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September 13, 2016

By Email

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549

Re: Hannon Armstrong Sustainable Infrastructure Capital, Inc.

Dear Mr. Scheidt:

We are writing on behalf of Hannon Armstrong Sustainable Infrastructure Capital, Inc. ("**Hannon Armstrong**") to request your assurance that the staff of the Division of Investment Management (the "**Staff**") will not recommend that the Securities and Exchange Commission (the "**Commission**" or "**SEC**") take enforcement action against certain of Hannon Armstrong's majority-owned subsidiaries described below (each, an "**HA Subsidiary**") under Section 7 of the Investment Company Act of 1940, as amended ("**1940 Act**"), if each of the HA Subsidiaries, in reliance on Section 3(c)(5)(A) and/or (B) of the 1940 Act, operates in a manner described below without registering with the Commission as an investment company under the 1940 Act. None of the HA Subsidiaries should be required to register as investment companies because each of the HA Subsidiaries is primarily engaged in purchasing and otherwise acquiring notes representing part or all of the sales price of merchandise and services, and/or making loans to manufacturers, wholesalers, and retailers of specified merchandise and services.[1] As a result, each of the HA Subsidiaries falls within the exception from the definition of an investment company provided by Section 3(c)(5)(A) and/or Section 3(c)(5)(B) of the 1940 Act. More specifically, and as discussed more fully below, each of the HA Subsidiaries satisfies the requirements of Section 3(c)(5)(A) because it is primarily engaged in the non-investment company business of purchasing or otherwise acquiring notes obligating others to make

[1] Hannon Armstrong itself typically relies on Section 3(a)(1)(C) of the 1940 Act or Rule 3a-1 thereunder. We are not asking for interpretive guidance or no-action relief with respect to the investment company status of Hannon Armstrong under Section 3(a)(1)(C) or Rule 3a-1.

AUSTIN BEIJING BRUSSELS HONG KONG LOS ANGELES NEW YORK PALO ALTO SAN DIEGO
SAN FRANCISCO SEATTLE SHANGHAI WASHINGTON, DC WILMINGTON, DE

payments representing all or part of the sales price of energy and related services, and/or satisfies the requirements of Section 3(c)(5)(B) because it is primarily engaged in the non-investment company business of making loans to manufacturers, wholesalers and retailers of specified energy and services.

BACKGROUND

Hannon Armstrong is a publicly-traded company engaged in the business of providing debt and equity financing to participants in the energy efficiency and renewable energy sector. The financings are in the form of preferred or senior-level capital provided to established renewable energy sponsors and high credit-quality obligors for assets that generate long-term, recurring, and predictable cash flows. Hannon Armstrong has numerous subsidiaries, including the HA Subsidiaries, and may create new subsidiaries in the future, including new HA Subsidiaries. The HA Subsidiaries are primarily engaged in making loans and acquiring notes evidencing loans ("**Notes**") to project companies ("**ProjectCos**") or managing members of ProjectCos ("**Managing Members**"), which are owned by renewable energy companies, including solar energy and wind energy companies. ProjectCos are generally structured as tax equity partnerships in order to allow a renewable energy company and a tax equity investor to take advantage of renewable energy tax credits.

As described in more detail below, a renewable energy company or an affiliated ProjectCo directly enters into power purchase agreements ("**PPAs**") and/or lease arrangements with residential, commercial, or utility customers. Where the renewable energy company is the contracting party, it usually assigns the PPAs or leases to one or more ProjectCos. In either case, the ProjectCos generally are the entities within a renewable energy company structure that hold the PPAs and the leases. As noted above, an HA Subsidiary makes loans to and/or acquires Notes from a ProjectCo or the Managing Member of a ProjectCo. The Notes held by an HA Subsidiary are repaid solely through payments received on the PPAs or leases by the ProjectCo, except in limited cases described below, with payments dependent on customer energy usage (as described below).

1. Background on the Renewable Energy Industry

Renewable energy companies are companies that develop, construct, and maintain renewable power systems and infrastructure as a source of generating energy. Renewable energy companies may provide energy and related services ("**Related Services**")[2] directly to end users, such as residences and businesses, or to power companies, such as public utilities, which deliver energy to their own end users. If, for example, a solar energy company provides energy directly to end users, it will typically install solar panels or similar equipment onto the customer's home

[2] Related Services required to maintain a renewable energy project (such as maintenance) are provided by an operating entity of the renewable energy company rather than by the ProjectCo or the Managing Member.

or commercial building. If a solar energy company provides energy to a power company, it will build a solar power plant or similar infrastructure, which generates solar-based energy and delivers it to the customer power company for distribution to the power company's own customers. In each case, the solar energy company enters into a lease or PPA with the customer. The lease or PPA provides the terms by which the solar energy company will deliver energy to the customer and the customer will pay the solar energy company. As noted above, the renewable energy company generally will assign PPAs and leases to one or more ProjectCos to take advantage of renewable energy tax credits.

ProjectCos generally hold only PPAs and/or leases, and sometimes may also hold renewable energy equipment and/or property. Each ProjectCo has its own Managing Member. Each Managing Member is a special purpose entity established by the renewable energy company to act as managing member to a specific ProjectCo.

2. The Leases and PPAs

The purpose of either a lease or PPA is to provide for the purchase of energy and Related Services from the renewable energy company. Renewable energy companies typically choose which type of agreement to use based on regulatory considerations and/or customer preferences. For example, depending on the jurisdiction of the end user to which a solar energy company provides energy, the solar energy company may be subject to regulatory constraints that prohibit any person other than a utility company from using a PPA. In such cases, the solar energy company uses a lease rather than a PPA. In addition, in jurisdictions that permit a solar energy company to use either a lease or a PPA, in cases involving smaller solar panel installations (i.e., residential or commercial projects), a solar energy company may provide the option for customers to choose between leases, which involve fixed monthly payments, and PPAs, which involve variable payments based on energy use. For larger infrastructure, utility-scale projects that provide energy to utilities at a wholesale level, a solar energy company typically will use a PPA. In general, from the perspective of a renewable energy company, leases and PPAs are economically equivalent and largely can be used interchangeably.

a. The Leases

Under a lease, a solar energy company leases equipment such as solar panels to a customer. The solar panels generate energy for the customer. The leases involve fixed monthly payments by the customer, who is guaranteed a certain amount of electrical energy over the term of the lease. In most cases, at the end of each year, the solar energy company refunds the customer to compensate for energy production below the guarantee, but the customer does not have to make an additional payment for any amounts exceeding the guarantee. The solar energy company credits the customer for any excess energy produced by the panels, and uses those credits to cover any future shortfalls. Thus, although payments on the lease are flat each month, the size of the aggregate payments made by the customer is ultimately variable and dependent on energy usage and energy production by the solar panels.

