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CLIENT ALERT

Effects of the House Tax Bill on Tax Credits for Nuclear Projects

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The U.S House of Representatives has passed a budget reconciliation bill (the "***Budget Act***") that includes a number of significant tax and energy-related provisions. The Budget Act now moves to the U.S. Senate, which is expected to make changes to the bill before sending it back to the House. While the tax bill as passed by the House significantly limits the availability of many energy credits created under the Inflation Reduction Act, the treatment of nuclear projects is more favorable relative to other technologies. Below is a high level summary of the key provisions included in the Budget Act as they relate to the nuclear energy tax credits.

1. A Silver Lining for Nuclear Projects

While the Budget Act would require new clean energy projects[1] to be both under construction no later than 60 days after the enactment of the new tax bill and placed in service by the end of 2028 in order to claim the "technology-neutral" production and investment tax credits,[2] the Budget Act provides an exception for advanced nuclear

[1] Projects that were under construction by the end of 2024 are not affected by the bill and will still qualify for full tax credits if completed within four years after the year construction started.

[2] Unless otherwise stated, all capitalized references to Sections are to the applicable section of the Internal Revenue Code of 1986.

facilities. Instead, qualifying nuclear energy facilities must only start construction by December 31, 2028. This would accelerate the phase-out by at least four years because, under current law, the technology-neutral ITC and PTC have a three-year, start of construction based phaseout period beginning in the later of (i) the year in which U.S. greenhouse gas emissions from the production of electricity are equal to or less than 25% of the annual U.S. emissions for calendar year 2022 or (ii) 2032.

Projects can start construction by either incurring at least 5% of the project's costs or performing "physical work of a significant nature." There are tax considerations and nuances to each approach, and sponsors should consult with tax counsel to ensure that the start of construction date is respected. While the Budget Act does not impose a statutory placed in service deadline, projects generally need to be in service within four years after the year in which construction began. A project may have more time to be placed in service if there are continuous efforts to advance the project after construction starts.

Together with the four executive orders recently issued by the President that seek to accelerate new reactor timelines, the preferential treatment of nuclear projects in the Budget Act should facilitate access to tax equity capital for qualifying nuclear energy facilities.

2. Transferability

The original version of the tax bill that passed the House Ways and Means Committee, which is the House tax-writing committee, would have eliminated the ability of taxpayers to transfer tax credits. However, the final House-passed version of the Budget Act restored transferability for most credits, including the technology-neutral PTC and ITC and the Section 45U production tax credit for existing nuclear projects. Note, however, that qualifying nuclear projects will still need to satisfy the beginning of construction deadline described above to avoid the elimination of credits.

3. Expanded FEOC Restrictions

The Budget Act provides for a complicated framework eliminating or disallowing a majority of the energy tax credits for projects funded by entities or constructed with components from certain prohibited foreign entities, which include China, Iran, North Korea and Russia (the "***FEOC Rules***"). The FEOC Rules would be applicable for projects beginning January 1, 2026. The rules require detailed analysis as they are complicated and to a degree unworkable as drafted. The FEOC Rules vary by credit and are far reaching in scope.

Most importantly, the new FEOC Rules place broad restrictions on tax credits for entities that have received "material assistance" from a prohibited foreign entity or, with respect to the technology-neutral ITC and PTC, where the taxpayer makes certain types of prohibited payments to one or more prohibited foreign entities beyond a specified threshold. Material assistance can include: any component, subcomponent, or applicable critical mineral included in such property that is extracted, processed, recycled, manufactured, or assembled by a prohibited foreign entity, and any design of such property which is based on any copyright or patent held by a prohibited foreign entity or any know-how or trade secret provided by a prohibited foreign entity. Given China's dominance in the manufacturing of components for clean energy facilities, the FEOC Rules under the new bill would be particularly difficult for developers and sponsors and would require an overhaul of clean energy component supply chains.

The definition of "prohibited foreign entities" proposed by the bill creates two new categories of foreign entities of concern: "specified foreign entities" and "foreign-influenced entities."

A "specified foreign entity" includes any "foreign-controlled entity," any entity identified as a "foreign entity of concern" as defined by IRA Section 30D (excluding subparagraph (C) of the definition), Chinese military companies operating in the United States, an entity that is subject to Uyghur Forced Labor Prevention Act restrictions, and certain other entities designated or identified by the U.S. government.

A "foreign-controlled entity" means (1) the government of a "covered nation" (i.e., China, Iran, North Korea and Russia); (2) a person who is a citizen, national, or resident of a covered nation and not a citizen or lawful permanent resident of the United States; (3) an entity or qualified business unit (as defined in Section 989(a)) incorporated or organized under the laws of, or has its principal place of business in, a covered nation; or (4) an entity (including subsidiaries) that is more than 50% owned or controlled by an entity described in foregoing clauses (1) through (3).

A "foreign-influenced entity" includes any entity that, during the taxable year, (1) a specified foreign entity has the direct or indirect authority to appoint a covered officer to such entity; (2) a single specified foreign entity owns at least 10% of such entity; (3) one or more specified foreign entities own in the aggregate at least 25% of such entity; or (4) at least 25% of the debt of such entity is held in the aggregate by one or more specified foreign entities. A "foreign-influenced entity" also includes any entity that, during the previous taxable year, (1) makes a payment of dividends, interest, compensation for services, rentals or royalties, guarantees or any other fixed, determinable, annual, or periodic amount to a specified foreign entity in an amount which is equal to or greater than 10% of the total of such payments made by such entity during such taxable year or (2) makes payments described in clause (1) to more than one specified foreign entity in an amount which, in the aggregate, is equal to or greater than 25% of the total of such payments made by such entity during such taxable year.

4. Section 45U PTC for Existing Nuclear Projects

Under the Budget Act, the PTC available for electricity produced and sold by existing nuclear facilities expires December 31, 2031. This is one year earlier than under current law and is more favorable treatment than was initially proposed in the draft bill from the Ways & Means Committee, which included a three-year phaseout of these credits starting in calendar year 2029. If the Budget Act is enacted in its current form, Section 45U credit would not be available to a "specified foreign entity" and starting two years after enactment, the taxpayer claiming the Section 45U credits could not be a "foreign-influenced entity."

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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