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Finally — More Renewable Energy Tax Credit Provisions

Law360, New York (October 08, 2008) -- On Oct. 3, 2008, President Bush signed into law, the "Emergency Economic Stabilization Act of 2008" (the "Act").

The energy tax provisions are contained in Division B of the Act (the "Energy Improvement and Extension Act of 2008") and include extensions, expansions and modifications of various energy tax credit provisions, including the production tax credits and investment tax credits for certain renewable energy projects.

The Act provides much-needed extensions of a number of tax credit provisions and includes a number of important modifications. These extensions and modifications provide the necessary support to allow the renewable energy industry to place projects into service, increase equipment manufacturing capacity and improve existing technologies.

Section 45 Production Tax Credits

The Act extends the placed-in-service deadline for one year (through the end of 2009) for facilities producing electricity from wind and refined coal facilities.

However, the Act extends the placed-in-service deadline for two years (through the end of 2010) for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, and qualified hydropower. The Act does not provide an extension for Indian coal facilities and solar facilities (under section 45).

In addition, the Act does not contain the 35 percent investment-based limitation on the credit amount that was proposed in various House-passed energy tax credit extension bills. This limitation was generally opposed by the renewable energy industry.

The Act also adds marine and hydrokinetic renewable energy as a qualified resource under section 45.

The Act defines marine and hydrokinetic renewable energy 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 non-mechanical structures to accelerate the flow of water for electric power production purposes); or (4) differentials in ocean temperature (ocean thermal energy conversion).

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 includes any such facility placed in service after Oct. 3, 2008 and before Jan. 1, 2012 that produces electric power from marine and hydrokinetic renewable energy and that has a nameplate capacity rating of at least 150 kilowatts.

The credit amount for such facilities is one-half of the full credit amount (currently, 1.0 cents/kWh for calendar year 2008).

Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Act terminates these facilities as a separate category.

The Act modifies the definition of nonhydroelectric dam for purposes of qualified hydropower production by (i) requiring it to be operated for flood control, navigation, or water supply purposes and (ii) replacing the requirement that the project not enlarge the diversion structure or bypass channel, or impound additional water from the natural stream channel, with a requirement that the project be operated so that the water surface elevation at any given location and time be the same as would occur in the absence of the project.

The Act also modifies the definition of refined coal by (i) deleting the requirement that the refined coal is produced in a manner that results in a 50 percent increase in the market value of the refined coal as compared to the feedstock coal, and (ii) increasing the emission reduction requirement for sulfur dioxide or mercury from 20 percent to 40 percent.

The Act clarifies the definition of qualified trash combustion facilities to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity.

In addition, the Act allows expansions of existing open-loop and closed-loop biomass facilities to qualify for the section 45 credit to the extent of the increased amount of electricity produced at such facilities by reason of the addition of the new unit.

Finally, the Act provides that steel industry fuel is refined coal for purposes of section 45.

The Act defines steel industry fuel as a fuel which (a) is produced by liquefying coal waste sludge - tar decanter sludge and related by products of the coking process - and distributing it on coal, and (b) is used as a feedstock for the manufacture of coke.

The credit amount is \$2.00 (or \$3.00 - the language is unclear) per barrel-of-oil equivalent (5.8 MMBtu) of steel industry fuel, and the amount is increased for inflation each year.

The credit period begins on the later of (i) the date the facility was placed-in-service, (ii) the date modifications to an existing facility which allow such facility to produce steel industry fuel were placed-in-service, or (iii) Oct. 1, 2008, and ends on the later of (x) Dec. 31, 2009, or (y) the date which is one year from the date such facility or the modifications to a facility were placed in service.

A steel industry fuel facility (or modification to a facility) must be placed in service before Jan. 1, 2010.

The steel industry fuel amendments are effective for fuel produced and sold from facilities placed in service after Sept. 30, 2008.

Section 48 Investment Tax Credits

The Act extends for eight years the placed-in-service deadline (through the end of 2016) for solar energy, fuel cell, and microturbine property.

This long-term extension is welcome news for developers of utility-scale solar thermal or CSP projects which take several years to plan and construct.

In addition, the extension may allow new solar technologies to be developed and implemented with the support of the 30 percent investment tax credit.

The Act (i) permits the Section 48 investment tax credit to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after Oct. 3, 2008, and (ii) repeals the public utility exception applicable to energy property owned by public utilities for periods after Feb. 13, 2008, in taxable years ending after such date.

Finally, the Act raises the \$500 per half kilowatt of capacity credit cap for fuel cell property to a \$1,500 per half kilowatt of capacity credit cap, effective as of Oct. 3, 2008.

The Act adds a new category of energy property to section 48 for combined heat and power system property ("CHP property").

CHP property is defined as property comprising a system: (A) which uses the same energy source for the simultaneous or sequential generation of electrical power, mechanical shaft power, or both, in combination with the generation of steam or other forms of useful thermal energy (including heating and cooling applications); (B) which produces at least 20 percent of its total useful energy in the form of (i) thermal energy that is not used to produce electrical or mechanical power and (ii) electrical or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Act) which exceeds 60 percent (with a special rule for systems using biomass); and (D) which is placed in service before Jan. 1, 2017.

CHP property is eligible for the 10 percent energy credit under section 48, subject to various limitations based on electrical or mechanical capacity.

The Act also adds a second new category of energy property to section 48 for small wind property. Small wind property is defined as a wind turbine which has a nameplate capacity of not more than 100 kilowatts and which is placed in service before Jan. 1, 2017. Such property is eligible for the 30 percent energy credit under section 48, subject to a limitation of \$4,000 per taxpayer.

Finally, the Act adds a third new category of energy property to section 48 for geothermal heat pump systems - equipment which uses the ground or ground water as a thermal energy source to heat a structure or as a thermal energy sink to cool a structure - which is placed in service before Jan. 1, 2017. Such property is eligible for a 10 percent energy credit.

Other Provisions

The Act also contains various other energy tax-related provisions which, among other things:

- Provides an additional \$800 million in "new" Clean Renewable Energy Bonds ("CREBS") for financing certain renewable energy projects owned by public power providers, governmental bodies, or cooperative electric companies, and extends the deadline for issuance of "old" CREBs for one year (through the end of 2009).
- Creates a new category of tax credit bonds and provides for an allocation limitation of \$800 million for "qualified energy conservation bonds" ("QECBs"). The rules for QECBs are similar to those for "new" CREBs.
- Provides an additional allocation amount and increases the Section 48A/48B tax credit amount for (i) IGCC and other advanced coal projects and (ii) qualifying gasification projects which separate and sequester a certain amount of the project's total carbon dioxide.
- Provides a tax credit for the capture and sequestration of carbon dioxide at certain projects.
- Provides a 5-year extension of the energy efficient commercial building deduction under section 179D.
- Provides an 8-year extension of the tax credit for residential energy efficient property under section 25D and make various modifications to the program.
- Extends and modifies various tax credits available for certain liquid renewable fuels, including biodiesel, renewable diesel, and other alternative fuels.

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