Under a lease, the solar energy company is responsible for providing a variety of Related Services. The solar energy company is obligated to design, permit, construct, install, test and activate the equipment covered by the lease. The solar energy company also connects the equipment to the electrical grid, tests operations and trains the customer on how to use the equipment. The solar energy company maintains the equipment and provides ongoing access to the power grid. The customer is responsible for keeping the equipment clean and unobstructed by providing access for maintenance and repairs, and notifying the solar energy company if the equipment is not working properly.

Solar power customers do not enter into the leases for the purpose of reselling energy or purchasing the solar panels. The purpose of a lease is to provide energy for the customer's own use. Leases do, however, frequently include a purchase option at the end of the lease term equal to fair market value of the leased equipment.

b. The PPAs

Under a PPA, a renewable energy company builds or installs renewable energy infrastructure in order to provide energy to its customers. For example, if the customer is an end user, a solar energy company installs infrastructure such as solar panels on the customer's home or commercial building. The solar panels provide energy to the customer. The solar energy company guarantees a minimum amount of energy will be produced by the solar panels and is obligated to maintain and repair the solar panels. The customer pays for the energy produced by the panels on an ongoing basis. At the end of the term, the customer has the option to have the panels removed, extend the PPA term, or purchase the panels at fair market value. Thus, the PPAs operate in much the same way as the leases.

In cases where the customer is a power company, the solar energy company guarantees that the solar array will provide a specified minimum amount of energy over the course of the PPA. The solar energy company must deliver the energy to a specific power grid interconnection point and in return, the customer power company agrees to make a stream of ongoing variable payments to the solar energy company based on the amount of energy delivered at a certain price per megawatt hour.

The solar energy company must also provide a variety of Related Services necessary for delivering the energy, and pay all associated expenses, including those associated with installation, maintenance and repair of the infrastructure. During the construction period, the solar energy company will, among other things, design and construct the infrastructure, perform all required studies (such as environmental impact studies), and obtain any necessary regulatory approvals. After the construction period, the solar energy company must, among other things, obtain regulatory certifications and verifications and coordinate with independent service operators or similar entities that operate the applicable energy grid(s) associated with delivering the energy produced under the PPA.

The customer power company has no rights to the infrastructure at any time during the term of the contract or after the contract terminates. The customer power company is responsible for all costs associated with transmitting the energy from the delivery point to its own customers.

Although the PPAs provide for variable payments based on the amount of energy delivered by a project, rather than fixed monthly payments, they are otherwise economically indistinguishable from a lease. As under the leases, the goal is to provide energy and Related Services in exchange for customer payments.

We note that certain HA Subsidiaries also may acquire Notes from wind energy companies that are repaid through the proceeds of PPAs associated with wind energy generation projects. These PPAs function in the same fashion as the solar PPAs described above.

3. The Notes

The HA Subsidiaries are each engaged in making loans evidenced by Notes to ProjectCos or their Managing Members and/or purchasing such Notes. Whether a Note is acquired directly from a ProjectCo or from its Managing Member depends on whether the tax equity investor in a ProjectCo requires leverage limitations at the ProjectCo-level. Where such limitations exist, an HA Subsidiary generally would acquire a Note from the ProjectCo's Managing Member rather than from the ProjectCo directly. In either case, in return for the purchase price of the Notes, a ProjectCo (or its Managing Member) makes payments to the HA Subsidiary from cash flows based on customer payments on specific leases and/or PPAs. This mechanism allows the ProjectCo to monetize future cash flows from leases and/or PPAs in order to fund the current activities of the relevant renewable energy company. Building renewable power infrastructure imposes significant up-front costs on renewable energy companies, which, based on the structure of the leases and PPAs, receive payments only after expending funds to build and install the infrastructure. To raise financing for these activities, renewable energy companies have their ProjectCos (and their Managing Members) issue instruments like the Notes.

a. Acquisition of the Notes by HA Subsidiaries

An HA Subsidiary typically acquires the Notes by originating loans directly to a ProjectCo or its Managing Member, or by purchasing Notes representing interests in loans to a ProjectCo or its Managing Member.

i. Loans Originated to a ProjectCo or its Managing Member

In cases where an HA Subsidiary originates a loan to a ProjectCo or its Managing Member, it provides funds in exchange for a Note issued by the ProjectCo or its Managing Member. The Note gives the HA Subsidiary the right to payments based on the applicable renewable energy company's customers' energy usage payments. Each loan is tied to a particular set of PPAs or leases described in the documentation for the loan. For example, language in a typical loan agreement will state that the obligor will "deposit or cause to be deposited into [an account used for payments on the loan] all Project Revenues," with Project

Revenues defined as "distributions from Project Company to Borrower." After a loan is funded by an HA Subsidiary, payments on the applicable leases and PPAs are directed by the applicable ProjectCo to the HA Subsidiary according to the terms of the loan agreement. This is the flow of funds even when the Managing Member is the obligor on a loan.

ii. Notes Representing Interests in a ProjectCo or its Managing Member Purchased from Third Parties

