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Global Energy Industry
REVIEW

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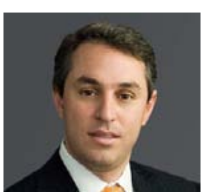

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In this edition of Mayer Brown's *Global Energy Industry Review*, we look at the Brazilian use of the phrase "local content," which has begun to appear more frequently in the laws, internal policies and tender protocols of governments and companies around the world, particularly with regards to the oil & gas industry. We also explore how the local content requirement is affecting research and development in Brazil's oil & gas industry.

With the suspension of sanctions barring investment in Myanmar, we thought it a good time to take a look at the new Foreign Investment Law. We have reviewed an unofficial translation of the law signed by President Thein Sein on November 2, 2012, and provide a summary of key provisions.

Turning next to the United Kingdom, we examine their new tax incentives designed to support the interest of exploiting their Shale Gas reserves.

Finally, we look at the recently passed American Taxpayer Relief Act of 2012 which not only addressed issues regarding the so-called "fiscal cliff" but also contains several "tax extender" provisions that could significantly impact the development and financing of wind and other renewable energy projects in the United States in 2013 and beyond.

This edition of the *Global Energy Industry Review* showcases current energy-related trends around the world. We regularly publish legal updates on timely industry issues. Please visit our Energy News and Publication page to view a complete list of our energy updates.

If you have any questions or comments on any of the articles in this edition, please contact us. ◆

Local Content in Brazil

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The phrase "local content" has begun to appear more frequently in the laws, internal policies and tender protocols of governments and companies around the world, particularly with regard to the oil & gas industry. The main argument to justify the local content rules is the enhancement of the local industry. But is it working?

Before analyzing the efficacy of the local content rules, it is important to understand the different approaches being adopted by different countries. Certain countries consider a local content rule to be fully observed when a service or good is provided by a company that is owned or controlled domestically; other countries have more complex methods to calculate the percentage of good and services available in the country, by local providers.

The first model seems to fail to reach the main purpose of the rule—the growth of the local industry—as it does not incentivize the manufacture, or even the assembly, of goods in the country or the provision of services, locally. Rather, the model simply creates opportunities for a few individuals who will own more than 51 percent of the joint ventures to be formed with foreign entities.

The second model seems to be more realistic, and closer to reaching the main purpose of the local content rule. However, the success of its implementation is not guaranteed, as the rule itself is not enough to ensure the development of the local industry, to develop sufficient manpower or to secure competitive prices. In this article, we will focus on the Brazilian model.

The Brazilian Model

Article 171 of the Brazilian National Constitution of 1988 used to classify companies as "Brazilian companies" or "Brazilian companies of national capital," creating a clear distinction between companies incorporated in Brazil but controlled by non-Brazilians, and companies incorporated in Brazil and controlled by Brazilians. Under this constitutional provision, any local content rule in Brazil would probably follow what we are calling "first model," according to which the definition of local content is conditioned to the nationality of the controlling shareholder of an entity.

However, with Constitutional Amendment no. 6/1995, Article 171 was revoked and companies incorporated in Brazil were considered "Brazilian companies" for all legal purposes, no matter the origin of the capital or the nationality of the shareholders (a few exceptions still exist, but it will not be considered in this article). Therefore, since 1995, unless expressly authorized under the

* Observations in this article about Brazilian law are by Tauil & Chequer Advogados. They are not intended to provide legal advice to any entity; any entity considering the possibility of a transaction must seek advice tailored to its particular circumstances.

constitution, any rule that creates any protection to Brazilian companies controlled by nationals in detriment to companies controlled by foreigners is considered unconstitutional and is null or voidable.

Constitutional Amendment no. 6/1995 was also the amendment that opened the Brazilian oil & gas sector to private companies. This was followed by the creation of the National Petroleum Agency (ANP) and the promotion of bid rounds, where the local content policy was adopted in the country for the very first time.

