Tax Credit Bonds

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Tax Credit Bonds

Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23218

Andrew R. Kintzinger
(202) 955-1837
akintzinger@hunton.com

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[1] These materials do not incorporate the changes discussed in Section 1 as a result of the enactment of the Stimulus Act of 2009, also known as the "American Recovery and Reinvestment Tax Act of 2009."

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Contacts

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Christopher G. Kulp
(804) 788-8742
ckulp@hunton.com

John D. O'Neill, Jr.
(804) 788-8406
joneill@hunton.com

Andrew R. Kintzinger
(202) 955-1837
akintzinger@hunton.com

Mary Nash K. Rusher
(919) 899-3066
mnrusher@hunton.com

William H. McBride
(919) 899-3030
wmcbride@hunton.com

B. Darrell Smelcer
(404) 888-4209
dsmelcer@hunton.com

Caryl Greenberg Smith
(404) 888-4025
carylsmith@hunton.com

J. Nicholson Meindl
(214) 468-3358
nmeindl@hunton.com

Conferees Reach Agreement on Stimulus; Bond Provisions Remain

On February 12, 2009, the American Recovery and Reinvestment Act of 2009 (the "ARRTA") emerged from conference committee. Based on the version of ARRTA posted on the Senate Finance Committee website, the compromise legislation will contain many of the municipal bond and tax credit bond-related provisions in the previously passed Senate and House versions, including marketability enhancements resulting from changes to the rules governing deductions for the cost of carrying tax-exempt debt and application of the alternative minimum tax, new categories of recovery zone bonds, qualified school construction bonds, build America bonds and tribal economic development bonds, expansion of the definition of manufacturing for small issue industrial development bonds, increases in allocation for new clean renewable energy bonds, qualified energy conservation bonds and qualified zone academy bonds and application of prevailing wage law to certain categories of bonds. It is anticipated that the House and Senate will each vote on ARRTA on Friday, February 13, with the President signing by Monday, February 16. This alert describes such provisions of ARRTA.

Marketability Enhancements — Section 265 and AMT Changes

De Minimis Safe Harbor Exception for Tax-Exempt Interest Extended to Financial Institutions

Section 265(b) of the Internal Revenue Code of 1986, as amended (the "Code"), currently provides that a financial institution may not deduct that portion of its interest expense allocable to interest on tax-exempt obligations held by such institution (with the exception of qualified tax-exempt obligations described below). Under such Section, the portion of a financial institution's interest expense allocable to tax-exempt interest is determined by calculating the ratio of the average adjusted bases of tax-exempt obligations held by the financial institution to the average adjusted bases for all assets of the financial institution. ARRTA amends Section 265(b) to provide that, when calculating the ratio described above, a financial institution may disregard tax-exempt obligations of all types held by the institution that were issued in 2009 and 2010, but only to the extent that the amount of such obligations does not exceed 2% of the portion of the financial institution's interest expense allocable to tax-exempt interest. Such "tax exempt obligations" include private activity bonds and governmental bonds that are in

excess of the qualified small issuer exception described below. The financial institution will be allowed only to deduct 80% of the interest expense related to the acquisition of such tax exempt obligations, because such interest will be treated as a "financial institution preference item" under Section 291(a)(3) of the Code. It is important to note, however, that current and advance refunding obligations are not eligible for the exclusion unless the bonds being refunded were issued in 2009 and 2010.

Modification of Small Issuer Exception

As described above, a financial institution may not deduct that portion of its interest expense allocable to interest on tax-exempt obligations held by such institution (other than "qualified tax-exempt obligations"). Section 265(b)(3) currently provides that "qualified tax-exempt obligations" are tax-exempt governmental and qualified 501(c)(3) obligations issued by a "qualified small issuer" that reasonably anticipates that it will not issue in a particular calendar year more than $10 million in aggregate principal amount of tax-exempt obligations (other than certain private activity bonds). ARRTA amends Section 265(b)(3) by increasing the $10,000,000 threshold to $30,000,000 for tax-exempt governmental and 501(c)(3) obligations issued in calendar years 2009 and 2010. ARRTA also provides that in the case of a qualified 501(c)(3) bond issued in calendar year 2009 or 2010, the 501(c)(3) conduit borrower will be treated as the issuer for "qualified small issuer" purposes.

Of significance, each 501(c)(3) entity will be entitled to its own $30 million limit for each calendar year. In addition, ARRTA amends Section 265(b)(3) to provide that any composite, pooled or other conduit financing issue may be treated as a qualified tax-exempt obligation if the proceeds are used to make loans to one or more ultimate borrowers each of whom would separately qualify for the small issuer exception. Qualified tax-exempt obligations continue to be treated as "financial institution preference items" under Section 291(a)(3) of the Code, and therefore the financial institution can deduct 80% of its interest expense allocable to such obligations. It appears that the current refunding and deemed designation rules under Section 265 will continue to apply, subject to the $30 million limit.

AMT Changes

ARRTA provides that private activity bonds issued in 2009 and 2010 are not subject to the alternative minimum tax ("AMT"). In other words, for purposes of individual and corporate AMT, interest on private activity bonds issued in those years will be accorded the same treatment as for governmental bonds, and will not be treated as a tax preference item. Additionally, for purposes of corporate AMT, interest on all tax-exempt bonds issued in 2009 and 2010 will not be an adjustment to current earnings. For these provisions related to the AMT, a refunding bond is treated as issued on the date of the refunded bond; therefore, a refunding bond will qualify for such treatment only if the refunded bond is issued in 2009 or 2010.

Tax Credit Bonds for Qualified School Construction

Section 1521 of ARRTA adds a new category of tax credit bonds that is to be codified in Section 54F of the Code and partially governed by the rules found in Code Section 54A. This category of tax credit bonds is entitled "Qualified School Construction Bonds" ("QSCB"). Under the provisions, 100% of the "available project proceeds" (as described in our summary of the tax credit bond provisions included in the 2008 bailout legislation) of such issue are to be used for the "construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue."

The QSCB must be issued by a state or local government within the jurisdiction of which the school is located, and the issuer must designate the bond as a QSCB.

The allocation for QSCB is $11 billion for each of calendar years 2009 and 2010 — a total of $22 billion in allocation. There is an additional $200 million in each of those years for Native American schools, and Indian tribal governments shall be treated as issuers for such purposes. Treasury will allocate to the states based upon the amounts a state is eligible to receive under Elementary and Secondary Education Act of 1965 for the fiscal year prior to the calendar year of allocation. The states will then reapportion such amounts within their respective states. ARRTA reserves 40% of the total allocation for large local education agencies,[1] and the allocation methodology is the same as for the state allocation above. Accordingly, a

[1] A large local education agency must be among the 100 local education agencies with the largest number of children aged 5 through 17 from families living below the poverty line, or one of not more than 25 educational agencies (excepting those in the preceding clause) that the Secretary of Education determines are in need of assistance based upon a low level of construction for school resources, a high level of enrollment growth or such other factors the Secretary deems appropriate.

state's allocation is reduced based upon the amount apportioned to the large local agencies. Any unused large local agency allocation may be reallocated by such agency to the state. Moreover, possessions of the United States other than Puerto Rico will receive allocation based upon a formula taking into account individuals below the poverty line living in the possession versus all such individuals in all states and possession. The amounts allocated to possessions will reduce the allocations to states and large local education agencies. Unused allocation may be carried over, and ARRTA does not place a limit on the years to which it may be carried over.

Tax Credit Build America Bonds and Refundable Credit Option

Section 1531 of ARRTA adds a new incentive for certain types of taxable governmental bonds. The incentive is to be codified in Section 54AA of the Code and entitled "Build America Bonds" ("BABs"). The credit is subject to limits and carryover provisions similar to those for credits under Code Section 54A (as described in our summary referenced above under the heading "*Tax Credit Bonds for Qualified School Construction*"). The credit on a BAB is includible in gross income.

The BAB must be issued before January 1, 2011, and (but for Code Section 54AA) qualify as a governmental bond under Section 103 of Code and not be a private activity bond. The issuer must designate the bond as a BAB. Moreover, the BAB must not have more than a *de minimis* amount of premium over the stated principal amount of the obligation.

The holder is entitled to a credit based upon a calculation that takes into account the amount of interest payable on the bond. The amount of the credit is 35% of the interest payable by the issuer on an interest payment date that is defined as "any date on which the holder of record of the taxable governmental bond is entitled to a payment of interest under such bond."

Section 1531 of ARRTA also provides that an issuer may elect to receive a credit in lieu of the holder receiving a credit under new Code Section 6431. This is the so-called "refundable credit option." If the election is made, Treasury will pay to the issuer (or conduit borrower, generally) on each interest payment date an amount equivalent to the amount of the credit. To qualify, 100% of the available project proceeds (net of any amounts placed in a reasonably required reserve fund) must be spent on capital expenditures, and the issuer must elect this option. ARRTA requires Treasury to pay to the issuer the amount of the credit on or about each interest payment date. This provision applies to bonds issued before January 1, 2011.

A BAB is not treated as federally guaranteed for purposes of Code Section 149(b) by reason of the tax credit or the refundable credit. For the non-refundable credit, yield is determined without regard to the credit. For the refundable credit, yield is reduced by the credit.

Section 1531 of ARRTA provides that any state's laws must treat the interest on the qualifying taxable bond and the refundable credit as being exempt from federal income tax unless the state enacts a law to the contrary after enactment of ARRTA into law.

Recovery Zone Bonds and Tribal Economic Development Bonds

Section 1401 of ARRTA creates recovery zone bonds that include recovery zone economic development bonds and recovery zone facility bonds. Each type of bond must be designated as such by the issuer and must be issued before January 1, 2011.

There is an allocation of $10 billion and $15 billion for recovery zone economic development bonds and recovery zone facility bonds, respectively. The allocation will be apportioned among the states with each state receiving at amount of allocation determined according to a ratio of a state's 2008 employment losses to such losses for all states. The 2008 losses are the difference between the number of individuals employed in December 2007 over December 2008. Under the allocation rules, each state is guaranteed to receive at least .9 percent of the allocation in each category. Each state shall apportion the allocation within the state among counties and large municipalities according to a ratio of their employment losses versus the state's losses. For a "large municipality" within a county, the municipality's losses will not be included in the county's losses. A "large municipality" means a municipality with a population of more than 100,000.

A recovery zone is either an area (i) designated by the issuer, with significant poverty, unemployment, rate of home foreclosures or general distress, (ii) designated by the issuer as economically distressed by reason of the closure or realignment of a military installation pursuant to the Defense Base Closure and Realignment Act of 1990, and (iii) with an effective designation as an empowerment zone or renewal community.

A recovery zone economic development bond shall entitle the issuer to a credit under new Code Section 6431 (described above under the heading "Tax Credit Build America Bonds and Refundable Credit Option"), except that the credit shall be 45% instead of 35%. The bond requires 100% of available project proceeds (net of any amounts placed in a reasonably required reserve fund) to be used for one or more qualified economic development purposes. Such purposes are described as "expenditures for purposes of promoting development or other economic activity in a recovery zone" and include capital expenditures paid or incurred with respect to property in the zone, expenditures for public infrastructure and construction of public facilities and expenditures for job training and educational programs.

A recovery zone facility bond is included within the meaning of an exempt facility bond under Section 142 of the Code. At least 95% of the "net proceeds" (as defined in Section 150 of the Code) of the bond must be used for "recovery zone property", which is defined as property that is to which Section 168 of the Code applies, was constructed, reconstructed or acquired by purchase by the taxpayer after the zone designation took effect, had an original use in the zone commenced by the taxpayer, and is substantially all used in the zone and is used in the active conduct of a "qualified business" by the taxpayer in such zone. A "qualified business" is any trade or business except rental of residential property or a business involving a facility described in Code Section 144(c)(6)(B) (*i.e.*, gambling, alcohol sales, country clubs, *etc.*). Furthermore, the limitations on acquisition of existing property (*i.e.*, rehabilitation expenditures) found in Code Section 147(d) shall not apply. Moreover, the volume cap rules under Code Section 146 shall not apply.

ARRTA creates a new category of tribal economic development bond, with an allocation of $2 billion. The Treasury Secretary shall administer the allocation as it shall determine in consultation with the Secretary of the Interior. A bond qualifies if it is exempt from taxation as a state or local-issued bond under Code Section 103 so long as specified types of gaming are not occurring and the facility is not located outside an Indian reservation. The Indian tribal government must designate the bond as a tribal economic development bond. Treasury is required to conduct a study and report on it to Congress within one year of the enactment of this provision.

Small Issue Manufacturing Bonds

ARRTA amends Section 144(a) to expand the purposes for which the proceeds of small issue manufacturing bonds issued before January 1, 2011 can be used to include the creation or production of "intangible property," defined as "any patent, copyright, formula, process, design, pattern, knowhow, format, or other similar item" described in Section 197(d)(1)(C)(iii) of the Code. In addition, a "manufacturing facility" financed with proceeds of qualified small issue bonds issued before January 1, 2011 can include functionally related and subordinate facilities, as further described in Treasury Regulations Section 1.103-8(a)(3). The concept of ancillary and related facilities (with the 25% limitation) will not apply to such bonds.

New Clean Renewable Energy Bonds ("New CREBs"), Qualified Energy Conservation Bonds ("QECBs") and Qualified Zone Academy Bonds ("QZABs")

Sections 1111 and 1112 of ARRTA increase the current allocations for each of New CREBs and QECBs from $800 million to $2.4 billion and $3.2 billion, respectively. For QECBs, ARRTA provides that the implementation of green community programs (which is one of many qualified purposes for QECBs) includes "the use of loans, grants, or other repayment mechanisms to implement such programs." Moreover, QECBs issued for capital expenditure to implement green community programs shall not be treated as private activity bonds solely because proceeds are to be used for such loans or grants to implement green community programs. This treatment is significant because it enables such QECBs to be eligible for the governmental portion of the QECB allocation. Each of the New CREBs and QECBs were created in the "Energy Improvement and Extension Act of 2008" that was included in the bailout package enacted on October 3, 2008. Please see our summary referenced above under the heading "*Tax Credit Bonds for Qualified School Construction.*"

For the QZAB program, Section 1522 of ARRTA increases the 2009 QZAB allocation from $400 million to $1.4 billion and extends the program into 2010 with allocation for that year to be $1.4 billion. The October 2008 bailout package included legislation entitled "Tax Extenders and Alternative Minimum Relief Act of 2008" that reauthorized and extended the existing QZAB program by adding $400 million in allocation for each of calendar years 2008 and 2009.

Each of the New CREB, QECB and modified QZAB programs are governed by Section 54A of the Code, which was added in the "Heartland, Habitat, Harvest and Horticulture Act of 2008." Code Section 54A makes significant changes to the statutory framework that governs the existing CREBs (Code Section 54) and that previously governed QZABs (Code Section 1397E). Those changes include, among others, introduction of a reserve fund option that generally allows for equal annual installments that are not treated as retiring a portion of the bond (subject to yield limitations), a three-year temporary period for expenditure of "available project proceeds," a 2% limitation on financing costs of issuance from the proceeds of the tax credit bond, stripping of the tax credits and carryover of the tax credits. A more detailed discussion of these matters is included in our summary referenced above under the heading "*Tax Credit Bonds for Qualified School Construction.*"

Application of Davis-Bacon Act Prevailing Wage Standards

Section 1601 of ARRTA subjects certain categories of bonds to the prevailing wage standards under the Davis-Bacon Act of 1931. Those bonds are New CREBs, QECBs, QZABs, QSCBs and recovery zone economic development bonds. In general, prevailing wage rules require the contractor to consult with the Department of Labor ("DOL") to determine the appropriate wage rate for the particular jobs under the contract. DOL has certain fixed rates for common jobs. In many cases, the contractor must request a "wage determination" from the Branch of Construction Wage Determination, a sub-agency within DOL.

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Summary of New CREBs and QECBs

On October 3, 2008, President Bush signed into law the "Energy Improvement and Extension Act of 2008" (the "Energy Act") and the "Tax Extenders and Alternative Minimum Tax Relief Act of 2008" (the "Extenders Act").

The Energy Act, among other things, affects Clean Renewable Energy Bonds ("CREBs"), found in Section 54 of the Internal Revenue Code of 1986, as amended (the "Code"), and creates new categories of tax credit bonds for New Clean Renewable Energy Bonds, Section 54C of the Code ("New CREBs"), and Qualified Energy Conservation Bonds, Section 54D of the Code ("QECBs").

The Extenders Act, among other things, reauthorizes the existing qualified zone academy bond ("QZABs") program under Section 54E of the Code. Each of Sections 54 and 54C-E are found in http://www.hunton.com/files/tbl_s47Details/FileUpload265/1782/IRC_Sections_54_54A-E_45d.pdf. The scope of the materials below will address the provisions of the Energy Act and the Extenders Act that affect CREBs, New CREBs, QECBs and QZABs.

CREBs, New CREBs, QECBs and QZABs — General

CREBs

The CREBs provisions in the Energy Act extend the sunset date for the issuance of all CREBs through December 31, 2009. Prior to the Energy Act, authorization for the issuance of CREBs expired on December 31, 2008. CREBs will continue to be governed under the provisions of Section 54 of the Code and the regulatory guidance found in Notice 2006-7 at 2006-10 I.R.B 559 (dated March 6, 2006), Notice 2007-26 at 2007-14 I.R.B. 870 (dated April 2, 2007) and Notice 2009-15 (dated January 22, 2009) that modifies Notice 2007-26 (the "Tax Credit Rate Pricing Notice"). The Internal Revenue Service disclosed details regarding the second-round CREBs allocation recipients in IR 2008-16 (dated February 8, 2008) that we summarized in our alert dated February 2008. For information on the first-round of allocations, see IR 2006-181 (dated November 20, 2006). Each of the foregoing notices can be found in Section 4 of this brochure. It is not known whether unused and returned allocation from the first two rounds will be reallocated to other issues, but it is worth noting that the second-round allocations for CREBs included approximately $77 million of returned allocation from the first-round allocations. For more information about CREBs, see the article written by Doug Lamb on CREBs that is found here http://www.hunton.com/files/tbl_s47Details/FileUpload265/2166/Lamb_CDFA_CREBs_Article.pdf. With the release of the Tax Credit Rate Pricing Notice, the manner for determining tax credit rates for CREBs and QZABs has been

modified. This modification will also apply to Qualified Forestry Conservation Bonds, New CREBs and QECBs once allocations are made for those programs and pending further changes as mentioned in the Tax Credit Rate Pricing Notice.

New CREBs, QECBs and QZABs

Each of the New CREB, QECB and the modified QZAB programs are governed by Code Section 54A that was added in the "Heartland, Habitat, Harvest and Horticulture Act of 2008." Section 54A imposes significant changes to the statutory framework that governed the existing CREBs (Section 54) and previously governed QZABs (Section 1397E). Section 54A is found here http://www.hunton.com/files/tbl_s47Details/FileUpload265/1782/IRC_Sections_54_54A-E_45d.pdf. Those changes include, among others, introduction of "available project proceeds" (i.e., allows for a 2% limitation on financing costs of issuance from the tax credit bond), a reserve fund option that generally allows for equal annual installments that are not treated as retiring a portion of the bond (subject to yield limitations), a three-year temporary period, credit stripping and carryover of the credits. These concepts are described below.

New Tax Credit Bond Framework

At this time, Section 54A governs Qualified Forestry Conservation Bonds (Section 54B) ("QFCBs"), New CREBs (Section 54C), QECBs (Section 54D) and the "new" QZABs (Section 54E). QFCBs are not addressed in these materials.

New Concepts

Under Section 54A, use of the bond proceeds is captured under the concept of available project proceeds ("APP"). APP means the sales proceeds of an issue (i.e. the amount received from the purchaser) less issuance costs financed by the issue so long as such costs do not exceed two percent of the sales proceeds, *plus* the earnings on the difference between the sale proceeds and financed costs of issuance.

Section 54A introduces a three-year expenditure period for 100% of the APP. This period operates as a temporary period for purposes of the arbitrage-rebate rules under Section 148 of the Code. By the third anniversary of the issue, 100% of the APP must be spent. At issuance, the issuer must reasonably expect to comply with this test as well as reasonably expect to incur, within six months of issuance, expenditures amounting to 10% of the APP. If, at the end of three years, 100% of APP is not spent, the period may be extended by Treasury upon application to it. An application to extend the period must be submitted prior to the period's expiration. If the period is not extended, a portion of the bonds must be redeemed within 90 days. The portion to be redeemed shall be determined in

accordance with the "non-qualified" bond rules in Section 142 and the regulations thereunder.

Another significant development is the addition of the reserve fund option. Generally, tax credit bonds must satisfy the arbitrage-rebate rules found in Section 148 of the Code. For the reserve fund to be structured in compliance with Section 148, there must be an expectation that the funds will be used to repay the issue. Moreover, the reserve fund must not be funded more frequently than annually, and the deposits must be equal installments. The amount of deposits must not be expected to result in an amount greater than necessary to repay the issue. Lastly, the yield on the fund cannot exceed the rate used to determine the maximum maturity on the bonds.

There is no ratable amortization requirement in Section 54A as there was with CREBs. Accordingly, even with the use of a reserve fund, it is possible that the bond may be structured (subject to credit concerns) so the investor is entitled to the tax credit on the full face amount of the bond for its entire life.

There are several other departures from the statutes governing CREBs and old QZABs. First, Section 54A allows the credit to be stripped in accordance with the rules that apply to the stripping of interest for tax-exempt bonds that are found in Section 1286 of the Code. Additionally, Section 54A provides that unused credits may be carried over to the ensuing tax year if the taxpayer is unable to use the credit as a result of the limitations in the statute.

Finally, Section 54A provides that the Issuer must certify that it is in compliance with state and local conflict of interest laws and additional Treasury rules that may exist or be promulgated.

Concepts Retained from Section 54

The tax credit rate and final maturity of the tax credit obligations will be determined by U.S. Treasury on a periodic basis and posted on Treasury's website. The website address for CREBs is https://www.treasurydirect.gov/SZ/SPESRates?type=CREBS, and the website address for QZABs is https://www.treasurydirect.gov/SZ/SPESQZABRate. The amount of the tax credit is measured quarterly based upon the annual tax credit rate, and the annual tax credit amount is the product of the sum of those quarterly measurements multiplied by 70% (except that the 70% reduction does not apply to QZABs). The annual tax credit rate is the product of the published tax credit rate and the outstanding face amount of the bond. For more information about the tax credit rates for CREBs plus the limitations on their use that are included in Section 54A(b), see Sections 54(b) and 54A(b) (found here http://www.hunton.com/files/tbl_s47Details/FileUpload265/1782/IRC_Sections_5

4_54A-E_45d.pdf) and Doug Lamb's above-referenced article on CREBs (found here http://www.hunton.com/files/tbl_s47Details/FileUpload265/2166/Lamb_CDFA_CREBs_Article.pdf). For QZABs, there will be one tax credit rate for the entire maturity of the bond. For QECBs and New CREBs, it is not known at this time whether there will be a tax credit rate for each year as is the case for CREBs or one credit rate as is the case with QZABs. For more information about the mechanics of setting the tax credit rate and establishing the maximum maturity of the bond, as set forth for CREBs, see Section 8 and 9 of Notice 2007-26 found here http://www.hunton.com/files/tbl_s47Details/FileUpload265/1807/CREB-Notice_2007-26.pdf, as modified by Notice 2009-15 found here http://www.hunton.com/files/tbl_s47Details/FileUpload265/2421/IRSNotice_2009-15.pdf .

Finally, the tax credit is treated as interest, and is included in gross income. The bonds can be sold to a wide range of investors. For instance, unlike the prior QZAB provisions in Section 1397E that limited purchasers to banks and financial institutions, there is no such limitation in Sections 54A, 54C, 54D or 54E.

New CREBs

New CREBs may be used to finance qualified renewable energy facilities that produce electricity. Such facilities must qualify under Section 45(d) of the Code but do not include refined coal or Indian coal facilities. Moreover, the placed-in-service date limitations in 45(d) do not apply. The facilities must be owned by public power providers ("PPPs"), governmental bodies, or cooperative electric companies ("CECs"). A PPP is a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act. With respect to the ownership requirements for governmental bodies and CECs, please see the section in the above referenced article entitled "Borrower, Project & Issuer Requirements."

New CREBs differ from CREBs in a number of ways, including that CREBs could finance refined coal facilities whereas New CREBs cannot.

The bond limitation for the New CREBs is $800 million, of which no more than one-third may be allocated to projects of each of PPPs, governmental bodies and CECs. Allocations to projects of PPPs will be made on a pro-rata basis based upon the total applied for amounts and allocation available. The method of allocation for the governmental and CEC projects will be in a manner determined by Treasury. It is expected the Internal Revenue Service will issue a notice explaining the allocation process and criteria upon which allocation will be awarded and that the smallest-to-largest methodology used for allocations of

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CREBs will continue to apply to CECs and governmental bodies. For a description of that methodology, see Section 6 of Notice 2007-26.

Under the New CREBs program, 100% of the APP must be spent on capital expenditures incurred by PPPs, CECs or governmental bodies. APP are required to be used on capital expenditures for the project within three years of the date of issuance (with limited exceptions). The tax credit amount for New CREBs is reduced to an amount that is 70% of the product of the formula used for old CREBs. The New CREBs credit may be claimed against both regular and AMT tax liability.

QECBs

The Energy Act creates a new tax credit bond program for “qualified energy conservation bonds” (“QECBs”). The rules for QECBs are similar to those for New CREBs. For instance, the tax credit amount for QECBs is the same as for New CREBs. There is one notable difference. The uses of QECBs are much broader than those for New CREBs. Specifically, QECBs contemplate ownership beyond governmental bodies or CECs.

Qualified purposes for QECBs are described as “qualified conservation purposes.” Such purposes include capital expenditures for projects related to reducing energy consumption in publicly-owned buildings by at least 20%, implementing green community programs, rural development involving renewable energy production, and qualified facilities as determined under Section 45(d) (other than refined coal or Indian coal facilities and without regard to placed-in service dates) (i.e., the same 45(d) projects that qualify under New CREBs).

Such qualified conservation purposes also include expenditures with respect to (A) research facilities, and research grants to support research in (i) development of cellulosic ethanol or other non-fossil fuels, (ii) technologies for the capture and sequestration of carbon dioxide produced through the use of fossil fuels, (iii) increasing the efficiency of existing technologies for producing non-fossil fuels, (iv) automobile battery technologies and other technologies to reduce fossil fuel consumption in transportation, or (v) technologies to reduce energy use in buildings; (B) mass commuting facilities and related facilities that reduce the consumption of energy, including expenditures to reduce pollution from vehicles used for mass commuting; (C) demonstration projects designed to promote the commercialization of (i) green building technology, (ii) conversion of agricultural waste for use in the production of fuel or otherwise, (iii) advanced battery manufacturing technologies, (iv) technologies to reduce peak use of electricity, or (v) technologies for the capture and sequestration of carbon dioxide emitted from combusting fossil fuels in order to produce electricity; and (D) public education

campaigns to promote energy efficiency. The qualified conservations described in this paragraph are not further defined in Sections 54A or 54D.

In the case of any QECB that is a private activity bond for purposes of Section 141 of the Code, a qualified conservation purpose does not include any expenditure which is not a capital expenditure. Accordingly, any of the above qualified conservation purposes seemingly may be financed by a private activity QECB so long as the APP are used for capital expenditures, i.e., costs chargeable to the account of the borrower (or would be so with a proper election).

The Energy Act provides $800 million in allocation for QECBs that are to be distributed among the States by population. Large local governments (i.e., population of 100,000 or more) receive a proportionate amount of its State's allocation. Indian tribal governments are to be treated in the same manner as large local governments. It is anticipated that the allocation process for QECBs will be administered by Treasury. Moreover, not more than 30% of the allocation to states or large local governments may be used for QECBs that are private activity bonds.

New QZABs

The October 2008 bailout package also included legislation entitled "Tax Extenders and Alternative Minimum Tax Relief Act of 2008" that reauthorized and extended the existing QZAB program under Section 54E. As a result, $400 million in allocation was added for each of calendar years 2008 and 2009. Any QZAB issued after October 3, 2008 is subject to the rules in Section 54A and 54E even if the allocation for it arose on or before October 3, 2008.

New QZABs retain many provisions contained in the prior statute, including the private contribution requirement, the definition of a qualified zone academy and the restrictions on the use of proceeds for repairs and rehabilitation, teacher training, course materials and development of course material. The allocation process for QZABs will continue to be administered by the States and unused allocation may be carried forward to the two calendar years following the year in which the excess allocation arose, including allocations made under the old rules.

For questions about Energy Tax Credit Bonds, please contact Doug Lamb or Laura Jones.

IRC Sections 54, 54A-E and 45(d)

Section 54 Credit to holders of clean renewable energy bonds

(a) Allowance of credit

If a taxpayer holds a clean renewable energy bond on one or more credit allowance dates of the bond occurring during any taxable year, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of the credits determined under subsection (b) with respect to such dates.

(b) Amount of credit

(1) In general

The amount of the credit determined under this subsection with respect to any credit allowance date for a clean renewable energy bond is 25 percent of the annual credit determined with respect to such bond.

(2) Annual credit

The annual credit determined with respect to any clean renewable energy bond is the product of--

(A) the credit rate determined by the Secretary under paragraph (3) for the day on which such bond was sold, multiplied by

(B) the outstanding face amount of the bond.

(3) Determination

For purposes of paragraph (2), with respect to any clean renewable energy bond, the Secretary shall determine daily or cause to be determined daily a credit rate which shall apply to the first day on which there is a binding, written contract for the sale or exchange of the bond. The credit rate for any day is the credit rate which the Secretary or the Secretary's designee estimates will permit the issuance of clean renewable energy bonds with a specified maturity or redemption date without discount and without interest cost to the qualified issuer.

(4) Credit allowance date

For purposes of this section, the term "credit allowance date" means--

(A) March 15,

(B) June 15,

(C) September 15, and

(D) December 15.

Such term also includes the last day on which the bond is outstanding.