In cases where an HA Subsidiary purchases a Note from a third party, the HA Subsidiary provides funds to the owner of the Note in exchange for the Note purchased. As with loans originated by the HA Subsidiary, the Note is tied to a particular set of PPAs or leases. The Note and/or associated purchase agreement provides the HA Subsidiary the right to payments based solely on the applicable renewable energy company's customers' energy usage payments to the relevant ProjectCo. An example of language in a Note purchase agreement is as follows: "All payments of interest [on the Notes] shall be payable solely from the proceeds of payments made to [ProjectCo] by [one or more specified power purchasers] based on its obligations under the PPA." An example of language in a Note is as follows: "All payments of interest on this Note ... shall be payable solely from the proceeds of payments made to [ProjectCo] by [the specified power purchaser(s)]...based on its obligation under the PPA."

b. All of the Notes Provide the Right to Payments by Renewable Energy Companies' Customers

In each of the scenarios described above, the Notes held by an HA Subsidiary are repaid solely from payments a ProjectCo receives on a specified set of leases or PPAs (except in the cases of default discussed below). In cases where the HA Subsidiary acquires a Note from a ProjectCo, customer payments flow from customers to a distribution account at the ProjectCo which is controlled by a depository for the benefit of the HA Subsidiary. Please see the flow of payments diagram for Notes that are acquired from a ProjectCo, which is attached as Exhibit 1. In cases where the HA Subsidiary acquires a Note from a ProjectCo's Managing Member, customer payments flow from customers to the ProjectCo and then to a distribution account at the Managing Member which is controlled by a depository for the benefit of the HA Subsidiary. Please see the flow of payments diagram for Notes that are acquired from a Managing Member, which is attached as Exhibit 2.[3] Because returns on the Notes depend on customer payments on the leases and PPAs, in deciding whether to acquire the Notes, an HA Subsidiary considers factors such as the amount of energy anticipated to be delivered under a PPA or lease, the age of the lease or PPA, the status of construction and the quality of the applicable infrastructure or equipment, probability of default by a customer, and other factors. These factors help the HA Subsidiary determine the potential future cash flows that may be generated to support payments on the Note.

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[3] The two exhibits depict loans that are originated by an HA Subsidiary rather than Notes acquired from a third party. However, the flow of funds shown in the exhibits is substantially the same for Notes that are acquired by an HA Subsidiary from a third party.

c. Mandatory Prepayment or Default Payments

The only instances in which payments on the Notes are not made solely from customer payments involve cases of mandatory prepayments or default. Both types of provisions are common protections in renewable energy financing agreements, and without them an HA Subsidiary would have difficulty financing its transactions.[4] Mandatory prepayments are primarily triggered by unforeseen and relatively uncommon events such as casualty insurance payments or condemnation recoveries. In default, an HA Subsidiary is typically provided the right to exercise voting and other ownership rights over a broad range of assets of the applicable renewable energy company. Such assets may include the entity's rights under various agreements, insurance, equity interests and other securities, hard assets, and others.

4. Additional HA Subsidiary Information

Each HA Subsidiary currently holds at least 80 percent of the value of its total assets in the Notes and other notes that qualify as Section 3(c)(5)(A) and/or Section 3(c)(5)(B) qualifying assets.[5] In addition, at least 80 percent of the net income after taxes received by each HA Subsidiary for the past four fiscal quarters combined was derived from the Notes and other notes that qualify as Section 3(c)(5)(A) and/or Section 3(c)(5)(B) qualifying assets.

None of the HA Subsidiaries have issued, and none now issues or proposes to issue, redeemable securities, face-amount certificates of the installment type, or periodic payment plan certificates.

ANALYSIS

Section 3(c)(5) of the 1940 Act excludes from the definition of investment company, in relevant part,

> Any person who is not engaged in the business of issuing redeemable securities, face-amount certificates of the installment type or periodic payment plan certificates, and who is primarily engaged in one or more of the following

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[4] It is our understanding that mandatory prepayment and default payment provisions also are common in factoring agreements. *See, e.g.,* Factoring Agreement between CIT Commercial Services, Inc. and American Telecom Services, Inc., dated July 6, 2005, at <http://www.sec.gov/Archives/edgar/data/1336467/000119312505245096/dex109.htm>. Factoring agreements are relevant to a determination of the scope of Section 3(c)(5)(A), because Section 3(c)(5)(A) was originally intended to exclude from the definition of "investment company" factoring and similar business.

[5] We are not requesting the Staff's views as to whether the notes held by the HA Subsidiaries – other than the Notes – are qualifying assets for purposes of Section 3(c)(5)(A) or Section 3(c)(5)(B).

> businesses: (A) Purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations representing part or all of the sales price of merchandise, insurance, and services; (B) making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services . . .

As discussed below, each HA Subsidiary meets the requirements of Section 3(c)(5)(A) and/or Section 3(c)(5)(B), both under the language of the statute and under the staff's previous interpretive and no-action positions. Each HA Subsidiary meets the requirements of Section 3(c)(5)(A) because it is (1) primarily engaged (2) in purchasing or otherwise acquiring notes (3) representing part or all of the sales price of merchandise and/or services, and/or meets the requirements of Section 3(c)(5)(B) because it is (1) primarily engaged (2) in making loans (3) to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, (4) specified merchandise and/or services.

Although Section 3(c)(5)(A), which requires that a company acquire notes related to the sales price of merchandise and services, differs somewhat from Section 3(c)(5)(B), which contemplates loans made directly to buyers and sellers of merchandise and services, the Staff has generally interpreted Section 3(c)(5)(A) and (B) in a similar fashion.[6] Thus, although some of the guidance cited below formally applies to only one of these two 1940 Act provisions, we treat guidance under each provision as generally applicable to both.

1. Section 3(c)(5)(A)

Each HA Subsidiary meets the requirements of Section 3(c)(5)(A) because it is (1) primarily engaged (2) in purchasing or otherwise acquiring notes (3) representing part or all of the sales price of merchandise and/or services.

(a) Primarily Engaged

Section 3(c)(5)(A) requires an issuer to be "primarily engaged" in purchasing or otherwise acquiring notes, drafts, acceptances, open accounts receivable, and other obligations that represent part or all of the sales price of merchandise, insurance, and services. Generally, the Staff has provided no-action assurances under Section 3(c)(5)(A) where, among other things, an issuer establishes that at least 55 percent of the value of its total assets is invested in notes, open accounts receivable or other obligations representing part or all of the sales price of merchandise and services.[7] Each of the HA Subsidiaries satisfies the "primarily engaged"

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[6] *See New England Education Loan Marketing Corp.*, SEC No-Action Letter (May 22, 1998) ("**Nellie Mae**") (providing relief under Section 3(c)(5)(A) and (B) without distinguishing between them).