In 1999, during the first bid round for oil & gas concessions, the development of the local industry was already a point of concern. An initial local content rule was included in ANP's Tender Protocol and the Concession Agreements. At that time, the Concessionaire agreed to "provide Brazilian Suppliers with the opportunity to present proposals for the supply of services in connection with Operations herein contemplated, with the objective of maximizing the Brazilian contents of such services in the Country subject to similar availability and condition in price, period and quality."

In addition to that general principle, each bidder had the opportunity to present, as part of its offer, a minimum percentage of local investment that would be dedicated to the purchase of goods and services from Brazilian Suppliers. This model was used by ANP until the 4th bid round (2002).

In 2003, in order to expedite the development of the local industry, the Brazilian regulator decided to require a minimum percentage for the acquisition of goods and services in Brazil for all concessions for exploration and production of oil & gas, whether or not the blocks are considered onshore, shallow water or deep water. Thus, during the 5th and 6th bid rounds, the local content percentage suggested by each bidder continued to represent a relevant portion of its offer, but there was a minimum percentage that had to be observed by all bidders.

Due to the slow development of the local industry at that time, many concessionaires were unable to reach either the minimum local content requirement or the incremental percentages offered during the bid rounds. This influenced the final result, as the local content commitment was part of the offer, which ended up as just a number, unenforceable for several reasons. In order to avoid distortions in the offers, ANP decided in 2005 (7th bid round) to establish a range of percentages (minimum and maximum) that should be considered by bidders during the preparation of their proposals.

Therefore, the minimum percentage of local content required under the tender rounds (and the maximum that each bidder was allowed to offer) was being constantly revised and improved by ANP, until the last bid round occurred in 2008 (10th bid round), as follows:

ROUNDS	DEEP WATER		SHALLOW WATER		ONSHORE	
	Exploration	Development	Exploration	Development	Exploration	Development
1st - 4th	0	0	0	0	0	0
5th - 6th	30%	30%	50%	60%	70%	70%
7th - 9th	37% to 55%	55% to 65%	51% to 60%	63% to 70%	70% to 80%	77% to 85%
10th	*	*	*	*	70% to 80%	77% to 85%

Brazilian Local Content Certification System

Since their beginning, the Brazilian concession agreements for oil & gas exploration and production included different provisions regarding local content and minimum percentages to be observed by the concessionaires. However, enforcing these provisions was a rather complex task, either because of the lack of qualified suppliers and service providers in the country (the main justification presented by the concessionaires) or because of the difficulty to confirm whether a specific good or service acquired in Brazil would satisfy the local content rules.

The model was improved in 2007 with ANP's enactment of the Local Content Certification rules. These rules established a methodology to calculate the percentage of local content in goods and services acquired in Brazil and provided clear rules and procedures for the accreditation of independent companies to certify such percentage.

Under this revised system, a certifying entity (accredited by ANP) is responsible for measuring the local content found in goods and services acquired/contracted by concessionaires in connection with their oil & gas exploration and production activities in the country. Using an independent certifying entity is important to ensure the transparency of the entire process; it also protects the seller/contracted parties from disclosing information that would put them at a competitive disadvantage.

Possession of a certificate issued by an independent entity enables the concessionaire to prove local content compliance for each specific good or service acquired in Brazil. Attaching the certificate to the respective invoice assists ANP with auditing the concessionaire's fulfillment of its commitment regarding the minimum or the exact percentage of local content.

Even if the concessionaire is not able to achieve the percentage of local content agreed under the concession agreement, the independent certification is important, as the contractual penalties are calculated based on the difference between the agreed and the actual percentage of local content achieved by the concessionaire.

Perspectives and Challenges

It seems clear that local content rules such as those in force in Brazil will be more efficient in developing local industry than rules where the nationality of the controlling shareholder is the sole criteria for determining whether certain equipment, materials and services have incorporated actual and effective domestic contribution. However, the legislation itself does not ensure the development of the local content. Recent research from a reputable Brazilian university indicates that the Brazilian local industry is only able to provide 5 of the 24 categories of equipment considered critical to exploration and production activities. In the other 19 categories, the national market prices exceed those of foreign competitors, and the products are subject to untimely delivery or falling short of the quality standards required by the oil & gas industry.