(5) Special rule for issuance and redemption

In the case of a bond which is issued during the 3-month period ending on a credit allowance date, the amount of the credit determined under this subsection with respect to such credit allowance date shall be a ratable portion of the credit otherwise determined based on the portion of the 3-month period during which the bond is outstanding. A similar rule shall apply when the bond is redeemed or matures.

(c) Limitation based on amount of tax

The credit allowed under subsection (a) for any taxable year shall not exceed the excess of--

(1) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over

(2) the sum of the credits allowable under this part (other than subpart C, section 1400N(l), and this section).

(d) Clean renewable energy bond

For purposes of this section--

(1) In General

The term "clean renewable energy bond” means any bond issued as part of an issue if--

(A) the bond is issued by a qualified issuer pursuant to an allocation by the Secretary to such issuer of a portion of the national clean renewable energy bond limitation under subsection (f)(2),

(B) 95 percent or more of the proceeds of such issue are to be used for capital expenditures incurred by qualified borrowers for one or more qualified projects,

(C) the qualified issuer designates such bond for purposes of this section and the bond is in registered form, and

(D) the issue meets the requirements of subsection (h).

(2) Qualified project; special use rules

(A) In general

The term "qualified project” means any qualified facility (as determined under section 45(d) without regard to paragraph (10) and to any placed in service date) owned by a qualified borrower.

(B) Refinancing rules

For purposes of paragraph (1)(B), a qualified project may be refinanced with proceeds of a clean renewable energy bond only if the indebtedness being refinanced (including any obligation directly or indirectly refinanced by such indebtedness) was originally incurred by a qualified borrower after the date of the enactment of this section.

(C) Reimbursement

For purposes of paragraph (1)(B), a clean renewable energy bond may be issued to reimburse a qualified borrower for amounts paid after the date of the enactment of this section with respect to a qualified project, but only if--

(i) prior to the payment of the original expenditure, the qualified borrower declared its intent to reimburse such expenditure with the proceeds of a clean renewable energy bond,

(ii) not later than 60 days after payment of the original expenditure, the qualified issuer adopts an official intent to reimburse the original expenditure with such proceeds, and

(iii) the reimbursement is made not later than 18 months after the date the original expenditure is paid.

(D) Treatment of changes in use

For purposes of paragraph (1)(B), the proceeds of an issue shall not be treated as used for a qualified project to the extent that a qualified borrower or qualified issuer takes any action within its control which causes such proceeds not to be used for a qualified project. The Secretary shall prescribe regulations specifying remedial actions that may be taken (including conditions to taking such remedial actions) to prevent an action described in the preceding sentence from causing a bond to fail to be a clean renewable energy bond.

(e) Maturity limitations

(1) Duration of term

A bond shall not be treated as a clean renewable energy bond if the maturity of such bond exceeds the maximum term determined by the Secretary under paragraph (2) with respect to such bond.

(2) Maximum term

During each calendar month, the Secretary shall determine the maximum term permitted under this paragraph for bonds issued during the following calendar month. Such maximum term shall be the term which the Secretary estimates will result in the present value of the obligation to repay the principal on the bond being equal to 50 percent of the face amount of such bond. Such present value shall be determined without regard to the requirements of subsection (l)(6) and using as a discount rate the average annual interest rate of tax-exempt obligations having a term of 10 years or more which are issued during the month. If the term as so determined is not a multiple of a whole year, such term shall be rounded to the next highest whole year.

(f) Limitation on amount of bonds designated

(1) National limitation

There is a national clean renewable energy bond limitation of $1,200,000,000.

(2) Allocation by Secretary

The Secretary shall allocate the amount described in paragraph (1) among qualified projects in such manner as the Secretary determines appropriate, except that the Secretary may not allocate more than $750,000,000 of the national clean renewable energy bond limitation to finance qualified projects of qualified borrowers which are governmental bodies.

(g) Credit included in gross income

Gross income includes the amount of the credit allowed to the taxpayer under this section (determined without regard to subsection (c)) and the amount so included shall be treated as interest income.

(h) Special rules relating to expenditures

(1) In general

An issue shall be treated as meeting the requirements of this subsection if, as of the date of issuance, the qualified issuer reasonably expects--

(A) at least 95 percent of the proceeds of such issue are to be spent for one or more qualified projects within the 5-year period beginning on the date of issuance of the clean energy bond,

(B) a binding commitment with a third party to spend at least 10 percent of the proceeds of such issue will be incurred within the 6-month period beginning on the date of issuance of the clean energy bond or, in the case of a clean energy bond the proceeds of which are to be loaned to two or more qualified borrowers, such binding commitment will be incurred within the 6-month period beginning on the date of the loan of such proceeds to a qualified borrower, and

(C) such projects will be completed with due diligence and the proceeds of such issue will be spent with due diligence.

(2) Extension of period

Upon submission of a request prior to the expiration of the period described in paragraph (1)(A), the Secretary may extend such period if the qualified issuer establishes that the failure to satisfy the 5-year requirement is due to reasonable cause and the related projects will continue to proceed with due diligence.

(3) Failure to spend required amount of bond proceeds within 5 years

To the extent that less than 95 percent of the proceeds of such issue are expended by the close of the 5-year period beginning on the date of issuance (or if an extension has been obtained under paragraph (2), by the close of the extended period), the qualified issuer shall redeem all of the nonqualified bonds within 90 days after the end of such period. For purposes of this paragraph, the amount of the nonqualified bonds required to be redeemed shall be determined in the same manner as under section 142.

(i) Special rules relating to arbitrage

A bond which is part of an issue shall not be treated as a clean renewable energy bond unless, with respect to the issue of which the bond is a part, the qualified issuer satisfies the arbitrage requirements of section 148 with respect to proceeds of the issue.

(j) Cooperative electric company; qualified energy tax credit bond lender; governmental body; qualified borrower

For purposes of this section--

(1) Cooperative electric company

The term "cooperative electric company" means a mutual or cooperative electric company described in section 501(c)(12) or section 1381(a)(2)(C), or a not-for-profit electric utility which has received a loan or loan guarantee under the Rural Electrification Act.

(2) Clean renewable energy bond lender

The term "clean renewable energy bond lender" means a lender which is a cooperative which is owned by, or has outstanding loans to, 100 or more cooperative electric companies and is in existence on February 1, 2002, and shall include any affiliated entity which is controlled by such lender.

(3) Governmental body

The term "governmental body" means any State, territory, possession of the United States, the District of Columbia, Indian tribal government, and any political subdivision thereof.

(4) Qualified issuer

The term "qualified issuer" means--

(A) a clean renewable energy bond lender,

(B) a cooperative electric company, or

(C) a governmental body.

(5) Qualified borrower

The term "qualified borrower" means--

(A) a mutual or cooperative electric company described in section 501(c)(12) or 1381(a)(2)(C), or

(B) a governmental body.

(k) Special rules relating to pool bonds

No portion of a pooled financing bond may be allocable to any loan unless the borrower has entered into a written loan commitment for such portion prior to the issue date of such issue.

(l) Other definitions and special rules

For purposes of this section--

(1) Bond

The term “bond" includes any obligation.

(2) Pooled financing bond

The term "pooled financing bond" shall have the meaning given such term by section 149(f)(6)(A).

(3) Partnership; S Corporation; and other pass-thru entities

(A) In general

Under regulations prescribed by the Secretary, in the case of a partnership, trust, S corporation, or other pass-thru entity, rules similar to the rules of section 41(g) shall apply with respect to the credit allowable under subsection (a).

(B) No basis adjustment

In the case of a bond held by a partnership or an S corporation, rules similar to the rules under section 1397E(l) shall apply.

(4) Bonds held by regulated investment companies

If any clean renewable energy bond is held by a regulated investment company, the credit determined under subsection (a) shall be allowed to shareholders of such company under procedures prescribed by the Secretary.

(5) Ratable principal amortization required

A bond shall not be treated as a clean renewable energy bond unless it is part of an issue which provides for an equal amount of principal to be paid by the qualified issuer during each calendar year that the issue is outstanding.

(6) Reporting

Issuers of clean renewable energy bonds shall submit reports similar to the reports required under section 149(e).

(m) Termination

This section shall not apply with respect to any bond issued after December 31, 2009.

Sec. 54A Credit to holders of qualified tax credit bonds

(a) Allowance of credit

If a taxpayer holds a qualified tax credit bond on one or more credit allowance dates of the bond during any taxable year, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of the credits determined under subsection (b) with respect to such dates.

(b) Amount of credit

(1) In general

The amount of the credit determined under this subsection with respect to any credit allowance date for a qualified tax credit bond is 25 percent of the annual credit determined with respect to such bond.

(2) Annual credit

The annual credit determined with respect to any qualified tax credit bond is the product of--

(A) the applicable credit rate, multiplied by

(B) the outstanding face amount of the bond.

(3) Applicable credit rate

For purposes of paragraph (2), the applicable credit rate is the rate which the Secretary estimates will permit the issuance of qualified tax credit bonds with a specified maturity or redemption date without discount and without interest cost to the qualified issuer. The applicable credit rate with respect to any qualified tax credit bond shall be determined as of the first day on which there is a binding, written contract for the sale or exchange of the bond.

(4) Special rule for issuance and redemption

In the case of a bond which is issued during the 3-month period ending on a credit allowance date, the amount of the credit determined under this subsection with respect to such credit allowance date shall be a ratable portion of the credit otherwise determined based on the portion of the 3-month period during which the bond is outstanding. A similar rule shall apply when the bond is redeemed or matures.

(c) Limitation based on amount of tax

(1) In general

The credit allowed under subsection (a) for any taxable year shall not exceed the excess of--

(A) the sum of the regular tax liability (as defined in section 26(b)) plus the tax imposed by section 55, over

(B) the sum of the credits allowable under this part (other than subpart C and this subpart).

(2) Carryover of unused credit

If the credit allowable under subsection (a) exceeds the limitation imposed by paragraph (1) for such taxable year, such excess shall be carried to the succeeding taxable year and added to the credit allowable under subsection (a) for such taxable year (determined before the application of paragraph (1) for such succeeding taxable year).

(d) Qualified tax credit bond

For purposes of this section--

(1) Qualified tax credit bond[i]

The term "qualified tax credit bond"[ii] means--

(A) a qualified forestry conservation bond,

(B) a new clean renewable energy bond,

(C) a qualified energy conservation bond, or

(D) a qualified zone academy bond,

which is part of an issue that meets requirements of paragraphs (2), (3), (4), (5), and (6).

(2) Special rules relating to expenditures

(A) In general

An issue shall be treated as meeting the requirements of this paragraph if, as of the date of issuance, the issuer reasonably expects--

(i) 100 percent or more of the available project proceeds to be spent for 1 or more qualified purposes within the 3-year period beginning on such date of issuance, and

(ii) a binding commitment with a third party to spend at least 10 percent of such available project proceeds will be incurred within the 6-month period beginning on such date of issuance.

(B) Failure to spend required amount of bond proceeds within 3 years

(i) In general

To the extent that less than 100 percent of the available project proceeds of the issue are expended by the close of the expenditure period for 1 or more qualified purposes, the issuer shall redeem all of the nonqualified bonds within 90 days after the end of such period. For purposes of this paragraph, the amount of the nonqualified bonds required to be redeemed shall be determined in the same manner as under section 142.

(ii) Expenditure period

For purposes of this subpart, the term "expenditure period" means, with respect to any issue, the 3-year period beginning on the date of issuance. Such term shall include any extension of such period under clause (iii).

(iii) Extension of period

Upon submission of a request prior to the expiration of the expenditure period (determined without regard to any extension under this clause), the Secretary may extend such period if the issuer establishes that the failure to expend the proceeds within the original expenditure period is due to reasonable cause and the expenditures for qualified purposes will continue to proceed with due diligence.

(C) Qualified purpose[iii]

For purposes of this paragraph, the term "qualified purpose"[iv] means--

(i) in the case of a qualified forestry conservation bond, a purpose specified in section 54B(e),

(ii) in the case of a new clean renewable energy bond, a purpose specified in section 54C(a)(1),

(iii) in the case of a qualified energy conservation bond, a purpose specified in section 54D(a)(1), and

(iv) in the case of a qualified zone academy bond, a purpose specified in section 54E(a)(1).

(D) Reimbursement

For purposes of this subtitle, available project proceeds of an issue shall be treated as spent for a qualified purpose if such proceeds are used to reimburse the issuer for amounts paid for a qualified purpose after the date that the Secretary makes an allocation of bond limitation with respect to such issue, but only if--

(i) prior to the payment of the original expenditure, the issuer declared its intent to reimburse such expenditure with the proceeds of a qualified tax credit bond,

(ii) not later than 60 days after payment of the original expenditure, the issuer adopts an official intent to reimburse the original expenditure with such proceeds, and

(iii) the reimbursement is made not later than 18 months after the date the original expenditure is paid.

(3) Reporting

An issue shall be treated as meeting the requirements of this paragraph if the issuer of qualified tax credit bonds submits reports similar to the reports required under section 149(e).

(4) Special rules relating to arbitrage

(A) In general

An issue shall be treated as meeting the requirements of this paragraph if the issuer satisfies the requirements of section 148 with respect to the proceeds of the issue.

(B) Special rule for investments during expenditure period

An issue shall not be treated as failing to meet the requirements of subparagraph (A) by reason of any investment of available project proceeds during the expenditure period.

(C) Special rule for reserve funds

An issue shall not be treated as failing to meet the requirements of subparagraph (A) by reason of any fund which is expected to be used to repay such issue if--

(i) such fund is funded at a rate not more rapid than equal annual installments,

(ii) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue, and

(iii) the yield on such fund is not greater than the discount rate determined under paragraph (5)(B) with respect to the issue.

(5) Maturity limitation

(A) In general

An issue shall be treated as meeting the requirements of this paragraph if the maturity of any bond which is part of such issue does not exceed the maximum term determined by the Secretary under subparagraph (B).

(B) Maximum term

During each calendar month, the Secretary shall determine the maximum term permitted under this paragraph for bonds issued during the following calendar month. Such maximum term shall be the term which the Secretary estimates will result in the present value of the obligation to repay the principal on the bond being equal to 50 percent of the face amount of such bond. Such present value shall be determined using as a discount rate the average annual interest rate of tax-exempt obligations

having a term of 10 years or more which are issued during the month. If the term as so determined is not a multiple of a whole year, such term shall be rounded to the next highest whole year.

(6) Prohibition on financial conflicts of interest

An issue shall be treated as meeting the requirements of this paragraph if the issuer certifies that--

(A) applicable State and local law requirements governing conflicts of interest are satisfied with respect to such issue, and

(B) if the Secretary prescribes additional conflicts of interest rules governing the appropriate Members of Congress, Federal, State, and local officials, and their spouses, such additional rules are satisfied with respect to such issue.

(e) Other definitions

For purposes of this subchapter--

(1) Credit allowance date

The term "credit allowance date" means--

(A) March 15,

(B) June 15,

(C) September 15, and

(D) December 15.

Such term includes the last day on which the bond is outstanding.

(2) Bond

The term "bond" includes any obligation.

(3) State

The term "State" includes the District of Columbia and any possession of the United States.

(4) Available project proceeds

The term "available project proceeds" means--

(A) the excess of--

(i) the proceeds from the sale of an issue, over

(ii) the issuance costs financed by the issue (to the extent that such costs do not exceed 2 percent of such proceeds), and

(B) the proceeds from any investment of the excess described in subparagraph (A).

(f) Credit treated as interest

For purposes of this subtitle, the credit determined under subsection (a) shall be treated as interest which is includible in gross income.

(g) S corporations and partnerships

In the case of a tax credit bond held by an S corporation or partnership, the allocation of the credit allowed by this section to the shareholders of such corporation or partners of such partnership shall be treated as a distribution.

(h) Bonds held by regulated investment companies and Real Estate Investment Trusts

If any qualified tax credit bond is held by a regulated investment company or a real estate investment trust, the credit determined under subsection (a) shall be allowed to shareholders of such company or beneficiaries of such trust (and any gross income included under subsection (f) with respect to such credit shall be treated as distributed to such shareholders or beneficiaries) under procedures prescribed by the Secretary.

(i) Credits may be stripped

Under regulations prescribed by the Secretary--

(1) In general

There may be a separation (including at issuance) of the ownership of a qualified tax credit bond and the entitlement to the credit under this section with respect to such bond. In case of any such separation, the credit under this section shall be allowed to the person who on the credit allowance date holds the instrument evidencing the entitlement to the credit and not to the holder of the bond.

(2) Certain rules to apply

In the case of a separation described in paragraph (1), the rules of section 1286 shall apply to the qualified tax credit bond as if it were a stripped bond and to the credit under this section as if it were a stripped coupon.

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[i] Code section 54A(d)(1), as excerpted below (and in the form prior to the amendments under the 2008 Energy Improvement and Extension Act (P.L. 110-343) (the "Energy Act")), applies to obligations issued before Oct. 4, 2008.

"(1) Qualified tax credit bond

The term "qualified tax credit bond" means a qualified forestry conservation bond which is part of an issue that meets the requirements of paragraphs (2), (3), (4), (5), and (6)."

[ii] Code section 54A(d)(1), in its current form, as amended by sections 107, 301, and 313 of the Energy Act, applies to obligations issued after Oct. 3, 2008.

[iii] Code section 54A(d)(2)(C), as excerpted below (and in the form prior to the amendments under the Energy Act), applies to obligations issued before Oct. 4, 2008.

(C) Qualified purpose

For purposes of this paragraph, the term "qualified purpose" means a purpose specified in section 54B(e).

[iv] Code section 54A(d)(2)(C), in its current form, as amended by sections 107, 301, and 313 of the Energy Act, applies to obligations issued after Oct. 3, 2008.

HUNTON & WILLIAMS

Sec. 54B Qualified forestry conservation bonds

(a) Qualified forestry conservation bond

For purposes of this subchapter, the term "qualified forestry conservation bond" means any bond issued as part of an issue if--

(1) 100 percent of the available project proceeds of such issue are to be used for one or more qualified forestry conservation purposes,

(2) the bond is issued by a qualified issuer, and

(3) the issuer designates such bond for purposes of this section.

(b) Limitation on amount of bonds designated

The maximum aggregate face amount of bonds which may be designated under subsection (a) by any issuer shall not exceed the limitation amount allocated to such issuer under subsection (d).

(c) National limitation on amount of bonds designated

There is a national qualified forestry conservation bond limitation of $500,000,000.

(d) Allocations

(1) In general

The Secretary shall make allocations of the amount of the national qualified forestry conservation bond limitation described in subsection (c) among qualified forestry conservation purposes in such manner as the Secretary determines appropriate so as to ensure that all of such limitation is allocated before the date which is 24 months after the date of the enactment of this section.

(2) Solicitation of applications

The Secretary shall solicit applications for allocations of the national qualified forestry conservation bond limitation described in subsection (c) not later than 90 days after the date of the enactment of this section.

(e) Qualified forestry conservation purpose

For purposes of this section, the term "qualified forestry conservation purpose" means the acquisition by a State or any political subdivision or instrumentality thereof or a 501(c)(3) organization (as defined in section 150(a)(4)) from an unrelated person of forest and forest land that meets the following qualifications:

(1) Some portion of the land acquired must be adjacent to United States Forest Service Land.

(2) At least half of the land acquired must be transferred to the United States Forest Service at no net cost to the United States and not more than half of the land acquired may either remain with or be conveyed to a State.

(3) All of the land must be subject to a native fish habitat conservation plan approved by the United States Fish and Wildlife Service.

(4) The amount of acreage acquired must be at least 40,000 acres.

(f) Qualified issuer

For purposes of this section, the term "qualified issuer" means a State or any political subdivision or instrumentality thereof or a 501(c)(3) organization (as defined in section 150(a)(4)).

(g) Special arbitrage rule

In the case of any qualified forestry conservation bond issued as part of an issue, section 54A(d)(4)(C) shall be applied to such issue without regard to clause (i).

(h) Election to treat 50 percent of bond allocation as payment of tax

(1) In general

If--

(A) a qualified issuer receives an allocation of any portion of the national qualified forestry conservation bond limitation described in subsection (c), and

(B) the qualified issuer elects the application of this subsection with respect to such allocation,

then the qualified issuer (without regard to whether the issuer is subject to tax under this chapter) shall be treated as having made a payment against the tax imposed by this chapter, for the taxable year preceding the taxable year in which the allocation is received, in an amount equal to 50 percent of the amount of such allocation.

(2) Treatment of deemed payment

(A) In general

Notwithstanding any other provision of this title, the Secretary shall not use the payment of tax described in paragraph (1) as an offset or credit against any tax liability of the qualified issuer but shall refund such payment to such issuer.

(B) No interest

Except as provided in paragraph (3)(A), the payment described in paragraph (1) shall not be taken into account in determining any amount of interest under this title.

(3) Requirement for, and effect of, election

(A) Requirement

No election under this subsection shall take effect unless the qualified issuer certifies to the Secretary that any payment of tax refunded to the issuer under this subsection will be used exclusively for 1 or more qualified forestry conservation purposes. If the qualified issuer fails to use any portion of such payment for such purpose, the issuer shall be liable to the United States in an amount equal to such portion, plus interest at the overpayment rate under section 6621 for the period from the date such portion was refunded to the date such amount is paid. Any such amount shall be assessed and collected in the same manner as tax imposed by this chapter, except that subchapter B of chapter 63 (relating to deficiency procedures) shall not apply in respect of such assessment or collection.

(B) Effect of election on allocation

If a qualified issuer makes the election under this subsection with respect to any allocation--

(i) the issuer may issue no bonds pursuant to the allocation, and

(ii) the Secretary may not reallocate such allocation for any other purpose.

HUNTON& WILLIAMS

Sec. 54C New clean renewable energy bonds

(a) New clean renewable energy bond

For purposes of this subpart, the term "new clean renewable energy bond" means any bond issued as part of an issue if--

(1) 100 percent of the available project proceeds of such issue are to be used for capital expenditures incurred by governmental bodies, public power providers, or cooperative electric companies for one or more qualified renewable energy facilities,

(2) the bond is issued by a qualified issuer, and

(3) the issuer designates such bond for purposes of this section.

(b) Reduced credit amount

The annual credit determined under section 54A(b) with respect to any new clean renewable energy bond shall be 70 percent of the amount so determined without regard to this subsection.

(c) Limitation on amount of bonds designated

(1) In general

The maximum aggregate face amount of bonds which may be designated under subsection (a) by any issuer shall not exceed the limitation amount allocated under this subsection to such issuer.

(2) National limitation on amount of bonds designated

There is a national new clean renewable energy bond limitation of $800,000,000 which shall be allocated by the Secretary as provided in paragraph

(3), except that--

(A) not more than 33 1/3 percent thereof may be allocated to qualified projects of public power providers,

(B) not more than 33 1/3 percent thereof may be allocated to qualified projects of governmental bodies, and

(C) not more than 33 1/3 percent thereof may be allocated to qualified projects of cooperative electric companies.

(3) Method of allocation

(A) Allocation among public power providers

After the Secretary determines the qualified projects of public power providers which are appropriate for receiving an allocation of the national new clean renewable energy bond limitation, the Secretary shall, to the maximum extent practicable, make allocations among such projects in such manner that the amount allocated to each such project bears the same ratio to the cost of such project as the limitation under paragraph (2)(A) bears to the cost of all such projects.

(B) Allocation among governmental bodies and cooperative electric companies

The Secretary shall make allocations of the amount of the national new clean renewable energy bond limitation described in paragraphs (2)(B) and (2)(C) among qualified projects of governmental bodies and cooperative electric companies, respectively, in such manner as the Secretary determines appropriate.

(d) Definitions

For purposes of this section--

(1) Qualified renewable energy facility

The term "qualified renewable energy facility" means a qualified facility (as determined under section 45(d) without regard to paragraphs (8) and (10) thereof and to any placed in service date) owned by a public power provider, a governmental body, or a cooperative electric company.

(2) Public power provider

The term "public power provider" means a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act (as in effect on the date of the enactment of this paragraph).

(3) Governmental body

The term "governmental body" means any State or Indian tribal government, or any political subdivision thereof.

(4) Cooperative electric company

The term "cooperative electric company" means a mutual or cooperative electric company described in section 501(c)(12) or section 1381(a)(2)(C).

(5) Clean renewable energy bond lender

The term "clean renewable energy bond lender" means a lender which is a cooperative which is owned by, or has outstanding loans to, 100 or more cooperative electric companies and is in existence on February 1, 2002, and shall include any affiliated entity which is controlled by such lender.

(6) Qualified issuer

The term "qualified issuer" means a public power provider, a cooperative electric company, a governmental body, a clean renewable energy bond lender, or a not-for-profit electric utility which has received a loan or loan guarantee under the Rural Electrification Act.

HUNTON & WILLIAMS

Sec. 54D Qualified energy conservation bonds

(a) Qualified energy conservation bond

For purposes of this subchapter, the term "qualified energy conservation bond" means any bond issued as part of an issue if--

(1) 100 percent of the available project proceeds of such issue are to be used for one or more qualified conservation purposes,

(2) the bond is issued by a State or local government, and

(3) the issuer designates such bond for purposes of this section.

(b) Reduced credit amount

The annual credit determined under section 54A(b) with respect to any qualified energy conservation bond shall be 70 percent of the amount so determined without regard to this subsection.

(c) Limitation on amount of bonds designated

The maximum aggregate face amount of bonds which may be designated under subsection (a) by any issuer shall not exceed the limitation amount allocated to such issuer under subsection (e).

(d) National limitation on amount of bonds designated

There is a national qualified energy conservation bond limitation of $800,000,000.

(e) Allocations

(1) In general

The limitation applicable under subsection (d) shall be allocated by the Secretary among the States in proportion to the population of the States.

(2) Allocations to largest local governments-

(A) In general

In the case of any State in which there is a large local government, each such local government shall be allocated a portion of such State’s allocation which bears the same ratio to the State’s allocation (determined without regard to this subparagraph) as the population of such large local government bears to the population of such State.

(B) Allocation of unused limitation to State

The amount allocated under this subsection to a large local government may be reallocated by such local government to the State in which such local government is located.

(C) Large local government

For purposes of this section, the term "large local government" means any municipality or county if such municipality or county has a population of 100,000 or more.

(3) Allocation to issuers; restriction on private activity bonds

Any allocation under this subsection to a State or large local government shall be allocated by such State or large local government to issuers within the State in a manner that results in not less than 70 percent of the allocation to such State or large local government being used to designate bonds which are not private activity bonds.

(f) Qualified conservation purpose

For purposes of this section--

(1) In general

The term "qualified conservation purpose" means any of the following:

(A) Capital expenditures incurred for purposes of--

(i) reducing energy consumption in publicly-owned buildings by at least 20 percent,

(ii) implementing green community programs,

(iii) rural development involving the production of electricity from renewable energy resources, or

(iv) any qualified facility (as determined under section 45(d) without regard to paragraphs (8) and (10) thereof and without regard to any placed in service date).

(B) Expenditures with respect to research facilities, and research grants, to support research in--

(i) development of cellulosic ethanol or other non-fossil fuels,

(ii) technologies for the capture and sequestration of carbon dioxide produced through the use of fossil fuels,

(iii) increasing the efficiency of existing technologies for producing non-fossil fuels,

(iv) automobile battery technologies and other technologies to reduce fossil fuel consumption in transportation, or

(v) technologies to reduce energy use in buildings.

(C) Mass commuting facilities and related facilities that reduce the consumption of energy, including expenditures to reduce pollution from vehicles used for mass commuting.

(D) Demonstration projects designed to promote the commercialization of-

(i) green building technology,

(ii) conversion of agricultural waste for use in the production of fuel or otherwise,

(iii) advanced battery manufacturing technologies,

(iv) technologies to reduce peak use of electricity, or

(v) technologies for the capture and sequestration of carbon dioxide emitted from combusting fossil fuels in order to produce electricity.

(E) Public education campaigns to promote energy efficiency.

(2) Special rules for private activity bonds

For purposes of this section, in the case of any private activity bond, the term "qualified conservation purposes" shall not include any expenditure which is not a capital expenditure.

(g) Population

(1) In general

The population of any State or local government shall be determined for purposes of this section as provided in section 146(j) for the calendar year which includes the date of the enactment of this section.

(2) Special rule for counties

In determining the population of any county for purposes of this section, any population of such county which is taken into account in determining the population of any municipality which is a large local government shall not be taken into account in determining the population of such county.

(h) Application to Indian tribal governments

An Indian tribal government shall be treated for purposes of this section in the same manner as a large local government, except that--

(1) an Indian tribal government shall be treated for purposes of subsection (e) as located within a State to the extent of so much of the population of such government as resides within such State, and

(2) any bond issued by an Indian tribal government shall be treated as a qualified energy conservation bond only if issued as part of an issue the available project proceeds of which are used for purposes for which such Indian tribal government could issue bonds to which section 103(a) applies.

Sec. 54E Qualified zone academy bonds

(a) Qualified zone academy bonds

For purposes of this subchapter, the term "qualified zone academy bond" means any bond issued as part of an issue if--

(1) 100 percent of the available project proceeds of such issue are to be used for a qualified purpose with respect to a qualified zone academy established by an eligible local education agency,

(2) the bond is issued by a State or local government within the jurisdiction of which such academy is located, and

(3) the issuer--

(A) designates such bond for purposes of this section,

(B) certifies that it has written assurances that the private business contribution requirement of subsection (b) will be met with respect to such academy, and

(C) certifies that it has the written approval of the eligible local education agency for such bond issuance.

(b) Private business contribution requirement

For purposes of subsection (a), the private business contribution requirement of this subsection is met with respect to any issue if the eligible local education agency that established the qualified zone academy has written commitments from private entities to make qualified contributions having a present value (as of the date of issuance of the issue) of not less than 10 percent of the proceeds of the issue.

(c) Limitation on amount of bonds designated

(1) National limitation

There is a national zone academy bond limitation for each calendar year. Such limitation is $400,000,000 for 2008 and 2009, and, except as provided in paragraph (4), zero thereafter.

(2) Allocation of limitation

The national zone academy bond limitation for a calendar year shall be allocated by the Secretary among the States on the basis of their respective populations of individuals below the poverty line (as defined by the Office of Management and Budget). The limitation amount allocated to a State under the preceding sentence shall be allocated by the State education agency to qualified zone academies within such State.

