

 **Client Alert**

## New Tax Incentives for Renewable Energy Projects

### I. Introduction

The House of Representatives and the Senate passed the American Recovery and Reinvestment Act of 2009 (the "Act") on February 13, 2009, and President Obama is expected to sign the Act into law on February 17, 2009.

The Act includes a number of tax incentives for developers and investors in renewable energy projects. In particular, the Act establishes a tax credit for Qualifying Advanced Energy Projects, extends the placed-in-service sunset date for eligibility for production tax credits ("PTCs"), allows taxpayers to elect an investment tax credit ("ITC") in lieu of claiming PTCs or to claim a grant from the Treasury Department in lieu of the ITC or PTC and extends the period to claim bonus depreciation.

### II. Renewable Energy Incentives

#### Qualifying Advanced Energy Project Credit

The Act establishes a tax credit equal to 30 percent of the qualifying investment with respect to any qualified advanced energy project (the "Qualifying Advanced Energy Project Credit"). A qualifying advanced energy project includes a project which re-equips, expands or establishes a manufacturing facility for the production of:

- Property designed to be used to produce energy from renewable resources
- Electric grids to support the transmission of intermittent renewable energy, including storage of such energy
- Property designed to capture and sequester carbon dioxide emissions
- Property designed to refine or blend renewable fuels or to produce energy conservation technologies
- Other advanced energy property designed to reduce greenhouse gas emissions

The qualified investment for any taxable year is the basis of eligible property placed in service by the taxpayer during the taxable year which is part of the qualifying advanced energy project. Credits are available only for qualifying advanced energy projects certified by the Secretary of the Treasury. There is a total of US\$2.3 billion in credits available under this program through a competitive bidding process. A taxpayer that claims the Qualifying Advanced Energy Project Credit may not also claim the Energy Credit, Qualifying Advanced Coal Project Credit or the Qualifying Gasification Project Credit with respect to the same investment.

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### Extension of Placed-in-Service Sunset Date for PTCs

Under current law, PTCs are generally available only with respect to electricity derived from qualified energy resources at a qualified facility that is placed in service before certain specified dates. Qualified energy resources are defined as wind, closed-loop biomass, open-loop biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste, qualified hydropower production and marine and hydrokinetic renewable energy. A qualified facility is, in general, a facility that produces electricity using qualified energy resources. The Act extends the placed-in-service date for wind facilities to January 1, 2013, and extends the PTC for other qualified facilities that are placed in service before January 1, 2014. The changes to the placed-in-service sunset dates are effective for property placed in service after the date of the enactment of the Act.

### Election of Investment Credit in Lieu of the Production Credit

The Act allows taxpayers to make an irrevocable election to claim a 30 percent ITC in lieu of the PTC on certain qualifying facilities. This election should be attractive to tax investors wishing to take advantage of the tax benefit in a single year rather than over a ten-year period, especially if they are uncertain about their tax positions in future years. Qualified investment credit facilities are wind, closed-loop biomass, open-loop biomass, geothermal or solar, landfill gas, trash, qualified hydropower and marine and hydrokinetic facilities. To be eligible for the ITC, wind facilities are required to be placed in service during the period from January 1, 2009 to December 31, 2012, and all other qualified facilities are required to be placed in service during the period from January 1, 2009 to December 31, 2013. A taxpayer who elects to take the ITC in lieu of the PTC is required to reduce the adjusted basis of the property by one-half of the amount of the ITC claimed.

### Grants for Specified Energy Property

Under the Act, eligible taxpayers are permitted to claim a cash grant from the Secretary of the Treasury in an amount equal to 30 percent (or, in some cases ten percent) of the basis of "specified energy property" that is placed in service during 2009 or 2010. The grants are in lieu of PTCs or ITCs and taxpayers that claim the grants are not eligible to claim PTCs or ITCs with respect to the same property. Specified energy property is defined, in general, as any wind, closed-loop biomass, open-loop biomass, geothermal or solar, landfill gas, trash combustion, qualified hydropower, or marine and hydrokinetic renewable energy facility that is eligible for PTCs, and any qualified fuel cell property, solar property, qualified small wind energy property, geothermal property, qualified microturbine property, combined heat and power system property and geothermal heat pump property that is eligible for the energy credit. The amount of the grant is excluded from the taxpayer's gross income. However, the taxpayer is required to reduce the adjusted basis of the property by one-half of the amount of the grant.

Taxpayers may obtain the grants by filing an application with the Secretary of the Treasury before October 1, 2011. Under the Act, the Secretary of the Treasury is required to make payment of the grant within 60 days of either the date of the application or the date that the specified energy property was placed in service, whichever is later.

### Repeal of Certain Limitations on Credit for Renewable Energy Property

The Act removes the US\$4,000 cap on the credit available for qualified small wind energy property placed in service after December 31, 2008, and before January 1, 2017. A qualified small wind energy property means property that uses a qualifying small wind turbine to generate electricity. In addition, the Act eliminates the current law requirement that a taxpayer reduce the basis of property for purposes of claiming the energy credit if the property is financed by subsidized energy financing or by the proceeds of a private activity bond.

### **III. Extension of Bonus Depreciation for Newly Acquired Property**

The Act extends the additional first-year depreciation deduction introduced in the Foreclosure Prevention Act of 2008 (which allows taxpayers to take an additional first-year depreciation deduction of 50 percent of the adjusted basis of certain qualified property ("bonus depreciation")) to certain property placed in service during 2009 or 2010. Subject to certain exceptions, qualified property means property to which the modified accelerated cost recovery system applies with a recovery period of 20 years or less, certain computer software, water utility property or qualified leasehold improvement property, which is purchased and placed into service within the applicable time period. The Act allows taxpayers to also take the bonus depreciation for qualified property acquired and placed in service in calendar year 2009 (or 2010 for certain property with longer production periods and transportation property).

### **IV. Conclusion**

The American Recovery and Reinvestment Act of 2009 includes a number of tax incentives that are designed to encourage investment in renewable energy projects during calendar years 2009, 2010 and beyond. This Client Alert only provides a general discussion of certain key provisions; therefore taxpayers are advised to evaluate the general impact of the Act on their specific circumstances.

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