The development of a local industry, especially the segment dedicated to the oil & gas industry, takes time, and the reliability of the local suppliers is a paramount issue to be considered by the concessionaires. At the same time, if ANP simply waives compliance with the required minimum percentages of local content defined in the concession agreements due to lack of qualified suppliers in the country, the local content policy will have failed.

In recent announcements made by ANP, it seems that the local content regulation is becoming more mature. There is a clearer understanding about the kind of goods and services that can be provided in Brazil, and what still needs to be acquired abroad.

The development of the local industry is critical for the generation of jobs and maximization of the advantages that the oil industry can offer to the country. However, the pertinent policies must be implemented cautiously, without creating requirements that cannot be fulfilled or that might somehow jeopardize the safety of the operations. ◆

Research and Development in the Oil & Gas Industry in Brazil

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As exploration and production (E&P) activities advance in the oil & gas industry, the host countries are challenged to create new, beneficial and efficient regulations that will ensure the development of a strong local industry. Also, the continuing demand for innovation and the increasing technological challenges faced by the sector make it clear that fostering national investments in research and development (R&D) is vital to building local industry. Establishing a legal obligation to invest in R&D has proven to be a crucial tool for encouraging a strong national development policy, which helps boost social and economic indicators.

Taking into account the numerous local content obligations imposed by developing countries in the oil & gas industry, the R&D investment obligation seems to be one of the cleverest and most efficient strategies in a long-term public policy. Investments in R&D can: (i) foment the development of a national technological industry; (ii) enable the increase of competitiveness of the country in the global market; (iii) indirectly or directly result in improved technical and upper-level education; and (iv) enable the creation of partnerships between government entities and private investors, especially in developing countries.

Current R&D Structure in the Concession Regime

In the Brazilian Concession Contract regime (Concession Regime), the R&D investment obligation derives from a combination of legal and contractual aspects. In actual terms, according to the Petroleum Law and Federal Decree 2,705, if production of oil or natural gas in a certain field reaches a specified volume of production, the concessionaire shall pay an additional financial compensation to the government—this is called Special Participation. In such cases, the Concession Contract also requires the concessionaires to invest an amount equal to 1 percent of the field's gross production income in R&D projects. This obligation is also established by the National Agency of Petroleum, Natural Gas and Biofuels (ANP) in Resolution No. 33/2005 (ANP Resolution), which provides detailed guidance on the performance of the R&D expenditures, including models of standard reports to be used by the concessionaires when evidencing their R&D investments to ANP.

Up to one-half of that 1 percent R&D expenditure may be directed to development activities in the concessionaire's own facilities or those of its affiliates, when located in Brazil, or may be contracted directly with national companies, regardless of whether those activities are involved with or are related to the operations under the Concession Contract. The remaining expenditure must be invested in institutions previously accredited by the ANP (Approved Institutions). The main purpose of this R&D investment requirement is to protect and channel the investments to institutions with high expertise, operational capability and technological standards.

In the current Brazilian E&P scenario, approximately 17 concessionaries operate big production/revenue oil fields that exceed the specified production volume, resulting in their obligation to pay the Special Participation and invest in R&D projects. According to the ANP, the R&D obligation resulted in the contribution of around US$500 million to the country's research and development sector last year. Additionally, since the R&D clause was introduced in the Concession Contract (in 1998), more than US$3.3 billion has been invested in R&D projects related to the oil and gas industry. The agency projects that for the next 10 years, more than US$10 billion will be injected to support the expansion of the industry in the country, reaching U$2 billion per year in 2017.