(3) Designation subject to limitation amount

The maximum aggregate face amount of bonds issued during any calendar year which may be designated under subsection (a) with respect to any qualified zone academy shall not exceed the limitation amount allocated to such academy under paragraph (2) for such calendar year.

(4) Carryover of unused limitation

(A) In general

If for any calendar year--

(i) the limitation amount for any State, exceeds

(ii) the amount of bonds issued during such year which are designated under subsection (a) with respect to qualified zone academies within such State,

the limitation amount for such State for the following calendar year shall be increased by the amount of such excess.

(B) Limitation on carryover

Any carry-forward of a limitation amount may be carried only to the first 2 years following the unused limitation year. For purposes of the preceding sentence, a limitation amount shall be treated as used on a first-in first-out basis.

(C) Coordination with section 1397E

Any carryover determined under section 1397E(e)(4) (relating to carryover of unused limitation) with respect to any State to calendar year 2008 or 2009 shall be treated for purposes of this section as a carryover with respect to such State for such calendar year under subparagraph (A), and the limitation of subparagraph (B) shall apply to such carryover taking into account the calendar years to which such carryover relates.

(d) Definitions

For purposes of this section--

(1) Qualified zone academy

The term "qualified zone academy" means any public school (or academic program within a public school) which is established by and operated under the supervision of an eligible local education agency to provide education or training below the postsecondary level if--

(A) such public school or program (as the case may be) is designed in cooperation with business to enhance the academic curriculum, increase graduation and employment rates, and better prepare students for the rigors of college and the increasingly complex workforce,

(B) students in such public school or program (as the case may be) will be subject to the same academic standards and assessments as other students educated by the eligible local education agency,

(C) the comprehensive education plan of such public school or program is approved by the eligible local education agency, and

(D)(i) such public school is located in an empowerment zone or enterprise community (including any such zone or community designated after the date of the enactment of this section), or

(ii) there is a reasonable expectation (as of the date of issuance of the bonds) that at least 35 percent of the students attending such school or participating in such program (as the case may be) will be eligible for free or reduced-cost lunches under the school lunch program established under the National School Lunch Act.

(2) Eligible local education agency

For purposes of this section, the term "eligible local education agency" means any local educational agency as defined in section 9101 of the Elementary and Secondary Education Act of 1965.

(3) Qualified purpose

The term "qualified purpose" means, with respect to any qualified zone academy--

(A) rehabilitating or repairing the public school facility in which the academy is established,

(B) providing equipment for use at such academy,

(C) developing course materials for education to be provided at such academy, and

(D) training teachers and other school personnel in such academy.

(4) Qualified contributions

The term "qualified contribution" means any contribution (of a type and quality acceptable to the eligible local education agency) of--

(A) equipment for use in the qualified zone academy (including state-of-the-art technology and vocational equipment),

(B) technical assistance in developing curriculum or in training teachers in order to promote appropriate market driven technology in the classroom,

(C) services of employees as volunteer mentors,

(D) internships, field trips, or other educational opportunities outside the academy for students, or

(E) any other property or service specified by the eligible local education agency.

HUNTON & WILLIAMS

Section 45(d)

Qualified facilities

For purposes of this section--

(1) Wind facility

In the case of a facility using wind to produce electricity, the term "qualified facility" means any facility owned by the taxpayer which is originally placed in service after December 31, 1993, and before January 1, 2010. Such term shall not include any facility with respect to which any qualified small wind energy property expenditure (as defined in subsection (d)(4) of section 25D) is taken into account in determining the credit under such section.

(2) Closed-loop biomass facility

(A) In general

In the case of a facility using closed-loop biomass to produce electricity, the term "qualified facility" means any facility--

(i) owned by the taxpayer which is originally placed in service after December 31, 1992, and before January 1, 2011, or

(ii) owned by the taxpayer which before January 1, 2011, is originally placed in service and modified to use closed-loop biomass to co-fire with coal, with other biomass, or with both, but only if the modification is approved under the Biomass Power for Rural Development Programs or is part of a pilot project of the Commodity Credit Corporation as described in 65 Fed. Reg. 63052.

(B) Expansion of facility[v]

Such term shall include a new unit placed in service after the date of the enactment of this subparagraph in connection with a facility described in subparagraph (A)(i), but only to the extent of the increased amount of electricity produced at the facility by reason of such new unit.

(C) Special rules

In the case of a qualified facility described in subparagraph (A)(ii)--

(i) the 10-year period referred to in subsection (a) shall be treated as beginning no earlier than the date of the enactment of this clause, and

(ii) if the owner of such facility is not the producer of the electricity, the person eligible for the credit allowable under subsection (a) shall be the lessee or the operator of such facility.

(3) Open-loop biomass facilities

(A) In general

In the case of a facility using open-loop biomass to produce electricity, the term "qualified facility" means any facility owned by the taxpayer which--

(i) in the case of a facility using agricultural livestock waste nutrients--

(I) is originally placed in service after the date of the enactment of this subclause and before January 1, 2011, and

(II) the nameplate capacity rating of which is not less than 150 kilowatts, and

(ii) in the case of any other facility, is originally placed in service before January 1, 2011.

(B) Expansion of facility[vi]

Such term shall include a new unit placed in service after the date of the enactment of this subparagraph in connection with a facility described in subparagraph (A), but only to the extent of the increased amount of electricity produced at the facility by reason of such new unit.

(C) Credit eligibility

In the case of any facility described in subparagraph (A), if the owner of such facility is not the producer of the electricity, the person eligible for the credit allowable under subsection (a) shall be the lessee or the operator of such facility.

(4) Geothermal or solar energy facility

In the case of a facility using geothermal or solar energy to produce electricity, the term "qualified facility" means any facility owned by the taxpayer which is originally placed in service after the date of the enactment of this paragraph and before January 1, 2011 (January 1, 2006, in the case of a facility using solar energy). Such term shall not include any property described in section 48(a)(3) the basis of which is taken into account by the taxpayer for purposes of determining the energy credit under section 48.

(5) Small irrigation power facility

In the case of a facility using small irrigation power to produce electricity, the term "qualified facility" means any facility owned by the taxpayer which is originally placed in service after the date of the enactment of this paragraph and before the date of the enactment of paragraph (11).

(6) Landfill gas facilities

In the case of a facility producing electricity from gas derived from the biodegradation of municipal solid waste, the term "qualified facility" means any facility owned by the taxpayer which is originally placed in service after the date of the enactment of this paragraph and before January 1, 2011.

(7) Trash facilities[vii]

In the case of a facility which burns municipal solid waste to produce electricity, the term "qualified facility" means any facility owned by the taxpayer which is originally placed in service after the date of the enactment of this paragraph and before January 1, 2011. Such term shall include a new unit placed in service in connection with a facility placed in service on or before the date of the enactment of this paragraph, but only to the extent of the increased amount of electricity produced at the facility by reason of such new unit.

(8) Refined coal production facility[viii]

In the case of a facility that produces refined coal, the term "refined coal production facility" means--

(A) with respect to a facility producing steel industry fuel, any facility (or any modification to a facility) which is placed in service before January 1, 2010, and

(B) with respect to any other facility producing refined coal, any facility placed in service after the date of the enactment of the American Jobs Creation Act of 2004 and before January 1, 2010.

(9) Qualified hydropower facility

In the case of a facility producing qualified hydroelectric production described in subsection (c)(8), the term "qualified facility" means--

(A) in the case of any facility producing incremental hydropower production, such facility but only to the extent of its incremental hydropower production attributable to efficiency improvements or additions to capacity described in subsection (c)(8)(B) placed in service after the date of the enactment of this paragraph and before January 1, 2011, and

(B) any other facility placed in service after the date of the enactment of this paragraph and before January 1, 2011.

(C) Credit period.-- In the case of a qualified facility described in subparagraph (A), the 10-year period referred to in subsection (a) shall be treated as beginning on the date the efficiency improvements or additions to capacity are placed in service.

(10) Indian coal production facility

In the case of a facility that produces Indian coal, the term "Indian coal production facility" means a facility which is placed in service before January 1, 2009.

(11) Marine and hydrokinetic renewable energy facilities[ix]

In the case of a facility producing electricity from marine and hydrokinetic renewable energy, the term "qualified facility" means any facility owned by the taxpayer-

(A) which has a nameplate capacity rating of at least 150 kilowatts, and

(B) which is originally placed in service on or after the date of the enactment of this paragraph and before January 1, 2012.

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[v] Code section 45(d)(2)(B), as added by the Energy Act, applies to property placed in service after Oct. 3, 2008.

[vi] Code section 45(d)(3)(B), as added by the Energy Act, applies to property placed in service after Oct. 3, 2008. Former subpar. (B) redesignated (C).

[vii] Code section 45(d)(7), as amended by the Energy Act, strikes "facility which burns" and inserts "facility (other than a facility described in paragraph (6)) which uses" for electricity produced and sold after Oct. 3, 2008.

[viii] Code section 45(d)(8), as amended by the Energy Act, applies to fuel produced and sold after September 30, 2008. Code section 45(d)(8) (as excerpted below and as in the form prior to the amendment) applies to fuel produced and sold before October 1, 2008.

> (8) Refined coal production facility
> "In the case of a facility that produces refined coal, the term "refined coal production facility" means a facility which is placed in service after the date of the enactment of this paragraph and before January 1, 2009.

[ix] Code section 45(d)(11), as added by the Energy Act, applies to electricity produced and sold after Oct. 3, 2008.

Part III -- Administrative, Procedural, and Miscellaneous

Notice 2009-33

New clean renewable energy bonds application
solicitation and requirements

SECTION 1. PURPOSE

This notice solicits applications for allocations of the present total national bond volume limitation authority ("volume cap") of $2.4 billion to issue new clean renewable energy bonds (New CREBs) under § 54C(a) of the Internal Revenue Code (the "Code") to finance certain qualified renewable energy facilities described in § 45(d) of the Code (also referred to in this notice as a qualified "project" or "projects"). This notice also provides related guidance on the following: (1) eligibility requirements that a project must meet to be considered for a volume cap allocation; (2) application requirements and the application form for requests for volume cap allocations; (3) the method that the Internal Revenue Service ("IRS") and the Treasury Department will use to allocate the volume cap; and (4) certain aspects of the applicable law and interim guidance in this area.

Applications for New CREB volume cap allocations pursuant to this notice must be filed in accordance with this notice by the following application deadline: August 4, 2009.

This notice will use the term CREBs for clean renewable energy bonds issued under § 54 and the term New CREBs for new clean renewable energy bonds issued under § 54C. To the extent that this notice refers generally to the clean renewable energy bond program, the term CREB program will be used.

SECTION 2. BACKGROUND

.01 Introduction

Section 1303 of the Energy Tax Incentives Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), added § 54 to the Code. Section 54 originally provided for a total national volume cap of $800 million for CREBs to finance eligible clean renewable energy projects and delegated to the Secretary the authority to allocate that volume cap, subject to the constraint that the Secretary could allocate no more than $500 million of that volume cap to qualified borrowers that were governmental bodies (with the balance to be allocated to qualified borrowers which were cooperative electric companies). Section 54 originally required that CREBs had to be issued by an expiration date of December 31, 2007.

Section 202 of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006) (the "2006 Act"), amended § 54 in three respects. First, the 2006 Act increased the total national bond volume cap for CREBs from $800 million to $1.2 billion. Second, the 2006 Act extended the expiration date for the issuance of CREBs under the total authorized national volume cap of $1.2 billion from December 31, 2007, to December 31, 2008. Third, the 2006 Act increased the maximum allocations or reallocations to qualified borrowers which are governmental bodies from $500 million to $750 million (with the balance to be allocated to cooperative electric companies). In 2007, the IRS completed the allocation with respect to the volume cap under § 54 of the Code, as amended.

Section 15316 of the Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (2008) (the "2008 Food Act"), added new § 54A to the Code. Section 54A provides certain general program requirements and operating rules for qualified tax credit bonds. Section 54A(a) provides that a taxpayer that holds a qualified tax credit bond on one or more credit allowance dates of the bond occurring during any taxable year is allowed as a credit against Federal income tax for the taxable year an amount equal to the sum of the credits determined under § 54A(b) with respect to such dates.

Section 107 of the Energy Improvement and Extension Act of 2008, Division B of Pub. L. No. 110-343, 122 Stat. 3765 (2008) (the "2008 Energy Act") (the 2008 Food Act and the 2008 Energy Act are referred to collectively as the "2008 Acts"), added new § 54C to the Code to provide for a new national volume cap of $800 million for New CREBs to finance qualified renewable energy facilities. Section 107(b) of the 2008 Energy Act amended § 54A(d)(1) of the Code to provide that the term qualified tax credit bond, in part, means a New CREB that is part of an issue that meets the requirements of § 54A(d)(2), (3), (4), (5), and (6) regarding expenditures of bond proceeds, information reporting, arbitrage, maturity limitations, and prohibitions on financial conflicts of interest, respectively. Section 107(d) of the 2008 Energy Act provides that amendments to the Code made by § 107 of the 2008 Energy Act apply to obligations issued after October 3, 2008.

Section 1111 of Title I of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) (the "2009 Act"), increased the national bond volume cap for New CREBs by $1.6 billion.

Section 107(c) of the 2008 Energy Act extends the expiration date for the issuance of CREBs under authority previously allocated by the IRS pursuant to § 54 of the Code from December 31, 2008, to December 31, 2009. In addition to providing for authority to issue New CREBs, the 2008 Acts amended certain provisions and requirements applicable to CREBs with respect to New CREBs authorized under §§ 54A and 54C of the Code. These amended requirements include: (1) requiring that 100 percent of the "available project proceeds" (as defined in § 54A(e)(4)) be used for capital expenditures incurred for one or more qualified renewable energy facilities; (2) reducing the amount of annual CREB credit under § 54C to 70 percent of the amount determined under the general rules of § 54A(b); (3) providing that not more than one-third of the national volume cap of $800 million may be allocated to qualified projects owned by each of three types of qualified owners, including public power providers, governmental bodies,

and cooperative electric companies, respectively; (4) allowing unrestricted investments of available project proceeds during a prescribed three-year spending period and, subject to certain restrictions, allowing investments of certain sinking funds expected to be used to repay the CREBs within certain limitations; (5) permitting credit "stripping" or separation of the ownership of a qualified tax credit bond, including a New CREB, and the entitlement to the credit under § 54A with respect to a qualified tax credit bond under regulations to be promulgated by the Secretary; and (6) omitting the requirement that the New CREBs be repaid in equal annual installments.

.02 New clean renewable energy bonds under § 54C

Section 54C(a) provides that a "new clean renewable energy bond" or New CREB means any bond issued as part of an issue if: (1) 100 percent of the available project proceeds of such issue are to be used for capital expenditures incurred by qualified owners, including governmental bodies, public power providers, or cooperative electric companies, for one or more qualified renewable energy facilities; (2) the bond is issued by a qualified issuer; and (3) the issuer designates such bond for purposes of this section.

Section 54C(b) provides that the annual credit amount under § 54A(b) with respect to any New CREB issued under § 54C shall be 70 percent of the amount so determined without regard to § 54C(b).

Section 54C(d)(6) defines a "qualified issuer" as: (1) a public power provider; (2) a cooperative electric company; (3) a governmental body; (4) a clean renewable energy bond lender; or (5) a not-for-profit electric utility that has received a loan or loan guarantee under the Rural Electrification Act. Section 54C(d)(2) provides that the term "public power provider" means a State utility with a service obligation, as such terms are defined in § 217 of the Federal Power Act (as in effect on the date of the enactment of this paragraph). Section 54C(d)(3) provides that the term "governmental body" means any State (including the District of Columbia and any possession of the United States) or Indian tribal government, or any political subdivision thereof. Section 54C(d)(4) provides that the term "cooperative electric company" means a mutual or cooperative electric company described in § 501(c)(12) or § 1381(a)(2)(C). Section 54C(d)(5) provides that the term "clean renewable energy bond lender" means a lender that is a cooperative that is owned by, or has outstanding loans to, 100 or more cooperative electric companies and is in existence on February 1, 2002, and shall include any affiliated entity controlled by such lender.

Section 54C(d)(1) defines the term "qualified renewable energy facility" to mean any of the following qualified facilities (as determined under § 45(d) without regard to paragraphs (8) and (10) thereof and to any placed in service date) owned by a public power provider, a governmental body, or a cooperative electric company: (1) a wind facility under § 45(d)(1); (2) a closed-loop biomass facility under § 45(d)(2); (3) an open-loop biomass facility under § 45(d)(3); (4) a geothermal or solar energy facility under § 45(d)(4); (5) a small irrigation power facility under § 45(d)(5); (6) a landfill gas facility under § 45(d)(6); (7) a trash combustion facility under § 45(d)(7); (8) a qualified

hydropower facility under § 45(d)(9); and (9) a marine and hydrokinetic renewable energy facility under § 45(d)(11).

Section 54C(c)(2) provides that the national bond volume cap for New CREBs is $2.4 billion. Section 54C(c)(2) further provides that the Secretary shall allocate no more than one third of the volume cap to qualified projects owned by public power providers, governmental bodies, and cooperative electric companies, respectively. Section 54C(c)(3)(A) provides that with respect to public power providers, after the Secretary identifies the qualified projects of public power providers that are appropriate for receiving an allocation of the CREB volume cap, the Secretary shall, to the maximum extent practicable, make allocations among such projects in such manner that the amount allocated to each such project bears the same ratio to the cost of such project as the portion of the CREB volume cap that may be allocated to public power providers bears to the cost of all such projects. Section 54C(c)(3)(B) provides that with respect to governmental bodies and cooperative electric companies, the Secretary shall make allocations of the respective CREB volume caps among qualified projects of governmental bodies and cooperative electric companies in such manner as the Secretary determines appropriate.

SECTION 3. APPLICATION REQUIREMENTS IN GENERAL

Each application for an allocation of the New CREBs volume cap under § 54C ("Application") must be prepared and submitted in accordance with this section. In order for an Application to comply with this section, among other things, the Application must be prepared in substantially the form attached to this notice as Appendix A, subject to such minor changes or variations as the IRS and the Treasury Department may approve in their discretion. This Notice, including Appendix A, may be found on the IRS web site at http://www.irs.gov/taxexemptbond/index.html or http://www.irs.gov/pub/irs-drop/. By submitting an Application, the applicant agrees to comply with the requirements of this notice.

a. Qualified issuer. An Application must be submitted by a qualified issuer within the meaning of § 54C(d)(6). A "qualified issuer" is: (1) a public power provider (as defined in § 54C(d)(2)); (2) a cooperative electric company (as defined in § 54C(d)(4)); (3) a governmental body (as defined in § 54C(d)(3)); (4) a New CREB lender (as defined in § 54C(d)(5)); or (5) a not-for-profit electric utility that has received a loan or loan guarantee under the Rural Electrification Act. An Application must identify the qualified issuer (including the qualified issuer's Federal tax identification number) and must demonstrate that the entity constitutes a qualified issuer within the meaning of § 54C(d)(6).

b. Signatures. An Application must be signed and dated by, and must include the printed name and title of, an authorized official of the qualified issuer. For purposes of this notice, the term "authorized official of the qualified issuer" means an officer, board member, employee, or other official of the qualified issuer who is duly authorized to execute legal documents on behalf of the qualified issuer in connection with incurring debt of the qualified issuer (e.g., a mayor, chairperson of a city council, chairperson of a board of directors, county or city administrator or manager, chief executive officer or

chief financial officer), similar to the kind of duly authorized official of an issuer who would be authorized to execute documents in connection with an issuer's declaration of official intent to reimburse expenditures from the proceeds of a borrowing under § 1.150-2(e), Income Tax Regs.

c. Contact person. An Application must designate one or more persons with knowledge regarding the project that the qualified issuer duly authorizes to discuss with the IRS any information relating to the Application. The designation must include the designee's name, title, telephone number, fax number, and mailing address. If a designee is not an official or officer of the issuer, the Application must include an executed Form 8821 (Taxpayer Information Authorization), authorizing the disclosure of taxpayer information specifically relating to the Application to the designee.

d. Addresses. An Application must be submitted by hard copy in duplicate accompanied by a copy of the Application in electronic format on compact disc ("CD") by mail to the IRS, TEB CREBs Allocations, 1122 Town & Country Commons, St. Louis, Missouri 63017.

e. Due date. An Application must be filed with the IRS on or before the Application deadline of August 4, 2009.

f. Project description. Each Application must contain the information required by this subsection f.

(i) Qualified owner. Each Application must identify the public power provider, governmental body, or cooperative electric company expected to own the qualified renewable energy facility. A "public power provider" is a State utility with a service obligation, as such terms are defined in § 217 of the Federal Power Act (as in effect on October 3, 2008). A "governmental body" is any State or Indian Tribal government, or any political subdivision thereof (within the meaning of § 103 of the Code). A "cooperative electric company" is a mutual or cooperative electric company described in §§ 501(c)(12) or 1381(a)(2)(C) of the Code. The Application must demonstrate that the entity is a public power provider, governmental body, or cooperative electric company within the meaning of § 54C(d)(2), (3), and (4), respectively.

(ii) Qualified project. Each Application must describe in reasonable detail the qualified renewable energy facility or facilities constituting the project to be financed with the proceeds of the New CREBs. The Application must demonstrate that each project will constitute a "qualified renewable energy facility" under § 54C(d)(1). The Application must indicate the expected date that the acquisition and construction of each project will commence and the expected date that each project will be placed in service.

The Application must contain a certification by an independent, licensed engineer that each project will meet the requirements for a "qualified facility" under § 45(d)(but without regard to § 45(d)(8) and (10) and to any placed in service date), and that the project will be technically viable and will produce electricity.

If the project is a qualified hydropower facility under § 45(d)(9) producing incremental hydropower production (as defined under § 45(c)(8)(B)),then the certification also must

state that the project consists only of efficiency improvements or additions to capacity that produce additional production as described in § 45(c)(8)(B) based on a methodology that would meet Federal Energy Regulatory Commission (FERC) standards. If the project is a qualified hydropower facility under § 45(d)(9) for qualified hydropower production at a nonhydroelectric dam under § 45(c)(8)(C), then the certification also must state that: (i) the facility, when constructed, will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements; and (ii) the facility will be operated so that the water surface elevation at any given location and time that would have occurred in the absence of the hydroelectric project is maintained, subject to any license requirements imposed under applicable law that change the water surface elevation for the purpose of improving environmental quality of the affected waterway.

(iii) Prior allocations and related projects. Each Application must describe the amount of CREB volume cap previously allocated to each project under § 54 of the Code described in the Application and to any "related projects." For purposes of this notice and the Application, the term "related projects" means projects that are owned by the same entity, or a "related party" as defined in § 1.150-1(b), that are of the same type under § 45(d), located on the same site, and integrated, interconnected, or directly or indirectly dependent on each other, based on all the facts and circumstances ("Related Projects"). For purposes of the allocation methodology described in section 6 of this notice, a facility the construction of which causes an increase in capacity (measured in units of power) of a project for which an Applicant previously received an allocation under § 54 will not be treated as a Related Project with respect to such project.

(iv) Location of project. The Application must indicate the location of the project.

(v) Regulatory approvals. The Application must describe a plan to obtain all necessary Federal, state and local regulatory approvals for the project.

g. Plan of financing. The Application must contain a reasonably detailed description of the plan of financing for the project, including all reasonably expected sources and uses of financing and other funds, the status of such financing, the anticipated date of bond issuance, the sources of security and repayment for the bonds, the aggregate face amount of bonds expected to be issued for the project, and the issuer's reasonably expected schedule for spending proceeds of New CREBs. If the owner intends to use the proceeds of New CREBs to reimburse amounts paid with respect to a qualified project, the Application must demonstrate that the requirements under § 54A(d)(2)(D) will be met.

h. Dollar amount of allocation requested. The Application must specify the dollar amount of the volume cap requested for the project.

SECTION 4. REQUIRED DECLARATIONS IN APPLICATIONS

Each application submitted under this notice must include the following declaration signed and dated by an authorized official of the qualified issuer who has personal knowledge of the relevant facts and circumstances: "Under penalties of perjury, I

declare that I have examined this document and, to the best of my knowledge and belief, all of the facts contained herein are true, correct, and complete."

SECTION 5. CONSENT TO DISCLOSURE OF ALLOCATION

In order to provide the public with information on how the volume cap authorized by Congress has been allocated and to facilitate oversight of the CREB program, the IRS intends to publish the results of the allocation process. The information will be the most useful to the public if it identifies the specific allocations awarded. Pursuant to § 6103, consent is required in order for the IRS to disclose identifying information with respect to applicants awarded an allocation. Therefore, the IRS requests that each applicant submit with the Application a declaration consenting to the disclosure by the IRS of the name of the applicant (issuer), the name of the qualified renewable energy facility owner (if other than the issuer), the type and location of the qualified renewable energy facility that is the subject of the Application, and the amount of the New CREBs volume cap allocation for such facility in the event the facility receives an allocation. To provide valid consent, the declaration must be in the form set forth in Appendix B. An applicant is not required to provide a declaration consenting to disclosure in order to receive an allocation. The IRS will not publish identifying information with respect to applications that are not awarded an allocation of volume cap or while applications are pending.

SECTION 6. VOLUME CAP ALLOCATIONS AND METHODOLOGY

a. In general. New CREB volume cap under § 54C will be allocated in accordance with this section for qualified projects for which Applications meeting the requirements of this notice have been filed with the IRS on or before the Application deadline set forth in this notice. For purposes of this section 6, all Related Projects, as defined in section 3(f)(iii), will be treated as a single project.

b. Allocation methodology for governmental bodies and cooperative electric companies. Up to one-third of the total national volume cap will be allocated to qualified projects owned by governmental bodies and up to an additional one-third of the total national volume cap will be allocated to qualified projects owned by cooperative electric companies. With respect to each such category of qualified owners, the full amount of volume cap requested will be allocated beginning with the project for which the smallest dollar amount of volume cap has been requested and continuing with the project for which the next-smallest dollar amount of volume cap has been requested until the total amount of volume cap set aside for that category of qualified owners has been exhausted or until all applications from that category of qualified owners have been granted, whichever occurs first. For this purpose, except for projects consisting of increases in capacity as described in section 3(f)(iii) of this notice, any amount of the CREB volume cap previously allocated to a project under § 54 (for CREBs) of the Code will be taken into account by increasing the amount requested for that project in the Application submitted pursuant to this notice by the amount previously allocated to the project. A project that causes an increase in capacity of an existing project or of a project that was previously allocated CREB volume cap under § 54 will be treated as a separate, new project for purposes of the allocation of New CREBs volume cap under this section.

c. Allocation methodology for public power providers. Up to one-third of the total national volume cap will be allocated to qualified projects owned by public power providers using the pro rata allocation method described below. The amount of volume cap allocated to a project for a public power provider will bear the same proportion to the national volume cap allocated to public power providers as the amount of volume cap requested for that project bears to the total amount of volume cap requested for all projects by public power providers.

SECTION 7. INSUBSTANTIAL DEVIATIONS FROM APPLICATION PROVISIONS

Generally, any allocation of CREBs or New CREBs volume cap is valid for purposes of § 54 or § 54C, respectively, with respect to bonds issued pursuant to such allocation that are used to finance qualified renewable energy facilities described in the application. An allocation of CREBs or New CREBs under §§ 54 and 54C, respectively, is also valid notwithstanding insubstantial deviations with respect to the information submitted in the Application. Whether a deviation with respect to the information submitted in the Application is insubstantial is determined based on all the facts and circumstances using criteria similar to those used under § 5f.103-2(f)(2) and Prop. Reg. § 1.147(f)-1(b)(6), as amended from time to time, relating to the insubstantial deviation in the information required for public approval of an issue of governmental bonds under § 147(f) of the Code. Applications for approval of specific insubstantial deviations must be submitted by hard copy and in electronic format on compact disk ("CD") by mail to IRS, TEB CREBs Determinations, 1122 Town & Country Commons, St. Louis, Missouri 63017. An application for approval of a specific insubstantial deviation must include (a) a detailed description of the proposed deviation, (b) facts establishing the continued technical viability of the project and that no other taxpayer or the Government will be prejudiced, (c) a copy of the allocation letter issued by the IRS, and (d) a declaration pursuant to section 4 of this notice signed by an authorized person in accordance with section 3.b. of this notice.

SECTION 8. INFORMATION REPORTING

Section 54A(d)(3) requires issuers of New CREBs to submit information reporting returns to the IRS similar to those required to be submitted under § 149(e) for tax-exempt State or local governmental bonds. These information reporting returns are required to be submitted at the same time and in the same manner as those under § 149(e) on such forms as shall be prescribed by the IRS for such purpose. Pending further guidance from the IRS regarding the applicable forms to be used for such information reporting for New CREBs, in the case of an issue of New CREBs, the issuer must submit to the IRS an information return on Form 8038, *Information Return for Tax-Exempt Private Activity Bond Issues*, at the same time and in the same manner as required under § 149(e), with modifications as described below. Issuers of New CREBs should complete Part II of Form 8038 by checking the box on Line 20c (Other), writing "New Clean Renewable Energy Bonds" or "New CREBs" in the space provided for the bond description, and entering the issue price of the New CREBs in the Issue Price column. For purposes of this notice, the term "issue" has the meaning used for tax-exempt bond purposes in § 1.150-1(c).

SECTION 9. RELIANCE ON NOTICE AND INTERIM GUIDANCE

(a) Generally

Pending the promulgation and effective date of applicable future regulations or other published administrative guidance, taxpayers may rely on the interim guidance provided in this notice and, to the extent not inconsistent with §§ 54A and 54C and this notice. Taxpayers may also rely on Notice 2006-7, 2006-1 C.B. 559 (March 6, 2006), and Notice 2007-26, 2007-14 I.R.B. 870 (April 2, 2007).

(b) Credit Rate

For New CREBs issued under § 54C, the credit rate is determined as of the date that the issue of New CREBs is sold. The New CREB credit rate is published for that date by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov. The credit rates will be determined by the Treasury Department in accordance with Notice 2009-15, 2009-6 I.R.B. 449 (February 9, 2009).

