tax liabilities have any desire to engage in lease transactions.

Leveraged leases generally require lenders that are willing to make nonrecourse loans. With the crisis in the lending industry, these types of lenders may be harder to find. While a loan-to-value ratio of 60 percent may at first glance seem attractive to a lender, a lender may believe that the cost of a limited-purpose wind energy facility does not equate to value.

Leveraged leases often require lenders to loan funds under a schedule that equals or comes close to the length of the lease term. The optimum lease terms for wind facilities may be in the 15- to 20-year range (dependent upon appraisers' determination of expected useful life), but most financing is available only for an 8- to 10-year period, and lessors will be very reluctant to take risks of refinancing even if the leases include rental adjustment clauses.

Lessors face a variety of risks, including lessee default, potential loss of tax benefits, and risks as to residual value. The success or failure of a wind facility will be dependent on, among other things, prices for electricity and the ability to move the electrical energy from the facility to places where it is needed (i.e., grid development). A lessee could default solely because of mismanagement (e.g., too much spent on other projects, bad financing decisions, etc.) in which case the facility may still have sufficient value to sustain the debt service if it is leased to another operator. A lessee also could default because the price of electricity is insufficient to generate sufficient cash flow to meet rent. In that case, the lessor may not have sufficient cash flow from the lease to pay the debt service and the lessor will have to add equity, convince the lender to waive defaults and modify the loan, or allow the lender to foreclose. If a default is caused by the price of electricity from the facility, terminating the lease and finding a new lessee is not likely to be a viable solution. A lessee could also face foreclosure if the lease includes an increasing rent schedule based on anticipated increases in the price of electricity or expected access to a national grid and those events do not occur. A lessor's decision to invest and the pricing of the lease will depend on the lessor's assessment of the residual value of the facility. The same factors
that may lead to a lease default can also affect residual value.

The energy ITC, while claimed when a facility is placed in service, vests over a 60-month period. If certain events occur within the 60-month period, part or all of the credit could be recaptured. Most of the potential events are unlikely to occur or can be avoided by agreement. For example, wind facilities are largely immobile; to the extent they (or parts) may be mobile, the lessee can be prohibited from moving them out of the United States. The credit may also be subject to recapture if the wind facility is destroyed (e.g., by a tornado). Insurance may need to be set at a level sufficient to reimburse the lessor for loss of the credit. This may require the insured amount to exceed fair market value and cost. If the insurance is used to rebuild, the credit may still be recaptured. A portion of the credit will be recaptured if the lender forecloses within the 60-month period and sells the facility in a foreclosure sale.

Lessees often enter into leveraged lease transactions to partially monetize tax benefits that they could not otherwise use. A wind facility owner can claim a grant-in-lieu of credit without regard to its own tax position. Therefore, developers that begin construction of wind facilities in 2009 or 2010 and complete them before 2013 will not need to use a leveraged lease to monetize tax benefits. As of now, the energy investment credit for most wind facilities is also scheduled to expire at the end of 2012, so the only projects eligible for the credit but not the grant are those started in 2011 or 2012 and placed in service before 2013 and possibly some that are owned by entities that are not qualified to claim the grant.

Recent legislative developments also add uncertainty to leasing. Legislative proposals to codify the economic substance doctrine may place a chill on leveraged leasing of property for which there are significant tax benefits, such as wind energy property. In its crudest form, legislation would deny or restrict benefits for any transaction that would have occurred or that would not generate an economic profit were it not for the tax benefits of the transaction. More recent attempts to codify the economic substance doctrine place heavy weight on a taxpayer having a substantial purpose, other than the tax benefits, for entering into a transaction. It is hard to predict whether a lease transaction that has economic substance (as traditionally measured) would pass muster under these ambiguous tests if a substantial purpose of the transaction is to transfer the benefit of a 30 percent energy ITC.

The combination of the energy ITC, the 50 percent basis adjustment, and five-year MACRS depreciation for wind energy property leads to whopping tax benefits for the owner of the facility. Consider the tax consequences of a $1 million investment to a taxpayer in a 39 percent combined federal and state tax bracket (before any state tax incentives that may be available), as shown in Table 1.

The tax benefits of ownership exceed 63 percent of the basis eligible for the credit. At a 7 percent discount rate and if the tax benefits accrue quarterly, the present value of tax benefits associated with a mid-year investment would be approximately 58 percent of the cost.

