

January 2, 2013

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# Tax Group Client Alert

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## RENEWABLE ENERGY TAX PROVISIONS IN THE FISCAL CLIFF LEGISLATION – THE “AMERICAN TAXPAYER RELIEF ACT OF 2012”

The House of Representatives last night approved H.R. 8, the “American Taxpayer Relief Act of 2012” (the “Bill”), by a vote of 257-167. The Bill was approved earlier in the day by the Senate by a vote of 89-8. Still pending signature by the President, the Bill addresses various expiring tax cuts and pending budgetary requirements, together commonly referred to as the “fiscal cliff.” This Client Alert addresses several of the provisions of the Bill that are relevant to ongoing and future projects in the renewable energy space.

### Energy Tax Extenders-PTC and ITC

Apparently responding to industry arguments that a one-year extension of the December 31, 2012 “placed in service” requirement for wind energy facilities would be of limited utility due to the lead time required to develop and build these facilities, Section 407 of the Bill extends the production tax credit under Section 45 of the Internal Revenue Code of 1986, as amended (the “Code”), and the 30% investment tax credit available pursuant to Section 48 of the Code to otherwise qualifying wind facilities for which **construction begins before January 1, 2014**. In addition to wind energy facilities, this “beginning of construction” requirement replaces the prior placed in service requirement (previously set at January 1, 2014) for several other types of qualified facilities, including closed and open-loop biomass facilities, geothermal facilities, landfill gas facilities, trash facilities, qualified hydropower facilities, and qualified marine and hydrokinetic renewable energy facilities. Consequently, any such otherwise qualifying facility (or the electricity generated and sold from any such facility) construction of which began before January 1, 2014 will be eligible for the investment tax credit or production tax credits regardless of when the facility is placed in service.

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Notably, the Bill does not modify the current placed in service eligibility requirements under Sections 45 and 48 of the Code for small irrigation power facilities, solar energy facilities, refined coal production facilities or Indian coal facilities. However, Section 406 of the Bill extends the available production tax credit period for Indian coal facilities placed in service before January 1, 2009 from seven years to eight years.

### **Business Tax Extenders-Depreciation**

Section 331 of the Bill extends the special first-year allowance, commonly referred to as “50% bonus depreciation,” to qualifying property placed in service before January 1, 2014. In addition, certain “long production-period property” and aircraft will be eligible for 50% bonus depreciation if placed in service before January 1, 2015.

Section 315 of the Bill extends the increased limitation for the expensing of certain depreciable property under Section 179 of the Code. Under the Bill, an aggregate cost of up to \$500,000 may be taken into account as a deductible Section 179 expense for qualifying property placed in service in 2013. The \$500,000 limitation is subject to reduction if the total amount of qualifying property placed in service in 2013 exceeds \$500,000. For taxable years after 2013, the applicable limitation is \$25,000, which is subject to reduction if the total amount of qualifying property exceeds \$200,000.

Section 313 of the Bill reintroduces the special accelerated depreciation periods for business property used on an Indian reservation. For qualified Indian reservation property placed in service on or before December 31, 2011, Section 168(j)(2) of the Code provided special recovery periods that were shorter than the otherwise applicable MACRS periods. Section 313 of the Bill provides that Section 168(j) will apply to property placed in service on or before December 31, 2013, explicitly including qualified Indian reservation property placed in service in 2012.

### **Budget Provisions-Sequestration**

Section 1001 of the Bill modifies the sequestration provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 (Pub. L. 99-177), as amended in particular by the Budget Control Act of 2011 (Pub. L. 112-25) (the “BCA”). The BCA requires a mandatory sequestration, commencing within 15 days following the adjournment of the present Congress, to eliminate any budget-year breach of specified discretionary spending limits. The Bill provides that, notwithstanding any other provision of law, this “after-session” sequestration for fiscal year 2013 will be implemented on March 27, 2013.

In addition, the BCA requires that, unless an approved budget achieves a deficit reduction of greater than \$1.2 trillion, discretionary spending limits, discretionary appropriations and direct spending must be further reduced. These reductions were previewed in a report published in September 2012 by the Office of Management and Budget (“OMB”) pursuant to the Sequestration Transparency Act of 2012 (Pub. L. 112-155). That report suggested that funding for payments under Section 1603 of the American Reinvestment and Recovery Tax Act of 2009 may be reduced by 7.6%, without answering significant questions as to how such cuts would be implemented. The Bill provides that this sequestration, previously required to be calculated by OMB and ordered by the President for fiscal year 2013 on January 2, 2013, is delayed until March 1, 2013. The Bill therefore does not prevent sequestration, but provides additional time to reach a budget deal and avoid the damaging effects highlighted in the OMB report.

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