[7] *See, e.g., B.C. Ziegler and Company*, SEC No-Action Letter (pub. Avail. Sept 11, 1991) (noting that "[t]he staff has granted no-action relief under Section 3(c)(5)(A) where a company invested

requirement because the Notes and other notes that qualify as Section 3(c)(5)(A) and/or Section 3(c)(5)(B) qualifying assets currently make up at least 80 percent of the value of each HA Subsidiary's total assets.

(b) Acquiring Notes

Section 3(c)(5)(A) requires that a company purchase or otherwise acquire, among other instruments, notes. The HA Subsidiaries acquire the Notes either by originating associated loans or purchasing the Notes.[8] Thus, each HA Subsidiary satisfies the requirement of Section 3(c)(5)(A) that it purchase or otherwise acquire notes or other obligations.

(c) Representing Part or All of the Sales Price of Merchandise and Services

To fall within the Section 3(c)(5)(A) exception, the Notes acquired by the HA Subsidiaries must represent "part or all of the sales price of merchandise [and] services." Because the PPAs and leases provide for customers to pay amounts tied to the receipt of energy and Related Services, and are otherwise primarily structured to facilitate the provision of energy and Related Services, both the PPAs and leases are best understood as contracts for the purchase and sale of energy and services. Because the Notes held by an HA Subsidiary entitle it to payments based on the payments for energy and Related Services under the PPAs and leases, the Notes represent part or all of the sales price of merchandise and services for purposes of Section 3(c)(5)(A). Consistent with existing guidance from the Staff, there is a direct nexus between an HA Subsidiary's Notes and the sales price of the energy and Related Services purchased through the PPAs and the leases.

(i) The PPAs and Leases Provide for the Purchase of Merchandise and/or Services

Both the leases and PPAs are contracts for the purchase and sale of merchandise and services, because (i) energy should qualify as "merchandise" or "services" and Related Services should qualify as "services" under Section 3(c)(5)(A), and (ii) the PPAs and the leases are

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at least 55% of its assets in notes, open accounts receivable or other obligations representing part or all of the sales price of merchandise") ("**Ziegler**"); *Econo Lodges of America, Inc.*, SEC No-Action Letter (pub. Avail. Dec. 22, 1989) ("**Econo Lodges**").

[8] According to the Merriam-Webster Dictionary, the word "acquire" means "to get (something)," "to come to own (something)," or "to come to have (something)." When an HA Subsidiary originates a loan, it documents that loan through a Note that is issued by the applicable ProjectCo or Managing Member. The HA Subsidiary receives the Note in exchange for the funding it provides to the ProjectCo or Managing Member. Through this process, the HA Subsidiary "comes to own" the Note. As a result, we believe that loan origination is a form of "acquiring notes" consistent with the plain text of Section 3(c)(5)(A).

designed to ensure that the customer of a renewable energy company receives energy in return for payments linked to the amount of energy delivered.

(1) Energy is Merchandise or Services, and Related Services Are Services

Energy and Related Services provided by a renewable energy company should qualify as "merchandise and services" for purposes of Section 3(c)(5)(A). Energy itself may be either merchandise or services. According to the Merriam-Webster dictionary, the term "merchandise" means, among other things, "commodities or goods that are bought and sold in business," and the term "service" means, among other things, a "facility supplying some public demand." Energy may be viewed as merchandise, in that it is a commodity that may be purchased or sold and is in fact purchased and sold by renewable energy companies, or as a service, in that it supplies the public demand of providing the energy necessary for a wide range of business, residential and personal activities by end users.

The position that energy may be treated as merchandise or services is supported by Staff guidance under Section 3(c)(5)(B). In a no-action letter to *National Rural Utilities Cooperative Finance Corporation* ("**National Rural Utilities**"),[9] the Staff provided relief under Section 3(c)(5)(B) to a cooperative that made loans to member rural electric systems engaged in generating, transmitting and distributing electricity, a type of energy. The electricity was delivered to local distribution systems, which in turn sold the power to retail consumers. Thus, the members of the cooperative, as sellers of energy, were treated as sellers of "merchandise and services."[10] Although it is not clear from National Rural Utilities whether the energy was treated as merchandise, services, or both, because we do not believe that this affects our analysis, we do not address the question in this letter. In any case, just as in National Rural Utilities, in the case of the HA Subsidiaries, the energy sold by renewable energy companies to customers should be treated as merchandise and/or services.[11]

In addition, the Related Services should qualify as "services" under Section 3(c)(5)(A). Under the leases, a renewable energy company is responsible for Related Services such as

[9] SEC No-Action Letter (Nov. 15, 1974).

[10] *See also Colorado-Ute Financial Services Corporation* ("**Colorado-Ute**"), SEC No-Action Letter (May 5, 1986) (granting relief under Section 3(c)(5)(B) to a company that provided loans to an electricity cooperative and its members, themselves electric distribution cooperative associations, where the loans funded the purchase of electric generating, transmission and distribution facilities, equipment and machinery, which were treated as merchandise).

[11] We recognize that both National Rural Utilities and Colorado-Ute were decided under Section 3(c)(5)(B) and not Section 3(c)(5)(A). However, as discussed above, the Staff has generally interpreted Section 3(c)(5)(A) and (B) in a similar fashion and has not indicated that the purchase and sale of a particular type of merchandise or services would not be equally eligible for coverage under Section 3(c)(5)(A) and Section 3(c)(5)(B).

designing, permitting, constructing, installing, testing and activating the equipment covered by the lease; connecting the equipment to and providing ongoing access to the electrical grid; testing operations and training the customer on how to use the equipment; and maintaining the equipment. Under the PPAs, the Related Services involve designing and constructing the infrastructure; performing all required studies (such as environmental impact studies); obtaining any necessary regulatory approvals, certifications and verifications; and coordinating with independent service operators or similar entities that operate the applicable energy grid(s) associated with delivering the energy produced under the PPA. Each of these is a service purchased by a customer under the terms of a contract, whether a PPA or a lease, with the renewable energy company. The Related Services are also similar to the services described in National Rural Utilities, in that they involve generating, transmitting and distributing energy. Therefore, the Related Services should be treated as "services" for purposes of Section 3(c)(5)(A).

