KIRKLAND & ELLIS

Blog Post

Bipartisan Senator Group Asks Treasury for Relief for Renewables Placement in Service Deadline

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Update: The U.S. Department of the Treasury sent a response letter addressed to Senate Finance Committee Chairman Chuck Grassley (R-Iowa) on May 7, 2020, saying that it appreciates the concern raised in the senators' letter and "plans to modify the relevant rules in the near future." We will continue to monitor the development of any future renewable tax credit guidance and encourage you to reach out to us with any questions.

A bipartisan group of senators sent Treasury Secretary Steven Mnuchin a letter dated April 23, 2020, urging a one-year extension of an IRS deadline relevant to the qualification of renewables projects for tax credits. The letter was signed by Senate Finance Committee Chairman Chuck Grassley (R-Iowa), Ranking Member Ron Wyden (D-Ore.), Sens. John Thune (R-S.D.), Maria Cantwell (D-Wash.), and Senate Energy and Natural Resources Committee Chairman Lisa Murkowski (R-Alaska) and Ranking Member Joe Manchin (D-W.Va.). The extension would enhance the financeability of renewables projects that began construction in 2016 or 2017 and have been delayed by COVID-19.

Background – Continuity Requirement and Safe Harbor

Under U.S. tax law the value of production tax credits ("PTCs") or investment tax credits ("ITCs") for which a renewables project may qualify varies depending on the year in which the construction of the project begins. Once construction begins, the project either needs to be "placed in service" over the next four years or the sponsor has to prove that work was "continuous" based on facts and circumstances. The IRS guidance calls this rule the "continuity requirement," and refers to the four-year placement in service window as the "continuity safe harbor." Due to the difficulty of proving continuity through subjective facts (particularly in the context of a project that has taken longer than four years to complete), a project's ability to meet the four-year continuity safe harbor deadline is a critical financeability issue for purposes of securing tax equity and debt.

The IRS guidance also provides that certain "excusable disruptions" outside of a developer's control (e.g., natural disasters and permitting delays) are not taken into account in considering whether the developer failed to meet the continuity requirement. However, these kinds of delays do not extend the continuity safe harbor. So while COVID-19-related delays likely qualify as "excusable disruptions" under the guidance, this is only really helpful for developers relying on a facts and circumstances analysis, which is already difficult to finance as a general matter.

The senators' letter proposes an extension of the continuity safe harbor from four years to five years for projects that started construction in 2016 or 2017.

Implications of Potential Continuity Safe Harbor Extension

COVID-19 delays pose a problem for renewables developers generally, but wind developers potentially have the most to lose, at least in the near-term. As discussed in more detail in a previous blog post, to qualify for the maximum amount of PTCs, wind projects that began construction in 2016 need to be placed in service by the end of 2020 to meet the continuity safe harbor. The financing for these projects could be severely impacted if they slip to 2021. Projects that began construction in 2017 are similarly impacted if they slip to 2022.

While a one-year extension of the continuity safe harbor for 2016 and 2017 vintage projects would not solve all of the problems faced by renewables developers in the wake of the COVID-19 pandemic, it would give significant comfort to developers with projects pushing up against a year-end placement in service deadline, and help address one of the industry's most immediate concerns. It is also a relatively "easy" form of relief in the sense that it can be accomplished through U.S. Treasury guidance and does not require Congressional approval or a change to currently existing federal government subsidies.

Looking Ahead

The proposed continuity safe harbor extension would provide relief to renewables developers facing immediate pressure to place projects in service in 2020 or 2021. However, renewable energy developers still have a list of outstanding policy asks that the extension does not address. First, the extension would not benefit developers of projects that began construction in 2018 or later. Those developers would continue to face a four-year deadline under the continuity safe harbor irrespective of how long their projects may be delayed by COVID-19 issues. Second, it remains unclear what the tax equity market will look like after COVID-19 subsides. As described in our prior post, the Solar Energy Industries Association and other trade groups have been advocating to give investors the option of receiving a direct cash payment in lieu of tax credits, opening the door for investment by entities that may not have significant U.S. taxable income that they need to offset with tax credits. Finally, PTCs and ITCs are both phasing down (or out, depending on the type of asset) and trade groups have been advocating for an extension of the credit as a means to spur additional investment in renewables in the years ahead.

Recent COVID-19 legislation such as the CARES Act has focused on providing immediate relief to individuals and businesses (e.g., airlines) most acutely affected by the pandemic. The $480 billion relief bill signed by President Trump yesterday included an additional $310 billion for the paycheck protection program and additional amounts directed towards health care and testing — but no infrastructure spending. Both President Trump and congressional Democrats have continued to signal their desire to include a massive infrastructure program in further stimulus bills, which would also assumedly address any extension of the PTC or ITC or cash grant programs for renewable. In the meantime, renewable energy and other infrastructure investors await with bated breath.

Read more insights on Kirkland's Energy & Infrastructure blog.

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