

# Client Alert

January 2013

## Congress Passes Extension of Wind Credit and Adopts Beginning of Construction Rule

On January 1, 2013, the Senate and the House of Representatives passed the American Taxpayer Relief Act of 2012 (the "Act") to avert the "fiscal cliff." The Act includes a number of extensions and modifications relating to energy tax provisions.

*Beginning of Construction Rule.* Congress adopted a "beginning of construction" rule in lieu of the current placed-in-service, sunset dates for the production tax credits ("PTCs") for wind, closed- and open-loop biomass, geothermal, landfill gas, trash, hydropower, and marine and hydrokinetic produced energy. As amended, facilities will qualify for the PTC provided construction of the facilities begins prior to January 1, 2014. The Act does not provide a termination date by which a facility for which construction begins prior to January 1, 2014 must be completed and placed in service.

The Act does not define "beginning of construction." A similar standard has applied for certain prior tax credit transition rules and also is applicable to the Section 1603 Treasury grant program. It is not clear that the requirement will be interpreted and applied in the same manner as the guidance developed under the Treasury grant program (e.g., project election, continuous construction, 5% safe harbor, etc.). No legislative history or explanation by the Staff of the Joint Committee on Taxation has been released. It is possible that interpretation of the beginning of construction requirement will be explained in forthcoming legislative history.

*Wind PTC.* Congress extended the PTC for wind by adopting the same beginning of construction rule now applicable to other qualified resources. Accordingly, if construction of a wind project begins before January 1, 2014, the wind project will be eligible for PTCs regardless of whether it is placed in service in 2013.

*Impact on Section 1603 Treasury Grants.* The extension of PTCs through the change from a placed-in-service date requirement to beginning-of-construction date requirement does not extend the date by which qualified property must be placed in service for purposes of the Section 1603 Treasury grant program. The Act leaves intact the "credit termination date" in the Section 1603 legislation that requires qualified property to be placed in service by the date applicable to that property prior to amendment by this Act. For example, a wind project would need to be in service before January 1, 2013 in order to qualify for a Section 1603 Treasury grant.

*ITC Election.* Congress conformed the election to claim investment tax credits ("ITCs") in lieu of PTCs to match the new sunset dates and beginning of construction rule applicable to the PTCs. Accordingly, taxpayers will have the ability to elect either PTCs or the ITC for projects for which construction begins prior to January 1, 2014.

*Original Use.* Congress made technical corrections to the ITC election and to the Treasury grant legislation to clarify that the taxpayer or applicant must be the original user of the property. This technical correction is consistent with current practice and understanding.

*Bonus Depreciation.* Congress extended bonus depreciation by one year. Thus, specified property will be eligible for 50% bonus depreciation provided it is placed in service before January 1, 2014.

*Sequestration.* The Act delays the mandatory “sequestration” of certain types of federal spending originally set forth in the Budget Control Act of 2011 until March 1, 2013. If not delayed, grants payable under the Section 1603 Treasury grant program might have been subject to a 7.6% reduction. The Act does not eliminate potential sequestration for any grants payable after March 1, 2013, if additional legislation is not enacted. Sequestration should not impact grants payable through the end of February.

A [copy of the Act](#) may be found at.

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