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Locke Lord QuickStudy: Proposed Legislative Extension of Investment Tax Credits for Energy ?Storage Technologies

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On March 9, 2021, a bipartisan group of federal lawmakers introduced the "Energy Storage Tax Incentive and Deployment Act of 2021" (the "**Act**") which is intended to extend certain investment tax credits to standalone energy storage systems (such as batteries). The Act would provide business certainty and create a level playing field between certain standalone energy storage systems and other energy property historically eligible for federal income tax credits. Companion legislation has been introduced in both the House of Representatives (H.R. 1684) and the Senate (S. 627), which generally mirror prior versions of similar legislation proposed in Congress in previous years. This QuickStudy is intended to summarize the current law with respect to investment tax credits for commercial applications, and the effects of the proposed legislation.

Background

As currently drafted, Section 48 of the Internal Revenue Code of 1986, as amended (the "**Code**"), allows taxpayers a federal income tax credit for a portion of expenditures paid to place certain energy property in service (the "**Investment Tax Credit**" or "**ITC**"). Energy property, for purposes of the ITC consists of specifically listed energy-related property, including, but not limited to, certain solar projects and wind projects.

The Investment Tax Credit for a tax year equals the product of the energy percentage and the basis of the energy property placed in service during that year, subject to certain phaseouts and placed in service deadlines. For example, the energy percentage for solar energy property is generally 30 percent, but is subject to the following phaseout schedule: (i) 26 percent in the case of such property the construction of which begins during 2020, 2021 or 2022, (ii) 22 percent in the case of such property the construction of which begins during 2023, and (iii) 10 percent thereafter; provided that if such property described in clause (i) or clause (ii) is not placed in service before January 1, 2026, the energy percentage will be 10 percent. There are similar phaseout schedules for other types of energy property.

There is currently uncertainty with respect to the application of the Investment Tax Credit to storage devices, except for narrow circumstances. Treasury Regulations include "storage devices" in the definitions of solar energy property and wind energy property. However, such storage devices are only eligible for ITCs if the energy input to

such storage devices is primarily from solar energy property or wind energy property. The Treasury Regulations and relevant IRS private letter rulings provide that if a storage device has energy input from solar or wind energy property and some other non-qualified energy property, and the input from the non-qualified energy property exceeds 25 percent, then the storage device would not be considered solar energy property or wind energy property (the "**75 Percent Test**"). Therefore, if a storage device does not meet the 75 Percent Test, such device will not be eligible for the Investment Tax Credit. Additionally, the IRS has provided limited guidance in private letter rulings (which cannot not be relied upon by anyone other than the taxpayer to whom they are addressed) that suggest batteries are "storage devices" eligible for the Investment Tax Credit. However, these private letter rulings do not address other types of storage devices.

Energy Storage Tax Incentive and Deployment Act of 2021

In general, the Act would extend the Investment Tax Credit to include certain standalone energy storage devices. Specifically, the Act would add the following category as a standalone energy property under Section 48(a)(3)(A) of the Code:

"Equipment which receives, stores, and delivers energy using batteries, compressed air, pumped hydropower, hydrogen storage (including electrolysis), thermal energy storage, regenerative fuel cells, flywheels, capacitors, superconducting magnets, or other technologies identified by the Secretary in consultation with the Secretary of Energy, and which has a capacity of not less than 5 kilowatt hours."

Furthermore, the Act would clarify that the credit allowed for energy storage technologies is the same as currently available for many other types of energy property, including solar energy. This means that the energy percentage used to calculate the Investment Tax Credit for energy storage technologies for solar energy would also be subject to the same phaseout schedule discussed above.

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