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Impact of the Inflation Reduction Act of 2022 on Renewable Energy Tax Credits: Stinson

On August 16, 2022, President Biden signed the Inflation Reduction Act of 2022 (Act) into law. The Act, while not as expansive as the previously proposed Build Back Better Act, addresses numerous areas of policy and law including health care, corporate taxation and energy. Two particular focuses for the energy community, in addition to incentives for domestic manufacturing of clean energy technology and developing technologies such as geothermal, carbon capture, clean hydrogen and biofuel, are the Act's 1) extension and modification of the production tax credit under Code Section 45 (PTC) and investment tax credit under Section 48 (ITC) and 2) creation of the new Clean Electricity Investment Credit (Clean ITC) under Section 48D and Clean Electricity Production Credit (Clean PTC) under Section 45Y.

NEW PTC AND ITC BASE RATES
Under the Act's modified tax credit program, certain renewable energy projects which place in service after December 31, 2021 will be eligible to receive the new base credit amount. Eligible wind, solar (which previously had expired), closed-loop biomass, open-loop biomass, geothermal, landfill gas, municipal solid waste, qualified hydropower and geothermal facilities would qualify for a PTC base credit amount of 0.3 cents per kWh (adjusted for inflation). Additionally, a new ITC base credit amount of 6% would be available to solar energy property, fuel cell property and waste energy recovery property, as well as the newly added energy storage technology, qualified biogas property and microgrid controllers, which begin construction by December 31, 2024. The 6% credit for energy property includes amounts paid or incurred for qualified interconnection property on projects with a nameplate capacity not greater than 5MWac.

CLEAN PTC AND CLEAN ITC
The Act also provides a new production tax credit and investment tax credit for projects generating electricity that place in service after December 31, 2024 and have a greenhouse gas emission rate of zero or less. An eligible project may receive either the Clean PTC or the Clean ITC but not both. The Clean PTC and Clean ITC will provide the same revised base credit rate available under the PTC and ITC. As with the ITC, costs incurred in connection with qualified interconnection property will qualify for the Clean ITC.

Both the Clean PTC and Clean ITC will have a phase-down period beginning on the later of 1) the year in which greenhouse gas emissions from the electric power sector are equal to or less than 25% of 2022 sector emission levels or 2) 2032 (Applicable Year). The credit will remain at 100% of the applicable credit percentage in the year following the Applicable Year and then decrease to 75% in the second year and 50% in the third year. After the third year, the credit will expire.

MULTIPLIER REQUIREMENTS
A taxpayer can increase a project's base credit amount by a multiplier of five (up to 1.5 cents per kWh for PTC or Clean PTC and up to 30% for ITC or Clean ITC) by satisfying certain prevailing wage rate and apprenticeship requirements (Multiplier Requirements). Under the prevailing wage requirements, laborers and mechanics employed by the taxpayer or any contractor or subcontractor

during the construction, alteration or repair of the facility during the applicable credit period must be paid local prevailing wages as established by the Secretary of Labor (Secretary). A taxpayer can cure a failure to satisfy the prevailing wage requirements by paying underpaid laborers or mechanics the difference in pay, plus interest, as well as paying a $5,000 penalty per underpaid laborer or mechanic to the Secretary. Further guidance on the prevailing wage requirements will be issued by the Secretary.

The apprenticeship requirements establish a minimum number of labor hours on a project that must be completed by qualified apprentices participating in a registered apprenticeship program under Code Section 3131(e)(3)(B). These apprenticeship programs, as well as a project's requisite apprentice-to-journeyman ratios, are established by the Department of Labor or the applicable state apprenticeship agency. Projects beginning construction before January 1, 2023 need only 10% of total labor hours completed by a qualified apprentice. That percentage increases to 12.5% for projects beginning construction in 2023 and 15% for projects beginning construction on or after January 1, 2024. Additionally, each taxpayer, contractor or subcontractor which employs four or more individuals to perform construction, alteration or repair work on the project must employ at least one qualified apprentice. A taxpayer can cure a failure to satisfy the apprenticeship requirements if it 1) pays the Secretary of Labor a penalty equal to $50 per labor hour not in compliance (this amount increases to $500 if the failure is determined to have been intentional disregard) or 2) establishes a good faith effort to obtain apprentices which failed due to a denial or failure to respond by apprenticeship programs.