**IV Conclusion**

Recent changes in tax law make leveraged lease transactions far more attractive on paper than they were before the changes. However, changes in the economy and the financial industry and other changes in law counterbalance the favorable tax law changes and make it uncertain whether lease transactions will be used to finance new wind facilities.

1 Internal Revenue Code ("IRC") § 45(a).
2 Notice 2009-40, 2009-19 IRB 931. The credit is set at 1.5 cents, which is indexed for inflation and adjusted downward if the reference price for electricity produced from wind exceeds 8 cents, as adjusted for inflation. See IRC § 45(a) and (b). The reference price for wind for 2009 did not exceed 8 cents multiplied by the inflation factor.
3 IRC § 45(a)(2)(A)(ii).
4 IRC § 38. As a general rule business tax credits may reduce regular income tax to no less than the greater of (1) 25 percent of the taxpayer's regular tax liability as exceeds $25,000, or (2) the taxpayer's tentative minimum tax. The tentative minimum tax limitation does not apply to section 45 credits for electricity production during the four-year period beginning on the date the facility was placed in service.

5 IRC § 45(b).


7 IRC § 48(a)(5) as added by American Recovery and Reinvestment Tax Act (ARRTA) § 1102(a). The procedures for electricity the energy credit in lieu of the production credit are set forth in Notice 2009-52, 2009-25 IRB 1094.

8 IRC § 45(a)(5)(D).


10 IRC § 48(a)(2)(A)(i)(IV) as added by P.L. 110-143, § 104(c) Div B.

11 IRC § 45(c)(4).

12 IRC § 50(d)(5).

13 IRC § 50(d)(4).

14 ARRTA § 1603(a). If construction on qualified small wind energy property began in 2009 or 2010, the property would need to be placed in service before 2017 to be eligible for the grant.


17 IRC § 50(c).

18 IRC § 168(c)(3)(B)(vi).


21 Section 4.01(2) of Rev. Proc. 2001-28.

22 Section 4.01(3) of Rev. Proc. 2001-28.

23 Id.


25 Id.


29 Section 4.06(1) of Rev. Proc. 2001-28.

30 Section 4.06(2) of Rev. Proc. 2001-28.
31 Sacks v. Commissioner, 69 F.3d 982, 76 AFTR 2d 95-7138 (9th Cir. 1995).


34 Treasury guidelines for the grant program do not require recapture of the credit if the property is transferred to another qualified party. Guidance Document, at 18. Treasury guidelines also permit a lessor to pass through to the lessee the right to claim the grant. Guidance Document, at 17.

35 Section 5.02(01) of Rev. Proc. 2001-28.

36 Note that the guidelines require the residual value of property to be reduced by such costs for purposes of determining whether the 20 percent residual value test is satisfied.

37 See Example (b) in section 5.02(2) of Rev. Proc. 2001-28.

38 The passive loss rules of IRC § 469 and the at-risk rules of IRC §§ 49 and 465 usually keep individuals away from leveraged leases of equipment.

39 IRC § 50(a).

40 Property used outside of the United States is not eligible of the credit IRC § 50(b)(1).

41 IRC § 50(b)(4) and (5).

42 Id.

43 A partnership with a governmental unit or exempt organization as a partner generally is not eligible for the grant. The taxable partners of a partnership with tax-exempt members or government entities as member may be able to claim the energy investment tax credit. IRC §§ 50(b)(4)(D) and (E) and 168(h).

44 H.R. 3962, The Affordable Health Care for America as passed by the House of Representatives on Nov. 7, 2009, included an "economic substance" provision that would not automatically disregard a transaction if it were not profitable on a pre-tax basis. Under H.R. 3962, for any transaction to which the economic substance doctrine is relevant, the transaction would be treated as having economic substance only if (1) the transaction changes in a meaningful way (apart from Federal income tax effects) the taxpayer's economic position, and (2) the taxpayer has a substantial purpose (apart from federal income tax effects) for entering into the transaction. See Staff of the Joint Committee on Taxation, "Technical Explanation of the Revenue Provisions Contained in H.R. 3962, the 'Affordable Heath Care for America Act,' as amended," JCX 47-09 (Nov. 5, 2009) at 89-90. The Joint Committee reports states, "Leasing transactions, like all other types of transactions, will continue to be analyzed in light of the all the facts and circumstances." JCX 47-09 at 90-91. It is difficult to determine what this language really means or how it will be interpreted by the IRS or the courts.