(c) Maximum term

The maximum term for a New CREB is determined under § 54A(d)(5) by using a discount rate equal to 110 percent of the long-term adjusted AFR, compounded semi-annually, for the month in which the bond is sold. For purposes of this notice, a bond is "sold" on the first day on which there is a binding written contract for the sale or exchange of the bond. The maximum term for a New CREB is published daily by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov.

(d) Permitted sinking fund yield

Section 54A(d)(4)(C) provides that an issue shall not be treated as failing to meet the arbitrage requirements of § 148 by reason of any fund which is expected to be used to repay the issue if: (i) the fund is funded at a rate not more rapid than equal annual installments; (ii) the fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (iii) the yield on such fund is not greater than the discount rate determined under § 54A(d)(5)(B) (the "permitted sinking fund yield").

The permitted sinking fund yield is determined under § 54A(d)(5)(B) by using a rate equal to 110 percent of the long-term adjusted AFR, compounded semi-annually, for the month in which the bond is sold. The IRS publishes the long-term adjusted AFR, compounded semi-annually, each month in a revenue ruling published in the Internal Revenue Bulletin. The Bureau of Public Debt publishes the permitted sinking fund yield for each month on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov.

(e) Joint ownership of qualified renewable energy facilities

Joint ownership of qualified renewable energy facilities financed with New CREBs will be recognized in a manner similar to the recognition of joint ownership of output projects under the private activity bond restrictions on tax-exempt bonds under § 141.

(f) Allocation and accounting

In determining whether all or a part of a facility will be eligible to be a qualified renewable energy facility for New CREBs purposes, allocation and accounting rules similar to those employed for mixed-use projects will be applied.

(g) Qualified expenditures

For purposes of the requirement under § 54C(a)(1) to use 100 percent of the available project proceeds of an issue of New CREBs for qualified costs to finance capital expenditures for qualified renewable energy facilities, available project proceeds used to finance a reserve, sinking, or replacement fund (e.g., a debt service reserve fund to secure the New CREBs), including a Qualified Tax Credit Bond sinking fund, will be treated as nonqualified costs. Except in limited circumstances involving reimbursements to which § 54A(d)(2)(D) applies, costs of acquiring existing facilities, including refinancing costs (as contrasted with costs of enhancements, repair, or rehabilitation of existing facilities) generally will be treated as nonqualified costs for purposes of the 100 percent use of proceeds test under § 54C(a)(1).

(h) Coordination with tax credit under § 45K

A qualified renewable energy facility under § 54C(d)(1) shall include a qualified facility under § 45(d)(6) without regard to the limitation under § 45(e)(9)(A) (which limitation disallows the renewable electricity production credit under § 45 for certain facilities which receive the nonconventional source production credit under § 45K), provided that the owner of the qualified renewable energy facility has not been allowed a credit under § 45K during any taxable year with respect to landfill gas to be used by the qualified renewable energy facility.

(i) Cooperative electric companies treated like state or local governmental entities

Cooperative electric companies under § 54C(d)(4) will be treated as "governmental persons" under § 1.141-1(b) for purposes of (1) applying the arbitrage investment restrictions under § 148, including the program investment definition under § 1.148-1(b), and (2) determining whether New CREBs are private activity bonds under § 141 in applying any particular arbitrage investment restriction that depends on whether bonds are private activity bonds.

(j) Expiration of allocation

An allocation of New CREBs volume cap is valid for 3 years after the date of the letter issuing the allocation (the "allocation date"). An allocation of unused volume cap will expire and revert back to the IRS on the first day following 3 years after the allocation date. Any bonds issued pursuant to such expired allocation will not be New CREBs for purposes of §§ 54A and 54C. Under a program to be announced, the IRS plans to

reallocate any unallocated volume cap, and any allocated volume cap that has been relinquished or that has reverted to the IRS. For purposes of reallocation, relinquished volume cap means volume cap previously allocated to a qualified issuer to finance a qualified project for which the IRS has received written notice from a duly authorized official of the qualified issuer stating that the issuer will not issue CREBs pursuant to the allocation.

To facilitate reallocation of the unused New CREBs volume cap, a qualified issuer that determines it will not issue bonds within 3 years from the allocation date must notify the IRS of such determination in writing within 90 days after the determination is made. If no determination is made, a qualified issuer that fails to issue bonds pursuant to its allocation within the 3-year period must notify the IRS of such failure within 90 days after the end of the 3-year period. The notification must include a copy of the original allocation letter and must be submitted by hard copy and in electronic format on compact disk ("CD") by mail to the IRS, TEB CREBs Forfeiture, 1122 Town & Country Commons, St. Louis, Missouri 63017.

Consistent with allocation requirements under § 54C(c)(2), any relinquished or reverted New CREB volume cap under § 54C will be reallocated only for a qualified project owned or to be owned by the same category of qualified owner as the owner that originally received the relinquished or reverted allocation. The IRS does not plan to reallocate any unused, relinquished, or unallocated portion of the CREB volume cap authorized under § 54 of the Code.

SECTION 10. EFFECT ON OTHER DOCUMENTS

To the extent not amended by the 2008 Acts and 2009 Act, references to § 54 of the Code under Notice 2006-7 and Notice 2007-26 apply as if the references were to corresponding provisions of §§ 54A and 54C.

SECTION 11. DRAFTING INFORMATION

The principal authors of this notice are Zoran Stojanovic and Timothy L. Jones of the Office of Associate Chief Counsel (Financial Institutions and Products). However, other personnel from the IRS and the Treasury Department participated in its development. For further information regarding this notice and the Application, contact Janae Lemley on (636) 255-1202 (not a toll-free call).

APPENDIX A

APPLICATION FOR ALLOCATION OF NEW CLEAN RENEWABLE ENERGY BOND VOLUME CAP

Internal Revenue Service
TEB CREBs Allocations
1122 Town & Country Commons
St. Louis, Missouri 63017

The following constitutes the application ("Application") of (Name) (the "Applicant") for allocation of new clean renewable energy bond ("New CREB") volume cap under Section 54C(c) of the Internal Revenue Code (the "Code") (unless otherwise noted, section references herein are to the Code) to finance the project described below. (*If a single Application is used to request New CREB volume cap for more than one project, then all of the required information in the Application must be provided separately for each project.)*

1. Name of Applicant/Issuer ____________________________

Street Address ____

City ____

State ____

Zip ____

Telephone Number ____

Fax Number ____

2. Status of Issuer -- *(Select as appropriate)*

The Applicant/Issuer is a "qualified issuer" under section 54C(d)(6) because it is --

(i) a "clean renewable energy lender" that is a cooperative owned by, or has outstanding loans to, 100 or more cooperative electrical companies and was in existence on February 1, 2002, or is an affiliate that is owned by such a lender, as demonstrated by the attached documents included as Exhibit D.

(ii) a "cooperative electric company" that is a mutual or cooperative electric company described in section 501(c)(12) or section 1381(a)(2)(C), as demonstrated by the attached documents included as Exhibit D, including a copy of the determination letter previously obtained from the IRS, if any (or other relevant documents).

(iii) a "governmental body" that is a State, possession of the United States, District of Columbia, Indian tribal government, or any political subdivision of the

foregoing, as demonstrated by the attached documents included as Exhibit D. *(Supporting documents are not required to be attached for governmental bodies that are general purpose governmental entities with substantial taxing, eminent domain, **and** police powers such as generally a county, city, municipality, township, or borough.)*

(iv) a "public power provider" that is a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act (as in effect on October 3, 2008), as demonstrated by the attached documents included as Exhibit D.

(v) a "not-for-profit electric utility which has received a loan or loan guarantee under the rural Electrification Act," as demonstrated by the attached documents included as Exhibit D. For this purpose, supporting documents should include copies of the articles of incorporation and bylaws of the not-for-profit electric utility, and of the loan or loan guarantee documents.

3. Name of Qualified Renewable Energy Facility Owner ___
____

Street Address ____

City ____

State ____

Zip ____

Telephone Number ____

Fax Number ____

4. Status of Owner -- *(Select as appropriate)* The Owner is a qualified entity under section 54C(d)(1) because it is --

(i) a qualified owner under section 54C(d)(4) that is a mutual or cooperative electric company under section 501(c)(12) or section 1381(a)(2)(C), as demonstrated by the attached documents included as Exhibit D, including a copy of the determination letter previously obtained from the IRS, if any (or other relevant documents).

(ii) a qualified owner under section 54C(d)(3) that is a "governmental body" and is a State, possession of the United States, District of Columbia, Indian tribal government, or any political subdivision of the foregoing, as demonstrated by the attached documents included as Exhibit D. *(Supporting documents are not required to be attached for governmental bodies that are general purpose governmental entities with substantial taxing, eminent domain, **and** police powers such as generally a county, city, municipality, township, or borough.)*

(iii) a qualified owner under section 54C(d)(2) that is a "public power provider" and is a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act (as in effect on October, 3 2008), as demonstrated by the attached documents included as Exhibit D. For this purpose, supporting documents should include copies of the articles of incorporation and bylaws of the not-for-profit electric utility, and of the loan or loan guarantee documents.

5. Name of Qualified Renewable Energy Facility. __________
____
_

6. Detailed Description of the Qualified Renewable Energy Facility. A reasonably detailed description of the qualified renewable energy facility (the "Project") is set forth below or in attached Exhibit A, including reasonably expected costs of components, such as land, site prep, equipment, installation, other dedicated facilities such as transmission, Project capacity and projected or expected use of the power produced at the Project:

7. Qualified Renewable Energy Facility. The Project is a "qualified renewable energy facility" within the meaning of section 54C(d)(1) of the Code because it is a "qualified facility" (as determined under section 45(d) of the Code without regard to section 45(d)(8) and (10) and to any placed in service date) that is *(select as appropriate)* --

(1) a wind facility -- a facility using wind to produce electricity;

(2) a closed-loop biomass facility -- a facility using closed-loop biomass (as defined in section 45(c)) to produce electricity or, if owned by the taxpayer prior to January 1, 2008, a facility using closed-loop biomass to produce electricity which is modified to use closed-loop biomass to co-fire with coal, with other biomass, or with both, but only if the modification is approved under the Biomass Power for Rural Development Programs or is part of a pilot project of the Commodity Credit Corporation;

(3) an open-loop biomass facility -- a facility using open-loop biomass (as defined in section 45(c)) to produce electricity and in the case of a facility using agricultural livestock waste nutrients, the nameplate capacity rating of which is not less than 150 kilowatts;

(4) a geothermal or solar energy facility -- a facility using geothermal energy (as defined in section 45(c)) or solar energy to produce electricity (not including a facility described in section 48(a)(3) the basis of which is taken into account by the taxpayer for purposes of determining the energy credit under section 48 of the Code);

(5) a small irrigation power facility -- a facility using small irrigation power (as defined in section 45(c)) to produce electricity;

(6) a landfill gas facility -- a facility producing electricity from gas derived from the biodegradation of municipal solid waste (as defined in section 45(c));

(7) a trash combustion facility -- a facility that burns municipal solid waste (as defined in section 45(c)) to produce electricity;

(8) a qualified hydropower facility -- a facility engaged in qualified hydropower production (as defined in section 45(c)); or

(9) a marine and hydrokinetic renewable energy facility -- a facility producing electricity from marine and hydrokinetic renewable energy (as defined in section 45(c)) with a nameplate capacity of at least 150 kilowatts.

8. Construction Commencement Date and Placed in Service Date. The Borrower begun or expects to begin the construction, installation and equipping of the Project on ______________________. The Borrower expects that the Project will be placed into service on or before _________________.

9. Independent Engineer's Certificate: (*If the Application is for more than one Project, a separate certificate must be included for each Project.)* Attached as Exhibit B hereto is a certification by an independent, licensed engineer to the effect that the Project will be a "qualified renewable energy facility" within the meaning of section 54C(d)(1) and a "qualified facility" within the meaning of section 45(d) of the Code (without regard to section 45(d)(8) and (10) of the Code and to any placed in service date), and that the project is technically viable and will produce electricity.

If the project is a **qualified hydropower facility** under section 45(d)(9) --

a. producing incremental hydropower production, then the engineering certificate also must state that the project consists only of efficiency improvements or additions to capacity that produce additional production as described in section 45(c)(8)(B) based on a methodology that would meet Federal Energy Regulatory Commission (FERC) standards; or

b. that is a nonhydroelectric dam under section 45(c)(8)(C), then the engineering certificate also must state that the facility, when constructed, (a) will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements, and (b) will be operated so that the water surface elevation at any given location and time that would have occurred in the absence of the hydroelectric project is maintained, subject to any license requirements imposed under applicable law that change the water surface elevation for the purpose of improving environmental quality of the affected waterway.

10. Location of the Project:

Project address or physical location (do not include postal box numbers or mailing address) ____

City _________________________

State ________________________

Zip ___________________________

County where Project is located __________________________

11. Individual to contact for more information about the Project:

Individual Name ______________________

Company Name _________________________

Street Address _______________________

City _________________________________

State ________________________________

Zip ___________________________________

Telephone Number _____________________

Fax Number ___________________________

Email Address ________________________

(Include as appropriate) The contact person is not an authorized official or officer of the Issuer and a properly executed Form 8821 is included with this Application that authorizes the disclosure by the IRS of information that relates to this Application and the Project(s) described above to the contact person.

12. Regulatory Approvals. Identify each regulatory body, the action that must be taken, status of any pending action and the remaining timeframe required to obtain each required approval such as a FERC approval, or siting permits. The plan of the Applicant for obtaining such approvals is as follows: *(or attach an Exhibit)*

13. Plan of Financing. Include a reasonably detailed description of the plan of financing for the Project, including all reasonably expected sources and uses of financing and other funds, the status of such financing, the anticipated date of bond issuance, the sources of security and repayment for the bonds, the aggregate face amount of bonds expected to be issued for the Project, and the issuer's reasonably expected schedule for spending proceeds of New CREBs. Attached as Exhibit C is a plan of financing for the Project.

14. Reimbursements. *(For reimbursements, include the following statement.)* The Issuer intends to use the proceeds of New CREBs to reimburse costs of the Project in accordance with section 54A(d)(2)(D).] *(In addition, the Issuer must demonstrate that the requirements of § 54A(d)(2)(D) will be met.)*

15. Dollar Amount of Allocation Requested for the Project. To finance the Project, the Applicant hereby requests a New CREB allocation in the amount of $____________________.

16. Prior Allocations for the Project or Related Project. (*If the Project or any Related Project (as defined in section 3.f.(iii) of this notice) previously received an allocation of CREBs volume cap under section 54 of the Code, then this paragraph must include a statement to that effect.)*

[*If applicable, include the following statement:* On (*Insert date)*, the Project previously received a CREBs volume cap allocation in the amount of $________________. A copy of the IRS allocation letter for that allocation is attached.]

[*If applicable, include the following statement:* On *(Insert date)*,a Related Project previously received a CREBs volume cap allocation in the amount of $______________. A copy of the IRS allocation letter for that allocation is attached.]

17. Other Allocation Requests for Related Projects to the Project. Included below are descriptions of other projects that are Related Projects (as defined in paragraph 16 above) to the Project for which the applicant or other entities are applying for a CREB volume cap allocation. With respect to an applicant on a Related Project other than the Applicant, set forth below are the names, addresses, contact persons, and telephone numbers for any such applicant.

18. Pooled Financing Bonds. (*If the issuer expects to use the requested allocation of New CREB volume cap as part of a pooled financing bond within the meaning of section 149(f), then the issuer should include the undertaking noted below.)*

[The Applicant Issuer expects to use the requested allocation for New CREBs volume cap in a pooled financing bond within the meaning of section 149(f), and the Issuer expressly agrees that it will obtain a written loan commitment for all borrowers from the issue of New CREBs to which the requested allocation relates before the issue date of that issue.]

I hereby certify that I am an authorized officer or official of the Applicant and am duly authorized to execute legal documents on behalf of the Applicant in connection with incurring debt and that I am duly authorized to execute legal documents on behalf of the Application in making this Application. Under penalties of perjury, I declare that (i) I have knowledge of the relevant facts and circumstances relating to this Application and the Project(s), (ii) I have examined this Application, and (iii) to the best of my knowledge and belief, all of the facts contained in this Application are true, correct and complete.

By: ____

Name and Title: ________________________________

Date: ____

EXHIBIT A

DESCRIPTION OF THE PROJECT
(RESPONSE TO QUESTION 6 OF THE APPLICATION)

(Attached hereto)

* * * * *

EXHIBIT B

ENGINEER'S CERTIFICATE
(RESPONSE TO QUESTION 9 OF THE APPLICATION)
(Attached hereto in substantially the form below)

Dated: ___________, 2009

This certificate is being provided to the Internal Revenue Service ("IRS") in connection with an application (the "Application") by [*Name of Applicant Issuer:* ___________________________] (the "Issuer") to the IRS requesting an allocation of volume cap authority to issue new clean renewable energy bonds ("New CREBs") under section 54C of the Internal Revenue Code, as amended (the "Code"). The New CREBs are being issued to make a loan to [*Name of the qualified renewable energy facility owner*]: _______________ (the "Owner"), to finance the costs of certain qualified renewable energy facility or facilities described more particularly in the Application (the "Project"). The undersigned hereby certifies as follows:

1. I am an independent, licensed engineer, duly qualified to practice the profession of engineering under the laws of the State of ______________, and I am not an officer or employee of the Issuer or the Borrower.

2. I have reviewed the Application for a New CREBs volume cap allocation (including the exhibits thereto) of the Issuer of even date herewith describing the Project. To the best of my knowledge, information, and belief, the Project will meet the requirements to be a "qualified renewable energy facility" under section 54C(d)(1) of the Code and correspondingly a "qualified facility" under section 45(d) of the Code (determined without regard to section 45(d)(8) and (10) of the Code and without regard to any placed in service date).

[*(Include as applicable)* To the best of my knowledge, information, and belief, the Project is a qualified hydropower facility under section 45(d)(9) --

a. producing incremental hydropower production consisting only of efficiency improvements or additions to capacity that produce additional production as described in section 45(c)(8)(B) based on a methodology that would meet Federal Energy Regulatory Commission (FERC) standards. *or*

b. that is a nonhydroelectric dam under section 45(c)(8)(C) and the facility, when constructed, (a) will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements, and (b) will be operated so that the water surface elevation at any given location and time that would have occurred in the absence of the hydroelectric project is maintained, subject to any license requirements imposed under applicable law that change the water surface elevation for the purpose of improving environmental quality of the affected waterway.]

3. To the best of my knowledge, information and belief, the Project is technically viable and, when constructed, will produce electricity.

IN WITNESS WHEREOF, I have hereunto affixed my official signature on the date of this Engineer's Certificate.

By: ____

Seal and/or License number: ____________________

Name and Title: _______________________________

Company: ______________________________________

EXHIBIT C

PLAN OF FINANCING
(RESPONSE TO QUESTION 13 OF THE APPLICATION)

(Attached hereto)

* * * * *

EXHIBIT D

DOCUMENTS REGARDING ISSUER OR BORROWER ORGANIZATIONAL STATUS (RESPONSE TO QUESTION 2 OR 4 OF THE APPLICATION, AS APPLICABLE)

(Attached hereto)

* * * * *

APPENDIX B

CONSENT TO PUBLIC DISCLOSURE
OF CERTAIN CLEAN RENEWABLE ENERGY BOND
APPLICATION INFORMATION

In the event that the Application of [(*Insert name of applicant here):* ______________________________] (the "Applicant") for an allocation of authority to issue new clean renewable energy bonds ("New CREBs") under section 54C of the Internal Revenue Code is approved, the undersigned authorized representative of the Applicant hereby consents to the disclosure by the Internal Revenue Service through publication of a Notice in the Internal Revenue Bulletin or a press release of the name of applicant (issuer), the name of the qualified renewable energy facility owner (if other than the issuer), the type and location of the facility that is the subject of the Application, and the amount of the allocation, if any, of volume cap authority to issue New CREBs for such facility. The undersigned understands that this information might be published, broadcast, discussed or otherwise disseminated in the public record.

This authorization shall become effective upon the execution thereof. Except to the extent disclosure is authorized herein, the returns and return information of the undersigned taxpayer are confidential and are protected by law under the Internal Revenue Code.

I certify that I have the authority to execute this consent to disclose on behalf of the taxpayer named below.

Date: ___________________

Signature: __________________________

Print name: __________________________

Title: __________________________

Name of Applicant-Taxpayer: _____________________________________

Taxpayer Identification Number: ___________________________________

Taxpayer's Address:

____

____

____

Note: Treasury Regulations require that the Internal Revenue Service must receive this consent within 60 days after it is signed and dated.

Notice 2009-29

Part III -- Administrative, Procedural, and Miscellaneous

Notice 2009-29

Qualified Energy Conservation Bond Allocations for 2009

SECTION 1. PURPOSE

This Notice sets forth the maximum face amount of qualified energy conservation bonds ("QECBs") that may be issued by each State and large local government under § 54D(e)(1) of the Internal Revenue Code. For this purpose, § 54A(e)(3) provides that the term "State" includes the District of Columbia and any possession of the United States. This Notice also provides certain interim guidance for QECBs.

SECTION 2. BACKGROUND

.01 INTRODUCTION

Section 301(a) of Tax Extenders and Alternative Minimum Tax Relief Act of 2008, Division C of Pub. L. 110-343. 122 Stat. 1365 (2008) ("Act") added new § 54D to provide program provisions for QECBs. The Act amended § 54A(d)(1) to provide that the term "qualified tax credit bond" means, in part, a qualified energy conservation bond that is part of an issue that meets the requirements of § 54A(d)(2), (3), (4), (5), and (6) regarding expenditures of bond proceeds, information reporting, arbitrage, maturity limitations, and prohibitions against financial conflicts of interest. The Act also amended § 54A(d)(2) to provide that, for purposes of § 54A(d)(2)(C), the term "qualified purpose" for a QECB means a purpose specified in § 54D(a)(1) described below.

The Act added § 54D(d) to provide a national bond limitation ("national bond volume cap") authorization for QECBs of $800 million. Section 1112 of Title 1 of Division B of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009) ("2009 Act") amended § 54D(d) to increase the national bond volume cap authorization for QECBs from $800 million to $3.2 billion.

.02 QUALIFIED ENERGY CONSERVATION BONDS UNDER § 54D

Section 54D(a) defines a "qualified energy conservation bond" to mean any bond issued as part of an issue if --

> (1) 100 percent of the available project proceeds of such issue are to be used for one or more qualified conservation purposes,

(2) the bond is issued by a State or local government, and

(3) the issuer designates such bond for purposes of this section.

Section 54D(b) provides that the annual credit determined under § 54A(b) with respect to any qualified energy conservation bond shall be 70 percent of the amount so determined without regard to § 54D(b).

Section 54D(c) provides that the maximum face amount of bonds which may be designated under § 54D(a) by any issuer shall not exceed the portion of the volume cap allocated to such issuer under § 54D(e).

Section 54D(e)(1) provides that the $3.2 billion in total national bond volume cap shall be allocated by the Department of the Treasury among the States in proportion to the population of the States. Section 54D(e)(2)(A) provides that in the case of any State where there is a "large local government," as defined § 54D(e)(2)(C), each large local government shall be allocated a portion of the State's allocation that bears the same ratio to the State's allocation (determined without regard to this subparagraph) as the population of the large local government bears to the population of the State. Section 54D(e)(2)(B) provides that the amount allocated under this subsection to a large local government may be reallocated by the large local government to the State where the large local government is located. Section 54D(e)(2)(C) provides that for purposes of § 54D, the term "large local government" means any municipality or county that has a population of 100,000 or more.

Under § 54D(e)(3), any allocation to a State or large local government shall be allocated in turn by the State or large local government to issuers within the State in a manner that results in the use of not less than 70 percent of the allocation to such State or large local government to designate bonds that are not private activity bonds.

Section 54D(f) defines the term "qualified conservation purpose" to mean any of the following:

(A) Capital expenditures incurred for purposes of (i) reducing energy consumption in publicly-owned buildings by at least 20 percent, (ii) implementing green community programs (including the use of loans, grants, or other repayment mechanisms to implement such programs), (iii) rural development involving the production of electricity from renewable energy resources, or (iv) any qualified facility (as determined under section 45(d) without regard to paragraphs (8) and (10) thereof and without regard to any placed in service date).

(B) Expenditures with respect to research facilities, and research grants, to support research in (i) development of cellulosic ethanol or other nonfossil fuels, (ii) technologies for the capture and sequestration of carbon dioxide produced through the use of fossil fuels, (iii) increasing the efficiency of existing technologies for producing nonfossil fuels, (iv) automobile battery technologies

and other technologies to reduce fossil fuel consumption in transportation, or (v) technologies to reduce energy use in buildings.

(C) Mass commuting facilities and related facilities that reduce consumption of energy, including expenditures to reduce pollution from vehicles used for mass commuting.

(D) Demonstration projects designed to promote the commercialization of (i) green building technology, (ii) conversion of agricultural waste for use in the production of fuel or otherwise, (iii) advanced battery manufacturing technologies, (iv) technologies to reduce peak use of electricity, or (v) technologies for the capture and sequestration of carbon dioxide emitted from combusting fossil fuels in order to produce electricity.

(E) Public education campaigns to promote energy efficiency.

Section 54D(f)(2) provides that, in the case of any private activity bond, the term "qualified conservation purposes" shall not include any expenditure that is not a capital expenditure. New § 54D(e)(4) added by the 2009 Act provides a special rule for bonds to finance green community programs, stating that bonds issued for the purpose of providing loans, grants, or other repayment mechanisms for capital expenditures to implement green community programs are not treated as private activity bonds for purposes of § 54D(e)(3).

Section 54D(g)(1) provides that the population of any State or local government shall be determined for purposes of this section as provided in § 146(j) for 2008. Section 54D(g)(2) provides, in determining the population of any county for purposes of § 54D, for the exclusion of that portion of the county population taken into account in determining the population of any municipality that is a large local government.

Under § 54D(h), an Indian tribal government shall be treated as a large local government, except that (1) an Indian tribal government shall be treated as located within a State to the extent of so much of the population of such government as resides within the State, and (2) any bond issued by an Indian tribal government shall be treated as a qualified energy conservation bond only if issued as part of an issue the available project proceeds of which are used for purposes for which such Indian tribal government could issue bonds to which § 103(a) applies.

SECTION 3. INTERIM GUIDANCE AND RELIANCE

.01 GENERALLY

Pending the promulgation and effective date of future administrative or regulatory guidance, taxpayers may rely on the interim guidance provided in this Notice.

.02 CREDIT RATE

For QECBs issued under §§ 54A and 54D, the maximum maturity and the credit rate are determined as of the date that there is a binding, written contract for the sale or

exchange of the bond. The applicable maximum maturity, the discount rate for determining the maturity, and QCEB credit rate are published for that date by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov. For further information regarding the methodology and procedures that the Treasury Department uses to determine these credit rates, see Notice 2009-15, 2009-6 I.R.B. 449 (February 9, 2009).

.03 SINKING FUND YIELD

Section 54A(d)(4)(C) provides that an issue shall not be treated as failing to meet the requirements of § 148 by reason of any fund which is expected to be used to repay the issue if: (i) the fund is funded at a rate not more rapid than equal annual installments; (ii) the fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (iii) the yield on such fund is not greater than the discount rate determined under § 54A(d)(5)(B)(the "permitted sinking fund yield").

The permitted sinking fund yield is determined under § 54A(d)(5)(B) by using a rate equal to 110 percent of the long-term adjusted, applicable federal rate ("AFR"), compounded semiannually, for the month in which the bond is sold. The IRS publishes the long-term adjusted AFR, compounded semiannually, each month in a revenue ruling that is published in the Internal Revenue Bulletin. The Bureau of Public Debt publishes the permitted sinking fund yield for each month on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov.

.04 INFORMATION REPORTING

Section 54A(d)(3) requires issuers of QECBs to submit information reporting returns to the IRS similar to those required to be submitted under § 149(e) for tax-exempt State or local governmental bonds. These information reporting returns are required to be submitted at the same time and in the same manner as those under § 149(e) on such forms as shall be prescribed by the IRS for such purpose. Pending further guidance from the IRS regarding the applicable forms to be used for such information reporting for QECBs, in the case of an issue of QECBs, the issuer must submit to the IRS an information return on Form 8038, at the same time and in the same manner as required under § 149(e), with modifications as described below. Issuers of QECBs should complete Part II of Form 8038 by checking Line 20c (Other), writing "QECBs" in the space provided for the bond description, and entering the issue price of the QECBs in the Issue Price column on Line 20c. For purposes of this Notice, the term "issue" has the meaning used for tax-exempt bond purposes in § 1.150-1(c) of the Income Tax Regulations.

.05 ELIGIBLE ISSUERS

Eligible issuers of QECBs include States, political subdivisions as defined for purposes of § 103, and entities empowered to issue bonds on behalf of any such entity under rules similar to those for determining whether a bond issued on behalf of a State or political subdivision constitutes an obligation of that State or political subdivision for

purposes of § 103 and § 1.103-1(b) of the regulations. Further, eligible issuers include otherwise-eligible issuers in conduit financing issues (as defined in § 1.150-1(b) of the regulations). An eligible issuer may issue QECBs based on a volume cap allocation received by the eligible issuer itself or by a conduit borrower or other ultimate beneficiary of the issue of QECBs. In all events, the eligible costs for qualified conservation purposes financed with the proceeds of an issue of QECBs under § 54D(f) must relate to qualified conservation purposes that are located within or attributable to both the jurisdiction of the issuer of the QECBs and the jurisdiction of the entity authorized to allocate volume cap to an issue of QECBs for the financing of those qualified conservation purposes. Entities authorized to allocate volume cap consist of States and large local governments that receive volume cap allocations under § 54D(e). Thus, for example, a large local government that has received a volume cap allocation under § 54D(e)(2) either may issue bonds and designate them as QECBs with respect to that volume cap itself or it may be a beneficiary of proceeds of an issue of bonds issued and designated as QECBs by another eligible issuer with respect to that volume cap, provided that, in either event, the proceeds of the issue are used to finance qualified conservation purposes located within or attributable to both the jurisdiction of the issuer of the QECBs and the jurisdiction of the large local government authorized to allocate volume cap to the issue of QECBs for the financing of those qualified conservation purposes.

