NELSON MULLINS

MEMORANDUM

To: Fortified Solar, LLC

From: Nelson Mullins Riley & Scarborough LLP

Date: March 30, 2026

Re: ***At-Risk Rules***

I. Introduction

Fortified is in the business of manufacturing, marketing and selling integrated structures incorporating solar panels and solar-panel related products, as well as related services (the "**Business**"). As a part of the Business, Fortified enters into agreements with customers to manufacture and cause to be installed certain structures, which include integrated solar photovoltaic power systems (each a "**Project**" and together, the "**Projects**"). Each Project is comprised of a general structure and roofing made of specialized solar photovoltaic roof panels manufactured by Fortified (the "**Solar Components**"). Once placed in service, the Projects are expected to qualify for either Section 48 or 48E credits.

Pursuant to the Manufacturing Contracts, Fortified will design, build, and supervise the installation of the contracted-for structure at the site selected by the customer. The final Project consists of the selected structure, *e.g.*, a storage shed, custom-designed to the Project's specifications provided by the customer, and the Solar Components as integrated roofing on such structure.

Fortified works with a lender, Eclipse Financing, LLC ("**Eclipse**"), a Delaware limited liability company, to provide financing to customers of Fortified. Additionally, each Manufacturing Contract requires the customer to pay Fortified upon execution a non-refundable amount equal to fifty percent (50%) of the cash due for the total agreed upon price for the manufacture and installation of the structure. If work is conducted pursuant to the terms of the Manufacturing Contract, the customer makes periodic payments based on the progress of the work performed by Fortified and, upon final payment and delivery to the customer, the structure's ownership fully vests with the customer.

II. Law & Analysis

(A) Loss Limitations

The U.S. Internal Revenue Code of 1986, as amended (the "**Code**"[1]), only permits losses "to the extent of the aggregate amount with respect to which the taxpayer is at risk," and limits

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[1] References to "Section" (§) or "Sections" (§§) herein are references to the Code, and any reference to the Treasury Regulations herein refers to the Treasury Regulations issued by the Secretary of the Treasury.

certain credits to such amount.[2] Generally, a taxpayer is "at risk" with respect to (i) the amount of cash or adjusted basis of property contributed by the taxpayer for use in the activity and (ii) "borrowed amounts" where the taxpayer is personally liable for the debt or has pledged property (other than that which is used in the activity) as a security for the debt.[3] However, certain "qualified nonrecourse financing" is also treated as being at risk.[4]

In order to be "qualified nonrecourse financing," the debt must:

(i) be secured by real property used in the activity;
(ii) be borrowed with respect to holding real property;
(iii) be borrowed from a "qualified person" or from a federal, state, or local government entity (or instrumentality thereof), or be guaranteed by the federal, state, or local government;
(iv) not be convertible debt; and
(v) be debt for which no person is personally liable.[5]

For these purposes, a "qualified person" is any person who is not related to the taxpayer, the person from which the property was acquired (or a person related thereto) or a person receiving a fee as a result of a taxpayer's investment in the property.[6] However, some financing from related persons is acceptable for the purposes of the at risk rules "if the financing from the related person is commercially reasonable and on substantially the same terms as loans involving unrelated persons."[7]

The "activity of holding real property" includes both holding real estate directly, as well as "the holding of personal property and providing of services which are incidental to making real property available as living accommodations."[8] Where an asset is held with a real property interest in the space and the inherently permanent structure (an "**IPS**") is served by a distinct asset that is not otherwise on the list of structural components, the determination is based on the following factors:

(i) Manner, time, and expense of installing and removing the distinct asset;
(ii) Whether the distinct asset is designed to be removed;
(iii) Damage that removal of the distinct asset would cause to the item itself or to the IPS to which it is affixed;
(iv) If the distinct asset serves a utility-like function with respect to the structure;
(v) Whether the distinct asset is passive or active in its function;
(vi) Whether the distinct asset produces income;

[2] § 465(a)(1).
[3] § 465(b)(1)-(2).
[4] *See* § 465(b)(6).
[5] § 465(b)(6)(B).
[6] § 465(b)(6)(D)(i) (defining by reference to § 49(a)(1)(D)(iv)).
[7] § 465(b)(6)(D)(ii).
[8] § 465(b)(6)(E)(i).