Given this success, the ANP has decided to revise the current R&D clause applicable to the Concession Regime. The new clause, which is to be included in the future Concession Contracts of the 11th bid round (expected to happen in May 2013), is estimated to provide the ANP with more decision-making power on investment allocation. The main purpose of the review is to respond to the agency's development priorities by creating a committee that will be responsible for generating an annual list of investment priorities.

One expectation for the new clause is that up to 20 percent of the R&D amount may be designated to fund research initiatives other than technological R&D projects. This would significantly expand the range of investment opportunities to include other areas relevant to the oil & gas industry, including Business Management and Economics.

The Future of R&D and the Pre-Salt Discoveries

Because of the recent oil discoveries in the pre-salt layer in the Campos, Santos and Espírito Santo offshore basins, the Brazilian government has decided to adopt a new regime to govern the E&P activities in Brazil, together with the current Concession Regime. The production-sharing regime, created by the Pre-Salt Law in 2010, will apply exclusively for the E&P activities to be developed in the pre-salt and strategic areas (PSA Regime), while the Concession Regime (governed by the Petroleum Law) will continue to be applicable for all the other areas (onshore and offshore), which represent 98 percent of the Brazilian sedimentary basin, according to ANP.

Unlike the Concession Contract, the PSA Regime does not expressly determine any percentage for investments in R&D. In the PSA Regime, as determined by the Pre-Salt Law, the financial compensations due by the concessionaries will be (i) the signature bonus and (ii) the royalties.

The Pre-Salt Law also created the so-called Social Fund, which will benefit from the following resources: (i) a portion of the signature bonus, (ii) the royalties due to the government, (iii) the revenues deriving from the sale of the government's share of oil profit, (iv) the royalties and special participation revenues due to the government regarding pre-salt areas that have already been granted under the Concession Regime, (v) the fund's financial earnings and (vi) other resources allocated to the fund in accordance with the Pre-Salt Law. Moreover, the Social Fund will serve as a reserve of resources for the government's oil revenues arising out of the production-sharing contracts, and is also supposed to work as a strategic fund, meaning that the government will allocate its resources for the development of social and regional programs related to areas such as education, culture, sports, public health, science and technology, environment and climate change.

The main criticism, however, of this new legal framework adopted by the PSA Regime vis-à-vis the investments in R&D is that the oil money will be allocated directly by the government through the Social Fund. That means that science and technology will now compete with other initiatives, such as public health and education. Moreover, because the allocation of funds is discretionary, there is a concern about whether the government will allocate to the R&D projects the amount of investments that are necessary to meet the sector demands and standards.

Although there is no Special Participation in the PSA Regime, continuing technological development requires that the PSA contract that is currently being drafted by the government also establishes a mechanism through which the concessionaires are obliged to invest in R&D. The adoption of a model similar to that already in force under the Concession Regime could lead to more investments in R&D projects, with a focus on new technologies for the pre-salt areas, or to research linked to the development of alternative energy technologies, for example. It is known that the major oil companies are already investing in the development of technologies related to biofuels, and that they will play a leadership role in the clean energy market in the future.

Furthermore, the application of mandatory R&D investments to the concessionaires in the PSA Regime would enable the creation of more opportunities for partnerships between public R&D institutions and private entities. An example of this is the technological park of the Federal University of Rio de Janeiro (UFRJ), where Petrobras and other E&P companies and oilfield service providers work together with the researchers of the UFRJ to develop new technologies related to the oil & gas industry.

Conclusion

Considering the current technological challenges for the E&P activities in ultra-deep waters and the huge estimates for the oil production in the pre-salt layer, there is a lot to be expected from R&D in Brazil for the next decade. The country has already started to experience the benefits from the development of the petroleum industry, but it is necessary that new E&P bid rounds are effectively launched in the upcoming years. If that happens, the companies already operating in the country will be able to increase their portfolios, new players will finally have the opportunity to enter the market and, consequently, more R&D projects will develop. ◆

Details of Myanmar's New Foreign Investment Law

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We have now seen an unofficial translation of the long-awaited new Foreign Investment Law, signed into law by President Thein Sein on 2 November 2012. We highlight some of the key features of the new law.