SECTION 4. NATIONAL BOND VOLUME CAP FOR QECBs

The national bond volume cap for QECBs is $3.2 billion. Each State must allocate a portion of its allocation of the national bond volume cap to each large local government in the State in an amount that bears the same ratio to the State's allocation as the population of such large local government bears to the population of such State. For this purpose, § 54D(h), described above, is applicable.

The allocations set forth below were based on the most recent available state population information released by the by the United States Census Bureau before the beginning of 2009 (which consists of state population information as of July 1, 2008), which can be found at the following web site: http://www.census.gov/popest/states/tables/NST-EST2008-01.xls.

In making the required reallocations of applicable portions of State allocations to large local governments, States must use population figures for large local governments within the States based on available data from the United States Census Bureau for the period that is closest in time to that used for the State and released by the Census before 2009 which consists of information as of July 1, 2007. City and county population figures are located generally at http://www.census.gov/popest/.

In making the required allocations to large local governments, a State shall make the required adjustments under § 54D(g)(2), described above. Further, in making the required allocations to large local governments, in the case of a State that has local political subdivisions that are not referred to as counties or cities (e.g., townships, boroughs, or parishes), the determination of whether such political subdivisions are eligible to be treated as large local governments is based on whether, in substance,

such political subdivisions are most closely analogous to counties or cities and whether they constitute uncontrolled general purpose governmental entities under § 1.150-1(e)(3)(providing that an entity is not a controlled entity if the entity possesses substantial taxing, eminent domain, and police powers).

Allocations to States of the National Bond Volume Cap for Qualified Energy Conservation Bonds

State or Territory	QECB Allocation (in dollars)
Alabama	48,364,000
Alaska	7,120,000
Arizona	67,436,000
Arkansas	29,623,000
California	381,329,000
Colorado	51,244,000
Connecticut	36,323,000
Delaware	9,058,000
District of Columbia	6,140,000
Florida	190,146,000
Georgia	100,484,000
Hawaii	13,364,000
Idaho	15,809,000
Illinois	133,846,000
Indiana	66,155,000
Iowa	31,150,000
Kansas	29,070,000
Kentucky	44,291,000
Louisiana	45,759,000
Maine	13,657,000
Maryland	58,445,000
Massachusetts	67,413,000
Michigan	103,780,000
Minnesota	54,159,000
Mississippi	30,486,000
Missouri	61,329,000
Montana	10,037,000
Nebraska	18,502,000
Nevada	26,975,000
New Hampshire	13,651,000
New Jersey	90,078,000
New Mexico	20,587,000
New York	202,200,000
North Carolina	95,677,000
North Dakota	6,655,000
Ohio	119,160,000
Oklahoma	37,787,000
Oregon	39,320,000
Pennsylvania	129,144,000
Rhode Island	10,901,000
South Carolina	46,475,000
South Dakota	8,343,000
Tennessee	64,476,000
Texas	252,378,000
Utah	28,389,000
Vermont	6,445,000

Virginia	80,600,000
Washington	67,944,000
West Virginia	18,824,000
Wisconsin	58,387,000
Wyoming	5,526,000
American Samoa	673,000
Guam	1,826,000
Northern Marianas	899,000
Puerto Rico	41,021,000
US Virgin Islands	1,140,000
Total Allocation	3,200,000,000

SECTION 5. EFFECTIVE DATE OF VOLUME CAP LIMITATIONS.

The limitations for QECBs in Section 4 are effective for QECBs issued pursuant to the national bond volume cap after October 3, 2008.

SECTION 6. DRAFTING INFORMATION

The principal authors of this Notice are Timothy L. Jones and David E. White of the Office of Associate Chief Counsel (Financial Institutions & Products). For further information regarding this Notice contact Timothy L. Jones or David E. White on (202) 622-3980 (not a toll-free call).

Notice 2009-15

Part III—Administrative, Procedural, and Miscellaneous
Credit Rates on Tax Credit Bonds

Notice 2009-15

SECTION 1. PURPOSE

This Notice provides guidance regarding how the Treasury Department and the Internal Revenue Service (IRS) will determine and announce credit rates on certain tax credit bonds described in this Notice.

SECTION 2. BACKGROUND

Section 54A provides for the issuance of certain qualified tax credit bonds in which investors are eligible to receive Federal tax credits in lieu of the payment of all or a portion of the interest on the tax credit bonds. Qualified tax credit bonds under § 54A include qualified forestry conservation bonds, new clean renewable energy bonds, qualified energy conservation bonds, and qualified zone academy bonds. Section 54A(b)(3) provides that the applicable credit rate for a qualified tax credit bond is the rate which the Secretary of the Treasury estimates will permit the issuance of the qualified tax credit bond with a specified maturity or redemption date without discount and without interest cost to the qualified issuer. Section 54A(b)(3) further provides that the applicable credit rate with respect to any qualified tax credit bond shall be determined as of the first day on which there is a binding written contract for the sale or exchange of the bond. In addition, §§ 54 and 1400N(l) provide for the issuance of certain tax credit bonds known as clean renewable energy bonds and Midwestern tax credit bonds, respectively, which have similar credit rate-setting procedures. Unless otherwise provided, references in this Notice to tax credit bonds include qualified tax credit bonds under § 54A, clean renewable energy bonds under § 54, and Midwestern tax credit bonds under § 1400N(l).

SECTION 3. CREDIT RATES

Pending further notice in a manner described in this Notice, the Treasury Department will determine and announce credit rates for tax credit bonds daily

for purposes of §§ 54, 54A, 1400N(l), and other similar provisions, based on its estimate of the yields on outstanding bonds from market sectors selected by the Treasury Department in its discretion that have an investment grade rating of between A and BBB for bonds of a similar maturity for the business day immediately preceding the sale date of the tax credit bonds. The applicable credit rate for a tax credit bond on its sale date is the credit rate published for that date by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov. The Treasury Department and the IRS will set forth future refinements in the manner for determining credit rates on tax credit bonds in regulations, public notices, forms, instructions, or public notice directly on the above-referenced Internet site on which credit rates on tax credit bonds presently are published.

SECTION 4. EFFECT ON OTHER DOCUMENTS

Notice 99-35, 1999-2 C.B. 26 (July 12, 1999) is obsoleted. Notice 2007-26, 2007-14 I.R.B. 870 (April 2, 2007) is modified.

SECTION 5. EFFECTIVE DATE

This Notice is effective as of January 22, 2009.

Notice 2007-26

Part III - Administrative, Procedural, and Miscellaneous

Notice 2007-26

Section 54 -- Clean Renewable Energy Bonds

SECTION 1. PURPOSE

This Notice solicits applications for allocations of the national bond volume limitation authority ("volume cap"), to issue tax credit bonds called "clean renewable energy bonds" ("CREBs") under section 54(f) of the Internal Revenue Code (the "Code") to finance eligible clean renewable energy projects described in section 45 of the Code. This Notice also provides related guidance on the following: (1) eligibility requirements that a project must meet to be considered for a volume cap allocation; (2) application requirements and the application form for requests for volume cap allocations; (3) the method (generally, a "smallest-to-largest" method) that the Internal Revenue Service ("IRS") and the Treasury Department will use to allocate the volume cap; and (4) certain aspects of the applicable law regarding CREBs and expected regulatory guidance in this area.

Applications for volume cap allocations pursuant to this Notice must be filed in accordance with this Notice by the following application deadline: July 13, 2007.

This Notice *modifies* and *supersedes* Notice 2005-98, 2005-52 I.R.B.1211 (December 11, 2005), which provided guidance on CREBs in connection with the allocation process for the original volume cap authorization under section 54.

SECTION 2. BACKGROUND

Section 1303 of the Energy Tax Incentives Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (the "2005 Act"), added section 54 to the Code. Section 54 originally provided for a total national volume cap of $800 million for CREBs to finance eligible clean renewable energy projects and delegated to the Secretary of the Treasury the authority to allocate that volume cap, subject to the constraint that the Secretary could allocate no more than $500 million of that volume cap to qualified borrowers which were governmental bodies (with the balance to be allocated to qualified borrowers which were

cooperative electric companies). Section 54 originally required that CREBs had to be issued by an expiration date of December 31, 2007.

Section 202 of the Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922 (2006) (the "2006 Act"), amended section 54 in three respects. First, the 2006 Act increased the total national volume cap for CREBs from $800 million to $1.2 billion. Second, the 2006 Act extended the expiration date for the issuance of CREBs under the total authorized national volume cap of $1.2 billion from December 31, 2007, to December 31, 2008. Third, the 2006 Act increased the maximum allocations or reallocations to qualified borrowers which are governmental bodies from $500 million to $750 million (with the balance to be allocated to cooperative electric companies).

Section 54(a) provides that a taxpayer that holds a CREB on one or more credit allowance dates of the bond occurring during any taxable year is allowed as a nonrefundable credit against Federal income tax for the taxable year an amount equal to the sum of the credits determined under section 54(b) with respect to such dates.

Section 54(b)(1) provides that the amount of the credit with respect to any credit allowance date is 25 percent of the annual credit. Section 54(b)(2) provides that the annual credit is the product of (1) the credit rate determined by the Secretary, multiplied by (2) the outstanding face amount of the bond.

Section 54(b)(3) provides that the Secretary shall determine daily a credit rate that shall apply to the first day on which there is a binding, written contract for the sale or exchange of a CREB. The credit rate for any day is the credit rate the Secretary estimates will permit the issuance of CREBs with a specified maturity or redemption date without discount and without interest cost to the issuer.

Section 54(b)(4) provides that the term "credit allowance date" means March 15, June 15, September 15, December 15, and the last day on which the bond is outstanding. Section 54(b)(5) generally provides that if a bond is issued or redeemed, or matures, during the 3-month period ending on a credit allowance date, then the amount of the credit for that credit allowance date is a ratable portion of the credit otherwise determined for that 3-month period.

Section 54(g) provides that gross income includes the amount of the credit allowed to the taxpayer under section 54 (without regard to section 54(c)) and the amount so included is treated as interest income.

Section 54(d) provides that a "clean renewable energy bond" or CREB means any bond issued as part of an issue if: (1) the bond is issued by a qualified issuer pursuant to an

allocation by the Secretary to the issuer of a portion of the volume cap under section 54(f)(2); (2) 95 percent or more of the proceeds of the issue are to be used for capital expenditures incurred by qualified borrowers for one or more qualified projects; (3) the qualified issuer designates the bond for purposes of section 54 and the bond is in registered form; and (4) the issue meets certain requirements described in section 54(h) regarding the expenditure of bond proceeds, including a requirement that the issuer reasonably expects, as of the issue date, that at least 95 percent of the net proceeds will be expended within 5 years.

Section 54(j)(4) defines a "qualified issuer" as: (1) a CREB lender; (2) a cooperative electric company; or (3) a governmental body. Section 54(j)(2) provides that a "CREB lender" is a lender that is: (1) a cooperative that is owned by, or has outstanding loans to, 100 or more cooperative electric companies and was in existence on February 1, 2002; or (2) any affiliated entity controlled by such a lender. Section 54(j)(1) defines the term "cooperative electric company" as a mutual or cooperative electric company described in section 501(c)(12) or section 1381(a)(2)(C), or a not-for-profit electric utility that has received a loan or loan guarantee under the Rural Electrification Act. Section 54(j)(3) defines the term "governmental body" as any State, territory, possession of the United States, the District of Columbia, Indian tribal government, or any political subdivision thereof.

Section 54(j)(5) provides that a "qualified borrower" is: (1) a mutual or cooperative electric company described in section 501(c)(12) or 1381(a)(2)(C); or (2) a governmental body.

Section 54(d)(2) defines the term "qualified project" as any of the following qualified facilities (as determined under section 45(d) without regard to any placed in service date) owned by a qualified borrower: (1) a wind facility under section 45(d)(1); (2) a closed-loop biomass facility under section 45(d)(2); (3) an open-loop biomass facility under section 45(d)(3); (4) a geothermal or solar energy facility under section 45(d)(4); (5) a small irrigation power facility under section 45(d)(5); (6) a landfill gas facility under section 45(d)(6); (7) a trash combustion facility under section 45(d)(7); (8) a refined coal production facility under section 45(d)(8); and (9) a qualified hydropower facility under section 45(d)(9).

Section 54(f)(1), as amended by section 202(a)(1) of 2006 Act, provides that the national volume cap is $1.2 billion. Section 54(f)(2), as amended by section 202(a)(2) of the 2006 Act, provides that the Secretary shall allocate the volume cap among qualified projects in such manner as the Secretary determines appropriate, except that the Secretary may not allocate more than $750 million of the national volume cap to finance qualified projects of qualified borrowers that are governmental bodies. The

amendments to section 54 of the Code made by section 202 of 2006 Act apply to bonds issued, and allocations or reallocations of volume cap made, after December 31, 2006.

Section 54(d)(2)(D) provides that, for purposes of section 54(d)(1)(B), which requires qualified borrowers to use at least 95 percent of the proceeds of an issue for capital expenditures for qualified projects, any action that a qualified borrower or qualified issuer takes that is within its control and that causes such proceeds to fail to be used for a qualified project is treated as failing to satisfy that requirement. Section 54(d)(2)(D) further provides that the Secretary shall prescribe regulations specifying remedial actions that may be taken (including conditions to taking such remedial actions) to prevent an action described in the preceding sentence from causing a bond to fail to be a CREB.

Section 54(k) generally requires that, for a CREB that is a pooled financing bond under section 149(f)(4)(A), borrowers must enter into written loan commitments before the issue date of the CREB.

Section 54(l)(5) requires that the qualified issuer pay and amortize an equal amount of the principal of an issue of CREBs during each calendar year that the issue is outstanding.

Section 54(e)(1) limits the term of a CREB to the maximum term determined by the Secretary under section 54(e)(2). Section 54(e)(2) provides that, during each calendar month, the Secretary shall determine the maximum term for CREBs issued in the following calendar month. The maximum term is the term the Secretary estimates will result in the present value of the obligation to repay the principal on the bond being equal to 50 percent of the face amount of the bond. Section 54(e)(2) further provides that such present value shall be determined (1) without regard to the requirement of section 54(l)(5) to amortize the principal of CREBs amortized ratably each year and (2) using a discount rate equal to the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month. If the term as so determined is not a multiple of a whole year, such term shall be rounded to the next highest whole year.

Section 54(i) generally provides that the arbitrage requirements of section 148 applicable to tax-exempt State or local bonds apply to CREBs.

Section 54(l)(6) requires issuers of CREBs to submit information reporting returns to the IRS similar to those required to be submitted under section 149(e) for tax-exempt State or local governmental bonds.

Notice 2006-7, 2006-10 I.R.B. 559 (March 6, 2006), provides guidance regarding certain definitions used for CREB purposes.

SECTION 3. APPLICATION REQUIREMENTS IN GENERAL

Each application for a CREBs volume cap allocation ("Application") must be prepared and submitted in accordance with this section. In order for an Application to comply with this section, among other things, the Application must be prepared in substantially the form attached to this Notice as Appendix A, subject to such minor changes or variations as the IRS and the Treasury Department may approve in their discretion. This notice, including Appendix A, may be found on the IRS web site at http://www.irs.gov/taxexemptbond/index.html or http://www.irs.gov/pub/irs-drop/. By submitting an Application, the applicant agrees to comply with the requirements of this Notice.

a. Qualified issuer. An Application must be submitted by a qualified issuer within the meaning of section 54(j)(4). A "qualified issuer" is: (1) a CREB lender (as defined in section 54(j)(2)); (2) a cooperative electric company (as defined in section 54(j)(1)); or (3) a governmental body (as defined in section 54(j)(3)). An Application must identify the qualified issuer and must demonstrate that the entity constitutes a qualified issuer within the meaning of section 54(j)(4).

b. Signatures. An Application must be signed and dated by, and must include the printed name and title of, an authorized official of the qualified issuer. For purposes of this Notice, the term "authorized official of the qualified issuer" means an officer, board member, employee, or other official of the qualified issuer who is duly authorized to execute legal documents on behalf of the qualified issuer in connection with incurring debt of the qualified issuer (e.g., a mayor, chairperson of a city council, chairperson of a board of directors, county or city administrator or manager, or chief financial officer), similar to the kind of duly authorized official of an issuer who would be authorized to execute documents in connection with an issuer's declaration of official intent to reimburse expenditures from the proceeds of a borrowing under §1.150-2(e).

c. Contact person. An Application must designate one or more persons with knowledge regarding the project, whom the qualified issuer duly authorized to discuss with the IRS any information relating to the Application. The designation must include the designee's name, title, telephone number, fax number, and mailing address. If a designee is not an official or officer of the issuer, the Application must include an executed Form 8821 (Taxpayer Information Authorization), authorizing the disclosure of taxpayer information specifically relating to the Application to the designee.

d. Addresses. An Application must be submitted in one of the following ways: (1) by hard copy in duplicate accompanied by a copy of the application in electronic format on compact disc ("CD") by mail to the Internal Revenue Service (IRS), Attention SE:T:GE:TEB, 1111 Constitution Avenue, NW, PE – 5N3, Washington, D.C. 20224; (2) by hard copy in duplicate accompanied by a copy of the application in electronic format on compact disc ("CD") by hand delivery Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, PE – 5N3, Washington, D.C., attention SE:T:GE:TEB; or (3) by electronic submission in PDF format of a copy of a signed original document to the IRS to Tina.F.Hill@irs.gov.

e. Due date. An Application must be filed with the IRS on or before the Application deadline of July 13, 2007.

f. Project description. Each Application must contain the information required by this subsection f.

(i) Qualified borrower. Each Application must identify the qualified borrower expected to own the qualified project. A "qualified borrower" is: (1) a mutual or cooperative electric company described in section 501(c)(12) or 1381(a)(2)(C); or (2) a governmental body (as defined in section 54(j)(3)). The Application must demonstrate that the entity is a qualified borrower within the meaning of section 54(j)(5). If any bond is expected to be a pooled financing bond (within the meaning of section 149(f)(4)(A)), the Application must demonstrate that the qualified issuer will enter into a written loan commitment with each qualified borrower prior to the issue date of the issue of CREBs.

(ii) Qualified project. Each Application must describe in reasonable detail the project or projects to be financed with the proceeds of the CREBs. The Application must demonstrate that each project will constitute a "qualified project" under section 54(d)(2)(A). The Application must indicate the expected date that the acquisition and construction of each project will commence and the expected date that each project will be placed in service. The Application must contain a certification by an independent, licensed engineer that each project will meet the requirements for a qualified facility under section 45(d) (but without regard to section 45(d)(10) and to any placed in service date) and that the project will be technically viable and will produce electricity. If the project is a qualified hydropower facility under section 45(d)(9) producing incremental hydropower production (as defined under section 45(c)(8)(B)), then the certification also must state that the project consists only of efficiency improvements or additions to capacity that produce additional production as described in section 45(c)(8)(B) based on a methodology that would meet Federal Energy Regulatory Commission (FERC) standards. If the project is a qualified hydropower facility under section 45(d)(9)

producing qualified hydropower production that is a nonhydroelectric dam under section 45(c)(8)(C), then the certification also must state that the facility, when constructed, will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements.

(iii) Prior allocations and related projects. Each Application must describe the amount of CREB volume cap previously allocated to each project described in the Application and to any "related projects." For purposes of this Notice and the Application, the term "related projects" means projects that are owned by the same qualified borrower, or a "related party" as defined in § 1.150-1(b), located on the same site, and integrated, interconnected, or directly or indirectly dependent on each other, based on all the facts and circumstances ("Related Projects").

(iv) Location of project. The Application must indicate the location of the project.

(v) Regulatory approvals. The Application must describe a plan to obtain all necessary Federal, state and local regulatory approvals for the project.

g. Plan of financing. The Application must contain a reasonably detailed description of the plan of financing for the project, including all reasonably expected sources and uses of financing and other funds, the status of such financing, the anticipated date of bond issuance, the sources of security and repayment for the bonds, the aggregate face amount of bonds expected to be issued for the project, and the issuer's reasonably expected schedule for spending proceeds of CREBs. If the qualified borrower intends to use the proceeds of CREBs, to refinance qualified projects with CREBs, or to reimburse amounts paid with respect to a qualified project, the Application must demonstrate that the requirements under section 54(d)(2)(B) and (C), respectively, will be met.

h. Dollar amount of allocation requested. The Application must specify the dollar amount of the volume cap requested.

SECTION 4. REQUIRED DECLARATIONS IN APPLICATIONS

Each Application submitted under this Notice must include the following declaration signed and dated by an authorized official of the qualified issuer who has personal knowledge of the relevant facts and circumstances: "Under penalties of perjury, I declare that I have examined this document and, to the best of my knowledge and belief, all of the facts contained herein are true, correct, and complete."

SECTION 5. CONSENT TO DISCLOSURE OF ALLOCATION

In order to provide the public with information on how the volume cap authorized by Congress has been allocated and facilitate oversight of the CREB program, the IRS intends to publish the results of the allocation process. The information will be the most useful to the public if it identifies the specific allocations awarded. Pursuant to § 6103, consent is required in order for the Service to disclose identifying information with respect to applicants awarded an allocation. Therefore, the Service requests that each applicant submit with the Application a declaration, consenting to the disclosure by the Internal Revenue Service of the name of the applicant (issuer), the name of the borrower (if other than the issuer), the type and location of the project that is the subject of the Application, and the amount of the CREBs volume cap allocation for such project in the event the project receives an allocation. To provide valid consent, the declaration must be in the form set forth in Appendix B. An applicant is not required to provide a declaration consenting to disclosure in order to receive an allocation. The Service will not publish identifying information with respect to applications that are not awarded an allocation of volume cap.

SECTION 6. VOLUME CAP ALLOCATIONS AND METHODOLOGY

a. In general. Available CREB volume cap under section 54, as amended by the 2006 Act, and any "relinquished volume cap" (as defined in paragraph b. of this section) will be allocated in accordance with this section to qualified projects for which Applications meeting the requirements of this Notice have been filed with the IRS on or before the Application deadline set forth in this Notice. Projects for governmental bodies and mutual or cooperative electric companies described in section 501(c)(12) or 1381(a)(2)(C) will be allocated the full amount of volume cap requested beginning with the project(s) for which the smallest dollar amount of volume cap has been requested and continuing with the project(s) for which the next-smallest dollar amount of volume cap has been requested until the total amount of volume cap has been exhausted. For this purpose, any amount of the volume cap previously allocated to a project will be taken into account by increasing the amount requested for the project in the Application submitted pursuant to this Notice by the amount previously allocated to the project. All applications that meet the requirements described in this notice will be granted according to the methodology set forth above until all applications from governmental bodies have been granted, or up to a maximum of $750 million has been allocated to projects of qualified borrowers that are governmental bodies, whichever occurs first. The remaining volume cap will be allocated under the smallest-to-largest methodology described above to qualified projects of qualified borrowers that are not governmental bodies. For purposes of this section, all Related Projects will be treated as a single project.

b. Relinquished volume cap. For purposes of this Notice, "relinquished volume cap" means volume cap previously allocated to a qualified issuer to finance a qualified project for which the IRS has received written notice from a duly authorized official of the qualified issuer before the due date for Applications under to this Notice which states that the qualified issuer CREBs will not issue CREBs pursuant to the allocation and is relinquishing such allocation.

SECTION 7. EXPECTED TEMPORARY REGULATIONS; EFFECTIVE DATES; RELIANCE ON NOTICE

The Treasury Department and the IRS expect to issue temporary and proposed regulations (the "Temporary Regulations") under section 54 to provide guidance to holders and issuers of CREBs on selected issues regarding the CREBs program, including potentially, among other matters, certain definitions, general CREBs program requirements, qualified projects, use and expenditure of proceeds, remedial actions, arbitrage investment restrictions, and information reporting applicable to CREBs. The Treasury Department and the IRS expect that the Temporary Regulations will apply to CREBs sold on or after June 13, 2007 with respect to interim guidance provided in this Notice. Prior to the promulgation and effective date of the Temporary Regulations on CREBs under section 54, taxpayers may rely on the interim guidance provided in this Notice and Notice 2006-7.

SECTION 8. MAXIMUM TERM

The maximum term for a CREB is determined under section 54(e)(2) by using a discount rate equal to 110 percent of the long-term adjusted AFR, compounded semi-annually, for the month in which the bond is sold. For purposes of this Notice, a bond is "sold" on the first day on which there is a binding contract in writing for the sale or exchange of the bond. The maximum term for a CREB will be published daily by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov.

SECTION 9. CREDIT RATE

For each issue of CREBs, a separate credit rate will apply to each of the level annual repayments of principal of the issue (each, a "principal maturity"). The credit rate for a principal maturity of an issue of CREBs is the applicable CREB credit rate for that principal maturity on the date that the issue of CREBs is sold, which applicable CREB credit rate is published for that day by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: https://www.treasurydirect.gov. The credit rates will be determined by the Treasury Department based on its estimate of the

yield on outstanding AA rated corporate bonds of a similar maturity for the business day immediately prior to the date on which the issue is sold.

SECTION 10. INFORMATION REPORTING

Section 54(l)(6) requires issuers of CREBs to submit information reporting returns to the IRS similar to those required to be submitted under section 149(e) for tax-exempt State or local governmental bonds. These information reporting returns are required to be submitted at the same time and in the same manner as those under section 149(e) on such forms as shall be prescribed by the Commissioner of the IRS for such purpose. Pending further guidance from the IRS regarding the applicable forms to be used for such information reporting for CREBs, in the case of an issue of CREBs, the issuer must submit to the IRS an information return on Form 8038, *Information Return for Tax-Exempt Private Activity Bond Issues*, at the same time and in the same manner as required under section 149(e), with modifications as described below. Issuers of CREBs should complete Part II of Form 8038 by checking the box on Line 20(c)(Other) and writing "CREBs" in the space provided for the bond description. For purposes of this Notice, the term "issue" has the meaning used for tax-exempt bond purposes in §1.150-1(c).

SECTION 11. REMEDIAL ACTIONS

The Treasury Department and the IRS expect that the Temporary Regulations will provide that, for purposes of the requirement of section 54(d)(1)(B) that qualified borrowers use at least 95 percent of the proceeds of an issue of CREBs for capital expenditures for qualified projects, a "deliberate action" taken by a qualified issuer or qualified borrower may cause such proceeds to fail to be used for such qualified use. For this purpose, the term "deliberate action" will have the same meaning as used in § 1.141-2(d)(3), except that "section 54" will be substituted for "section 141" in § 1.141-2(d)(3)(i). The Treasury Department and the IRS further expect that the Temporary Regulations will provide that a deliberate action that otherwise would cause an issue of CREBs to fail to meet the requirements of section 54(d)(1)(B) will not be treated as a deliberate action if the issuer takes a "remedial action" which meets the requirements specified in the Temporary Regulations. In addition, the Treasury Department and the IRS expect that the Temporary Regulations will contain a "redemption or defeasance" remedial action and an "alternative use of disposition proceeds" remedial action similar, but not identical to, the remedial actions contained in § 1.141-12(d) and § 1.141-12(e).

SECTION 12. ARBITRAGE REQUIREMENTS

Section 54(i) generally requires that an issue of CREBs must satisfy the arbitrage investment restrictions under section 148 applicable to tax-exempt bonds with respect to proceeds of the issue. In general, under section 148, subject to various specific prompt spending exceptions and other exceptions, the arbitrage investment restrictions, including the yield restrictions and the arbitrage rebate requirement, apply broadly to gross proceeds of tax-exempt bonds. The Treasury Department and the IRS expect that, except as otherwise provided in this section 12, the arbitrage investment restrictions under section 148 and §1.148-1 to §1.148-11, inclusive, and the exceptions to those restrictions will apply to gross proceeds of CREBs to the same extent and in the same manner as they apply to gross proceeds of tax-exempt state or local governmental bonds the interest on which is excludable from gross income under section 103.

The Treasury Department and the IRS further expect that, in applying the arbitrage investment restrictions under section 148 to CREBs, the modifications to the general rules described in paragraphs a. through e. of this section 12, below, will apply.

a. Cooperative electric companies treated like state or local governmental entities. Cooperative electric companies under section 54(j)(1) will be treated as "governmental persons" under § 1.141-1(b) for purposes of (1) applying the arbitrage investment restrictions under section 148, including the program investment definition under § 1.148-(b), and (2) determining whether CREBs are private activity bonds under section 141 in applying any particular arbitrage investment restriction that depends on whether bonds are private activity bonds,

b. 5-year temporary period exception to arbitrage yield restriction. If an issue of CREBs meets the spending requirements of section 54(h)(1), then the proceeds of the issue of CREBs will be treated as qualifying for a 5-year temporary period exception to arbitrage yield restriction under §1.148-2(e)(2) beginning on issue date of the issue.

c. CREB credit disregarded determining CREB yield for arbitrage purposes. In determining the yield on an issue of CREBs for arbitrage purposes under §1.148-4, the CREBs credit allowed under section 54(a) and the credit rate under section 54(b)(2)(A) will be disregarded.

d. Non-AMT tax-exempt bond investment exception inapplicable. In applying the arbitrage restrictions against investing gross proceeds of an issue of CREBs in higher yielding investments under section 148(a) and §1.148-2, the exception to arbitrage yield restriction for investments of gross proceeds of tax-exempt bonds in specified non-AMT

tax-exempt bond investments under section 148(b)(3) (relating to an exception to the definition of "investment property" for specified non-AMT tax-exempt bonds) and §1.148-2(d)(2)(v) (relating to a corresponding exception to arbitrage yield limitations) will be inapplicable.

e. Application of small issuer exception to the arbitrage rebate requirement. In determining whether an issue of CREBs qualifies for the $5 million small issuer exception to the arbitrage rebate requirement (increased to $10 million for certain public school facilities) under section 148(f)(4)(D) and §1.148-8, both CREBs and tax-exempt bonds the interest on which is excludable from gross income under section 103 (other than private activity bonds) that are reasonably expected to be issued or actually issued by the CREB issuer (and other applicable on-behalf-of entities and subordinate entities taken into account under that section) within a calendar year will be taken into account in measuring the applicable size limitation.

