GOP'S "TAX CUTS AND JOBS ACT" TRIMS RENEWABLE ENERGY AND OTHER TAX CREDITS

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Tax Alert

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On November 2, 2017, the House Ways and Means Committee unveiled its much anticipated tax reform bill titled the "Tax Cuts and Jobs Act" (the "House Plan"). The House Plan is a significant step by Republican lawmakers to fulfill a campaign promise to reform the United States tax code. Significantly, for solar, wind, and other renewable energy companies that have been scrambling to predict how proposed tax reform might affect their industries, the House Plan includes substantial modifications to existing renewable energy tax credits including the production tax credit ("PTC") and the investment tax credit ("ITC"). Many other energy-related tax incentives were also cut, including the Code Section 199 Domestic Production Activities Deduction and credits for Enhanced Oil Recovery and Producing Oil and Gas from Marginal Wells. Two other credits that are often used in conjunction with the ITC on small solar developments, the New Markets and Historic Rehabilitation Tax Credits, were also cut.

THE PTC

The House Plan would permanently reduce the maximum PTC rate from 2.4 to 1.5 cents per kilowatt-hour--with no inflation adjustments going forward--for all projects that did not begin construction prior to the date the House Plan is enacted. It is possible that this reduction may be retroactive for projects that commence construction on or after November 2, 2017, the day on which the House Plan was released. Under current law, the PTC is scheduled to sunset in 2020; this schedule would remain unchanged in the House Plan.

Effective for all tax years--including years beginning prior to, on or after enactment of the House Plan--the House Plan would require a "continuous program of construction" from the date a facility begins construction to the date it is placed in service. The "continuous program of construction" requirement exists under current law and has been interpreted by the Department of the Treasury (the "Department") to permit several "safe harbor" time periods. At present, it is unclear whether the House Plan, if enacted, would effectively eliminate those safe harbors or whether the Department may issue them unchanged or substantially unchanged.

THE ITC

The House Plan would align the expiration dates and phase-out schedules for different qualified energy properties and extend the ITC to certain other technologies. Solar energy, fiber-optic solar energy, qualified fuel cell, and qualified small wind energy property would be eligible for a 30% ITC if construction begins before 2020 and would be phased out for construction that begins before 2022 using the same schedule currently applicable to solar energy property. Qualified microturbine, combined heat and power systems, and thermal energy property would be eligible for a 10% ITC if construction begins before 2022. The permanent 10% ITC available for solar energy and geothermal property would be eliminated for all facilities if construction of such facility begins after 2027.

Similar to the PTC, the House Plan would also require a "continuous program of construction" until a facility is placed in service to meet the "beginning of construction" requirement to qualify for the ITC. Existing Department guidance regarding the continuous program of construction is currently applicable only to wind facilities intended to qualify for the PTC. As with regard to the PTC, it is not clear whether the Department will apply the same standard to projects intended to qualify for the ITC if the House Plan is enacted.

The good news for the renewable power industry is that the PTC and ITC survive under the House Plan, albeit with changes that may have a significant impact on the industry. Other tax incentives did not fare as well. For example:

Section 199 Domestic Production Activities Deduction

The Code Section 199 domestic production activities deduction or "DPAD" would be repealed effective for tax years beginning after 2017. This affects a variety of domestic manufacturers of a number of items, including solar panels, construction equipment, and software, as well as oil and gas producers.

Enhanced Oil Recovery Credit

The enhanced oil recovery credit would be repealed effective for tax years after 2017.

Credit for Producing Oil and Gas from Marginal Wells

The credit for producing oil and gas from marginal wells would be repealed effective for tax years after 2017.

New Market and Historic Rehabilitation Tax Credits

Two other credits that are often seen in conjunction with small solar installations were also cut. The New Market Tax Credit for development in designated low-income areas of the country would be eliminated effective for tax years after 2017, but credits that would have already been allocated may be used over the course of up to seven years as contemplated under current law. Similarly, the Historic Rehabilitation Tax Credit for expenses incurred to rehabilitate old and/or historic buildings would be repealed. Under a transition rule, the credit would continue to apply to expenditures incurred through the end of a 24-month period of qualified expenditures that would have to begin within 180 days after January 1, 2018.

CONCLUSION

The House Plan is far from final, but it is moving very quickly. The House Ways and Means Committee Chair, Kevin Brady, has indicated that the House Republicans plan to pass the House Plan by Thanksgiving. Taxpayers impacted by these proposed changes must engage immediately in order to have any impact on the final legislation. For any questions on these issues, please contact one of the following members of our Tax and Federal Tax Policy Teams.

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