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Client Alert Commentary

Latham & Watkins Transactional Tax Practice

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COVID-19 Tax Relief Package Extends Renewable Power and Carbon Capture Tax Credits

Congress extends tax credits for certain renewables, and expands tax credits for offshore wind and waste energy recovery.

Key Points:

- Production tax credits for onshore and offshore wind projects are extended at a 60% rate for projects that start construction by end of 2021.
- Offshore wind projects will receive a new investment tax credit at 30% for all projects that start construction by end of 2025.
- Investment tax credits for solar projects are extended for two years at a 26% rate through the end of 2022, with a step down to 22% for projects that start construction in 2023.
- Carbon capture projects have two more years to start construction and qualify for 45Q credits.

Project developers have received a critical time extension to complete wind, solar, carbon capture, and other renewable energy projects. The Consolidated Appropriations Act, 2021 (the Act), which President Trump signed into law on December 27, 2020, extends the investment tax credit (ITC) and the production tax credit (PTC) for qualifying projects, as well as the credit under Section 45Q[1] (45Q Credit) for qualifying carbon capture projects. The Act also expands the ITC for offshore wind and waste energy projects that start construction before an applicable deadline.

The Internal Revenue Service (IRS) previously issued a series of notices explaining the applicable requirements for a project to be under construction. As a general matter, a project is under construction when physical work of a significant nature has begun, or when at least 5% of the total project costs have been incurred. Once construction begins, a project owner must generally complete the project within four years, or demonstrate that work on the project has been continuous. The IRS has historically updated its start of construction notices following previous tax credit extensions, and is widely expected to do so in this case as well.

This *Client Alert* summarizes the Act's extensions to the ITC, PTC, and 45Q Credit. The Act also provides for various research and development grants and subsidies for a variety of clean energy projects and activities, including wind energy, solar energy, energy storage, carbon management, and carbon removal. These incentives may signal a first step toward larger climate bills during the incoming administration of President-Elect Joe Biden.

Extension of Tax Credits for Qualified Wind Projects and Expansion of Investment Tax Credits for Qualified Offshore Wind Projects

Section 45 allows taxpayers to claim PTCs for each kilowatt hour of electricity produced by a qualifying wind project (both onshore and offshore) during the 10-year period following the project's placed-in-service date. Under Section 48, taxpayers have the option of electing a one-time ITC (in lieu of the PTC) equal to a specified percentage of the cost of eligible property included in the project. The amount of credits that taxpayers may claim for qualifying wind projects had been stepped down and phased out over time. Prior to the Act, owners of these projects could claim 60% PTCs or an 18% ITC if construction began during 2020, and were not eligible for PTCs or an ITC if construction began after 2020.

The Act extends the date by which construction of a qualifying wind project must begin to the end of 2021 in order for the owner to claim 60% PTCs (or an 18% ITC for onshore projects).

The Act also provides a full 30% ITC for qualified offshore wind projects if construction begins before January 1, 2026 (including projects that began construction prior to 2021). The Act does not, however, provide for an extension to the PTC for offshore wind projects beyond that granted to onshore wind projects. PTCs are scheduled to end for all wind projects that begin construction after 2021.

Extension of Production Tax Credits for Certain Other Renewable Technologies

Section 45 allows taxpayers to claim PTCs for each kilowatt hour of electricity produced by a qualifying closed-loop biomass, open-loop biomass, geothermal, landfill gas, municipal solid waste, hydropower, or marine and hydrokinetic power project, following the project's placed-in-service date. Prior to the Act, the owners of these projects could claim a full PTC (or a 30% ITC in lieu of PTCs) only if construction of their project began by the end of 2020.

Under the Act, project owners may now claim PTCs or an ITC if construction of these projects begins by the end of 2021.

Comparison of Credit Eligibility for Qualifying Wind and Certain Other Facilities Under the Act			
Start of Construction	**Qualifying onshore wind project credit eligibility**	**Qualifying offshore wind project credit eligibility**	**Certain other qualifying project credit eligibility**
Prior to 2017	100% PTC or 30% ITC	100% PTC or 30% ITC	100% PTC or 30% ITC
During 2017	80% PTC or 24% ITC	80% PTC or 30% ITC	100% PTC or 30% ITC
During 2018	60% PTC or 18% ITC	60% PTC or 30% ITC	100% PTC or 30% ITC
During 2019	40% PTC or 12% ITC	40% PTC or 30% ITC	100% PTC or 30% ITC
During 2020	60% PTC or 18% ITC	60% PTC or 30% ITC	100% PTC or 30% ITC
During 2021	60% PTC or 18% ITC	60% PTC or 30% ITC	100% PTC or 30% ITC
During 2022 through 2025	Not applicable	30% ITC	Not applicable