(2) The PPAs and Leases Are Contracts for the Purchase and Sale of Energy and Related Services

The PPAs and leases are contracts for the purchase and sale of energy and Related Services. In the case of the PPAs, renewable energy companies contract with customers (directly or through ProjectCos) to provide energy by building or installing equipment and providing services such as, depending on the nature of the project, designing and constructing the equipment; performing required studies and obtaining regulatory approvals, certifications and verifications; coordinating with independent service operators and otherwise providing access to the electrical grid; and maintaining the equipment over time. The renewable energy companies are ultimately responsible for ensuring that energy is delivered to customers at specified levels over the course of the contract. Customers of the renewable energy companies provide payments based on the amount of energy produced. Customers have no rights to the infrastructure developed to produce the energy. Based on these facts, the PPAs are contracts for the purchase and sale of energy and Related Services.

The leases operate in functionally the same way. As with the PPAs, under the leases a renewable energy company is responsible for designing, constructing, and installing equipment; obtaining necessary permits; providing access to the power grid; and maintaining the applicable equipment. The purpose of the lease is to provide energy to customers, who make payments in return for a guaranteed level of energy production. In most cases, at the end of each year, the customer is refunded for any deficit in energy or credited for any excess energy produced by the panels. Any credits are used to pay for any future shortfalls. The customer is responsible for keeping the equipment clean and unobstructed, providing access for maintenance and repairs, and notifying the renewable energy company if equipment is not working properly, all of which are necessary for the renewable energy company to provide its customers energy by means of the infrastructure. Thus, the leases are also best understood as contracts for the sale and purchase of energy and Related Services, and not as leases of equipment.

As discussed above, the leases typically provide an option to purchase the equipment at fair market value upon termination. We recognize that the Staff has provided guidance in the

Ziegler no-action letter suggesting that leases with the option to purchase are only qualifying assets for purposes of Section 3(c)(5)(A) if a portion of each payment on the lease represents part of the purchase price of the leased equipment, which suggests that they are finance leases rather than "true" leases of equipment. In Ziegler, the fact that a lessee acquired title to leased equipment for a nominal price at the end of a lease suggested that each lease payment was part of the overall purchase price of the equipment.

We do not believe this precedent should apply to the HA Subsidiaries. Unlike in Ziegler, the equipment that is the subject of leases with renewable energy companies is not the merchandise that a customer ultimately intends to purchase. Instead, the merchandise (or services) that customers of the renewable energy companies intend to purchase is energy. For example, in the case of solar energy companies, the fact that the leases provide for the purchase of the solar equipment at the end of the lease at fair market value is incidental to the purchase of energy. In fact, in the case of the HA Subsidiaries, the fact that payments on the leases are not credited toward the purchase price of the equipment (but are refunded if insufficient amounts of energy are produced) is consistent with the fact that payments on the lease are tied to the production of energy rather than rental or purchase of the equipment. Because the customer is paying for energy, and not equipment, there is no reason that payments would be applied to a future purchase of the equipment. In other words, rather than being a true lease of equipment with the option to buy, the leases operate in the same way as the PPAs and are, for all intents and purposes, contracts for the sale and purchase of energy and Related Services. As a result, renewable energy company leases are not similar to the type of lease arrangement at issue in Ziegler, because they are really energy sales contracts.

We note that the solar energy companies that utilize the lease structure frequently do so due to regulations that allow only local utilities to sell energy to retail customers using a PPA. From the point of view of the HA Subsidiaries, leases and PPAs in this context are simply two different methods to facilitate the purchase and sale of energy.

(ii) There Is a Direct Nexus Between the Sales Price of Energy and Related Services and Payments on the Notes

The Staff has indicated that the single most important factor in determining whether an issuer may rely on both Section 3(c)(5)(A) and Section 3(c)(5)(B) is the strength of the connection between the obligations held by the issuer and the specific merchandise, insurance, or services purchased and sold.[12] Because payments on the Notes flow from payments made

[12] *See* Nellie Mae. Nellie Mae makes clear that to fall within the exemptions provided by Section 3(c)(5)(A) and Section 3(c)(5)(B), it is the direct nexus between a note or other obligation and the sale of specific merchandise, insurance, or services that is required, not the existence of so-called "sales financing." Specifically, the Staff stated in Nellie Mae that "[t]he term 'sales financing activity' ... is not contained in Section 3(c)(5), and appears to be a term used by the staff to describe the requirement in Sections 3(c)(5)(A) and (B) that a note must relate to a sale of specified merchandise, insurance or

by customers for the purchase of energy under the PPAs and leases, payments on the Notes have a direct nexus with payments on the PPAs and leases.

In a no-action letter issued by the Staff under Section 3(c)(5)(A) to *Royalty Pharma* ("**Royalty Pharma**"),[13] the issuer was primarily engaged in the business of purchasing royalty interests obligating others to pay royalties to Royalty Pharma representing part of the sales price of specific biopharmaceutical products. Royalty Pharma would purchase the royalty interests by purchasing a patent and interests in the associated exclusive license agreement, interests in a license agreement (without the patent), or the royalties themselves (without the license agreement or patent). The royalty interests purchased provided Royalty Pharma the right to receive payments based on the sales of the underlying products, in exchange for a lump sum paid by Royalty Pharma. After the transaction, licensees would either make payments directly to Royalty Pharma or to the original licensor, who was in turn obligated to remit all or a portion to Royalty Pharma. The Staff provided relief in part based on the issuer's representation that the royalty interests entitled Royalty Pharma to collect royalty receivables directly based on the sales price of specific biopharmaceutical products that used intellectual property covered by specific license agreements.

