

## CLIENT ALERT

### Wasted Energy: Treasury Reexamines Eligibility Requirements for Renewable Energy Credits (Again) as Uncertainty Remains

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Treasury is considering additional guidance on two energy tax credits due to uncertainty about the eligibility requirements among renewable energy companies and investors alike. The Renewable Energy Production Tax Credit under Code section 45 and the Energy Investment Tax Credit under Code section 48 were intended to boost investment in qualified wind, geothermal, biomass, and other renewable energy facilities. Both credits were originally limited to qualified facilities "placed in service" before January 1, 2014. However, in response to lackluster investment in the renewable energy space, the American Taxpayer Relief Act of 2012 extended the credits to projects "the construction of which begins" before January 1, 2014.

The IRS issued two notices last year attempting to clarify eligibility requirements related to the beginning construction language. In April the IRS issued Notice 2013-29 explaining that a taxpayer may establish beginning construction on a qualified facility either by starting "physical work" on the facility or by meeting a "safe-harbor" related to payments made towards the cost of the facility. That was followed in September by Notice 2013-60 which, among other things, confirmed that the transfer of a facility after construction has begun will not prevent a facility from qualifying for the credit. Five months into 2014, the requirements remain unclear and Treasury is rightfully concerned.

Although neither the IRS nor Treasury has announced formal plans to issue new guidance, in a recent interview with BNA Christopher Kelly, an attorney-adviser in Treasury's Office of Tax Legislative Counsel, indicated that now is a good time to weigh in on changes. The cut-off date for new projects has passed, but any new guidance could affect potential investors in a project where construction began before 2014, as well as a controversy over the date construction began. Crowell tax attorneys are well positioned to discuss these issues with IRS Chief Counsel. If your company owns or has invested in a renewable energy project, contact one of the authors of this alert to discuss your eligibility for these credits.

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For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**David B. Blair**

Partner – Washington, D.C.

Phone: +1 202.624.2765

Email: [dblair@crowell.com](mailto:dblair@crowell.com)

**David J. Fischer**

Partner – Washington, D.C.

Phone: +1 202.624.2650

Email: [dfischer@crowell.com](mailto:dfischer@crowell.com)