Extension of Investment Tax Credits for Solar Projects

Section 48 allows taxpayers to claim a one-time ITC equal to a specified percentage of the cost of eligible property included in the facility. The ITC percentage for qualifying solar projects is subject to a step down from a historic 30% rate to a 10% final rate. Prior to the Act, the step down began for solar projects that started construction after 2019, with a 26% ITC for projects that began construction during 2020, a 22% ITC for those that began construction during 2021, and a 10% credit for solar projects that began construction thereafter. In each case, if a solar project was placed in service after 2023, it would qualify only for a 10% ITC.

The Act generally extends the step-down schedule by two years, and it extends through 2025 the date by which these projects must be placed in service to qualify for an ITC exceeding 10%.

Expansion of Investment Tax Credits to Waste Energy Recovery Property

The Act expands Section 48 to include an ITC for waste energy recovery property, defined as property with a capacity of 50 megawatts or less that "generates electricity solely from heat from buildings or equipment if the primary purpose of such building or equipment is not the generation of electricity" and that is not part of a combined heat and power system. Owners of waste energy recovery property can claim a 26% ITC if construction of such property begins during 2021 or 2022, and a 22% ITC if construction begins during 2023, provided in each case that the property is placed in service by the end of 2025. Property that begins construction after 2023 is not eligible for the ITC.

Credit Eligibility for Solar Projects and Waste Energy Recovery Property Under the Act		
Start of Construction	**Qualifying solar project credit eligibility if placed in service by 2025***	**Qualifying waste energy recovery property if placed in service by 2025†**
Prior to 2020	30% ITC	Not applicable
During 2020	26% ITC	Not applicable
During 2021 through 2022	26% ITC	26% ITC
During 2023	22% ITC	22% ITC
After 2023	10% ITC	Not applicable

* Solar projects placed in service after 2025 are limited to a 10% ITC.
† Waste energy recovery property placed in service after 2025 is not eligible for the ITC.

Extension to 45Q Credits for Carbon Capture Facilities

Section 45Q allows taxpayers to claim tax credits for each metric ton of qualified carbon oxide captured at qualified carbon capture facilities (CCS Projects) and then disposed of in secure geological storage, used as a tertiary injectant in an enhanced oil or natural gas recovery project, or utilized in commercial processes. Owners of CCS Projects may claim tax credits over a 12-year period, starting when the carbon capture equipment is first put into service. Prior to the Act, the owner of a CCS Project could claim the 45Q Credit if construction of the facility began by the end of 2023 and if either construction of the carbon capture equipment began by the end of 2023, or the original design of the facility included the installation of carbon capture equipment.

The Act extends the date by which construction of a CCS Project must begin to the end of 2025 in order for the owner to claim 45Q Credits, assuming one of the two conditions is satisfied.

Key Takeaways

The Act's inclusion of a tax extenders package is a welcome development for the clean energy sector despite certain omissions. In particular, the Act does not provide for a "direct-pay option" that would have enabled project owners to avoid an increasingly crowded tax equity market. The Act also does not include a tax credit for stand-alone energy storage. Energy storage projects continue to qualify for tax credits only when they are paired with energy generation sources that otherwise qualify for tax credits, such as solar or wind projects.

The solar industry received a generous two-year extension at the current 26% ITC rate and a deferral of the placed-in-service cliff to 2025. The onshore wind sector received the same accommodation as last year — a one-year tax credit extension at current levels (60% PTCs).

The offshore wind sector, which is poised to grow dramatically, received an ITC at full rates through 2025, but without the option to elect a PTC alternative. This change will likely result in most offshore wind projects electing into the ITC, both for the increased value and longer qualification periods — meaning that offshore wind will have to compete more directly with large-scale solar projects for increasingly scarce tax equity funding.

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If you have questions about this *Client Alert*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

Jim Cole
james.cole@lw.com
+1.713.546.7435
Houston

E. Rene de Vera
rene.devera@lw.com
+1.312.876.7610
Chicago

Eli M. Katz
eli.katz@lw.com
+1.212.906.1620
New York

Ben A. Cheatham
ben.cheatham@lw.com
+1.212.906.4595
Washington, D.C.

Chelsea M. Muñoz-Patchen
chelsea.munoz-patchen@lw.com
+1.713.546.7591
Houston

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Endnotes

[1] All Section references are to the Internal Revenue Code of 1986, as amended.