The Multiplier Requirements apply to projects that begin construction 60 days or more after the Secretary publishes guidance on the requirements. Projects that begin construction earlier, as well as facilities with a maximum net output of less than 1MWac, will automatically qualify for the tax credit multiplier without having to satisfy the Multiplier Requirements.

ADDITIONAL PERCENTAGE BOOSTS

The Act also provides that projects satisfying the Multiplier Requirements and Placed in Service after December 31, 2022 can receive an additional 10% credit increase for containing certain levels of steel, iron or manufactured products that are made in the United States. The taxpayer may certify that any steel or iron used in the project is produced in the U.S. but at least 40% of manufactured products used on a project (20% for offshore wind facilities) must be produced in the U.S. to qualify for the boost. However, a project that does not use projects produced in the U.S.can still receive the 10% boost if not enough materials were produced in the United States or if using U.S. made materials would increase the project cost more than 25%.

Similarly, a project that satisfies the Multiplier Requirements can receive a 10% credit boost for being located in specified energy communities. Such energy communities include brownfield sites, areas with certain employment related to coal, oil or natural gas experiencing unemployment above the national average, and areas with closed coal mines or coal-generating plants.

Regardless of whether the Multiplier Requirements are satisfied, solar and wind projects can also receive additional boosts for being involved in certain low-income policy goals. Projects located in low-income communities or on Indian Land are eligible for an additional 10% boost, and projects that are part of a low-income residential building project or economic benefit project can receive a 20%. The Act also establishes that energy credits under Section 48 will not apply for purposes of determining eligible basis for LIHTC under Section 42.

DIRECT PAY AND CREDIT TRANSFERABILITY

As many in the energy community anticipated, the Act includes provisions allowing eligible taxpayers to treat tax credits as a direct payment of taxes to the IRS (Direct Pay). Many renewable energy credits, including the PTC if placed in service by December 31, 2022, the ITC, the Clean PTC and the Clean ITC, are eligible for Direct Pay treatment. However, the Act only allows tax-exempt entities, states and political subdivisions, the Tennessee Valley Authority, Indian tribal governments, Alaska Native Corporations and rural electricity co-ops to use Direct Pay for these credits. Other taxpayers can only elect to use Direct Pay for clean hydrogen, carbon oxide sequestration and advanced manufacturing production for the first five years after the facility is placed in service. An election to use Direct Pay must be made no later than the due date for the tax return for the year in which the election is made. For the PTC and Clean PTC, the Direct Pay election will apply for a 10-year period beginning on the eligible facility's placed in service date.

While most taxpayers cannot use Direct Pay, the Act does permit taxpayers to transfer certain tax credits, including the PTC, ITC, Clean PTC and Clean ITC, to an unrelated party. Beginning in taxable year 2023, a tax credit may be transferred once and may not be transferred again. Such transfer must be made in cash, and any gain is not included in the seller's gross income or deducted by the buyer. In the case of a partnership, payment received for the transfer of credits will be treated as tax exempt income and would pass-through to the partners of the seller. Transfers of credits can begin in approximately mid-February 2023 and must be made no later than the tax return due date for the taxable year for which the credit is determined. Transferrable credits would also receive extended carryback and carryforward periods. The carryback period would be increased from one to three years and the carryforward period would increase from 20 to 22 years.

This alert spotlights just a few of the developments included in the 300-page Act. Stinson's Tax Credit & Impact Finance team will continue to monitor the Act's implementation and its potential impact on firm clients.

Stinson LLP

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