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Conference Committee Agreement on Stimulus Bill Tax Provisions Released

On February 12, 2009, the Senate Finance and House Ways & Means Committees released the tax title of the "American Recovery and Reinvestment Tax Act of 2009," as agreed to by the conference committee (the "Bill"). The Bill is similar to the version passed by the Senate earlier this week. However, the bill does contain a modified version of the grants in lieu of tax credits program contained in the House-passed version. The conference report to accompany the Bill (H.Rept. 111-16) can be found on the Rules Committee's homepage at www.rules.house.gov.

The House, by a vote of 246-183, passed the Bill on February 13, and the Senate will vote on the Bill on Friday or Saturday in order to present the Bill to the President for signature on Presidents' Day, February 16. The President is expected to sign the Bill.

Section 45

The Bill provides a three-year extension of the placed in service deadline for certain facilities as follows:

Facility	Deadline (Before)
Wind	January 1, 2013
Closed-Loop Biomass	January 1, 2014
Open-Loop Biomass	January 1, 2014
Geothermal	January 1, 2014
Solar	January 1, 2006 (no change)
Small Irrigation Power	October 3, 2008 (subsumed in marine and hydrokinetic below)
Landfill Gas	January 1, 2014
Trash Facilities	January 1, 2014
Refined Coal/Steel Industry Fuel	January 1, 2010 (no change)
Hydropower	January 1, 2014
Indian Coal	January 1, 2009 (no change)
Marine and Hydrokinetic	January 1, 2014

Section 48

The Bill provides taxpayers an election to claim a 30% investment tax credit rather than production tax credits for wind, closed-loop, open-loop, geothermal, landfill gas, trash, hydropower or marine/hydrokinetic facilities (as described in Section 45(d)) that are placed in service after December 31, 2008 and before the deadlines described in the chart above. The Bill clarifies that the "qualified property" for purposes of the credit means property (a) which is tangible personal property or other tangible property (not including a building or its structural components), but only if such property is used as an integral part of the facility and (b) with respect to which depreciation or amortization is allowable. (This is new language that was not in prior versions of the Bill.)

In order to qualify, the taxpayer (1) must not have claimed Section 45 tax credits with respect to such facility and (2) must make an irrevocable election to claim investment tax credits rather than production tax credits. If the taxpayer makes such an election, production tax credits will not be allowed for such facility in any taxable year, and the facility will be treated as "energy property" for purposes of Section 48. Accordingly, the rules applicable to other investment tax credit property (e.g., recapture rules, tax-exempt use property rules, sale-leaseback rules, qualified progress expenditure rules, etc.) apply. Note that since geothermal currently is only eligible for a 10% investment tax credit under Section 48 of the Code, this election allows a taxpayer to receive a 30% investment tax credit for geothermal property since geothermal facilities also are included in Section 45(d)(4) of the Code.

Section 48(c)(4)(B) currently provides a $4,000 limitation on the amount of investment tax credits that a taxpayer may claim in any taxable year for small wind energy property (wind turbines with a nameplate capacity of 100 kw or less) placed in service during such year. The Bill repeals this limitation.

Finally, Section 48(a)(4) currently provides that the basis of energy property is reduced to the extent such property is financed with "subsidized energy financing" or the proceeds of private activity bonds. The Bill repeals this limitation (on a permanent basis), effective for periods after December 31, 2008, applying certain specified transition rules. This limitation also is removed for purposes of the tax credits provided by Sections 25C (nonbusiness energy property), 25D (residential energy efficient property), 48A (IGCC and other advanced coal-based generation projects), and 48B (gasification projects), effective for taxable years beginning after December 31, 2008. Note that the Bill did not change the subsidized financing rules for the Section 45 production tax credit, only for the investment tax credits mentioned above. However, if a taxpayer makes an election to claim investment tax credits in lieu of production tax credits, as described above, the repeal of this limitation should be applicable as well.