(vii) Whether the distinct asset is installed during construction of the IPS; and
(viii) If the distinct asset will remain after the tenant vacates the premises (if applicable).[9]

To be an IPS, the affixed property (which may be affixed by weight alone), must be reasonably expected to last indefinitely based on all applicable facts and circumstances.[10] For these purposes, "indefinitely" does not require existence in perpetuity, but instead focuses on the intent and ability for the asset to remain for the foreseeable future.[11]

The Treasury Regulations provide an on-point example regarding solar property:

> "[Taxpayer] I owns a solar energy site [among the components of which are land, photovoltaic modules ("**PV Modules**"), mounts and an exit wire (collectively, the "**Solar Energy Site Assets**"). Taxpayer enters into a long-term lease with a tenant for the solar energy site, and neither operates the site nor provides services to the tenant. The mounts support the PV Modules, and the racks are affixed to the land through concrete foundations, with the mounds remaining in place after the tenant vacates the site. The exit wire is buried, and is connected to the equipment, which is in turn connected to the PV modules and transmits electricity from the PV modules to a power grid for sale to third parties.]
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> [Taxpayer] leases the office building and the solar energy site to a single tenant. [Taxpayer] does not operate the office building or the solar energy site and does not provide services to its tenant. Although the tenant occasionally transfers excess electricity produced by the Solar Energy Site Assets to a utility company, the Solar Energy Site Assets are designed and intended to produce electricity only to serve the office building. The size and specifications of the Solar Energy Site Assets were designed to be appropriate to serve only the electricity needs of the office building. Although the Solar Energy Site Assets were not installed during construction of the office building, no facts indicate either that the Solar Energy Site Assets will not remain in place indefinitely or that they may be removed if the tenant vacates the premises.
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> With the exception of the occasional transfers of excess electricity to a utility company, the Solar Energy Site Assets serve the office building to which they are adjacent, and, therefore, the Solar Energy Site Assets are analyzed to determine whether they are a structural component using the factors provided in paragraph (d)(3)(iii) of this section. The Solar Energy Site Assets—
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> (A) Are expensive and time consuming to install and remove;

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[9] Treas. Reg. § 1.856-10(d)(3)(iii).
[10] Treas. Reg. § 1.856-10(d)(2)(i).
[11] *See* T.D. 9784, 81 Fed. Reg. at 59,851.

(B) Were designed with the size and specifications needed to serve only the office building;

(C) Will be damaged, but will not cause damage to the office building, upon removal;

(D) Serve a utility-like function with respect to the office building;

(E) Serve the office building in its passive functions of containing, sheltering, and protecting the tenant and the tenant's assets;

(F) Produce income from consideration for the use or occupancy of space within the office building;

(G) Were not installed during construction of the office building; and

(H) Will remain in place when the tenant vacates the premises."[12]

Based on these facts, the Treasury Regulation provides that the factors considered indicate the Solar Energy Site Assets are structural components "and, therefore, are real property."[13] Further, the Treasury Regulation provides that, with respect to this example, the result "would not change if, instead of the Solar Energy Site Assets, solar shingles were used as the roof of [the office building]."[14]

With respect to Fortified and its customers, requirement that the debt be secured by real property used in the activity should be met because Section 2(a) of the Security Agreement used by Eclipse secures the amount borrowed from Eclipse against all assets of the borrower, inclusive of "equipment" and "fixtures." Similarly, the requirements that (i) no person be personally liable for the debt should be met because the amount be borrowed with respect to holding real property and (ii) the debt not be convertible should be met. First, none of the note, loan, security agreement (collectively, the "**Loan Documents**") provide that a person is personally liable for the debt. Second, no provision of the Loan Documents allow for the debt to be converted into equity of the borrower.

Whether the amounts are borrowed with respect to holding real property depends on the qualification of a Project qualifying as real property under the aforementioned factors. Applying this analysis to a solar shed produced by Fortified should also result in the solar shed being deemed real property. First, the property is relatively expensive and not particularly easily moved (and this

[12] Treas. Reg. § 1.856-10(g), Example 9.
[13] *Id*.
[14] *Id*.

factor is heightened in cases where the roofing is built into a parking structure or something otherwise sunk into the ground). Second, the solar sheds are designed to customer specifications based on site and removing the solar roofing on the structure would cause damage to both the structure and solar roofing. Third, the solar shed serves passive functions in addition to the electricity generated by the roof, *i.e.*, containing, sheltering, and protecting the contents. Finally, a solar shed is capable of remaining in place even if situated on leased property and the lessee vacates.