- Certain activities are designated as restricted or prohibited, and the Myanmar Investment Commission (the "Commission") may only permit these activities with the permission of the Union Government when doing so would be deemed to be in the best interest of the State and its citizens. Other than these restrictions, the Commission may allow foreign ownership of any level in its discretion. The restricted and prohibited activities include:
  - any that would adversely affect public health or the environment or that would involve bringing hazardous or toxic waste material into Myanmar;
  - the use or production of hazardous chemicals;
  - service and manufacturing activities reserved for Myanmar nationals under foreign investment rules (Rules) to be promulgated within 90 days of the date of the new law (2 November 2012);
  - the use of technologies, medicines, or accessories (as well as any activities) that are still at the testing stage or are not yet permitted to be used abroad;
  - agriculture and livestock breeding;
  - activities within 10 miles of the national boundary except in designated Economic Zones
- The new law lays down objectives and basic principles, and any activities that promote these objectives and follow these principles are more likely to be approved.
  - Objectives include: natural resource exploitation, infrastructure development, human resource development, job creation, educational development.
  - Principles include: the promotion of exports, import substitution, large investment projects, the development of advanced technology, energy saving, the development of modern industry, environmental conservation, the exchange of information and technology, improving knowledge and technical know-how, developing banking services, promoting modern service provision, securing energy resources.
- The Commission has the discretion to set the minimum investment amount with the approval of the Union Government. The amount will depend on the nature of the business activity.

- In the case of a joint venture between a foreign investor and a Myanmar citizen in a restricted activity, the foreign ownership ratio may be proposed according to a ratio to be prescribed in the Rules. The law no longer specifies that the foreign investor must supply a minimum of 35 percent of the capital of the joint venture.
- The law contains a guarantee against nationalization, and a guarantee that approved investment activities will not be terminated during the contract period "without sufficient cause." It also guarantees that, after the expiry of the investment period, the investor can remit overseas its investment gains in the same foreign currency that it brought in at the outset.
- The law permits investment contracts to stipulate a dispute-resolution procedure.
- The law imposes duties on foreign investors, which should be carefully reviewed before any investment is made.
- A five-year tax holiday is included, as expected. Other forms of tax relief may be available.
- Where the foreign investment is in the high-tech sector, foreign companies are required to hire local employees with the relevant skills. Locals must make up at least 25 percent of the workforce in the first two years, 50 percent in the next two years and 75 percent in the third two-year period. Such companies must also provide training to locals. (What is regarded as "high-tech" for this purpose will require definition.)
- Foreign investors will be able to lease land from the government or from authorized private owners for a period of 50 years, with two 10-year extensions also being possible. This is also as expected. In underdeveloped and remote areas, the Commission may, with the consent of the Union Government, allow a longer period.

Until the Rules are promulgated, it will not be possible to form a complete picture of the new foreign investment environment in Myanmar. ◆

Shale Gas: The UK Announces Tax Incentives

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On 8 October 2012, the Chancellor of the Exchequer, George Osborne, announced that the British Government will soon be consulting on "a generous new tax regime for shale so that Britain is not left behind as gas prices tumble on the other side of the Atlantic."

Background

Readily accessible oil and gas reserves are declining and consequently gas imports are rising rapidly. The energy supply industry is increasingly turning to unconventional reserves to fill the gap left by the decline of coal energy and the unreliability of renewable energy.

Interest in exploiting shale gas reserves has increased with the recent growth of shale gas production in the US and high natural gas prices in the UK. In the US, shale gas now accounts for 23 percent of domestic gas production and 22 percent of domestic consumption, helping to reduce natural gas prices in the US to a quarter of UK prices. While the prospects of reductions of this magnitude are unlikely in the UK, the Government clearly sees the exploitation of shale gas as potentially having significant benefits for British consumers.