SECTION 13. MISCELLANEOUS REGULATORY GUIDANCE

The Treasury Department and the IRS expect that the Temporary Regulations will provide guidance on selected discrete issues that have arisen with respect to CREBs, including clarifying that: (1) in applying the reimbursement restrictions under section 54(d)(1)(C), the general reimbursement rules and exceptions in §1.150-2 will apply; (2) joint ownership of projects financed with CREBs will be recognized in a manner similar to the recognition of joint ownership of output projects under the private activity bond restrictions on tax-exempt bonds under section 141; (3) in determining whether all or a part of a facility will be eligible to be a qualified project for CREBs purposes, allocation and accounting rules similar to those employed under section 141 for mixed-use projects will be applied; (4) for purposes of the requirement under section 54(d) to use 95 percent of the proceeds of an issue of CREBs for qualified costs to finance capital expenditures for qualified projects, proceeds used to finance a reserve or replacement fund (e.g., a debt service reserve fund to secure the CREBs) will be treated as nonqualified costs and will be eligible for financing with CREBs only from the five percent nonqualified portion of the proceeds; and (5) except in limited circumstances involving certain refinancings to which section 54(d)(2)(B) applies and reimbursements to which section 54(d)(2)(C) applies, costs of acquiring existing facilities (as contrasted with costs of enhancements, repair, or rehabilitation of existing facilities) generally will be treated as nonqualified costs for purposes of the 95 percent use of proceeds test under section 54(d).

SECTION 14. EFFECT ON OTHER DOCUMENTS

This Notice *modifies* and *supersedes* Notice 2005-98, 2005-52 I.R.B.1211 (December 11, 2005), which provided guidance on CREBs in connection with the allocation process for the original volume cap authorization under section 54.

SECTION 15. DRAFTING INFORMATION

The principal authors of this Notice are Zoran Stojanovic and Timothy Jones of the Office of Associate Chief Counsel (Tax Exempt & Government Entities). However, other personnel from the IRS and the Treasury Department participated in its development. For further information regarding this Notice and the Application, contact Tina Hill at (202) 283 9774 (not a toll-free call).

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APPENDIX A

APPLICATION FOR ALLOCATION OF CLEAN ENERGY RENEWABLE BOND VOLUME CAP

Internal Revenue Service

Washington, D.C.

Dear Sir or Madam:

The following constitutes the application ("Application") of (Name) (the "Applicant") for allocation of clean renewable energy bond (CREB) volume cap under Section 54(f) of the Internal Revenue Code (the "Code") (unless otherwise noted, section references herein are to the Code) to finance the project described below. (*If a single Application is used to request CREB volume cap for more than one project, then all of the required information in the Application must be provided separately for each project.)*

1. **Name of Applicant/Issuer**____

   Street Address ____

   City________________________State_____________________Zip___________

   Telephone Number _____________________ Fax Number ____________________

2. **Status of Issuer** – *(Select as appropriate)*

   The Applicant/Issuer is a "qualified issuer " under section 54(j)(4) because it is:

   (i) a "clean renewable energy lender" that is a cooperative owned by, or has outstanding loans to, 100 or more cooperative electrical companies and was in existence on February 1, 2002 or is an affiliate that is owned by such a lender, as demonstrated by the attached documents included as Exhibit D.

   (ii) a "cooperative electric company" that is a mutual or cooperative electric company described in section 501(c)(12) or section 1381(a)(2)(C), as demonstrated by the attached documents included as Exhibit D, including a copy of the

determination letter previously obtained from the IRS, if any, (or other relevant documents).

(iii) a "governmental body" that is a State, territory, possession of the United States, District of Columbia, Indian tribal government, or any political subdivision of the foregoing, as demonstrated by the attached documents included as Exhibit D. *(Supporting documents are not required to be attached for governmental bodies that are general purpose governmental entities with substantial taxing, eminent domain,* ***and*** *police powers such as generally a county, city, municipality, township, or borough.)*

3. **Name of Borrower**____

Street Address ____

City ____________________ State __________________ Zip _________

Telephone Number ______________ Fax Number ________________

4. **Status of Borrower** – *(Select as appropriate)* The Borrower is a "qualified borrower" under section 54(j)(5) because it is

(i) a qualified borrower under section 54(j)(5)(A) that is a mutual or cooperative electric company under section 501(c)(12) or section 1381(a)(2)(C) , as demonstrated by the attached documents included as Exhibit D, including a copy of the determination letter previously obtained from the IRS, if any, (or other relevant documents).

(ii) a qualified borrower under section 54(j)(5)(B) that is a "governmental body" under section 54(j)(3)(B) and is a State, territory, possession of the United States, District of Columbia, Indian tribal government, or any political subdivision of the foregoing, as demonstrated by the attached documents included as Exhibit D. *(Supporting documents are not required to be attached for governmental bodies that are general purpose governmental entities with substantial taxing, eminent domain,* ***and*** *police powers such as generally a county, city, municipality, township, or borough.)*

5. **Name of Project** .

---

6. Detailed Description of Project. A reasonably detailed description of the project (the "Project") is set forth below or in attached Exhibit A, including reasonably expected costs of components, such as land, site prep, equipment, installation, other dedicated facilities such as transmission, and capacity:

7. Qualified Project. The Project is a "qualified project" within the meaning of section 54(d)(2)(A) of the Code, because it is a "qualified facility" (as determined under section 45(d) of the Code without regard to section 45(d)(10) and to any placed in service date) that is a *(select as appropriate)*--

(1) a wind facility – a facility using wind to produce electricity;

(2) a closed-loop biomass facility – a facility using closed-loop biomass (as defined in section 45(c) to produce electricity or, if owned by the taxpayer prior to January 1, 2008, a facility using closed-loop biomass to produce electricity which is modified to use closed-loop biomass to co-fire with coal, with other biomass, or with both, but only if the modification is approved under the Biomass Power for Rural Development Programs or is part of a pilot project of the Commodity Credit Corporation;

(3) an open-loop biomass facilities – a facility using open-loop biomass (as defined in section 45(c) to produce electricity and in the case of a facility using agricultural livestock waste nutrients, the nameplate capacity rating of which is not less than 150 kilowatts;

(4) a geothermal or solar energy facility – a facility using geothermal energy (as defined in section 45(c) or solar energy to produce electricity (not including a facility described in section 48(a)(3) the basis of which is taken into account by the taxpayer for purposes of determining the energy credit under section 48 of the Code);

(5) a small irrigation power facility – a facility using small irrigation power (as defined in section 45(c)) to produce electricity;

(6) a landfill gas facility – a facility producing electricity from gas derived from the biodegradation of municipal solid waste (as defined in section 45(c));

(7) a trash combustion facility – a facility that burns municipal solid waste (as defined in section 45(c)) to produce electricity;

(8) a refined coal production facility – a facility producing refined coal (as defined in section 45(c)); or

(9) a qualified hydropower facility – a facility engaged in qualified hydropower production (as defined in section 45).

8. **Construction Commencement Date and Placed in Service Date**. The Borrower begun or expects to begin the construction, installation and equipping of the Project on ______________________. The Borrower expects that the Project will be placed into service on or before _________________.

9. **Independent Engineer's Certificate**: (*If the Application is for more than one Project, a separate certificate must be included for each Project.)* Attached in Exhibit B hereto is a certification by an independent, licensed engineer to the effect that the Project will be a "qualified project" within the meaning of section 54(d)(2)(A) and a "qualified facility" within the meaning of section 45(d) of the Code (without regard to section 45(d)(10) of the Code and to any placed in service date) and that the project is technically viable.

If the project is a **qualified hydropower facility --**

a. producing incremental hydropower production**,** then the engineering certificate also must state that the project consists only of efficiency improvements or additions to capacity that produce additional production as described in section 45(c)(8)(B) based on a methodology that would meet Federal Energy Regulatory Commission (FERC) standards; or

b. that is a nonhydroelectric dam under section 45(c)(8)(C), then the engineering certificate also must state that the facility, when constructed, will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements.

10. **Location of the Project:**

Project address or physical location (do not include postal box numbers or mailing address)

____

____

____

City ___________________________ State________________________ Zip ___________

County where Project is located ____

11. **Individual to contact** for more information about the Project:

Individual Name ____

Company Name ____

Street Address ____

City ___________________________ State ________________________ Zip ___________

Telephone Number ______________________________

Fax Number ____

(Include as appropriate) The contact person is not an authorized official or officer of the Issuer and a properly executed Form 8821 is included with this Application that authorizes the disclosure by the IRS of information that relates to this Application and the Project(s) described above to the contact person.

12. **Regulatory Approvals**. Identify each regulatory body, the action that must be taken, status of any pending action and the remaining timeframe required to obtain each required approval such as a FERC approval, or siting permits. The plan of the Applicant for obtaining such approvals is as follows: *(or attach an Exhibit)*

13. **Plan of Financing**. Include a reasonably detailed description of the plan of financing for the Project, including all reasonably expected sources and uses of financing and other funds, the status of such financing, the anticipated date of bond issuance, the sources of security and repayment for the bonds, the aggregate face amount of bonds expected to be issued for the Project, and the issuer's reasonably expected schedule for spending proceeds of CREBs. Attached in Exhibit C is a plan of financing for the Project.

14. **Refinancings and Reimbursements.** *(Include the following statements, as applicable.)* [*(For refinancings, include the following statement.)* The Issuer intends to use the proceeds of CREBs to refinance qualified projects in accordance with section 54(d)(2)(B).] [*(For reimbursements, include the following statement.)* The Issuer intends to use the proceeds of CREBs to reimburse costs of a qualified project in accordance with section

54(d)(2)(C).] *(In addition, the Issuer must demonstrate that the requirements of §54(d)(2)(B) or (C), as applicable, will be met.)*

15. **Dollar Amount of Allocation Requested for the Project.** To finance the Project, the Applicant hereby requests a CREB allocation in the amount of $______________ .

16. **Prior Allocations for the Project or Related Project.** (*If the Project or any Related Project (as defined in section 3.f(iii) of this Notice) previously received an allocation of CREBs volume cap, then this paragraph must include a statement to that effect.)*

    [*If applicable, include the following statement:* On (*Insert date)*, the Project previously received a CREBs volume cap allocation in the amount of $_______________. A copy of the IRS allocation letter for that allocation is attached.]

    [*If applicable, include the following statement:* On *(Insert date)*, a Related Project previously received a CREBs volume cap allocation in the amount of $_____________. A copy of the IRS allocation letter for that allocation is attached.]

17. **Other allocation requests for Related Projects to the Project.** Included below are descriptions of other projects that are Related Projects (as defined in paragraph 16 above) to the Project for which the applicant or other entities are applying for a CREB volume cap allocation. With respect to an applicant on a Related Project other than the Applicant, set forth below are the names, addresses, contact persons, and telephone numbers for any such applicant.

18. **Pooled Financing Bonds.** (*If the issuer expects to use the requested allocation of CREB volume cap as part of a pooled financing bond within the meaning of section 54(l)(2, then the issuer should include the undertaking noted below.)*

    [The Applicant Issuer expects to use the requested allocation for CREBs volume cap in a pooled financing bond within the meaning of section 54(i)(2), and the Issuer expressly agrees that it will obtain a written loan commitment for all borrowers from the issue of CREBs to which the requested allocation relates before the issue date of that issue.]

I hereby certify that I am an authorized officer or official of the Applicant and am duly authorized to execute legal documents on behalf of the Applicant in connection with incurring debt and that I am duly authorized to execute legal documents on behalf of the Application in making this Application. Under penalties of perjury, I declare that (i) I have knowledge of the

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relevant facts and circumstances relating to this Application and the Project(s), (ii) I have examined this Application, and (iii) to the best of my knowledge and belief, all of the facts contained in this Application are true, correct and complete.

By: ____

Name and Title: ______________________________

Date: ____

EXHIBIT A

DESCRIPTION OF THE PROJECT
(RESPONSE TO QUESTION 4 OF THE APPLICATION)

(Attached hereto)

EXHIBIT B
ENGINEER'S CERTIFICATE
(RESPONSE TO QUESTION 9 OF THE APPLICATION)

(Attached hereto in substantially the form below)

Dated: ___________, 2007

This certificate is being provided to the Internal Revenue Service ("IRS") in connection with an application (the "Application") by [*Name of Applicant Issuer:* ___________________________] (the "Issuer") to the IRS requesting an allocation of volume cap authority to issue clean renewable energy bonds ("CREBs") under section 54 of the Internal Revenue Code, as amended (the "Code") . The CREBs are being issued to make a loan to [*Name of qualified borrower:* _______________ (the "Borrower"), to finance the costs of certain clean renewable energy facilities described more particularly in the Application (the "Project"). The undersigned hereby certifies as follows:

1. I am an independent, licensed engineer, duly qualified to practice the profession of engineering under the laws of the State of ______________, and I am not an officer or employee of the Issuer or the Borrower.

2. I have reviewed the Application for a CREBs volume cap allocation (including the exhibits thereto) of the Issuer of even date herewith describing the Project. To the best of my knowledge, information, and belief, the Project will meet the requirements to be a "qualified project" under section 54(d)(2)(A) of the Code and correspondingly a "qualified facility" under section 45(d) of the Code, determined without regard to section 45(d)(10) of the Code and without regard to any placed in service date).

[*(Include as appropriate)* To the best of my knowledge, information, and belief, the Project is a qualified hydropower facility under section 45(d)(9)**--**

a. producing incremental hydropower production consisting only of efficiency improvements or additions to capacity that produce additional production as described in section 45(c)(8)(B) based on a methodology that would meet Federal Energy Regulatory Commission (FERC) standards. *or*

b. that is a nonhydroelectric dam under section 45(c)(8)(C) and the facility, when constructed, will meet FERC licensing requirements and other applicable environmental, licensing and regulatory requirements.]

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3. To the best of my knowledge, information and belief, the Project is technically viable and when constructed will produce electricity.

IN WITNESS WHEREOF, I have hereunto affixed my official signature on the date of this Engineer's Certificate.

By:____

Seal and/or License number:

Name and Title: ____________________________________

____

Company: ____

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EXHIBIT C

PLAN OF FINANCING
(RESPONSE TO QUESTION 13 OF THE APPLICATION)

(Attached hereto)

EXHIBIT D

DOCUMENTS REGARDING ISSUER OR BORROWER ORGANIZATIONAL STATUS (RESPONSE TO QUESTION 2 OR 4 OF THE APPLICATION, AS APPLICABLE)

(Attached hereto)

APPENDIX B

CONSENT TO PUBLIC DISCLOSURE OF CERTAIN CLEAN RENEWABLE ENERGY BOND APPLICATION INFORMATION

In the event that the Application of [(*Insert name of applicant here):* ______________________________] (the Applicant) for an allocation of authority to issue clean renewable energy bonds ("CREBs") under section 54 of the Internal Revenue Code is approved, the undersigned authorized representative of the Applicant hereby consents to the disclosure by the Internal Revenue Service through publication of a Notice in the Internal Revenue Bulletin or a press release of the name of applicant (issuer), the name of the borrower (if other than the issuer), the type and location of the project that is the subject of the Application, and the amount of the allocation, if any, of volume cap authority to issue CREBs for such project. The undersigned understands that this information might be published, broadcast, discussed or otherwise disseminated in the public record.

This authorization shall become effective upon the execution thereof. Except to the extent disclosure is authorized herein, the returns and return information of the undersigned taxpayer are confidential and are protected by law under the Internal Revenue Code.

I certify that I have the authority to execute this consent to disclose on behalf of the taxpayer named below.

Date: ____________________

Signature: ____________________________

Print name: ____________________________

Title: ____________________________

Name of Applicant-Taxpayer: ______________________________________

Taxpayer Identification Number: ____________________________________

Taxpayer's Address: ____
____
____

Note: Treasury Regulations require that the Internal Revenue Service must receive this consent within 60 days after it is signed and dated.

Notice 2006-7

Notice 2006-7

2006-10 I.R.B. 559

Section 54 -- Clean Renewable Energy Bonds

SECTION 1. PURPOSE

This Notice provides guidance with respect to facilities that may be financed with the proceeds of clean renewable energy bonds under § 54(a) of the Internal Revenue Code (the Code). In addition, this Notice provides guidance with respect to the entities that may own facilities financed with the proceeds of clean renewable energy bonds and the entities that may issue clean renewable energy bonds. This Notice supplements Notice 2005-98, 2005-52 I.R.B. 1211, which was published on December 27, 2005.

SECTION 2. BACKGROUND

Section 1303 of the Energy Tax Incentives Act of 2005, Pub. L. No. 109-58, added § 54 to the Code. In general, § 54 authorizes up to $800,000,000 of tax credit bonds to be issued by qualified issuers to finance certain renewable energy projects described in § 45(d) of the Code.

Section 54(a) provides that a taxpayer that holds a "clean renewable energy bond" on one or more credit allowance dates of the bond occurring during any taxable year is allowed as a nonrefundable credit against Federal income tax for the taxable year an amount equal to the sum of the credits determined under § 54(b) with respect to such dates. Section 54(d) provides that a "clean renewable energy bond" means any bond issued as part of an issue if: (1) the bond is issued by a qualified issuer pursuant to an allocation by the Secretary to the issuer of a portion of the national clean renewable energy bond limitation under § 54(f)(2); (2) 95 percent or more of the proceeds of the issue are to be used for capital expenditures incurred by qualified borrowers for one or more qualified projects; (3) the qualified issuer designates the bond for purposes of § 54 and the bond is in registered form; and (4) the issue meets certain requirements described in § 54(h) with respect to the expenditure of bond proceeds.

Section 54(j)(4) defines a "qualified issuer" as: (1) a clean renewable energy bond lender (as defined in § 54(j)(2)); (2) a cooperative electric company (as defined in §

54(j)(1)); or (3) a governmental body. Section 54(j)(3) defines the term "governmental body" as any State, territory, possession of the United States, the District of Columbia, Indian tribal government, or any political subdivision thereof. Section 54(j)(5) provides that a "qualified borrower" is: (1) a mutual or cooperative electric company described in § 501(c)(12) or § 1381(a)(2)(C); or (2) a governmental body. Section 54(d)(2)(A) defines the term "qualified project" as any of the qualified facilities described in §§ 45(d)(1) through (d)(9) (determined without regard to any placed in service date) owned by a qualified borrower.

Notice 2005-98 solicits applications for allocations of the $800,000,000 clean renewable energy bond limitation and provides guidance on certain other matters under § 54.

SECTION 3. TEMPORARY REGULATIONS

The Treasury Department and the Internal Revenue Service intend to issue temporary and proposed regulations (the "Temporary Regulations") under § 54 to provide guidance to holders and issuers of clean renewable energy bonds. It is anticipated that the Temporary Regulations will provide, in part, as follows:

1. For purposes of § 54, the term "qualified project" includes any facility owned by a qualified borrower that is functionally related and subordinate (as determined under § 1.103-8(a)(3) of the Income Tax Regulations) to any qualified facility described in §§ 45(d)(1) through (d)(9) (determined without regard to any placed in service date) and owned by such borrower.

2. For purposes of § 54, the term "political subdivision" will have the same meaning as in § 1.103-1.

3. A clean renewable energy bond may be issued on behalf of a State or political subdivision within the meaning of § 1.103-1(b) under rules similar to those for determining whether a bond issued on behalf of a State or political subdivision, constitutes an obligation of that State or political subdivision for purposes of § 103.

4. For purposes of § 54, the term "qualified borrower" includes an instrumentality of a State or political subdivision (as determined for purposes of § 103).

SECTION 4. DRAFTING INFORMATION

The principal authors of this Notice are Timothy L. Jones and Aviva M. Roth of the Office of Associate Chief Counsel (Tax Exempt & Government Entities). However, other personnel from the IRS and the Treasury Department participated in its development.

For further information regarding this Notice contact Timothy L. Jones or Aviva M. Roth at (202) 622-3980 (not a toll-free call).

HUNTON & WILLIAMS

IRS Announces Energy Bond Allocations

IR 2008-16

February 8, 2008

WASHINGTON — The Internal Revenue Service today announced 312 projects eligible to be financed with tax-credit bonds under the Clean Renewable Energy Bonds (CREB) program.

The U.S. Treasury Secretary is authorized to distribute volume cap allocations of tax-credit bonds through the CREB program, which was created by the Energy Tax Incentives Act of 2005 and the Tax Relief and Health Care Act of 2006.

In November 2006, the IRS announced the first round of volume cap allocations, which allocated $800 million of volume cap (some of which was subsequently relinquished) to 610 projects. (The announcement was in IR-2006-181 available on the IRS website.) State and local governments as well as electrical cooperatives are able to issue tax-credit bonds under the program.

Internal Revenue Code Section 54 authorizes the allocation of $1.2 billion of tax-credit bond volume cap to fund projects that can generate clean renewable energy. State and local government borrowers are limited to no more than $750 million of the volume cap with the rest going to qualified mutual or cooperative electric companies.

CREB volume cap allocations are awarded on a “smallest-to-largest” project basis. IRS Notices 2007-26 and 2005-98 further explain the program and can also be found on the IRS website.

The IRS has completed the review of applications for $897 million of CREB financing submitted pursuant to Notice 2007-26 and has notified applicants of the results. The second round included 342 applications from 33 states, pertaining to 395 projects. Approximately $477 million of CREB volume cap was available for allocation to qualified issuers.

The deadline for making an application was July 13, 2007. There were 156 proposed projects in California, 57 in Minnesota, 23 in New Jersey, 17 in Washington, 13 in Nebraska, 12 in Montana, 11 in Illinois and 10 in Wisconsin. Applications ranged in size from $15,000 to $38.5 million.

Governmental borrowers submitted applications totaling $728 million to finance 367 projects with an average project size of about $2 million. Governmental borrowers in 28 states will receive $263 million of volume cap allocations ranging from $15,000 to $2.95 million. Approved projects of governmental borrowers include: 138 solar facilities, 88 wind facilities, 41 landfill gas facilities, 12 hydropower facilities, three closed-loop biomass facilities, three trash combustion facilities and one open-loop biomass facility.

Cooperative borrowers submitted applications totaling about $170 million to finance 28 projects with an average project size of about $6.1 million. Cooperative borrowers will receive about $143 million of volume cap allocations for projects in 13 states ranging from $300,000 to $30 million. Approved cooperative projects include: 14 wind facilities, four landfill gas facilities, six hydropower facilities, one solar facility and one open-loop biomass facility.

Disclosure restrictions prohibit releasing taxpayer-specific information without written consent. Notice 2007-26 included a Consent to Public Disclosure Statement. The 310 projects whose applicants signed the consent form can be viewed online.

Clean Renewable Energy Bond Volume Cap Allocation Information

IR 2006-181

Nov. 20, 2006

WASHINGTON — This information release provides certain general information regarding the results of the volume cap allocation process for the new Clean Energy Renewable Bonds ("CREBs") program created under the Energy Tax Incentives Act of 2005.

The Internal Revenue Service announced that a total of 610 projects for State and local governmental borrowers and for electrical cooperative borrowers will receive volume cap allocations of authority to issue tax credit bonds under the new CREBs program.

New Internal Revenue Code Section 54 authorizes the Secretary of the Treasury to allocate an $800 million volume cap in tax credit bonds to fund projects that can generate clean renewable energy. The allocation may be made in such manner as the Secretary deems appropriate except that more than $500 million may be allocated to qualified projects for borrowers that are State or local governmental entities and the balance is to be allocated to qualified projects for borrowers that are certain mutual or cooperative electric companies.

In Notice 2005-98, the IRS provided guidance on the CREBs volume cap application process and indicated that CREBs volume cap allocations would be made -- based on a "smallest-to-largest" project amount methodology -- beginning with the project requesting the smallest dollar amount and proceeding thereafter to projects for successively larger dollar amounts until the total national volume cap is consumed.

The Service has completed its review of applications for CREBs volume cap and is in the process of notifying applicants of the results. Disclosure restrictions prohibit the disclosure of taxpayer specific information.

Potentially qualified types of projects include wind facilities, closed loop biomass facilities, open loop biomass facilities, geothermal or solar facilities, small irrigation power facilities, landfill gas facilities, trash combustion facilities, refined coal production facilities and certain hydropower facilities.

Set forth below is certain general information regarding the allocations of the CREBs volume cap, with separate breakdowns for governmental borrowers and for cooperative borrowers. Projects for the governmental borrowers will receive allocations in 24 states

and projects for the cooperative borrowers will receive allocations in 22 states. The allocations for the governmental borrowers range from $23,000 to about $3.2 million and for the cooperatives ranged from $120,548 to $31 million.

Of the approved projects for the governmental borrowers, 401 are for solar facilities, 99 for wind facilities, 23 for landfill gas facilities, eight for hydropower facilities and one for an open loop biomass facility. Of the projects approved for the cooperatives, 33 are for solar facilities, 13 for wind facilities, 13 for landfill gas facilities, 12 for open-loop biomass facilities, six for hydropower facilities and one for a refined coal production facility.

Set forth below is certain general information regarding the applications for CREBs volume cap. Overall, there were 709 total applications from 40 different states and the District of Columbia requesting allocations for authority to issue approximately $2.6 billion in CREBs to finance 786 projects. The deadline for making an application was April 26, 2006 There were 231 proposed projects in California, 67 in New Mexico, 64 in Minnesota, 41 in New Jersey, 38 in Montana, 27 in Colorado, 24 in Massachusetts, 13 in New York and 12 in Ohio. The size of the proposed projects in the applications ranged from $23,000 to $80 million.

Governmental borrowers submitted applications for about $2 billion of CREBs to finance 701 projects with an average project size of about $2.9 million. Cooperative borrowers submitted applications for about $554 million of CREBs to finance 85 projects with an average project size of about $6.5 million.

Contact

Douglas E. Lamb
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 2321
(804) 788-8513
dlamb@hunton.com

Update on Clean Renewable Energy Bonds

Introduction & Background

The Clean Renewable Energy Bond ("CREB") program is a relatively new federal subsidy. The Energy Policy Act of 2005 ("EPACT")[1] provided the initial authorization for the CREB program. Such authorization was in the amount of $800 million with a sunset date of December 31, 2007. With the enactment of the Tax Relief and Health Care Act of 2006 (the "Extenders Act")[2], the authorization for the CREB program increased to $1.2 billion. Additionally, the Extenders Act lengthened the sunset date for the program through December 31, 2008. The IRS has issued various notices containing regulatory guidance on the CREB program; however, no regulations have been published at this time. As described in IRS Notices 2006-7[3] and 2007-26[4], however, temporary regulations are expected. The CREB program is codified in Section 54 of the Internal Revenue Code of 1986, as amended (the "Code").

One of the objectives for CREBs is to provide qualified non-taxing paying entities (e.g. state and local governments and certain cooperatives) a subsidy for the cost of developing certain renewable energy facilities that produce electricity. The renewable energy facilities that qualify for the CREB program are wind facilities, closed and open-loop biomass facilities, geothermal or solar energy facilities, small irrigation power facilities, landfill gas facilities, trash combustion facilities, refined coal production facilities and hydropower facilities, all as described in Section 45(d) of the Code without regard to any placed in service date.[5]

The CREB subsidy is a federal tax credit delivered to the holder of the CREB. The issuance of a CREB requires delivery of an instrument to the holder evidencing an obligation to repay the holder for its loan of the proceeds thereof. Subject to certain limitations, the CREB lender (or holder) may be any entity or natural person — generally, it is one that pays federal income taxes thus benefiting from the CREBs federal tax credit.[6]

To issue a CREB, the issuer must have received approval from the Internal Revenue Service ("IRS"). The form of that

[1] Public Law No. 109-58, 119 Stat. 594 (2005).

[2] Public Law No. 109-432, 120 Stat. 2922 (2006).

[3] 2006-10 I.R.B. 559. See http://www.irs.gov/irb/2006-10_IRB/ar07.html.

[4] 2007-14 I.R.B. 1 (modifying and superseding Notice 2005-98). See http://www.irs.gov/irb/2007-14_IRB/ar17.html. Notice 2007-26 states that temporary regulations will apply to CREBs sold on or after June 13, 2007 with respect to the interim guidance provided in Notice 2007-26. Moreover, the Notice states that taxpayers may rely on the interim guidance provided therein and in Notice 2006-7 prior to the effective date of the temporary regulations.

[5] See Code Section 54(d)(2)(A). CREBs specifically exclude Indian coal production facilities described in Section 45(d).

