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Renewable Energy Alert

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Senate Passes PTC Extension for 2014

The Tax Increase Prevention Act of 2014, H.R. 5771, was passed by the Senate on December 16 and by the House on December 3. The President is expected to sign the bill in the coming days.

H.R. 5771 extends to the end of 2014 the dozens of tax incentives that expired at the end of 2013. For the production tax credit (PTC), Section 155 of the act provides that a wind project must "start construction" **before** January 1, 2015, to be eligible for tax credits, rather than the lapsed deadline of starting construction **before** January 1, 2014.

As is the case with the last extension, this extension does not have a deadline for wind projects to be placed in service (i.e., operational) in order to qualify for tax credits, so long as the project started construction prior to January 1, 2015. The Internal Revenue Service (IRS) in Notice 2013-29 took the position that it would not consider a project to have **started construction** by the deadline, unless the project owner engaged in "continuous" activity toward completing construction from the start date to the date the project is placed in service. A discussion of Notice 2013-29 is available here and here.

Last year, taxpayers and their advisors were concerned about meeting the "continuous" standard and requested clarification from the IRS. The IRS published that clarification in Notice 2013-60, which is discussed here. That notice provides that the IRS will not scrutinize as to whether a project satisfied the "continuous" standard, so long as the project is placed in service by the end of 2015. We expect that the IRS will interpret the deadline in Notice 2013-60 to require a project to be placed in service by the end of 2016.

The election for wind projects to claim either the PTC or the 30 percent investment tax credit is also extended by the act.

The PTC extension was passed by Congress with only 15 days remaining until the newly enacted provision lapses; nonetheless, we view the PTC extension as a particular benefit to four types of developers:

1. Developers with projects that are slated to be completed at the end of 2015 and, therefore, any delay would risk their completion date slipping to 2016. A 2016 completion date would miss the 2015 deadline necessary to avoid IRS scrutiny of their compliance with the "continuous" standard. Such developers now have until the end of 2016 to complete their projects (assuming the IRS interprets Notice 2013-60 as we expect), so they should have an easier time raising capital given the additional year of cushion.

2. Developers that thought they had "started construction" in 2013 but then faced challenges raising capital due to concerns about their PTC eligibility strategy. Such developers can now either (a) spend the 5% in 2014 necessary to meet the IRS safe harbor or (b) engage in more robust work of a "significant physical nature" in order to cement their eligibility for PTCs.

3. Developers that tried to "start construction" in 2013 without involving tax counsel and then found when they tried to raise capital or obtain a PTC eligibility tax opinion that they had made a technical mistake in their documentation. Such developers have been given the gift of a "do over."

4. Developers that had the objective of meeting the 5 percent safe harbor but did not have sufficient cash available at the end of 2013 to do so. Such developers persuaded the IRS they should be able to prorate their projects' tax credits, so long as they spent at least 3 percent (e.g., spending 3.5% would result in eligibility for 70% of the tax credit) in 2013. See Notice 2014-46, § 5.01 and a discussion of it available here. Those developers now have an additional year of spending and may meet the 5 percent safe harbor and qualify for the safe harbor for full, rather than prorated, tax credits.

In a true windfall, Section 125 of the act extends a bonus 50 percent depreciation through the end of 2014, even for assets purchased earlier this year when bonus depreciation had lapsed. Thus, taxpayers that purchased assets earlier this year not counting on bonus depreciation would be entitled to bonus depreciation. This provision is not specific to the renewable energy industry and applies to everything from new office furniture to new airliners. Bonus depreciation is often waived in renewable-energy, tax-equity transactions due to partnership "capital account" constraints and investors' preference to use their tax appetite to absorb tax credits rather than depreciation deductions, so the renewable energy industry is less interested in this present from Congress than other segments of the economy may be.

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