UK Prospects and Potential

Quantifying the exploitable amount of shale gas reserves within the UK is challenging, but in May 2012, Dart Energy International reported a best estimate of shale gas reserves onshore of 66 trillion cubic feet.

The Institute of Directors (IoD) conservatively predicts that the country's onshore shale gas reserves would provide enough energy to meet 10 percent of the UK's gas demand for the next 103 years while the *Financial Times* predicts that shale gas could account for a quarter of UK consumption in 20 years. Increased shale production could also help offset the projected fall in conventional UK North Sea gas production over the next 10 years (which is estimated to equal 13 million tons of oil equivalent). The *Financial Times* has estimated that production of shale gas could reach 2,100m standard cubic feet a day by 2029, which is just over half of the North Sea gas production levels this year.

Benefits

The use of shale gas reserves also has wider-reaching benefits on both the economy and the environment.

A recent article in the *Financial Times* predicts that shale gas could bring £95 billion of investment into the UK.

In March 2012, *The Independent* reported Lord Browne, the former BP chief executive, as predicting that the UK shale gas industry could create 50,000 jobs across the UK. The IoD has predicted a slightly more conservative figure of 35,000 new jobs across the UK.

Gas emissions contain half as much carbon dioxide as coal emissions, so increasing the UK's gas-based energy supply would help to save up to 45 million tonnes of carbon dioxide annually, which is equivalent to 8 percent of the UK's annual carbon emissions.

Natural gas emissions contain fewer particulates and other pollutants than coal and diesel. The IoD anticipates that using natural gas instead of coal for the generation of electricity and switching vehicles from diesel to natural gas could reduce the number of deaths from poor air quality in the UK.

Risks

The use of shale gas as an energy resource is highly controversial due to some of the risks involved in the fracking process. The main risks are water contamination, tectonic plate movements and methane and other greenhouse gas emissions. The European Union is currently considering a legislative framework to manage these risks.

The Future

The Government has said that gas "will continue to be an important part of the UK energy mix" as a successful UK shale gas industry "has the potential to create jobs and support UK energy security, benefitting the economy and taxpayers." The Government's aim is that a targeted tax regime will unlock investment which will "stimulate investment and production that would otherwise not have gone ahead." The House of Commons Select Committee is due to publish a report on Shale Gas and has been asking for written evidence on the following areas:

- estimates on the reserves of shale gas in the UK, Europe and globally, and what proportion of those reserves are recoverable;
- the reasons why estimates for shale gas reserves are changeable;
- the prospects of offshore shale gas reserves in the UK Continental Shelf;
- whether the UK should consider setting up a wealth fund with the tax review from shale gas;
- the effects of shale gas on the liquefied natural gas industry;
- whether shale gas could lead to the emergence of a single, global gas market;
- effects on investment in lower-carbon energy technologies; and
- the potential impact on climate-change objectives with a larger use of shale gas.

In May 2011, the House of Commons Energy and Climate Change Committee produced a report on shale gas which recommended that the UK Government monitor the regulatory approach taken in Poland and other EU countries where shale gas is explored and produced. In this report, the Committee acknowledges that the offshore shale gas reserves could be far greater than the onshore supplies. The Committee therefore recommended that the DECC encourages the development of the offshore shale gas industry in the UK.

In a press release on 8 October 2012, the Treasury said that the Government will interact with companies to ensure that tax regime is "appropriately targeted while maintaining a fair return for the Exchequer." Ed Davey, Secretary of State for Energy and Climate Change, has since confirmed that he hopes to be able to "give the green light" to fracking around the time of the Government's gas strategy announcement, which is expected in early November. With these announcements, the UK, in future, will be better placed to take advantage of the opportunity to develop a cheap and reliable energy source which will reduce the country's dependence on foreign gas imports. ◆

Production Tax Credit for Wind Energy and Bonus Depreciation Extended, Cuts to Section 1603 Cash Grant Program Delayed

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On January 2, 2013, President Obama signed into law the American Taxpayer Relief Act of 2012 (the "Act"), which was passed by both the Senate and House of Representatives on January 1, 2013. In addition to addressing some issues related to the so-called "fiscal cliff," the Act contains several "tax extender" provisions that could significantly impact the development and financing of wind and other renewable energy projects in the United States in 2013 and beyond.