[6] See Code Section 54(1)(3) regarding bonds held by pass-thru entities.

approval is commonly referred to as an award of allocation. By statute, there is only $1.2 billion of CREBs authorized to be issued.[7] That full amount has been awarded, subject to any awards that have been relinquished. Of that amount, a sizeable portion has been issued. Of those CREBs issued to date for governmental borrowers, most, if not all, of those have been issued in private placements with a purchaser that has generally been a bank, a similar financial institution or an accredited investor. The deadline for issuance of the $1.2 billion in authorized CREBs is December 31, 2008.[8]

Borrower, Project & Issuer Requirements

Under the CREB statute, the facility must be owned by a qualified borrower that is defined to include any governmental body or mutual or cooperative electric company.[9] A governmental body includes a political subdivision of a state and other entities. Notice 2006-7 states that the temporary regulations are expected to provide that the term political subdivision shall have the same meaning as in Treasury Regulations Section (hereinafter "Treas. Regs. Sec.") 1.103-1. It is also expected that a qualified borrower will include any instrumentality of a state or political subdivision as determined for purposes of Section 103 of the Code.[10]

Pursuant to Revenue Ruling 57-128, there are six relevant factors in determining whether an entity constitutes an instrumentality for purposes of Section 103 of the Code. The IRS has ruled that all six factors need not be present in every case. These factors are: (i) the extent that the entity is formed for a governmental purpose and performs a governmental function; (ii) the extent that the performance of the entity's function is on behalf of one or more states or political subdivisions; (iii) the extent of private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; (iv) the extent that control or supervision of the entity is vested in a public authority or authorities; (v) express or implied statutory or other authority is necessary for the creation and/or use of the entity, and whether such authority exists; and (vi) the degree of the entity's financial autonomy and the source of its operating expenses.[11]

Under the CREB statute, 95% or more of the proceeds of the CREB must be used for capital expenditures incurred by the borrower for the project.[12] As a result, any costs of issuance or reserve fund deposits to be funded out of the CREB must not exceed 5%.[13] A qualifying capital expenditure is generally a cost that is chargeable to capital account.[14] Generally, if the cost is includable in the basis of the asset, it is a capital expenditure. The purpose of these requirements is to ensure that the CREB proceeds are used for project costs that are includable in the basis of the asset and to avoid use of the CREB proceeds for working capital type items. Importantly, costs of acquiring existing facilities generally will not be treated as qualified costs for purposes of the 95% test.[15]

Furthermore, the proceeds of a CREB are subject to reasonable expectations tests similar to those found in Treas. Regs. Sec. 1.148-2(b). In the case of CREBs, the issuer must reasonably expect as of the date of issuance of the CREB that: (i) 95% of the proceeds are to be spent prior to the fifth anniversary of such issuance; (ii) there will be a binding commitment with a third party to expend at least 10% of the proceeds of the CREB within six months of issuance; and (iii) the projects will be completed, and the proceeds will be spent, with due diligence.[16]

Regarding the facilities that qualify for financing, Notice 2006-7 provides that the expected temporary regulations should expand the concept of a qualified project to include any facility owned by the qualified borrower that is functionally related and subordinate to the qualifying facility. A functionally related and subordinate facility is one that is commensurate in size and function to the qualified facility and is determined in accordance with Treas. Regs. Sec. 1.103-8(a)(3).[17]

A CREB must be issued by an entity that is a qualified issuer. Such an issuer includes a governmental body, a cooperative electric company or a

[7] See Code Section 54(f).
[8] See Code Section 54(m).
[9] See Code Section 54(j)(3) and (4). A governmental body is any state, territory, possession of the United States, Washington, D.C., Indian tribal government, and any political subdivision thereof.
[10] See Notice 2006-7, Section 3.
[11] See Revenue Ruling 57-128, 1957-1 C.B. 311.
[12] See Code Section 54(d)(1)(B). The 95% requirement is not measured after netting out proceeds of the CREB used to fund a reasonably required reserve or replacement funds described in Treas. Regs. Sec. 1.148-2(f)(2).
[13] Notice 2007-26, Section 13(4) states that, "[f]or purposes of the requirement under [Code S]ection 54(d) to use 95 percent of the proceeds of an issue of CREBs for qualified costs to finance capital expenditures for qualified projects, proceeds used to finance a reserve or replacement fund (e.g., a debt service reserve fund to secure the CREBs) will be treated as nonqualified costs and will be eligible for financing with CREBs only from the five percent nonqualified portion of the proceeds…"
[14] See Treas. Regs. Sec. 1.150-1(b).
[15] See Notice 2007-26, Section 13(5).
[16] See Code Section 54(h)(1).
[17] See Notice 2006-7, Section 3(1).

clean renewable energy bond lender.[18] As described above, Notice 2006-7 expects that the temporary regulations will expand the meaning of political subdivision. Specifically, those regulations are expected to provide that a qualified issuer includes on-behalf of issuers.[19]

A cooperative electric company means a mutual or cooperative electric company described in Code Section 501(c)(12) or Code Section 1381(a)(2)(C), or a not-for-profit electric utility which has received a loan or loan guarantee under the Rural Electrification Act. A clean renewable energy bond lender means a lender which is a cooperative which is owned by, or has outstanding loans to, 100 or more cooperative electric companies and is in existence on February 1, 2002, and shall include any affiliated entity which is controlled by such lender.[20]

Financial Aspects & Additional Legal Requirements

Ratable Principal Amortization; Setting the Credit Rate & the Maturity; the Credit

Section 54 of the Code controls many, in not all, aspects of the economics of a CREB transaction. One of the most significant aspects of CREBs is the ratable amortization requirement found in Section 54(l)(5).[21] In effect, this requirement requires level amortization of principal throughout the life of a CREB. For example, a $1,000,000 face amount CREB with a 10 year maturity would be required to have ten $100,000 annual principal installments, with the first installment required to be made in the calendar year in which the CREB is initially issued. This requirement has received much attention because it leads to difficult choices for borrowers and lenders as to timing of issuance and the ability to make the first payment when a project may not yet be complete.

Under the CREB statute, the tax credit rate and the maximum maturity of the CREB are determined by U.S. Treasury on a periodic basis.[22] Each of the tax credit rate and the maximum maturity is set on the sale date of the CREB. That date is the day there is final, binding commitment for the purchase and sale of the CREB.[23] On such day, one would consult the Bureau of Public Debt website to determine the credit rate that applies to each principal installment.[24] That website will also reveal the maximum maturity for a CREB sold on that day.[25] The published maturity is a maximum, and it is quite possible that an issuer and a purchaser might consider contracting for a maturity that is less than the maximum.

The amount of the CREB tax credit that may be received by a holder is determined quarterly based on a formula that takes into account the outstanding amount of the CREB for that date and the tax credit rate for that year. As a result, on each quarterly credit allowance date, the holder is entitled to a federal income tax credit that is one-quarter of the product of that credit rate and the outstanding principal amount of the CREB.[26] The credit allowance dates are the 15th day of each March, June, September and December, and the last day on which the CREB is outstanding.[27] The resulting amount of the CREB tax credit is included in the holder's gross income.[28]

[18] See Code Section 54(j)(4).

[19] Notice 2006-7, Section 3(3), provides that "[a] clean renewable energy bond may be issued on behalf of a State or political subdivision within the meaning of Section 1.103-1(b) under rules similar to those for determining whether a bond issued on behalf of a State or political subdivision, constitutes an obligation of that State or political subdivision for purposes of Section 103." Generally, the IRS has endorsed two types of on behalf of issuers: (i) entities created under a specific state statute to issue bonds for a governmental purpose approved by the IRS in Revenue Ruling 57-187, and (ii) entities created under a general not-for-profit corporation statute that have certain characteristics that establish a relationship with a political subdivision approved by the IRS in Revenue Ruling 63-20 and in Revenue Procedure 82-26.

[20] See Code Section 54(j).

[21] Code Section 54(l)(5) states that "[a] bond shall not be treated as a clean renewable energy bond unless it is part of an issue which provides for an equal amount of principal to be paid by the qualified issuer during each calendar year that the issue is outstanding." As restated in Section 2 of Notice 2007-26, the issuer is required to pay and amortize an equal amount of the principal of an issue of CREBs during each calendar year that the issue is outstanding.

[22] See Code Section 54(b)(3). Section 9 of Notice 2007-26 states that "[f]or each issue of CREBs, a separate credit rate will apply to each of the level annual repayments of principal of the issue …"

[23] Id.

[24] See https://www.treasurydirect.gov/SZ/SPESRates?type=CREBS. Notice 2007-26 provides that "[t]he credit rates will be determined by the Treasury Department based on its estimate of the yield on outstanding AA rated corporate bonds of a similar maturity for the business day immediately prior to the date on which the issue is sold."

[25] Code Section 54(e)(2) states that the "…maximum term shall be the term which the Secretary estimates will result in the present value of the obligation to repay the principal on the bond being equal to 50 percent of the face amount of such bond. Such present value shall be determined without regard to the requirements of [IRS Form 8038] and using as a discount rate the average annual interest rate of tax-exempt obligations having a term of 10 years or more which are issued during the month. If the term as so determined is not a multiple of a whole year, such term shall be rounded to the next highest whole year." Section 8 of Notice 2007-26 further provides that "[t]he maximum term for a CREB is determined … using a discount rate equal to 110 percent of the long-term adjusted AFR, compounded semi-annually, for the month in which the bond is sold."

[26] See Code Section 54(b)(2).

[27] See Code Section 54(b)(4). Code Section 54(b)(5) states that for a CREB "… issued during the 3-month period ending on a credit allowance date, the amount of the credit determined … with respect to such credit allowance date shall be a ratable portion of the credit otherwise determined based on the portion of the 3-month period during which the bond is outstanding. A similar rule shall apply when the bond is redeemed or matures."

[28] Code Section 54 (g) states that "[g]ross income includes the amount of the credit allowed to the

Reimbursement; Refinancing

A CREB may be used to reimburse the borrower for expenditures incurred on the project prior to issuance of the CREB so long as the borrower and issuer have each taken appropriate action.[29] Just as with tax-exempt bonds, there are timing and characterization rules that apply to the types of costs that may be reimbursed. For CREBs, the original expenditure must have occurred after August 8, 2005 - the date of enactment of EPACT. Additionally, for those original expenditures that are hard costs (e.g. costs of construction), they cannot have been incurred earlier than 18 months prior to the date reimbursed from the proceeds of the CREB. For those prior expenditures that are soft costs, not more than 20% of the CREB proceeds may be used to reimburse for such costs.[30]

A CREB may refinance existing debt for a qualified project so long as the original debt was incurred by a qualified borrower after August 8, 2005.[31]

Arbitrage; Change-In-Use

As with tax-exempt bonds, the issuer must satisfy the arbitrage requirements of Code Section 148 with respect to proceeds of the CREB, and if there is any change-in-use without remedial action, a redemption of all or a portion of the CREB may be required.

First off, the issuer must certify as to its reasonable expectations about the amount and the use of the gross proceeds of the issue as required by Treas. Regs. Sec. 1.148-2(b). Furthermore, Notice 2007-26 provides that subject to certain exceptions in the notice, the arbitrage investment restrictions under Code Section 148 and Treas. Regs. Sections 1.148-1 through 1.148-11, and the accompanying exceptions "…will apply to gross proceeds of CREBs to the same extent and in the same manner as they apply to gross proceeds of tax-exempt state or local governmental bonds the interest on which is excludable from gross income under section 103."[32] Of these exceptions, the ones seemingly having the broadest effect are likely to be, as follows: (i) if a CREB meets the reasonable expectations requirements as to the use of the proceeds, such proceeds may be invested without yield restriction for five years; and (ii) in determining the yield on a CREB, the CREB tax credit and the credit rate will be disregarded.[33] In essence, this means that the proceeds of a CREB may not be invested at a yield higher than the effective interest rate on the CREB.

If 95 percent of the CREB proceeds are not expended by the close of the five year period beginning on the date of issuance and absent an extension, the issuer must redeem that portion of the CREB that is deemed to be nonqualified within 90 days after the end of such period. The nonqualified portion is determined in the same manner as under Code Section 142.[34] Furthermore, in determining whether the proceeds of the CREB have not been used for the qualified purposes, Section 11 of Notice 2007-26 provides that a deliberate action of the issuer or the borrower may disqualify a portion of the CREB.[35] A deliberate action may be cured, however, if a remedial action is taken which meets the requirements specified in the temporary regulations. The Notice states that it is expected that such temporary regulations will contain remedial actions allowing for redemption, defeasance or an alternative uses of disposition proceeds similar to the remedial actions contained in Treas. Regs. Secs. 1.141-12(d) and 1.141-12(e).

Approval to Issue CREBs

In addition to any state or local law requirements that may govern the issuance of a CREB, including applicable requirements for a cooperative, the issuer of a CREB must have received an allocation. At this time, there have been two rounds of allocation of CREBs for the allotted $1.2 billion in CREB authority. The second round of allocation included approximately $77 million

taxpayer under …[Section 54] … (determined without regard to [certain limitations on the amount of tax credits that may be claimed contained in] subsection (c)) and the amount so included shall be treated as interest income."

[29] Code Section 54(d)(2)(C) requires the (i) qualified borrower to have declared its intent to reimburse the original expenditure with the proceeds of a CREB before payment of the original expenditure, and (ii) qualified issuer to have adopted an official intent to reimburse the original expenditure with such proceeds not later than 60 days after payment of the original expenditure.

[30] Section 13 of Notice 2007-26 states that, in applying the reimbursement restrictions to CREBs, the general reimbursement rules and exceptions in § 1.150-2 will apply.

[31] See Code Section 54(d)(2)(B).

[32] See Section 12 of Notice 2007-26.

[33] The other exceptions to the arbitrage rules listed in Section 12 of Notice 2007-26 include, but are not limited to, (i) the exception to arbitrage yield restriction for investments of gross proceeds of tax-exempt bonds in specified non-AMT tax-exempt bond investments will be inapplicable to CREBs; and (ii) in determining whether a CREBs qualifies for the small issuer exception to the arbitrage rebate requirement, both CREBs and tax-exempt bonds (other than private activity bonds) that are reasonably expected to be issued or actually issued by the CREB issuer (and other applicable on-behalf-of entities and subordinate entities taken into account under that section) within a calendar year will be taken into account in measuring the applicable size limitation.

[34] See Code Section 54(h)(3).

[35] Notice 2007-26 provides that the term deliberate action "…will have the same meaning as used in [Treas. Regs.] Sec. 1.141-2(d)(3), except that '[S]ection 54' will be substituted for '[S]ection 141' in [Treas. Regs.] Sec. 1.141-2(d)(3)(i)."

of returned allocation from the first round.[36] Of the $1.2 billion in authority, not more than $750 million is for use by governmental bodies.[37] Notice 2007-26 provided the form of application and guidance for a request of allocation in the second round.

In IR-2008-16, dated February 8, 2008, the IRS reported that there were 342 second round applications from 33 states that pertained to 395 projects. Of those projects, the IRS reported that there were 156 proposed projects in California, 57 in Minnesota, 23 in New Jersey, 17 in Washington, 13 in Nebraska, 12 in Montana, 11 in Illinois and 10 in Wisconsin, and applications ranged in size from $15,000 to $38.5 million.

Recent Developments

On the legislative front, several bills have been introduced into Congress over the past year that would provide additional allocation and remove certain of the onerous restrictions on CREBs, e.g. providing for no principal amortization during the first calendar year the CREB is outstanding or allowing the tax-credit to be stripped. As of the date this article was submitted for publication, none of those bills has been presented to the President for signature.

[36] See IR-2008-16, dated February 8, 2008, available on the IRS website.
[37] See Code Section 54(f)(2).

The Clean Renewable Energy and Conservation Tax Act of 2007 ("CRECTA") proposed a new category of clean renewable energy bonds ("New CREBs") to finance qualified renewable energy facilities that (a) qualify under Code Section 45 (other than refined coal or Indian coal facilities and without regard to placed-in-service dates), and (b) are owned by public power providers ("PPPs"), governmental bodies or cooperative electric companies ("CECs"). A subsequent bill (the Renewable Energy and Energy Conservation Tax Act of 2008, ("REECTA")) excluded projects owned by governmental bodies from New CREBs.

The bond limitation for New CREBs under CRECTA and REECTA was $2 billion. Under CRECTA, not more than one-third of the total was to be allocated to each category of PPP, CEC and governmental body projects. Under REECTA, PPPs would not receive more than 60% of the allocation. Under CRECTA and REECTA, the tax credits for New CREBs could be stripped from the ownership of the bond, similar to the stripping of interest coupons for tax-exempt bonds.

Under CRECTA, there were additional provisions to create a new tax credit bond program for qualified energy conservation bonds ("QECBs"). The rules for QECBs would be similar to those for New CREBs. The QECB program would be intended for projects and programs that, among other things, (i) reduce energy consumption in public buildings by at least 20%, (ii) support rural development of renewable energy production, (iii) increase energy efficiency and reduce fossil fuel consumption in certain research facilities, and (iv) reduce energy consumption (and pollution) in commuting facilities. $3.0 billion in allocation was proposed for the QECB program under CRECTA, and that amount increased to $3.6 billion under REECTA.

Conclusion

This article is neither intended to be nor is it an exhaustive review of the applicable legal requirements for CREBs. Moreover, this article does not constitute advice (legal or otherwise) in relation to the issuance of a CREB, including the requirements of the Code and the regulations promulgated thereunder. Should you have any questions regarding the content of this article or CREBS in general, please contact Doug Lamb at 804.788.8513 or dlamb@hunton.com.

This article appeared in the April 2008 CDFA Update. *For more information on the Council of Development Finance Agencies, please visit www.cdfa.net.*

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UPDATE

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Contacts

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Christopher G. Kulp
(804) 788-8742
ckulp@hunton.com

John D. O'Neill, Jr.
(804) 788-8406
joneill@hunton.com

Andrew R. Kintzinger
(202) 955-1837
akintzinger@hunton.com

Mary Nash K. Rusher
(919) 899-3066
mnrusher@hunton.com

William H. McBride
(919) 899-3030
wmcbride@hunton.com

B. Darrell Smelcer
(404) 888-4209
dsmelcer@hunton.com

Caryl Greenberg Smith
(404) 888-4025
carylsmith@hunton.com

J. Nicholson Meindl
(214) 468-3358
nmeindl@hunton.com

Conferees Reach Agreement on Stimulus; Bond Provisions Remain

On February 12, 2009, the American Recovery and Reinvestment Act of 2009 (the "ARRTA") emerged from conference committee. Based on the version of ARRTA posted on the Senate Finance Committee website, the compromise legislation will contain many of the municipal bond and tax credit bond-related provisions in the previously passed Senate and House versions, including marketability enhancements resulting from changes to the rules governing deductions for the cost of carrying tax-exempt debt and application of the alternative minimum tax, new categories of recovery zone bonds, qualified school construction bonds, build America bonds and tribal economic development bonds, expansion of the definition of manufacturing for small issue industrial development bonds, increases in allocation for new clean renewable energy bonds, qualified energy conservation bonds and qualified zone academy bonds and application of prevailing wage law to certain categories of bonds. It is anticipated that the House and Senate will each vote on ARRTA on Friday, February 13, with the President signing by Monday, February 16. This alert describes such provisions of ARRTA.

Marketability Enhancements — Section 265 and AMT Changes

De Minimis Safe Harbor Exception for Tax-Exempt Interest Extended to Financial Institutions

Section 265(b) of the Internal Revenue Code of 1986, as amended (the "Code"), currently provides that a financial institution may not deduct that portion of its interest expense allocable to interest on tax-exempt obligations held by such institution (with the exception of qualified tax-exempt obligations described below). Under such Section, the portion of a financial institution's interest expense allocable to tax-exempt interest is determined by calculating the ratio of the average adjusted bases of tax-exempt obligations held by the financial institution to the average adjusted bases for all assets of the financial institution. ARRTA amends Section 265(b) to provide that, when calculating the ratio described above, a financial institution may disregard tax-exempt obligations of all types held by the institution that were issued in 2009 and 2010, but only to the extent that the amount of such obligations does not exceed 2% of the portion of the financial institution's interest expense allocable to tax-exempt interest. Such "tax exempt obligations" include private activity bonds and governmental bonds that are in

excess of the qualified small issuer exception described below. The financial institution will be allowed only to deduct 80% of the interest expense related to the acquisition of such tax exempt obligations, because such interest will be treated as a "financial institution preference item" under Section 291(a)(3) of the Code. It is important to note, however, that current and advance refunding obligations are not eligible for the exclusion unless the bonds being refunded were issued in 2009 and 2010.

Modification of Small Issuer Exception

As described above, a financial institution may not deduct that portion of its interest expense allocable to interest on tax-exempt obligations held by such institution (other than "qualified tax-exempt obligations"). Section 265(b)(3) currently provides that "qualified tax-exempt obligations" are tax-exempt governmental and qualified 501(c)(3) obligations issued by a "qualified small issuer" that reasonably anticipates that it will not issue in a particular calendar year more than $10 million in aggregate principal amount of tax-exempt obligations (other than certain private activity bonds). ARRTA amends Section 265(b)(3) by increasing the $10,000,000 threshold to $30,000,000 for tax-exempt governmental and 501(c)(3) obligations issued in calendar years 2009 and 2010. ARRTA also provides that in the case of a qualified 501(c)(3) bond issued in calendar year 2009 or 2010, the 501(c)(3) conduit borrower will be treated as the issuer for "qualified small issuer" purposes.

Of significance, each 501(c)(3) entity will be entitled to its own $30 million limit for each calendar year. In addition, ARRTA amends Section 265(b)(3) to provide that any composite, pooled or other conduit financing issue may be treated as a qualified tax-exempt obligation if the proceeds are used to make loans to one or more ultimate borrowers each of whom would separately qualify for the small issuer exception. Qualified tax-exempt obligations continue to be treated as "financial institution preference items" under Section 291(a)(3) of the Code, and therefore the financial institution can deduct 80% of its interest expense allocable to such obligations. It appears that the current refunding and deemed designation rules under Section 265 will continue to apply, subject to the $30 million limit.

AMT Changes

ARRTA provides that private activity bonds issued in 2009 and 2010 are not subject to the alternative minimum tax ("AMT"). In other words, for purposes of individual and corporate AMT, interest on private activity bonds issued in those years will be accorded the same treatment as for governmental bonds, and will not be treated as a tax preference item. Additionally, for purposes of corporate AMT, interest on all tax-exempt bonds issued in 2009 and 2010 will not be an adjustment to current earnings. For these provisions related to the AMT, a refunding bond is treated as issued on the date of the refunded bond; therefore, a refunding bond will qualify for such treatment only if the refunded bond is issued in 2009 or 2010.

Tax Credit Bonds for Qualified School Construction

Section 1521 of ARRTA adds a new category of tax credit bonds that is to be codified in Section 54F of the Code and partially governed by the rules found in Code Section 54A. This category of tax credit bonds is entitled "Qualified School Construction Bonds" ("QSCB"). Under the provisions, 100% of the "available project proceeds" (as described in our summary of the tax credit bond provisions included in the 2008 bailout legislation) of such issue are to be used for the "construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue."

The QSCB must be issued by a state or local government within the jurisdiction of which the school is located, and the issuer must designate the bond as a QSCB.

The allocation for QSCB is $11 billion for each of calendar years 2009 and 2010 — a total of $22 billion in allocation. There is an additional $200 million in each of those years for Native American schools, and Indian tribal governments shall be treated as issuers for such purposes. Treasury will allocate to the states based upon the amounts a state is eligible to receive under Elementary and Secondary Education Act of 1965 for the fiscal year prior to the calendar year of allocation. The states will then reapportion such amounts within their respective states. ARRTA reserves 40% of the total allocation for large local education agencies,[1] and the allocation methodology is the same as for the state allocation above. Accordingly, a

[1] A large local education agency must be among the 100 local education agencies with the largest number of children aged 5 through 17 from families living below the poverty line, or one of not more than 25 educational agencies (excepting those in the preceding clause) that the Secretary of Education determines are in need of assistance based upon a low level of construction for school resources, a high level of enrollment growth or such other factors the Secretary deems appropriate.

state's allocation is reduced based upon the amount apportioned to the large local agencies. Any unused large local agency allocation may be reallocated by such agency to the state. Moreover, possessions of the United States other than Puerto Rico will receive allocation based upon a formula taking into account individuals below the poverty line living in the possession versus all such individuals in all states and possession. The amounts allocated to possessions will reduce the allocations to states and large local education agencies. Unused allocation may be carried over, and ARRTA does not place a limit on the years to which it may be carried over.

Tax Credit Build America Bonds and Refundable Credit Option

Section 1531 of ARRTA adds a new incentive for certain types of taxable governmental bonds. The incentive is to be codified in Section 54AA of the Code and entitled "Build America Bonds" ("BABs"). The credit is subject to limits and carryover provisions similar to those for credits under Code Section 54A (as described in our summary referenced above under the heading "*Tax Credit Bonds for Qualified School Construction*"). The credit on a BAB is includible in gross income.

The BAB must be issued before January 1, 2011, and (but for Code Section 54AA) qualify as a governmental bond under Section 103 of Code and not be a private activity bond. The issuer must designate the bond as a BAB. Moreover, the BAB must not have more than a *de minimis* amount of premium over the stated principal amount of the obligation.

The holder is entitled to a credit based upon a calculation that takes into account the amount of interest payable on the bond. The amount of the credit is 35% of the interest payable by the issuer on an interest payment date that is defined as "any date on which the holder of record of the taxable governmental bond is entitled to a payment of interest under such bond."

Section 1531 of ARRTA also provides that an issuer may elect to receive a credit in lieu of the holder receiving a credit under new Code Section 6431. This is the so-called "refundable credit option." If the election is made, Treasury will pay to the issuer (or conduit borrower, generally) on each interest payment date an amount equivalent to the amount of the credit. To qualify, 100% of the available project proceeds (net of any amounts placed in a reasonably required reserve fund) must be spent on capital expenditures, and the issuer must elect this option. ARRTA requires Treasury to pay to the issuer the amount of the credit on or about each interest payment date. This provision applies to bonds issued before January 1, 2011.

A BAB is not treated as federally guaranteed for purposes of Code Section 149(b) by reason of the tax credit or the refundable credit. For the non-refundable credit, yield is determined without regard to the credit. For the refundable credit, yield is reduced by the credit.

Section 1531 of ARRTA provides that any state's laws must treat the interest on the qualifying taxable bond and the refundable credit as being exempt from federal income tax unless the state enacts a law to the contrary after enactment of ARRTA into law.

Recovery Zone Bonds and Tribal Economic Development Bonds

Section 1401 of ARRTA creates recovery zone bonds that include recovery zone economic development bonds and recovery zone facility bonds. Each type of bond must be designated as such by the issuer and must be issued before January 1, 2011.

There is an allocation of $10 billion and $15 billion for recovery zone economic development bonds and recovery zone facility bonds, respectively. The allocation will be apportioned among the states with each state receiving at amount of allocation determined according to a ratio of a state's 2008 employment losses to such losses for all states. The 2008 losses are the difference between the number of individuals employed in December 2007 over December 2008. Under the allocation rules, each state is guaranteed to receive at least .9 percent of the allocation in each category. Each state shall apportion the allocation within the state among counties and large municipalities according to a ratio of their employment losses versus the state's losses. For a "large municipality" within a county, the municipality's losses will not be included in the county's losses. A "large municipality" means a municipality with a population of more than 100,000.

A recovery zone is either an area (i) designated by the issuer, with significant poverty, unemployment, rate of home foreclosures or general distress, (ii) designated by the issuer as economically distressed by reason of the closure or realignment of a military installation pursuant to the Defense Base Closure and Realignment Act of 1990, and (iii) with an effective designation as an empowerment zone or renewal community.

A recovery zone economic development bond shall entitle the issuer to a credit under new Code Section 6431 (described above under the heading "Tax Credit Build America Bonds and Refundable Credit Option"), except that the credit shall be 45% instead of 35%. The bond requires 100% of available project proceeds (net of any amounts placed in a reasonably required reserve fund) to be used for one or more qualified economic development purposes. Such purposes are described as "expenditures for purposes of promoting development or other economic activity in a recovery zone" and include capital expenditures paid or incurred with respect to property in the zone, expenditures for public infrastructure and construction of public facilities and expenditures for job training and educational programs.

A recovery zone facility bond is included within the meaning of an exempt facility bond under Section 142 of the Code. At least 95% of the "net proceeds" (as defined in Section 150 of the Code) of the bond must be used for "recovery zone property", which is defined as property that is to which Section 168 of the Code applies, was constructed, reconstructed or acquired by purchase by the taxpayer after the zone designation took effect, had an original use in the zone commenced by the taxpayer, and is substantially all used in the zone and is used in the active conduct of a "qualified business" by the taxpayer in such zone. A "qualified business" is any trade or business except rental of residential property or a business involving a facility described in Code Section 144(c)(6)(B) (*i.e.*, gambling, alcohol sales, country clubs, *etc.*). Furthermore, the limitations on acquisition of existing property (*i.e.*, rehabilitation expenditures) found in Code Section 147(d) shall not apply. Moreover, the volume cap rules under Code Section 146 shall not apply.

ARRTA creates a new category of tribal economic development bond, with an allocation of $2 billion. The Treasury Secretary shall administer the allocation as it shall determine in consultation with the Secretary of the Interior. A bond qualifies if it is exempt from taxation as a state or local-issued bond under Code Section 103 so long as specified types of gaming are not occurring and the facility is not located outside an Indian reservation. The Indian tribal government must designate the bond as a tribal economic development bond. Treasury is required to conduct a study and report on it to Congress within one year of the enactment of this provision.

Small Issue Manufacturing Bonds

ARRTA amends Section 144(a) to expand the purposes for which the proceeds of small issue manufacturing bonds issued before January 1, 2011 can be used to include the creation or production of "intangible property," defined as "any patent, copyright, formula, process, design, pattern, knowhow, format, or other similar item" described in Section 197(d)(1)(C)(iii) of the Code. In addition, a "manufacturing facility" financed with proceeds of qualified small issue bonds issued before January 1, 2011 can include functionally related and subordinate facilities, as further described in Treasury Regulations Section 1.103-8(a)(3). The concept of ancillary and related facilities (with the 25% limitation) will not apply to such bonds.

New Clean Renewable Energy Bonds ("New CREBs"), Qualified Energy Conservation Bonds ("QECBs") and Qualified Zone Academy Bonds ("QZABs")

Sections 1111 and 1112 of ARRTA increase the current allocations for each of New CREBs and QECBs from $800 million to $2.4 billion and $3.2 billion, respectively. For QECBs, ARRTA provides that the implementation of green community programs (which is one of many qualified purposes for QECBs) includes "the use of loans, grants, or other repayment mechanisms to implement such programs." Moreover, QECBs issued for capital expenditure to implement green community programs shall not be treated as private activity bonds solely because proceeds are to be used for such loans or grants to implement green community programs. This treatment is significant because it enables such QECBs to be eligible for the governmental portion of the QECB allocation. Each of the New CREBs and QECBs were created in the "Energy Improvement and Extension Act of 2008" that was included in the bailout package enacted on October 3, 2008. Please see our summary referenced above under the heading "*Tax Credit Bonds for Qualified School Construction.*"

For the QZAB program, Section 1522 of ARRTA increases the 2009 QZAB allocation from $400 million to $1.4 billion and extends the program into 2010 with allocation for that year to be $1.4 billion. The October 2008 bailout package included legislation entitled "Tax Extenders and Alternative Minimum Relief Act of 2008" that reauthorized and extended the existing QZAB program by adding $400 million in allocation for each of calendar years 2008 and 2009.

