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Renewable Energy Tax Provisions in the American Taxpayer Relief Act of 2012

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The American Taxpayer Relief Act of 2012 (the "2012 Tax Act") extended the availability of certain US federal tax incentives relevant to ongoing and future renewable energy projects. Signed by the President on January 2, 2013, the 2012 Tax Act postpones the expiration of several tax cuts and tax incentives, while also briefly postponing the effective date of, and otherwise adjusting, the automatic cuts to non-exempt federal spending known as "sequestration." This memorandum summarizes the effects of the 2012 Tax Act on the renewable energy industry.

Energy Tax Credits

On New Year's Day 2013, the production tax credit ("PTC") and the 30% investment tax credit ("ITC") were no longer available to otherwise qualifying wind facilities that had not yet been placed in service. The 2012 Tax Act extends the availability of the PTC and ITC to qualifying wind facilities the construction of which begins before January 1, 2014. In addition, the 2012 Tax Act extends the availability of the PTC and ITC for other types of qualified energy generation facilities by providing that such credits are available for these facilities if their construction begins before January 1, 2014 (prior law had required that these facilities actually be placed in service prior to that date). The types of facilities covered by this change include: closed and open-loop biomass facilities, geothermal facilities, landfill gas facilities, trash facilities, qualified hydropower facilities and qualified marine and hydrokinetic renewable energy facilities. As a result of these changes, qualified facilities will be eligible for credits regardless of the date placed in service, provided that their construction is regarded as beginning before the deadline. The 2012 Tax Act does not modify the requirements for obtaining ITCs for solar energy facilities, which still must be placed in service before January 1, 2017 in order to be ITC-eligible.

The 2012 Tax Act does not otherwise change the PTC or ITC. The PTC for qualifying wind facilities for calendar year 2012 was 2.2 cents per kilowatt hour; this rate is inflation-adjusted on an annual basis. The PTC is available to a facility for the first 10 years that the facility operates. Wind facilities are eligible for an upfront ITC (in lieu of the periodic PTCs) that is equal to 30% of the cost of qualifying components of the facility.

Bonus Depreciation

The 2012 Tax Act extends the bonus depreciation rules for one year. Under the amended rules, businesses may take an additional depreciation deduction for the year in which qualified property is placed in service, equal to 50% of the cost of the qualified property, if it is purchased and placed in service before January 1, 2014 (before January 1, 2015 for certain longer-lived and transportation assets).

Expensing of Certain Depreciable Property

The 2012 Tax Act retroactively enhances Section 179 expensing of qualifying property. Up to $500,000 may now be taken into account per tax year as a deductible expense for the cost of qualifying property that is placed in service during a tax year that begins in 2012 or 2013. This incentive is primarily for use by smaller project companies as the $500,000 limitation is reduced if the total amount of qualifying property placed in service by the taxpayer during the tax year exceeds $2,000,000. For tax years beginning after 2013, the applicable limitation is $25,000, which is subject to reduction if the total amount of qualifying property placed in service during the year by the taxpayer exceeds $200,000.

Qualified Indian Reservation Property

The 2012 Tax Act also resurrects special accelerated depreciation periods for certain business property used on an Indian reservation, which had expired on December 31, 2011. The law provides for the application of shorter cost recovery periods for qualified Indian reservation property if such property is placed in service on or before December 31, 2013.

Postponement of Budget Sequestration

The Budget Control Act of 2011 (the “BCA”) requires that, because the so-called “Super Committee” did not propose, and Congress did not enact, deficit reduction legislation after the enactment of the BCA, both discretionary and mandatory spending must be reduced by means of sequestration (i.e., the “cancellation of budgetary resources”) according to a formula set forth in the BCA. These required reductions were previewed in a September 2012 report issued by the Office of Management and Budget (“OMB”), which found that the grant program in which the Treasury Department makes cash grants in lieu of tax credits for specified energy property (under Section 1603 of the American Reinvestment and Recovery Tax Act of 2009, as amended) was a non-exempt nondefense mandatory program. As a result, funding for such grants for fiscal year 2013 would be reduced by 7.6%, or $279 million, when the President issued a sequestration order on January 2, 2013, as required by Section 302(a) of the BCA.

The 2012 Tax Act provides that the President will issue a sequestration order on March 1, 2013, instead of January 2, 2013, and reduces to $85.33 billion from $109.33 billion the overall amount of cuts required to be implemented by this order. It is expected that this $24 billion reduction in overall sequestration cuts would result in a reduction in the percentage by which non-exempt nondefense mandatory spending, including the Section 1603 cash grant program, must be cut in FY 2013.

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The 2012 Tax Act addressed some of the US federal tax law changes that were scheduled to become automatically effective beginning in 2013. Additional fiscal negotiations remain likely, and further tax law changes may be proposed and enacted as revenue offsets as part of such negotiations. There also could be continued discussion of more comprehensive tax reform. Taxpayers are urged to follow the progress of these discussions and further tax law changes.

Circular 230 Disclosure

Any tax advice contained in this memorandum is not intended or written to be used, and cannot be used, for the purpose of avoiding tax penalties, and is not intended to be used or referenced in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement.

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