The HA Subsidiaries are operating in a way that is analogous to the Staff's guidance in Royalty Pharma. As in Royalty Pharma, each of the HA Subsidiaries satisfies the direct nexus requirement, because there is a direct link between each of an HA Subsidiary's Notes and the sale of energy. The Notes acquired by an HA Subsidiary are similar to the interests purchased by Royalty Pharma, because they provide the HA Subsidiary the right to receive payments based on the sales of energy and Related Services. Each Note specifies that payments will come from payments on a particular PPA or set of leases or PPAs.

In addition, the flow of funds related to the Notes held by an HA Subsidiary mirrors that in Royalty Pharma. Royalty Pharma provided funds to a licensee that sold its product to customers. Similarly, an HA Subsidiary provides funds to a ProjectCo or its Managing Member associated with the sale of energy to customers of the renewable energy company affiliated with the ProjectCo and Managing Member. The flow of funds from customers to an HA Subsidiary

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services." The Staff's pronouncement in Nellie Mae superseded its apparent previous position that Section 3(c)(5)(A) and Section 3(c)(5)(B) were limited to arrangements involving sales financing. Several early Section 3(c)(5)(A) and Section 3(c)(5)(B) no-action letters had focused on the concept of "sales financing" as integral to a company's reliance on Section 3(c)(5)(A) and Section 3(c)(5)(B). For example, in both *Raymond James and Assoc., Inc.*, SEC No-Action Letter (pub. avail. July 14, 1988), which is discussed below and involved Section 3(c)(5)(A), and *World Evangelical Development, Ltd.*, SEC No-Action Letter (Apr. 5, 1979), which involved both Section 3(c)(5)(A) and Section 3(c)(5)(B), the Staff did not grant no-action relief, stating as one reason that the sales financing "requirement" was not satisfied. In Nellie Mae, the Staff expressly rejected the position that an issuer had to be engaged in "sales financing" to rely on Section 3(c)(5)(A) or Section 3(c)(5)(B).

[13] SEC No-Action Letter (Aug. 13, 2010).

is also similar to that in Royalty Pharma. In Royalty Pharma, customers paid the licensee for a product, and the licensee passed along those payments either directly to Royalty Pharma or first to the original licensor, who would pass along the payments to Royalty Pharma. In the case of the HA Subsidiaries, funds flow from customers who make payments on leases or PPAs to the ProjectCo that holds the leases or PPAs, and those payments flow from the ProjectCo to the HA Subsidiary, either directly or through the ProjectCo's Managing Member.

Additional guidance under Section 3(c)(5)(A) and Section 3(c)(5)(B) also indicates that each of the HA Subsidiaries meets the "direct nexus" requirement. In the Nellie Mae no-action letter, provided under both Section 3(c)(5)(A) and Section 3(c)(5)(B), the issuer was in the business of originating and purchasing federal student loans. Each student loan related to an educational institution's sale of educational services to a particular student and was made to the student in an amount limited by the student's unmet financial need in paying for educational services. The amount of a loan therefore was less than or equal to the sales price of educational services. The Staff provided the requested relief in part because the loans related to the sale of specific educational services.

As in Nellie Mae, each HA Subsidiary originates and purchases loans, each of which relates to a renewable energy company's sale of energy and Related Services to particular customers through the PPAs and leases. The link between the Notes and the sales of the energy and Related Services is shown by the fact that payments to the HA Subsidiary are based on the amount of energy generated under the lease or PPA. Thus, just as the cap on the amount that could be funded by a loan was evidence of its link to the purchase of educational services in Nellie Mae, the structure of payments on the Notes by renewable energy companies to an HA Subsidiary shows that the Notes have a direct nexus with the sale of energy and Related Services.

Similarly, in separate no-action letters issued to *Econo Lodges of America, Inc.* ("**Econo Lodges**")[14] and *Days Inn of America, Inc.* ("**Days Inn**"),[15] the Staff treated franchise fee receivables stemming from the obligation of franchisees to pay for services, including the right to use trademarks and other integrated services, as obligations representing part of the sales price of those services within the meaning of Section 3(c)(5)(A). The obligations ultimately arose from franchisees' contracts to purchase a package of services made available to them by a hotel chain, as shown by the flow of funds from franchisees making payments on those contracts to the ultimate holder of the receivables associated with the contracts. As in the Econo Lodges and Days Inn letters, the obligations of ProjectCos or their Managing Members to pay HA Subsidiaries are linked to the sales price of services (and/or merchandise), in that the obligations arise from payments on contracts for the sale of energy and Related Services to renewable energy customers from the relevant renewable energy companies. As discussed above, the Notes held by HA Subsidiaries and/or related documentation explicitly provides that payments will

[14] SEC No-Action Letter (Dec. 22, 1989).

[15] SEC No-Action Letter (Dec. 30, 1988).

come from payments on the applicable PPAs or leases. Thus, the Notes involve a flow of funds that is directly traceable from renewable energy customers to HA Subsidiaries.

In contrast, in *Raymond James and Associates, Inc.* ("**Raymond James**"),[16] a letter that pre-dates Royalty Pharma, Nellie Mae, Econo Lodges and Days Inn, the issuer proposed to purchase rights that would require equipment owners to remit a portion of sales proceeds upon the sale of equipment after the expiration of a lease. The sale could be made either to the lessee or some other purchaser and was separate from the lease itself. In other words, the rights to be purchased by the issuer related to a sales agreement to be entered into at an unspecified point in the future with a purchaser not known at the time. The issuer would not itself lend money or otherwise fund the lease or the future sales agreement, and the rights to be purchased by the issuer did not in any other way give rise to or facilitate the eventual sale of the equipment. As a result, the Staff determined that the relationship between the obligation of the issuer to make payments and the ultimate sale of the equipment did not indicate that the obligation represented part of the sales price of the equipment.