Grants In Lieu of Tax Credits

Section 1603 of the Bill contains a program that provides grants in lieu of tax credits for certain specified energy property that is (a) placed in service in 2009 or 2010, or (b) placed in service after 2010 but before the placed in service deadline for such facility, but only if the construction of such property began during 2009 or 2010. The Bill provides that the Secretary of the Treasury will administer the program (the House-passed bill had proposed that the Secretary of Energy would administer the program.) A taxpayer must apply to the Secretary of the Treasury in order to receive the grant. The Bill provides that the Secretary of the Treasury shall provide such grants within 60 days of the later of either the date of the grant application, or the date the property is placed in service. The grant application must be received before October 1, 2011.

The Bill provides appropriations to the Secretary of the Treasury of "such sums as may be necessary to carry out this section." Accordingly, Section 1603 sets no limitation on the amount of grants that the Secretary of the Treasury can make under this section. And, considering the mandatory "shall" language in Section 1603, it does not appear that the Secretary has any discretion in providing the grants beyond the procedural requirements for the application. Rather, the grants function in the same manner as the tax credits and appear to be "off-the-shelf" in nature.

The grant is 30% of the basis of such property in the case of: wind, closed-loop, open-loop, geothermal, landfill gas, trash, hydropower and marine/hydrokinetic facilities, as described in Section 45(d) of the Code. The Bill clarifies that the "qualified property" for purposes of determining the amount of the grant is property (a) which is tangible personal property or other tangible property (not including a building or its structural components), but only if such property is used as an integral part of the facility and (b) with respect

to which depreciation or amortization is allowable. (This is new language that was not in prior versions of the Bill.) In addition, the grant is 30% of the basis in the case of: (1) qualified fuel cell property (defined in Section 48(c)(1) of the Code, but subject to the $1,500 per 0.5 kw limitation), (2) solar property (described in Section 48(a)(3)(A)(i) or (ii) of the Code), or (3) any qualified small wind energy property (defined in Section 48(c)(4) of the Code). The grant is 10% of the basis of such property in the case of: (1) geothermal property (described in Section 48(a)(3)(A)(iii) of the Code), (2) qualified microturbine property (defined in Section 48(c)(2) of the Code, but subject to the $200 per kw limitation), (3) combined heat and power systems (defined in Section 48(c)(3) of the Code, but subject to the capacity limitations in Section 48(c)(3)(B)), or (4) geothermal heat pump property (described in Section 48(a)(3)(A) of the Code). Note that since electric generating geothermal facilities currently are only eligible for a 10% investment tax credit under Section 48 of the Code, this grant allows a taxpayer to receive a grant equal to 30% of the basis of such geothermal property since geothermal facilities also are included in Section 45(d)(4) of the Code.

In making grants, the Secretary of the Treasury is directed to apply rules similar to Section 50 of the Code. However, in the case of recapture, the Secretary of the Treasury is directed to provide for the recapture of the "appropriate percentage of the grant amount in such manner as the Secretary of the Treasury determines appropriate." Accordingly, the Secretary of the Treasury has the discretion to shorten, lengthen or otherwise modify the five-year recapture period with respect to Section 1603 grants. In addition, the Secretary of the Treasury is directed not to make grants to: (a) any Federal, State, or local government (or any subdivision, agency, or instrumentality thereof), (b) any 501(c) organization which is tax-exempt, (c) any cooperative which is owned by, or has outstanding loans to, 100 or more cooperative electric company and which is in existence on February 1, 2002, (d) a cooperative electric company described in Section 501(c)(12) or Section 1381(a)(2)(C) of the Code, (e) a non-for-profit electric utility which has received a loan or loan guarantee under the Rural Electrification Act, (f) a possession of the United States, (g) the District of Columbia, (h) Indian tribal government, or (i) any partnership or other pass-through entity which has one of these entities as a partner (or owner of a equity/profits interest owner).

