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Provisions Affecting the Renewable Energy and Power Industry: 100% Bonus Depreciation

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Under the Tax Cuts and Jobs Act (TCJA), 100% bonus depreciation is available for qualified property acquired and placed into service after September 27, 2017 and before the end of 2022, which is a significant increase from the 50% bonus depreciation under the prior law, as described in greater detail ***here***. After 2022, the bonus depreciation level is phased down by 20% each year until it is eliminated at the end of 2026.

Previously only new property had been eligible for any bonus depreciation. The TCJA eliminated this "original use" requirement, thereby extending eligibility to used property, provided such property is acquired from an unrelated party in a taxable transaction. For a buyer with tax capacity to absorb the 100% bonus depreciation, this change should boost the value of any existing renewable energy project on the market for sale. Taxpayers should pay close attention to properties acquired in 2017. A property acquired before September 27, 2017 is only eligible for the pre-TCJA bonus depreciation schedule, even if such property is placed into service after such date. The date of the acquisition is not the closing date, but rather the date when a written binding contract for the acquisition was entered into. This situation may occur, for example, on a wind farm the construction of which started before September 27, 2017. If a written binding contract for the acquisition of a wind turbine to be installed on the wind farm was entered into before September 27, 2017, such wind turbine would only be eligible for the pre-TCJA bonus depreciation schedule, even if the wind farm was placed into service after September 27, 2017.

Similar to the prior law, the TCJA allows a taxpayer to opt out of the bonus depreciation and depreciate an asset over its applicable regular schedule, which is five years for wind and solar assets. Historically, most tax equity investors have opted out of bonus depreciation, especially in partnership flip structures. This is because tax equity investors typically prefer to spread out their tax capacity over multiple renewable energy projects, limiting their ability to absorb the tax depreciation from a single project. Furthermore, in partnership flip structures, the allocation of any tax depreciation to the tax equity investor is limited by such investor's capital account balance, unless the tax equity investor agrees to restore its negative capital account balance to zero when the partnership is liquidated (deficit restoration obligation). The allocation of the bonus depreciation to the tax equity investor may require the investor to agree to a significant deficit restoration obligation, which the tax equity investor generally does not like. However, in 2017, in anticipation of the corporate tax rate decrease, more renewable energy projects elected to take the bonus depreciation in order to achieve a higher after-tax return under the higher corporate tax rate for the depreciation benefits. With the new lower

corporate tax rate now in effect, most projects are expected to return to the historical norm of opting out of bonus depreciation. As such, while the increased bonus depreciation will provide significant benefits to taxpayers with sufficient tax capacity, it may ultimately provide only marginal benefits to renewable energy projects that have to rely on investments from tax equity investors.