The obligation of ProjectCos or Managing Members to make payments under the Notes owned by the HA Subsidiaries is much more closely tied to the sale of energy and Related Services than in Raymond James. When an HA Subsidiary originates a loan or purchases a Note, it provides funds related to particular PPAs or leases,[17] not an unknown set of future contracts. The energy and services to be purchased are provided to specific customers who purchase specific services and energy for a specific use. Customers pay for those services over an extended period of time. In other words, issuing the Notes is a method by which ProjectCos and their affiliated renewable energy companies monetize future cash flows to fund the current activities of the affiliated renewable energy company.[18] Based on this structure, unlike in Raymond James, the HA Subsidiaries' Notes directly facilitate the sales that are implemented by the PPAs and leases.

Finally, a ProjectCo or Managing Member is obligated to pay an HA Subsidiary over the term of a Note, and each particular payment generally corresponds to the terms of the underlying leases and PPAs (*e.g.*, monthly PPA and lease payments are collected in a revenue account and paid out quarterly to cover interest and principal payments). This contrasts with the one-time payment that would be received by the issuer in Raymond James upon the sale of the equipment, when the right to payment would be extinguished. For all these reasons, the connection between

[16] SEC No-Action Letter (July 14, 1988).

[17] See Section 3(a)(i) and (ii) above for a discussion of how the loans and Notes are linked to specific leases and PPAs through the applicable documentation for a loan or Note.

[18] We note that in Econo Lodges and Days Inn, the hotel chains planned to deposit the receivables into a funding vehicle that would sell interests to raise proceeds for future activities - i.e., to monetize the receivables. A ProjectCo or Managing Member is similarly issuing the Notes to HA Subsidiaries as a method to monetize future cash flows of the renewable energy companies that owns the ProjectCo or Managing Member to fund their current activities.

the Raymond James issuer's right to collect a future sales payment and the obligation of an unknown future equipment buyer is far weaker than the connection between the Notes held by the HA Subsidiaries and the obligations of ProjectCos and Managing Members to make payments based on payments on the underlying leases and PPAs.

2. Section 3(c)(5)(B)

Each HA Subsidiary that originates loans meets the requirements of Section 3(c)(5)(B) because it is (1) primarily engaged (2) in making loans (3) to manufacturers, wholesalers, and retailers of (4) specified merchandise and/or services.

(a) Primarily Engaged

Section 3(c)(5)(B) requires an issuer to be "primarily engaged" in making loans to manufacturers, wholesalers, and retailers of, and to prospective purchasers of, specified merchandise, insurance, and services. Although the Staff has not specified a test for whether a company is "primarily engaged" in making loans for purposes of Section 3(c)(5)(B), the Staff has, as noted above, provided no-action assurances under Section 3(c)(5)(A) where an issuer establishes that at least 55 percent of the value of its assets is held in Section 3(c)(5)(A) qualifying assets. Based on this guidance, each of the HA Subsidiaries that originates loans satisfies the "primarily engaged" requirement of Section 3(c)(5)(B), because the Notes and other notes that qualify as Section 3(c)(5)(A) and/or 3(c)(5)(B) qualifying assets currently make up at least 80 percent of the value of each's assets.[19]

(b) Making Loans

Section 3(c)(5)(B) requires that a company make loans. Certain HA Subsidiaries acquire the Notes by making loans to ProjectCos and/or their Managing Members. Each HA Subsidiary that originates loans satisfies the requirement of Section 3(c)(5)(B) that it make loans.

(c) To Manufacturers, Wholesalers and Retailers

To fall within the Section 3(c)(5)(B) exception, the loans must be made to, among other things, "manufacturers, wholesalers, and retailers" of "merchandise, insurance, and services." As discussed above, the PPAs and leases are best understood as contracts for the purchase and sale of energy and services, which qualify as merchandise and services under Section 3(c)(5)(B). Because the ProjectCos and their Managing Members produce the energy they sell, they are manufacturers of that energy. In addition, because the ProjectCos and their Managing Members use the PPAs and leases to sell energy and Related Services to utility companies (who sell the energy to end users) and to end users themselves, the ProjectCos and Managing Members are both wholesalers and retailers of that energy.

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[19] As discussed above, the Staff has generally interpreted Section 3(c)(5)(A) and (B) in a similar fashion.

(i) Energy and Related Services Are Merchandise and Services

For the reasons discussed above with respect to Section 3(c)(5)(A), energy and Related Services should be treated as "merchandise and services" for purposes of Section 3(c)(5)(B).

(ii) The PPAs and Leases Are Contracts for the Purchase and Sale of Energy and Related Services

Because the PPAs and leases provide for customers to pay amounts tied to the receipt of energy and Related Services, and are otherwise primarily structured to facilitate the provision of energy and Related Services, both the PPAs and leases are best understood as contracts for the purchase and sale of energy and Related Services.

(iii) The ProjectCos and their Managing Members are Manufacturers, Wholesalers, and Retailers of Energy and Related Services

The ProjectCos and their Managing Members are "manufacturers" of energy and Related Services. The Merriam-Webster Dictionary defines a "manufacturer" as "a company that makes a product." The ProjectCos and their Managing Members make energy through the ProjectCo's provision of infrastructure and Related Services to businesses and individuals.

In addition, the ProjectCos and their Managing Members are "wholesalers" and "retailers" of energy and Related Services. According to the Merriam-Webster Dictionary, a "wholesaler" is a "merchant middleman who sells chiefly to retailers, other merchants, or industrial, institutional, and commercial users mainly for resale or business use," and a "retailer" is person who "sell[s] in small quantities directly to the ultimate consumer." As also described above, in certain cases the PPAs and leases are used by the ProjectCos and their Managing Members to sell energy and Related Services to utility companies at the wholesale level, i.e., as wholesalers, and in certain cases they are used by the ProjectCos to sell energy and Related Services to end users, i.e., as retailers. As a result, the ProjectCos and Managing Members that have issued the Notes to HA Subsidiaries in exchange for loans are properly viewed as "wholesalers" and/or "retailers" of that energy and Related Services. Therefore, the HA Subsidiaries that originate loans have made loans to "wholesalers" and "retailers" for purposes of Section 3(c)(5)(B).

