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IRS Issues “Unrelated Person” Guidance in a Revised Open-Loop Biomass Notice

On June 25, 2008, the Internal Revenue Service issued Notice 2008-60 (the “Notice”), which modifies Notice 2006-88 (section 45 guidance for electricity produced from open-loop biomass, the “Old Notice”) in certain respects, and which provides favorable guidance on the provisions requiring a sale to an unrelated person for purposes of all section 45 resources, including refined coal and Indian coal. [A copy of the Notice is attached.](#)

With respect to electricity produced from open-loop biomass, the Notice reflects amendments to the Code enacted since the publication of the Old Notice, which: (1) extended the placed in service deadline from before January 1, 2008 to January 1, 2009, and (2) deleted the requirement that solid, nonhazardous, cellulosic waste materials or lignin material be “segregated from other waste materials.” The Notice also deletes the so-called “net sales rule” and corresponding examples contained in the Old Notice. That rule provided that if a taxpayer sold electricity produced from open-loop biomass to an unrelated person and the taxpayer (or a related person) simultaneously purchased electricity from an unrelated person for use at the same location, the electricity sale would be treated only as a sale to

an unrelated person to the extent that the electricity sold exceeded the electricity purchased.

The Notice also provides that electricity or coal will be treated as sold to an unrelated person if the ultimate purchaser of the electricity or coal is not related to the taxpayer that produced the electricity or coal. Accordingly, intermediate sales of the electricity or coal to a related person will be ignored if such related person ultimately sells the electricity or coal to a person that is unrelated to the producer. This guidance favorably addresses a recent issue raised of whether sales of electricity by a partnership to a utility that (1) owns more than 50 percent of the interests in such partnership and (2) ultimately sells the electricity to its customers are sales to an “unrelated person” for purposes of section 45.

The effective date of the Notice is the same as the effective date for the Old Notice. Thus, intermediate sales that have occurred since the Old Notice was issued would be covered by the Notice on a retroactive basis. The Notice also provides that any modifications made by the Notice to the Old Notice will not be applied adversely to taxpayers for electricity produced before July 28, 2008.