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## IRS Rules on Qualifying Landfill Gas Facility for CREBs

This alert provides information on some recent developments and guidance from the Internal Revenue Service (“Service”) on clean renewable energy bonds (CREBs).

### Private Letter Ruling 200844008

The Service recently issued a private letter ruling, [Private Letter Ruling 200844008](#) (June 25, 2008), addressing whether a landfill gas-to-energy facility constituted a “qualified project” under Section 54(d)(2)(A) of the Code.

The facts of the ruling are as follows: The ruling involves two not-for-profit cooperatives — the Issuer is a finance cooperative and the Borrower is a cooperative electric company. The Issuer received an allocation of CREBs for a landfill-gas-to-energy project that is owned and operated by the Borrower. The project is located adjacent to a landfill. Specifically, the project consisted of the addition to an existing landfill-gas-to-energy facility of a number of engine-generator units, as well as certain upgrades to the existing facility necessary to accommodate the expansion. The existing facility, which is also owned and operated by the Borrower, was producing electricity from gas derived from the biodegradation of municipal solid waste landfill gas. No part of, or interest in, the landfill or the landfill gas collection and

supply system is owned or operated by the Borrower, and the landfill and the landfill gas collection and supply system are independently owned and operated. The owner of the landfill had claimed tax credits under Sections 29 and 45K of the Code in prior years. The Issuer’s plans, according to the ruling, are to issue the CREBs, and loan a portion of the proceeds to the Borrower to reimburse the Borrower’s costs incurred in constructing the project.

The ruling considers whether the restrictions in Section 45(e)(9)(A) modify the definition of a “qualified facility” under Section 54(d)(2)(A) as it relates to landfill gas facilities. Section 45(e)(9)(A) provides that, in general, the term “qualified facility” shall not include any facility that produces electricity from gas derived from the biodegradation of municipal solid waste if such biodegradation occurred in a facility (within the meaning of Section 29/45K) the production from which is allowed as a credit under Section 29/45K for the taxable year or any prior taxable year. The ruling concludes that Congress did not intend Section 45(e)(9)(A) to apply for purposes of the definition of “qualified project” under Section 54(d)(2)(A), and reasons that:

Section 54(d)(2)(A) defines the term “qualified project” for purposes of § 54 by specific reference to § 45(d), a subsection of § 45,

instead of the entire § 45. Thus, Congress expressly limited the universe of rules defining the term “qualified project” to those in § 45(d). Had Congress intended to apply all the limitations of § 45, it could have merely referenced § 45.

In determining whether the project constitutes a “qualified project” for purposes of Section 54(d)(2)(A) of the Code, the Service ruled that the reference in Section 54(d)(2)(A) to Section 45(d) is construed without applying Section 45(e)(9)(A).

Accordingly, if an owner of a landfill gas collection system previously claimed Section 29/45K tax credits with respect to the landfill gas produced by that system, that fact will not disqualify a landfill gas-to-energy project which uses gas produced by that system for qualifying for CREB financing. This appears to be a change in the Service’s initial position with respect to such facilities and is a helpful clarification with respect to one of the open issues regarding the interplay of Sections 45 and 54 of the Code.

For purposes of determining whether a project is a “qualified project,” the ruling has broad significance because the ruling suggests that the Service would apply the restrictions and limitations contained only in Section 45(d) and would not apply any of the restrictions and limitations contained elsewhere in

Section 45. While the private letter ruling may provide some insight into how the Service might interpret Section 54 in similar circumstances, please note, however, that private letter rulings cannot be cited by taxpayers as precedent and have no binding effect on the Service. We hope that the Service will apply the holding in this ruling to all taxpayers when it issues additional expected guidance regarding the CREB program.

#### **Joint Committee on Taxation Report**

On October 29, 2008, the House Ways and Means Committee held a public hearing on economic recovery, job creation and investment in America, specifically including consideration of the ability of state and local governments to finance infrastructure needs in the current economic climate. In connection with that hearing the Joint Committee on Taxation on October 24, 2008, issued a report (the “JCT Report”), entitled “Present Law and Issues Related to Infrastructure Finance.” The JCT Report provides a description of present law relating to tax-exempt bonds issued by state and local governments and a description of present law relating to tax credit bonds, including qualified zone academy bonds and CREBs. The document also provides background data and an economic discussion of tax-exempt bonds and tax credit bonds, and includes an expanded discussion of the benefits and costs of tax-exempt bonds and tax-credit bonds. The JCT Report

can be found at the following link: <http://www.jct.gov/x-83-08.pdf>.

#### **Hunton & Williams Teleconference**

On October 30, 2008, Hunton & Williams hosted an “Energy Tax Credit Bonds Teleconference.” The teleconference reviewed the provisions of the recently enacted “Economic Stabilization Act,” in particular the provisions of the act affecting CREBs and creating the new CREBs and qualified energy conservation bonds (“QECBs”). The teleconference discussed the advantages of each of the new tax credit bond statutes and contrasted them with the existing statutory framework for tax credit bonds. A copy of the teleconference presentation and an audio clip of the teleconference can be found at the following link: [http://www.hunton.com/practices/event.aspx?gr\\_H4ID=1114&tab=0002&gen\\_H4ID=9822](http://www.hunton.com/practices/event.aspx?gr_H4ID=1114&tab=0002&gen_H4ID=9822).

#### **New CREBs/QECBs**

Our prior alert located at [http://www.hunton.com/emailblast/pdfs/EMKT-2111\\_Senate\\_Bill\\_Alert.pdf](http://www.hunton.com/emailblast/pdfs/EMKT-2111_Senate_Bill_Alert.pdf) described the New CREBs and QECBs programs that were enacted as part of the Economic Stabilization Act. Additional information regarding the application and allocation of New CREBs and QECBs has not yet been released. We expect to host additional teleconferences when such additional information is released.

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