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Recent Legislation Affecting the Production Tax Credit

On October 3, 2008, the President signed into law H.R. 1424 (the “Act”), which, among other items, provided the long-awaited renewable energy tax credit extensions. The following provides a summary of the key renewable and alternative energy provisions applicable to wind facilities and other renewable energy facilities that qualify for the production tax credit (the “PTC”) (described below).

General Description of the PTC

The PTC is generally available for a qualified facility beginning on the date the facility is originally placed in service, and the credit may be claimed for power produced by the qualified facility during the ten-year period following the placed in service date. The amount of the credit is directly proportional to the amount of power produced by the qualified facility. The credit rate varies based on the type of renewable resource for which the credit is claimed and is adjusted for inflation each year. The types of facilities that are generally eligible for the PTC include closed-loop and open-loop biomass facilities, geothermal energy facilities, small irrigation power facilities, landfill gas facilities, trash combustion facilities, refined coal production facilities, and qualified hydropower facilities.

Modifications Made by the Act

The Act amends the applicability of the PTC as follows:

- *Extension of the PTC:*

- Wind and Refined Coal Facilities. The PTC is extended one year for wind and refined coal facilities. As a result, wind and refined coal facilities must now be placed in service prior to January 1, 2010 in order to qualify for the credit.

- Other Qualifying Facilities. The PTC is extended for two years for other qualifying facilities, including (i) closed-loop biomass facilities, (ii) open-loop biomass facilities, (iii) geothermal facilities, (iv) small irrigation power facilities, (v) landfill gas facilities, (vi) trash combustion facilities, and (vii) qualified hydropowered facilities. Such facilities must now be placed in service prior to January 1, 2011.

- *Refined Coal.* In addition to extending the PTC with respect to refined coal facilities, the Act modifies the definition of refined coal to (i) eliminate the increased market value test (described below), (ii) increase the required sulfur dioxide and mercury emission reduction, and (iii) include “steel industry fuel” within the definition of refined coal.

- The Act eliminates the requirement that refined coal have an increased market value of at least 50%, as compared to the value of the feedstock coal (the “increased market value test”). Thus, in order to qualify for the PTC, refined coal is now defined only under the first three conditions that existed under prior law. Those include: (i) type of fuel, (ii) sale by the taxpayer with the reasonable expectation of producing steam, and (iii) certification by the taxpayer that the refined coal results in a qualified emission reduction. This provision applies for coal produced and sold from facilities placed in service after December 31, 2008.
- The Act adds a quantitative percentage test to the required reduction of the release of sulfur dioxide or mercury that doubles (from 20% to 40%) the reduction required prior to the Act. This provision applies to coal produced and sold from facilities placed in service after December 31, 2008.
- The Act modifies the definition of refined coal to include “steel industry fuel” so that the PTC applies to steel industry fuel. Thus, it is possible that a taxpayer may qualify for both the PTC and the non-conventional fuel credit under Section 45K of the Code. Because the taxpayer may only claim one of the credits, such taxpayer will have to determine which credit will provide the taxpayer with the maximum tax savings. This provision applies for fuel produced and sold after September 30, 2008.
- *Extension of PTC to Marine and Hydrokinetic Renewable Energy.* The Act extends the PTC to marine and hydrokinetic renewable energy.
 - For this purpose “Marine and Hydrokinetic Renewable Energy” includes energy derived from (i) waves, tides, and currents in oceans, estuaries and tidal areas, (ii) free flowing water in rivers, lakes, and streams, (iii) free flowing water in an irrigation system, canal, or other man-made channel, including projects that utilize non-mechanical structures to accelerate the flow of water for electric power production purposes, or (iv) differentials in ocean temperature. This does not include any source that utilizes a dam, diversionary structure, or impoundment for electric power production purposes.
 - Facilities producing marine and hydrokinetic renewable energy must (i) have a nameplate capacity rating of at least 150 kilowatts and (ii) be placed in service before January 1, 2012.
 - The amount of the PTC with respect to such facilities is half of the amount available for wind and closed-loop facilities.
- *Modification of Rules for Hydropower Production.* The Act replaces the definition of “nonhydroelectric dam” with a new definition that requires the hydroelectric project be operated so that the water surface elevation at any given location and time that would have occurred in the absence of the hydroelectric project is maintained. This provision applies to property originally placed in service after December 31, 2008.
- *Trash Combustion Facility Definition Modified.* The definition of “trash combustion facility” is expanded to provide that such facilities must “use” municipal solid waste. Previously, such facilities were required to “burn” municipal solid waste. This provision applies to electricity produced and sold after October 3, 2008.
- *Expansion of Open- or Closed-Loop Biomass Facilities.* The expansion of an open-loop or closed-loop biomass facility that qualified for the PTC will also qualify for the PTC if such expansion is placed in service on or after October 3, 2008 and before January 1, 2011. This credit is available to the extent of the increase in the amount of electricity produced at the facility as a result of the new unit. This provision applies to expansions placed in service after October 3, 2008.

For more information regarding the modifications made by the Act or the PTC in general, please contact Charles H. Purcell. In addition, please see our summary “Recent Legislation Affecting the Energy Tax Credit” for a summary of energy provisions included in the Act that address other types of renewable energy, such as solar power, and our summary “Recent Legislation Affecting the Residential Energy Efficient Property Credit” for a summary of the energy provisions in the Act that directly affect individuals.

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