Section 1104 of the Bill amends Section 48 of the Code to provide that if a taxpayer receives a grant under Section 1603 of the Bill, no tax credits are allowed with respect to such property under Section 45 or Section 48 of the Code for the taxable year or any subsequent taxable year. In addition, if a taxpayer claimed tax credits for qualified progress expenditures in any taxable year prior to the taxable year in which a Section 1603 grant was made, (1) the tax imposed on the taxpayer for the taxable year in which such grant was made will be increased by the amount of such tax credits allowed in prior years, (2) the tax credit carryforwards, if applicable, will be adjusted to recapture the amount of tax credits, and (3) the amount of the Section 1603 grant will be determined without regard to prior reductions to the basis of the property due to credits.

Section 1104 of the Bill also provides that Section 1603 grants are not includible in the gross income of a taxpayer, but the amount of the Section 1603 grant will be taken into account in determining the basis of the property, except that the basis of such property is reduced under Section 50(c) in the same manner as a credit allowed under Section 48(a). Accordingly, the depreciable basis of the property will be reduced by one-half of the amount of the Section 1603 grant.

Notably, the Bill does not require that in order to receive a grant, the taxpayer provide Treasury with warrants, stock or other equity as was proposed in Senator Bingaman's alternative grant program proposal.

Manufacturing Investment Tax Credit (Section 48C)

The Bill establishes a 30% investment tax credit for certain property used in a "qualified advanced energy manufacturing project"—a project that re-equips, expands, or establishes a manufacturing facility for the production of property designed to (1) produce energy from the sun, wind or geothermal deposits, or other renewable resources, (2) manufacture fuel cells, microturbines, or energy storage systems for certain electric motor vehicles, (3) manufacture electric grids to support the transmission of intermittent renewable energy sources (including storage), (4) manufacture equipment for use for carbon dioxide capture and sequestration, (5) refine or blend renewable fuels or to produce energy conservation technologies (including lighting and smart grid), (6) produce other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Secretary, or (7) produce new qualified plug-in electric

drive motor vehicles (defined in Section 30D), qualified plug-in electric vehicles (defined in Section 30(d)), or specifically designed components for such vehicles.

The credit is not subject to limitation if subsidized energy financing or private activity bonds are used to construct the facility. The Bill also (a) makes the qualified progress expenditures rules available with respect to the credit, and (b) provides a definition of the "eligible property" for purposes of the credit (essentially tangible personal property or other tangible property that is "necessary" for the production of the qualifying equipment).

This tax credit is subject to a certification and allocation process similar to the investment tax credit programs for certain advanced coal-based generation projects and certain gasification projects under Sections 48A and 48B of the Code. In determining which project to certify, the Secretary shall (a) take into account only those projects where there is a reasonable expectation of commercial viability, and (b) take into consideration which projects (i) will provide the greatest domestic job creation (both direct and indirect) during the credit period, (ii) will provide the greatest net impact in avoiding or reducing air pollutants or anthropogenic emissions of greenhouse gases, (iii) have the greatest potential for technological innovation and commercial employment, (iv) have the lowest levelized cost of generated or stored energy, or of measured reduction in energy consumption or greenhouse gas emission (based on costs of the full supply chain), and (v) have the shortest project time from certification to completion. In addition, the program provides for (a) a review, redistribution and reallocation of credits if certifications for certain projects are revoked, and (b) public disclosure of the successful applicants and the amount of credit received by the applicant.

The Secretary of Treasury is authorized to allocate up to $2.3 billion in such tax credits (increased from $2 billion in the prior Senate versions), and must establish the certification program within 180 days of enactment of the bill.

Section 45Q

The Bill modifies the Section 45Q tax credit for carbon dioxide sequestration to require that carbon dioxide used as a tertiary injectant be disposed of by the taxpayer in secure geological storage in order to qualify for the $10/metric ton tax credit. In addition, Section 45Q is amended to (a) clarify that secure geological storage also includes oil and gas reservoirs, and (b) that the Secretary of Energy and Secretary of the Interior will also be consulted in connection with regulations for determining adequate security measures for the geological storage of carbon dioxide. The provision is effective for carbon dioxide captured after the date of enactment.