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Senate Passes Stimulus Bill; Stage Set for Conference

On February 10, 2009, the Senate passed, by a vote of 61-37, the American Recovery and Reinvestment Act of 2009 (the "Bill"). Certain energy tax credit-related provisions of the Bill were added, modified or deleted from the version of the bill that passed the Senate Finance Committee which were described in [our prior alert](#). A copy of a summary of the tax-related provisions is [here](#).

The House and Senate versions of the bills will now need to be reconciled in conference committee. A side-by-side comparison of "notable differences"

between the two bills prepared by the Senate Finance Committee [is available here](#). Congress plans to pass a reconciled bill by Friday to present to the President for signature by Presidents' Day, February 16th.

Section 45

The Bill would provide a three-year extension of the placed in service deadline for certain facilities. If the Bill is enacted, the placed in service deadlines for Section 45 facilities would be 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

This proposal is unchanged from the Senate Finance Committee version of the bill and is identical to the proposal contained in the House-passed bill.

Section 48

The Bill would provide taxpayers the ability to elect 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 within the time frames described in the chart above. However, note that it appears that only the basis of the “facility” costs would qualify for the investment tax credit. For example, the IRS has defined an open-loop biomass facility for purposes of section 45 to include only certain equipment (boilers, turbines, generators, etc.) and to exclude certain equipment such as material handling equipment, transmission assets, etc.

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, and production tax credits will not be allowed for such facility in any subsequent taxable year. If a taxpayer makes such an election, the facility shall be treated as “energy property” for purposes of Section 48. Accordingly, the rules applicable other investment tax credit property (recapture rules, tax-exempt use property rules, sale-leaseback rules, qualified progress expenditure rules, etc.) would apply. Note that since geothermal currently is only eligible for a 10% investment tax credit under section 48 of the Code,

this election would allow 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.

This proposal is unchanged from the Senate Finance Committee version of the bill. However, the proposal contained in the House-passed bill would only permit the ITC election for facilities placed in service in 2009 and 2010.

Section 48(c)(4)(B) 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 would repeal this limitation. This proposal is unchanged from the Senate Finance Committee version of the bill and is identical to the proposal contained in the House-passed bill.

Finally, Section 48(a)(4) 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 would repeal this limitation (on a permanant basis), effective for periods after December 31, 2008, applying certain specified transition rules. This limitation also would be removed for purposes of the tax credits provided to individuals under 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.

This proposal is (basically) unchanged from the Senate Finance Committee version of the bill. However, the House-passed bill does not repeal the credit limitation for Section 48A and 48B projects.

Grants In Lieu of Tax Credits

The Bill does not contain a grant in lieu of tax credit program like the House-passed bill. That program was described in a [prior alert](#). However, Senator Bingaman has released a proposed amendment describing an [alternative grant program](#). Under Senator Bingaman’s proposal, the Department of Treasury would administer the program, rather the Department of Energy as proposed under the House-passed bill. In addition, Senator Bingaman’s grant program would require that in order to receive a grant, a taxpayer must agree to allow the Treasury Secretary to obtain (at the Secretary’s choice): (a) a warrant that gives the Secretary a right to receive nonvoting common stock, preferred stock, and/or voting stock with respect to which the Secretary agrees not to exercise voting power, (b) a senior debt instrument, and/or (c) an interest in such form as the Secretary determines appropriate. These rights are designed to cover administrative costs of the grant program and to allow taxpayers to benefit from any appreciation in the market value of the project company or the project.

Senator Bingaman’s proposed grant program is not included in the Senate-passed bill, but it is expected to be considered in conference committee.

5-Year Carryback of Business Credits — Deleted

The provisions of the Senate Finance Committee version of the bill which would have permitted taxpayers to (a) carryback general business credits claimed in 2008 and 2009 for five years, and (b) use general business credits carried to 2008 and 2009 to offset their entire tax liability were deleted. The House-passed bill does not contain a similar provision.

Manufacturing Investment Tax Credit (Section 48C)

The Bill would establish 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) other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Secretary.

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

This tax credit is subject to a Department of Energy certification process and a Treasury Department 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 Section 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 readiness for commercial employment, replication, and further commercial use in the United States, (iv) will provide the greatest benefit in terms of newness in the commercial market, (v) 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 (vi) have the shortest project time from certification to completion. In addition, the program would provide 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 billion in such tax credits, and must establish the certification program within 180 days of enactment of the bill.

The House-passed bill does not contain a similar provision.

Section 45Q

The Bill would modify 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 would be 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 would be effective for carbon dioxide captured after the date of enactment. This proposal is slightly different from the Senate Finance Committee version of the bill. The House-passed bill does not contain a similar provision.

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