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Energy Tax Legislation Introduced (Twice); IRS Issues Tax Credit Notices; CREB Update

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On April 3, 2008, Senators Cantwell and Ensign introduced S. 2821, the "Clean Energy Tax Stimulus Act of 2008," which would extend various energy tax credit provisions. A copy of the bill is available here. On April 10, 2008, the Senate included the provisions of the bill in the Senate version of the housing bill (H.R. 3221) by a vote of 88-8 (the "Housing Bill"). However, the House version of the Housing Bill does not include the energy tax provisions. In addition, the energy tax provisions are not "paid for," and House Democrats have expressed a strong preference to offset any tax breaks contained in legislation. Accordingly, the energy tax provisions in the Housing Bill will have to survive a conference to reconcile the different versions of the House and Senate bills, and the President has also expressed opposition to certain other provisions in the Housing Bill. Thus, the outlook for an extension continues to be uncertain. However, even if the energy tax provisions are not extended by the Housing Bill, a second opportunity for an extension exists in the business extenders legislation that Senate Finance Committee Chairman Baucus introduced, S. 2886, on April 17, 2008 (the "Extenders Bill"). A copy of the bill is available here.

Section 45. The Housing Bill would extend the Section 45 placed in service deadline for most qualified facilities by one year (from January 1, 2009 to January 1, 2010). However, the placed in service deadline for solar facilities (January 1, 2006) and Indian coal production facilities (January 1, 2009) would not be extended. The Housing Bill would also amend the definition of a trash combustion facility to clarify that, in order to qualify for the Section 45 tax credit, the municipal solid waste (trash) does not need to be burned directly in the facility and that the trash can be gasified first and the gas can then be used to generate electricity. The Housing Bill would also clarify that sales of electricity to regulated public utilities (as defined in section 7701(a)(33)) would be treated as sales to unrelated persons.

Marine and hydrokinetic renewable energy would be added to the list of "qualified energy resources." Marine and hydrokinetic renewable energy is defined as energy derived from (1) waves, tides, and currents in oceans, estuaries, and tidal areas; (2) free-flowing water in rivers, lakes, and streams; (3) free-flowing water in an irrigation system, canal, or other man-made channel (including projects that use nonmechanical structures to accelerate the flow of water for electric power production purposes); or (4) differentials in ocean temperature. The term excludes energy derived from any source that uses a dam, diversionary structure (except for irrigation systems, canals, and other man-made channels), or impoundment for electric power production.

A marine and hydrokinetic renewable energy facility would include any such facility placed in service after the date of enactment and before January 1, 2010 and that has a nameplate capacity rating of at least 150 kilowatts. The credit amount for such facilities would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities would include small irrigation facilities. Accordingly, such facilities placed in service on or after the date of enactment would qualify for the credit as marine and hydrokinetic renewable energy facilities.

The Extenders Bill would also extend the Section 45 placed in service deadline for most qualified facilities by one year (from January 1, 2009 to January 1, 2010), and the placed in service deadline for solar facilities (January 1, 2006) and Indian coal production facilities (January 1, 2009) would not be extended.

Section 48. The Housing Bill would extend the 30 percent ITC for solar, fuel cell, and qualified microturbine property for eight years (from January 1, 2009 to January 1, 2017). The Housing Bill would also remove the tax credit limitation of $500 per 0.5 kilowatt of capacity for qualified fuel cell property. The provision excluding public utility property from the definition of "energy property" would be eliminated and the Section 48 tax credit would be allowed against the alternative minimum tax.

The Extenders Bill would extend the 30 percent ITC for solar, fuel cell, and qualified microturbine property for only one year.

Clean Renewable Energy Bonds. The Housing Bill would extend the deadline for issuance of clean renewable energy bonds (CREBs) by one year (from December 31, 2008 to December 31, 2009). In addition, the Housing Bill would increase the national limitation of CREBs by $400,000,000. The additional $400,000,000 would be allocated equally among public power providers, mutual or cooperative electric companies and governmental bodies.

The Extenders Bill also would extend the deadline for issuance of CREBs by one year and increase the national limitation of CREBs by $400,000,000 (with $250,000,000 designated for governmental bodies). In addition, the Extenders Bill would modify the ratable principal amortization requirement to clarify that an equal amount of principal must be paid during each 12-month period that the issue is outstanding — except for the first 12-month period.

Section 45 Tax Credit Notice Issued

On April 29, 2008, the IRS issued the annual notice that provides the inflation adjustment factor and reference prices under Section 45 of the Code. In summary, no phase-out applies to any of the various energy resources in 2008. The credit amount for calendar year 2008 is 2.1 cent/kWh for wind, closed-loop biomass, geothermal and solar; 1.0 cent/kWh for all others; and $6.061/ton of refined coal. A copy of the notice is available here.

Section 29/45K Tax Credit Notice Issued

On March 31, 2008, the IRS issued Notice 2008-44 which provides the inflation adjustment factor and reference price under Section 45K of the Code for calendar year 2007. The inflation adjustment factor is 2.4160 and the reference price is $66.52. The credit amount was reduced by $4.87 due to the reference price of oil, and therefore the credit amount for calendar year 2007 is $2.38 per barrel-of-oil equivalent of qualified fuel.

The credit amount for the coke battery "extension" is $3.28 per barrel-of-oil equivalent and is not subject to phase-out. A copy of Notice 2008-44 is available here.

CREB Updates

Attached is a copy of an article on Clean Renewable Energy Bonds by Doug Lamb recently published by the Council of Development Finance Agencies. A copy of the article is available here.

On February 27, 2008, the IRS issued Notice 2008-31, which provides that the IRS intends to establish standardized closing agreement terms and amounts for particular violations of the tax code under the voluntary closing agreement program (VCAP) for tax-exempt bond issuers, including clean renewable energy bonds. The VCAP program allows tax-exempt bond and tax credit bond issuers to voluntarily come forward and remedy violations of the tax code. A copy of the Notice is available here.

On April 21, 2008, the IRS issued guidelines for obtaining acknowledgement from the IRS of receipt and acceptance of Form 8038, *Information Return for Tax-Exempt Private Activity Bond Issues*, which must be filed in connection with the issuance of clean renewable energy bonds. The guidelines provide that the entity: (1) provide a cover letter with a specific request for an acknowledgement of the return; (2) if the governmental issuer, power-of-attorney, or other authorized party filing the information return is submitting only one Form 8038 series return, write "Acknowledgement Copy" on the top of a copy of the first page of the form; (3) if the governmental issuer, power-of-attorney, or other authorized party filing the information return is submitting more than one Form 8038 series return, write "Acknowledgement Copy" on the top of the copy of the first page of each form and staple all of the copies together; and (4) provide a stamped, self-addressed envelope for each receipt recipient.

Section 48A Guidance Issued

On March 28, 2008, the IRS released AM 2008-004, a Chief Counsel Advice Memorandum, which clarifies what constitutes "eligible property" for purposes of the Section 48A tax credit and which costs would be includible into the basis of eligible property. A copy of AM 2008-004 is available here.