(d) Of Specified Merchandise and Services

To fall within the Section 3(c)(5)(B) exception, the loans must be made to wholesalers and retailers of "specified merchandise [and] services." As discussed above with respect to Section 3(c)(5)(A), the Staff has indicated that the single most important factor in determining whether an issuer may rely on either Section 3(c)(5)(A) or Section 3(c)(5)(B) is the strength of the connection – or the "direct nexus" – between the obligations held by the issuer and the specific merchandise, insurance or services purchased and sold. For the reasons discussed above in our analysis of the Notes as qualifying assets under Section 3(c)(5)(A), there is a direct nexus between an HA Subsidiary's loans and the sales price of the energy and Related Services purchased and sold through the PPAs and the leases. Payments flow to the HA Subsidiaries from payments made to each ProjectCo by customers for the purchase of energy and Related Services under the PPAs and leases associated with a particular Note. The ProjectCo has thus sold specific, identified energy and Related Services to the applicable customer. As a result, consistent with Staff guidance, the HA Subsidiaries make loans to manufacturers, wholesalers, and retailers of specified energy and Related Services.

CONCLUSION

For the reasons discussed above, none of the HA Subsidiaries should be required to register as an investment company. Each HA Subsidiary is primarily engaged in purchasing or otherwise acquiring notes representing all or part of the sales price of specific merchandise and services, and/or making loans to manufacturers, wholesalers and retailers of specified merchandise and services, and thus falls within the exceptions from the definition of an investment company provided by Section 3(c)(5)(A) and/or Section 3(c)(5)(B). We therefore request the Staff's assurance that it will not recommend that the Commission take enforcement action under Section 7 of the 1940 Act against any of the HA Subsidiaries if each operates in the manner described above without registration as an investment company.

Please call Robert Rosenblum at (202) 973-8808, Susan Gault-Brown at (202) 973-8809, or Amy Caiazza at (202) 973-8887 if you have any questions regarding the relief requested in this letter. We look forward to hearing from you or a member of the Staff.

Sincerely,

Susan I. Gault-Brown

Susan I. Gault-Brown

Exhibit 1: Flow of Payments to HA Subsidiary: Notes Acquired from ProjectCo

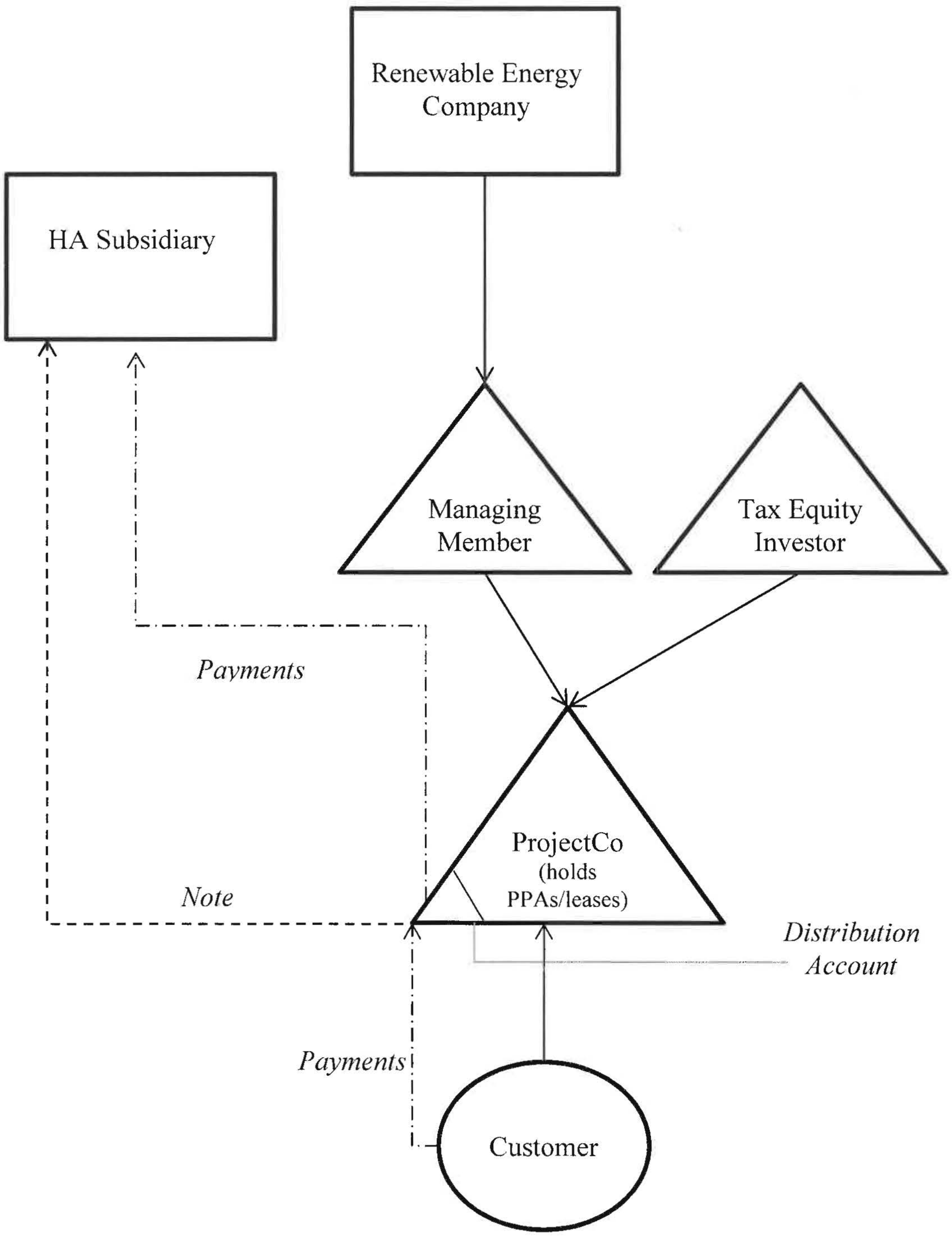

Exhibit 2: Flow of Payments to HA Subsidiary: Notes Acquired from Managing Member