The fact that it serves a utility-like function and can generate income are negative factors. However, based on the totality of the facts and circumstances, it should be property that is considered real estate because, like the example provided in the Treasury Regulations, the balance of the factors, and the relative strength of those supported by the facts surrounding each Project in general, support the conclusion that a Project should constitute "real property" and the amounts borrowed from Eclipse therefore be borrowed with respect to holding real property.

The last factor, that the amount be borrowed from a "qualified person" or governmental entity, should be met as well. Here, we understand that Eclipse will not make loans to related persons, Fortified is not making the loan, and Eclipse (or a related person) does not receive a fee as a result of customer's purchase of property from Fortified. Additionally, the sole trade or business of Eclipse is that of lending money.[15]

Section 465(b)(3)(C) of the Code provides that a person is related to any other person if the related person bears a relationship to such person specified in Sections 267(b) or 707(b)(1),[16] or the related person and such person are engaged in trades or businesses under common control within the meaning of Section 52(a) or (b) of the Code.

With respect to the relationship of Fortified and Eclipse, the two entities are affiliated limited liability companies. However, such affiliated ownership should not result in debt borrowed from Eclipse being considered borrowed from anything other than "qualified person." As we understand, Eclipse diligently monitors lending trends in its market sector in order to both remain competitive and to ensure the terms of its financing agreements determined by the market at large. Based on the determinations from such sector-wide monitoring, we understand Fortified provides financing on terms similar to those found in the same market and between unrelated persons. As such, the exception for "commercially reasonable" financing provided on "the same terms as loans involving unrelated persons" should apply to the financing provided by Eclipse to customers of Fortified.

Consequently, the relationship of Eclipse and Fortified is unlikely to result in Eclipse not being determined "qualified person," provided the taxpayer borrowing from Eclipse is not related to Eclipse, no person related to Eclipse receives a fee for an investment in the property, and the

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[15] *See e.g.*, https://eclipsefinancing.com/about-us/ (retrieved 9 Mar. 2026).
[16] Substituting 10% for 50% where 50% appears in those subsections.

totality of the property is not received from a person related to Eclipse. Accordingly, Eclipse should be considered a "qualified person" for the purpose of the debt meeting the requirements of the "qualified nonrecourse financing" rules.

(B) Credit Base Limitation

The basis used for the purpose of determining the credit against income tax provided by Section 48E of the Code is reduced by the amount of "nonqualified nonrecourse financing."[17] "[N]onqualified nonrecourse financing" is defined in the negative as "any nonrecourse financing that is not qualified commercial financing."[18] For this purpose, "qualified commercial financing" is any financing made with respect to property if the:

(i) property is acquired from a person unrelated to the taxpayer;
(ii) amount of nonrecourse financing does not exceed 80% of the credit base of the property; and
(iii) the amount is borrowed from a "qualified person" or from any federal, state or local government (or is guaranteed by such a governmental entity); and
(iv) debt is not convertible.[19]

A "qualified person" is defined for this purpose the same as defined in section II(A), above.

With respect to customers of Fortified, the financing from Eclipse should be considered "qualified commercial financing" with respect to a Project. First, we understand that Fortified does not sell its Solar Components to related persons, meeting the requirement that the property be acquired from a person unrelated to the taxpayer. Second, with respect to the total amount of nonrecourse financing with respect to the credit base of a Project (expressed as a percentage), risk exists at the customer level that cannot be fully mitigated by Fortified. While we understand Fortified works with its customers to make them aware of the limitation on the amount of qualified nonrecourse financing that may be included in the customer's credit base, the amount of debt taken with respect to a Project is ultimately in control of the customer. Finally, based on the analysis in section II(a), above, Eclipse should be considered a "qualified person."

Very truly yours,
Nelson Mullins Riley + Scarborough, LLP
NELSON MULLINS RILEY & SCARBOROUGH, LLP

[17] § 49(a)(1)(A); § 49(a)(1)(C)(vii).
[18] § 49(a)(1)(D)(i).
[19] § 49(a)(1)(D)(ii).