Sunset Date for Wind PTC Extended; Eligibility for PTC and ITC Election Based on When Construction Begins

Under prior law, section 45 of the Internal Revenue Code of 1986, as amended (the "Code"), provided a production tax credit (the "PTC") for electricity produced and sold during a 10-year period from a wind facility that was placed in service before January 1, 2013. Absent an extension, a wind facility that was not placed in service by December 31, 2012 would not have been eligible for the PTC. The Act extends the sunset date for the PTC with respect to wind facilities until January 1, 2014. By pushing out the sunset date for wind facilities, the Act puts them on parity with closed-loop biomass, open-loop biomass, geothermal energy, landfill gas, municipal solid waste, qualified hydropower and marine and hydrokinetic facilities, which have a sunset date of January 1, 2014.

In another significant (but more subtle) modification, the Act replaces the requirement that a facility be placed in service before January 1, 2014 with the requirement that construction of the facility must have begun before January 1, 2014. This modification, which applies to wind facilities, as well as closed-loop biomass, open-loop biomass, geothermal energy, landfill gas, municipal solid waste, qualified hydropower, and marine and hydrokinetic facilities, is a welcome broadening of the definitions of "qualified facilities" that takes into account the long development and construction periods required to complete certain projects. Although this modification does not provide the long-term certainty that a multiyear extension would have provided (as was sought by the wind industry), it effectively provides for more than a simple one-year extension to the PTC sunset date for wind facilities.

The new begun-construction requirement is similar to the requirement under the US Treasury Department's (Treasury) section 1603 cash grant program that construction on a facility have begun during 2009, 2010 or 2011 and for which the Treasury adopted a

5 percent safe harbor. However, there is no guidance indicating if the Internal Revenue Service will apply similar standards in determining whether construction of a facility has begun for purposes of the modified PTC requirements. It is possible that the IRS could adopt a 10 percent safe harbor similar to that used in the Treasury regulations dealing with the special first-year depreciation allowance (commonly referred to as "bonus depreciation") under section 168(k) of the Code.

The Act also extends for one year the ability of taxpayers to elect to claim the 30 percent investment tax credit (the "ITC") under section 48 of the Code in lieu of the PTC, with the placed-in-service requirement being replaced with the begun-construction requirement.

Notably, the Act does not change the placed-in-service requirements under section 45 of the Code for small irrigation power, solar, refined coal or Indian coal facilities, and it does not modify the placed-in-service requirement under section 48 of the Code for solar energy property, which still must be placed in service before January 1, 2017 to be eligible for the ITC. It does, however, extend the PTC period for production from Indian coal facilities placed in service before January 1, 2009 from seven to eight years.

One-Year Extension of 50 Percent Bonus Depreciation

The Act provides a one-year extension to the 50 percent bonus depreciation for qualifying property that is both acquired and placed in service before January 1, 2014. Certain long production-period property will be eligible for 50 percent bonus depreciation if it is acquired before January 1, 2014 and placed in service before January 1, 2015.

Delay in Cuts to Treasury's Section 1603 Cash Grant Program

The Act delays until March 1, 2013 any mandatory spending cuts under the sequestration provisions of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended by the Budget Control Act of 2011. Previously, Treasury announced, based on a report by the Office of Management and Budget, that such spending cuts likely would cause grants issued under the section 1603 cash grant program to be reduced by 7.6 percent beginning on January 2, 2013. Thus, the Act does not prevent sequestration but allows Congress additional time to reach a deal on a budget that would prevent such cuts to the section 1603 cash grant program. ◆

About Mayer Brown

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