Each of the New CREB, QECB and modified QZAB programs are governed by Section 54A of the Code, which was added in the "Heartland, Habitat, Harvest and Horticulture Act of 2008." Code Section 54A makes significant changes to the statutory framework that governs the existing CREBs (Code Section 54) and that previously governed QZABs (Code Section 1397E). Those changes include, among others, introduction of a reserve fund option that generally allows for equal annual installments that are not treated as retiring a portion of the bond (subject to yield limitations), a three-year temporary period for expenditure of "available project proceeds," a 2% limitation on financing costs of issuance from the proceeds of the tax credit bond, stripping of the tax credits and carryover of the tax credits. A more detailed discussion of these matters is included in our summary referenced above under the heading "*Tax Credit Bonds for Qualified School Construction.*"

Application of Davis-Bacon Act Prevailing Wage Standards

Section 1601 of ARRTA subjects certain categories of bonds to the prevailing wage standards under the Davis-Bacon Act of 1931. Those bonds are New CREBs, QECBs, QZABs, QSCBs and recovery zone economic development bonds. In general, prevailing wage rules require the contractor to consult with the Department of Labor ("DOL") to determine the appropriate wage rate for the particular jobs under the contract. DOL has certain fixed rates for common jobs. In many cases, the contractor must request a "wage determination" from the Branch of Construction Wage Determination, a sub-agency within DOL.

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Hunton & Williams

Update

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Contacts

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Mary Nash K. Rusher
(919) 899-3066
mnrusher@hunton.com

Andrew R. Kintzinger
(202) 955-1837
akintzinger@hunton.com

William H. McBride
(919) 899-3030
wmcbride@hunton.com

B. Darryl Smelcer
(404) 888-4209
dsmelcer@hunton.com

J. Nicholson Meindl
(214) 468-3358
nmeindl@hunton.com

Bond Provisions in Senate Finance Version of Stimulus Resemble House Bill and Expand Manufacturing Bonds

On January 28, 2009, the House of Representatives passed its version of the stimulus bill by a vote of 244-188. The tax credit bond and municipal bond provisions in the version passing the House remain as described in our client alert dated January 22, 2009.

Also, on January 28, 2009, the Senate Finance Committee, by a vote of 14-9, passed its version of the tax title of the "American Recovery and Reinvestment Tax Act of 2009," as amended by Chairman Baucus, that differs from the House bill with respect to, among other things, certain tax credit bond and municipal bond provisions. These differences will need to be reconciled in conference committee. The Joint Committee on Taxation released descriptions dated January 27, 2009 and January 23, 2009, respectively, of the changes made by the Chairman's Mark and the proposed version of the Senate Finance Committee bill. The Senate is expected to debate and vote on the bill some time next week.

For those tax credit bond and municipal bond provisions described in our aforementioned alert about the House version, the Senate Finance Committee version makes the following changes, among others:

- For purposes of small issue manufacturing bonds found in Section 144(a) of the Internal Revenue Code of 1986, as amended (the "Code"), Section 1301 of the Senate Finance Committee version provides that any such bond issued before January 1, 2011 is considered used for a manufacturing facility if the bond proceeds are expended on the creation or production of "intangible property" or a "facility functionally related and subordinate" to a manufacturing facility. Intangible property is defined as "any patent, copyright, formula, process, design, pattern, knowhow, format, or other similar item" as contained in Section 197(d)(1)(C)(iii) of the Code. Functionally related and subordinate facilities are further described in Treasury Regulations Section 1.103-8(a)(3).
- The taxable governmental tax credit bond provisions have been dubbed "Build America Bonds." These bonds must be issued before January 1, 2012.
- For Recovery Zone Bonds, each state is guaranteed a one percent allocation for each category of recovery zone economic development bonds and recovery zone facility bonds.

- For qualified school construction bonds, the requirement that 40 percent of the allocation be reserved for large school districts has been eliminated, and the Senate version reduces the allocation to $5 billion for each of 2009 and 2010 from $11 billion that was proposed in the House version.
- These are additional provisions of the Senate version that differ from the House bill and affect municipal bond provisions (e.g. high-speed rail facility bonds found in Code Section 142) that are not discussed here.

For more information on tax credit bonds, please contact Doug Lamb or Laura Jones.

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UPDATE

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Contacts

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Andrew R. Kintzinger
(202) 955-1837
akintzinger@hunton.com

Mary Nash K. Rusher
(919) 899-3066
mnrusher@hunton.com

William H. McBride
(919) 899-3030
wmcbride@hunton.com

B. Darryl Smelcer
(404) 888-4209
dsmelcer@hunton.com

J. Nicholson Meindl
(214) 468-3358
nmeindl@hunton.com

House Stimulus Bill Expands Tax Credit Bonds; IRS Reformulates Pricing for Tax Credit Rate on Certain Bonds

On Friday, January 16, 2009, HR 598, entitled the "American Recovery and Reinvestment Tax Act of 2009" ("ARRTA"), was introduced by Rep. Charles B. Rangel (D-NY). On January 22, 2009, an amendment in the nature of a substitute that affects AARTA was presented. The materials below are reflective of such amendment.

New Clean Renewable Energy Bonds ("New CREBs"), Qualified Energy Conservation Bonds ("QECBs") and Qualified Zone Academy Bonds ("QZABs").

Sections 1611 and 1612 of ARRTA increase the current allocations for each of New CREBs and QECBs from $800 million to $2.4 billion and $3.2 billion, respectively. Each of the New CREBs and QECBs were created in the "Energy Improvement and Extension Act of 2008" that was included in the bailout legislation package enacted on October 3, 2008. Please see the contemporaneous update on the tax credit bond provisions included in the bailout legislation.

For QECBs, the eligible projects are expanded to include loans and grants for green community programs. The report from the Joint Committee on Taxation, dated January 22, 2009 (JCX-8-09), states the change " . . . will enable States to issue these tax credit bonds to finance loans and/or grants to individual homeowners to retrofit existing housing . . . [and] . . . [t]he use of bond proceeds for such loans and grants will not cause such bond to be treated as a private activity bond . . ."

For the QZAB program, Section 1512 of ARRTA proposes to increase the 2009 QZAB allocation from $400 million to $1.4 billion and extend the program into 2010 with allocation for that year in the amount of $1.4 billion. The October 2008 bailout package included legislation entitled "Tax Extenders and Alternative Minimum Relief Act of 2008" that reauthorized and extended the existing QZAB program. As a result, $400 million in allocation was added for each of calendar years 2008 and 2009.

Each of the New CREBs, QECBs and the modified QZAB programs are governed by Internal Revenue Code Section 54A, which was added in the "Heartland, Habitat, Harvest and Horticulture Act of 2008." Section 54A makes significant changes to the statutory framework that governs the existing CREBs (Section 54) and that previously governed QZABs (Section 1397E). Those changes include, among others, introduction of a reserve fund option that generally allows for equal annual installments that are not treated as

retiring a portion of the bond (subject to yield limitations), a three-year temporary period for expenditure of the bond proceeds, a 2% limitation on financing costs of issuance from the proceeds of the tax credit bond, stripping of the tax credits and carryover of the tax credits. Please see our contemporaneous update discussing these matters.

Tax Credit Bonds for Qualified School Construction

Section 1511 of ARRTA proposes to add a new category of tax credit bonds that would be codified in Section 54F and governed by the rules found in Section 54A. This category of tax credit bonds is entitled "Qualified School Construction Bonds" ("QSCB"). Under the proposed provisions, 100% of the available project proceeds (please see the above-referenced update for information on this concept) of such issue are to be used for the "construction, rehabilitation, or repair of a public school facility or for the acquisition of land on which such a facility is to be constructed with part of the proceeds of such issue." The allocation for QSCB is $11 billion for each of calendar years 2009 and 2010. There is an additional $200 million in each of those years for Native American schools. Of the total allocation, 60 percent will be distributed among the states based upon secondary school populations within the state. The remaining 40% is to be distributed among "large local education agencies." Unused allocation may be carried over, and ARRTA does not place a limit on the years to which it may be carried over.

Credit Option for Taxable Governmental Bonds

Section 1521 of ARRTA proposes to add a new incentive for certain types of taxable governmental bonds. The incentive would be codified in Section 54AA of the Code and would be entitled "Taxable Bond Option for Governmental Bonds." So long as the bond is a governmental bond and not a private activity bond, the holder is entitled to a credit based upon a calculation that takes into account the amount of interest payable on the bond. The amount of the credit is 35% of the interest payable by the issuer on an interest payment date that is defined as "any date on which the holder of record of the taxable governmental bond is entitled to a payment of interest under such bond." The credit is subject to limits and carryover provisions similar to those for credits under Section 54A. The interest on the bond is includible in gross income.

Section 1521 also provides that an issuer may elect to receive a credit in lieu of the holder receiving a credit. To qualify, 100% of the available project proceeds must be spent on capital expenditures, and the issuer must elect this option. The Treasury would pay to the issuer the amount of the credit on or about each interest payment date. This provision would apply to bonds issued before January 1, 2011.

Section 1521 provides that any stateís laws must treat the interest on the qualifying taxable bond and the credit as being exempt from federal income tax.

Marketability Enhancements, New Category of Recovery Zone Bonds and Tribal Economic Development Bonds

There are other provisions of ARRTA that would benefit state and local bonds. For instance, in determining whether a bond is "bank qualified" for purposes of Section 265 of the Code, the $10 million limitation has been raised to $30 million for each of 2009 and 2010. Moreover, pooled bonds may be bank qualified without regard to a dollar limitation on the aggregate pool size so long as each pooled loan qualifies on its own under the $30 million cap.

There are additional changes that provide a "bank qualification" safe harbor to financial institutions holding tax-exempt debt, whereby tax-exempt bonds issued in 2009 and 2010 are not taken into account in determining whether the financial institution is entitled to the deduction under Section 265 so long as the amount of qualifying tax-exempt debt it holds does not exceed a 2% threshold of its average adjusted basis of assets. In other words, in calculating the existing 2% de minimis exception for banks and other institutions, these 2009 and 2010 bonds are ignored to the extent they comprise up to 2% of the average adjusted bases of the bankís assets.

In determining eligibility under Section 265 for qualified 501(c)(3) bonds, the bonds shall be treated as issued by the 501(c)(3) entity for whom the bonds were issued, and the requirements for qualification of the bond issue as part of a qualifying pool issue shall be applied as if the 501(c)(3) entity is the issuer.

Lastly, Section 1503 of ARRTA provides that private activity bonds issued in 2009 and 2010 would not be subject to AMT.

Section 1531 proposes the creation of a recovery zone bonds that would include economic development bonds and facility bonds, for which there is proposed $10 billion and $15 billion, respectively, in allocation. The allocation would be apportioned among the states according to employment losses. Within the states, the allocation is further subdivided

among counties and large local municipalities according to their employment losses. Each type of bond must be designated as such by the issuer and must be issued before January 1, 2011.

A recovery zone is either an area, designated by the issuer, with significant poverty, unemployment or rate of home foreclosures or an area for which an empowerment zone or renewal community is in effect. A recovery zone also includes any area of general distress (as defined in Section 1392(a)(2)).

A recovery zone economic development bond shall entitle the issuer to a credit similar to that available to an issuer of a qualified taxable governmental bond, as described above, except that the credit shall be 55% instead of 35%. The bond requires 100% of available project proceeds to be used for one or more qualified economic development purposes. Such purposes include expenditures for purposes of promoting development or other economic activity in a recovery zone, including capital expenditures paid or incurred with respect to property in the zone, expenditures for public infrastructure and construction of public facilities and expenditures for job training and educational programs.

A recovery zone facility bond shall be included within the meaning of an exempt facility bond under Section 142 of the Code. At least 95% of the "net proceeds" (as defined in Section 150 of the Code) of the bond must be used for recovery zone property. To be recovery zone property, it generally must be subject to Section 168 of the Code, have been acquired after the zone designation took effect, is first used in the zone by the taxpayer, is substantially all located in the zone and is used in the active conduct of a qualified business by the taxpayer in such zone. A qualified business is any trade or business except rental of residential property or a sin business (e.g. gambling, alcohol sales, country clubs, etc.). Furthermore, the limitations on acquisition of existing property found in Section 147(d) shall not apply.

A new category of tribal economic development bond was created, with an allocation of $2 billion. A bond qualifies if it would be exempt from taxation as a state or local bond under Section 103 so long as certain types of gaming are not occurring and the facility is not located outside an Indian reservation. Treasury is required to conduct a study and report on it to Congress within one year of the enactment of this provision.

Changes to Tax Credit Rates

In Notice 2009-15, released on and effective as of January 22, 2009, the Treasury will determine and announce tax credits daily for CREBs (Section 54), Midwestern tax credit bonds (Section 1400N(l)), and Qualified Forestry Conservation Bonds, New CREBs, CREBs and QZABs (Section 54A), based on "its estimate of the yields on outstanding bonds from market sectors selected by the Treasury Department in its discretion that have an investment grade rating of between A and BBB for bonds of a similar maturity for the business day immediately preceding the sale date of the tax credit bonds." See Notice 2009-15 that is linked hereto. The rates will be published on the website for the Bureau of Public Debt. For CREBs the link is https://www.treasurydirect.gov/SZ/SPESRates?type=CREBS, and for QZABs, the link is https://www.treasurydirect.gov/SZ/SPESQZABRate. This methodology is a departure from the prior methodology that based the rate on outstanding AA rated corporate bonds. This change is subject to further refinement and modifies Notice 2007-26, 2007-14 I.R.B.870 (April 2, 2007).

For questions about energy tax credit bonds, please contact Laura Jones or Doug Lamb.

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UPDATE

October 2008

House and Senate Pass Extensions of Energy Tax Credits; President Likely to Sign

On October 3, 2008, the House passed H.R. 1424, the "Emergency Economic Stabilization Act of 2008" (the "Bill") by a vote of 263-171. A copy of the Bill is available here. The Senate previously passed the Bill on October 1, 2008, by a vote of 74-25. Thus, the Bill will now be sent to the President for signature and the White House has issued two Statements of Administration Policy indicating that the President will sign the Bill. Statements of Administration Policies are available here, October 1 and October 3, 2008.

The energy tax provisions are contained in the "Energy Improvement and Extension Act of 2008" division of the Bill that is referenced as Division B. These provisions are identical to those contained in the Senate-passed version of H.R. 6049, and were described in detail in a prior alert.

If you have any questions relating to the Bill, please contact us.

Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

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UPDATE

September 2008

Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

House Passes Bill to Extend Energy Tax Credit Provisions

On September 26, 2008, the House passed H.R. 7060, the "Renewable Energy and Job Act of 2008," (the "Bill"), by a vote of 257-166, and a copy of the Joint Committee on Taxation description of the Bill is available here.

The Bill differs from the substitute amendment to H.R. 6049 that the Senate passed on September 23 (the "Senate Bill"). See the "Senate Passes Bill to Extend Energy Tax Credit Provisions" Client Alert," September 2008.

Despite the passage of the Bill by the House, the enactment of energy tax credit extensions remains uncertain due to key differences between the House and Senate versions of the bills, particularly that the House version is fully offset while the Senate version is only partially paid for, but includes an AMT patch and disaster tax relief that are not included in the House version. The Senate has indicated that it will not consider the House version and the bodies may find themselves in a stalemate. The White House has endorsed the Senate version and has threatened to veto the House version. See the "Statement of Administration Policy." Because Congress is likely to return next week to work on the economic recovery act, they may be able to tackle the differences in the House and Senate bills as well.

Section 45

Extension

The Bill would extend the placed-in-service deadline for one year (through the end of 2009) for facilities producing electricity from wind. However, the Bill would extend the placed-in-service deadline for two years and three-quarters years (through the end of September 2011) for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, and qualified hydropower. The Bill would not provide an extension for refined coal or Indian coal facilities. Finally, the Bill would eliminate the credit phase out, and in addition, the Bill contains an *investment-based limitation* on the credit amount for facilities placed in service after 2009. This limitation is substantially similar to the provision contained in a prior House bill. See the "Ways & Means Committee Passes Extenders Bill" Client Alert from May 2008.

Marine/Hydrokinetic

The Bill also would add marine and hydrokinetic renewable energy as a qualified resource under section 45. These provisions are very similar to those in the Senate Bill. The Bill 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 would include any such facility placed in service after the date of enactment and before October 1, 2011, 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 would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Bill would eliminate such facilities as a separate category.

Qualified Hydropower Production

Similar to the Senate Bill, the Bill would modify 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.

Other Section 45 Provisions

Also similar to the Senate Bill, the Bill would modify the definition of trash combustion facility by replacing the requirement that it burn municipal solid waste with a requirement that it be a facility (other than a landfill gas facility) that uses municipal solid waste in order to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity. In addition, the Bill would allow 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.

Section 48

Similar to the Senate Bill, the Bill would extend for eight years placed-in-service deadline (through the end of 2016) for solar energy, fuel cell, and microturbine property. The Bill would also permit the energy credit determined under section 48 to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after the date of enactment. The Bill would repeal the public utility exception applicable to energy property owned by public utilities for periods after February 13, 2008, in taxable years ending after such date. Finally, the Bill would raise 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 the date of enactment.

Combined Heat and Power Property

Similar to the Senate Bill, the Bill would add a new category of energy property to section 48 for combined heat and power 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 (i) at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power and (ii) produces at least 20 percent of its total useful energy in the form of electrical or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Bill) which exceeds 60 percent (with a special rule for systems using biomass); and (D) which is placed in service before January 1, 2017. CHP property would be eligible for the 10 percent energy credit under section 48, subject to various limitations based on electrical or mechanical capacity.

Section 48A/48B

The Bill would increase the section 48A credit for IGCC and other advanced coal projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional $950 million in credits to qualifying projects. The Bill would also increase the section 48B credit for qualifying gasification projects from the current credit rate of 20 percent to 30 percent and to permit the allocation of an additional $150 million in credits to qualifying projects. The allocation would be effective on the

date of enactment and the increase in the credit rate would be effective for the additional allocations.

The Bill would require (a) qualifying Section 48A projects to include equipment which separates and sequesters at least 65 percent of the project's total carbon dioxide (70 percent in the case of a reallocation) and (b) qualifying Section 48B projects to include equipment which separates and sequesters at least 75 percent of total carbon dioxide emissions. The Bill would provide for recapture of the credit if a project fails to attain or maintain these required levels of sequestration. In selecting qualifying projects, the Bill would require the Secretary to give the highest priority to projects with the greatest separation and sequestration and high priority to applicants that have a research partnership with an eligible educational institution.

Finally, the Bill would also require public disclosure of projects receiving credit allocations, including the identity of the taxpayer and the amount of the credit awarded.

Clean Renewable Energy Bonds

Notably, the Bill does not contain an extension of the Clean Renewable Energy Bond program.

Other Provisions

The Bill also contains various other provisions which would, among other things:

- Provide a five-year extension of the energy efficient commercial building deduction under section 179D.
- Provide an eight-year extension of the tax credit for residential energy efficient property under section 25D and make various modifications to the program.
- Extend and modify various tax credits available for certain liquid renewable fuels, including biodiesel, renewable diesel, and other alternative fuels.

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Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

Senate Passes Bill to Extend Energy Tax Credit Provisions

On September 23, 2008, the Senate passed the "Energy Improvement and Extension Act of 2008" (substitute amendment to H.R. 6049) (the "Bill") by a vote of 93-2. A copy of the Bill is available here. The Administration has issued a Statement of Administration Policy supporting the prompt passage of the Bill, despite the fact that the Administration opposes several provisions in the Bill. A copy of the SAP is attached.

Senate Majority Leader Reid has urged the House to pass the Senate version of the Bill in its current form in order to prevent a conference and to allow the Bill to be enacted. However, indications are that the House plans to vote on an amendment in the nature of a substitute to the Senate version of the Bill. If so, either the Senate will need to pass the revised House version of the bill, or the House and Senate versions of H.R. 6049 will need to be reconciled in conference committee. If the bills go to conference committee, any agreed upon final bill would have to be passed once again by both the House and the Senate. Because Congress has turned much of its attention this week to the ailing financial markets, it is not clear whether they will be able to reconcile the different versions of the energy extenders package before they break for recess. Another option is to try to conference during recess and hope to pass a conference bill during a lame duck session in either November or December, but this is not likely to be as politically advantageous as sending a final bill to the President before heading home for the November elections.

Section 45

Extension

The Bill would extend 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 Bill would extend 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 Bill does not provide an extension for Indian coal facilities and solar facilities (under section 45). In addition, the Bill does not contain an investment-based limitation on the credit amount as proposed in various House-passed energy tax credit extension bills.

Marine/Hydrokinetic

The Bill also would add marine and hydrokinetic renewable energy as a qualified resource under section 45. The Bill 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 would include any such facility placed in service after the date of enactment and before January 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 would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Bill terminates these facilities as a separate category.

Qualified Hydropower Production

The Bill would modify 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.

Other Section 45 Provisions

The Bill would modify the definition of refined coal by deleting the increased market value requirement and increasing the emission reduction requirement for sulfur dioxide or mercury from 20 percent to 40 percent. The Bill would also modify the definition of qualified trash combustion facilities to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity. Finally, the Bill would allow 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.

Steel Industry Fuel

The Bill would also provide that steel industry fuel is refined coal for purposes of section 45. The Bill defines steel industry fuel as a fuel that (a) is produced by liquifying 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 legislative language at this time is unclear) per barrel-of-oil equivalent 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 that would allow such facility to produce steel industry fuel were placed-in-service, or (iii) October 1, 2008, and ends on the later of (x) December 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 January 1, 2010. The steel industry fuel amendments would be effective for fuel produced and sold from facilities placed in service after September 30, 2008.

Section 48

The Bill would extend for eight years the placed-in-service deadline (through the end of 2016) for solar energy, fuel cell, and microturbine property. The Bill would also permit the energy credit determined under section 48 to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after the date of enactment. The Bill would repeal the public utility exception applicable to energy property owned by public utilities for periods after February 13, 2008, in taxable years ending after such date. Finally, the Bill would raise 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 the date of enactment.

Combined Heat and Power Property

The Bill would add a new category of energy property to section 48 for combined heat and power property (“CHP property”). CHP property is defined as property comprising a system: (A) that 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) that produces (i) at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power and (ii) produces at least 20 percent of its total useful energy in the form of electrical

or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Bill) that exceeds 60 percent (with a special rule for systems using biomass); and (D) that is placed in service before January 1, 2017. CHP property would be eligible for the 10 percent energy credit under section 48, subject to various limitations based on electrical or mechanical capacity.

Small Wind Property

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

Geothermal Heat Pump Systems

Finally, the Bill would add 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 January 1, 2017. Such property would be eligible for a 10 percent energy credit.

Clean Renewable Energy Bonds

The Bill would create a new category of clean renewable energy bonds ("New CREBs") to finance qualified renewable energy facilities that (a) qualify under section 45 (other than refined coal or Indian coal facilities and without regard to placed-in-service dates), and (b) are owned by public power providers ("PPPs"), governmental bodies, or cooperative electric companies ("CECs"). A PPP is a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act.

The bond limitation for the New CREBs would be $800 million, of which no more than one-third may be allocated to projects of PPPs, governmental bodies, or CECs. Allocations to projects of PPPs would be made in such manner that the amount allocated to each such project bears the same ratio to the cost of such project as the maximum allocation limitation to projects of PPPs bears to the cost of all such projects.

Under the New CREBs program, 100 percent of the proceeds of New CREBs (less issuance costs of no more than 2 percent of the bond) and any investment earnings on such proceeds would be required to be used on capital expenditures for the project within three years of the date of issuance (with limited exceptions). The Bill also would provide that the tax credit rate for New CREBs is a rate that is 70 percent of the rate that would permit issuance of a New CREB without discount and interest cost to the issuer; the credit would be claimed against both regular and AMT tax liability; any unused credit could be carried forward; and credits could be "stripped" from the ownership of the bond, similar to the "stripping" of interest coupons for tax-exempt bonds.

Finally, the Bill extends the deadline for issuance of current allocations of "old" CREBs by one year — from December 31, 2008 to December 31, 2009.

The Bill would also create a new tax credit bond program for "qualified energy conservation bonds" ("QECBs"). The rules for QECBs are similar to those for New CREBs. Set forth below are the significant highlights of the QECB program under the Bill.

- QECB Purposes — projects related to reducing energy consumption in publicly-owned buildings by at least 20 percent; implementing green community programs; rural development involving renewable energy production; qualified facilities as determined under Section 45(d) (other than refined coal or Indian coal facilities and without regard to placed-in service dates) (i.e., the same projects that qualify under the New CREBs); certain research facilities generally involving increasing energy efficiency and reducing fossil fuel consumption; commuting facilities that reduce energy consumption (and pollution); certain demonstration projects; and energy efficiency public education campaigns.
- QECB Allocation — $800 million to be distributed among the States and further subdivided among large local governments (i.e., population of 100,000 or more), all proportionately based on population. Indian tribal governments are to be treated in the same manner as large local governments.

Section 48A/48B

The Bill would increase the section 48A credit for IGCC and other advanced coal projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional $1.25 billion in credits to qualifying projects. The Bill would also increase the section 48B credit for qualifying gasification projects from the current credit rate of 20 percent to 30 percent and to permit the

allocation of an additional $250 million in credits to qualifying projects. The allocation would be effective on the date of enactment and the increase in the credit rate would be effective for the additional allocations.

The Bill would require (a) qualifying Section 48A projects to include equipment which separates and sequesters at least 65 percent of the project's total carbon dioxide (70 percent in the case of a reallocation) and (b) qualifying Section 48B projects to include equipment which separates and sequesters at least 75 percent of total carbon dioxide emissions. The Bill would provide for recapture of the credit if a project fails to attain or maintain these required levels of sequestration. In selecting qualifying projects, the Bill would require the Secretary to give the highest priority to projects with the greatest separation and sequestration and high priority to applicants that have a research partnership with an eligible educational institution.

Finally, the Bill would also require public disclosure of projects receiving credit allocations, including the identity of the taxpayer and the amount of the credit awarded.

Other Provisions

The Bill also contains various other provisions that would, among other things:

- Provide a tax credit for the capture and sequestration of carbon dioxide at certain projects.
- Provide a five-year extension of the energy efficient commercial building deduction under section 179D.
- Provide an eight-year extension of the tax credit for residential energy efficient property under section 25D and make various modifications to the program.
- Extend and modify various tax credits available for certain liquid renewable fuels, including biodiesel, renewable diesel, and other alternative fuels.

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Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

David S. Lowman, Jr.
(804) 788-8789
dlowman@hunton.com

Washington Office
1900 K Street NW
Washington, DC 20006

David Weisblat
(202) 955-1980
dweisblat@hunton.com

Business Tax Provisions of the Economic Stimulus Act of 2008

On February 13, 2008, the President signed H.R. 5140, The Economic Stimulus Act of 2008 (the "Stimulus Act"), which provides rebates for individual taxpayers and includes two provisions that affect business taxpayers. The business provisions are explained below.

Bonus Depreciation Allowance for Certain Property

The Stimulus Act allows an additional first-year depreciation deduction equal to 50 percent of the adjusted basis of qualified property. The additional first-year depreciation deduction is allowed for both regular tax and alternative minimum tax purposes for the taxable year in which the property is placed in service. The basis of the property and the depreciation allowances in the year the property is placed in service and later years are appropriately adjusted to reflect the additional first-year depreciation deduction. The amount of the additional first-year depreciation deduction is not affected by a short taxable year. The taxpayer may elect out of additional first-year depreciation.

In order for property to qualify for the additional first-year depreciation deduction, it must meet all of the following requirements.

- First, the property must be either (1) property to which MACRS applies with an applicable recovery period of 20 years or less, (2) water utility property as defined in Section 168(e)(5) of the Internal Revenue Code of 1986, as ameded ("the Code"), (3) computer software other than computer software covered by Section 197 of the Code, or (4) qualified leasehold improvement property as defined in Section 168(k)(3) of the Code.
- Second, the original use of the property must commence with the taxpayer after December 31, 2007. For these purposes, the term original use means the first use to which the property is put, whether or not such use is by the taxpayer.
- Third, the taxpayer must purchase the property within the "applicable time period" (described below).
- Fourth, the property must be placed in service after December 31, 2007, and before January 1, 2009. An extension of the placed in service date of one year (i.e., to January 1, 2010) is provided for certain property with a recovery period of 10 years or longer and certain transportation property. The existing provision under Section 168(k)(2)(E)(ii) of the Code remains in effect for purposes of determining the placed in service date of property that is sold and then leased back within three months of the date on which it was originally placed in service.

The applicable time period for acquired property is (1) after December 31, 2007, and before January 1, 2009, but only if no binding written contract for the acquisition is in effect before January 1, 2008, or (2) pursuant to a binding written contract which was entered into after December 31, 2007, and before January 1, 2009. With respect to property that is manufactured, constructed, or produced by the taxpayer for use by the taxpayer, the taxpayer must begin the manufacture, construction, or production of the property after December 31, 2007, and before January 1, 2009. Property that is manufactured, constructed, or produced for the taxpayer by another person under a contract that is entered into prior to the manufacture, construction, or production of the property is considered to be manufactured, constructed, or produced by the taxpayer.

For property eligible for the extended placed in service date, a special rule limits the amount of costs eligible for the additional first year depreciation. With respect to such property, only the portion of the basis that is properly attributable to the costs incurred before January 1, 2009 is eligible for the additional first-year depreciation. Finally, property does not qualify for the additional first-year depreciation deduction when the user of such property (or a related party) would not have been eligible for the additional first-year depreciation deduction if the user (or a related party) were treated as the owner.

Temporary Increase in Limitations on Expensing Certain Depreciable Business Assets

Taxpayers that satisfy limitations on annual investment may elect under Section 179 of the Code to deduct (or "expense") the cost of qualifying property, rather than to recover such costs through depreciation deductions. In general, qualifying property is defined as depreciable tangible personal property purchased for use in the active conduct of a trade or business. For taxable years beginning in 2008, the maximum amount that a taxpayer may expense is $128,000 of the cost of qualifying property placed in service for the taxable year. The $128,000 amount is reduced (but not below zero) by the amount by which the cost of qualifying property placed in service during the taxable year exceeds $510,000. The amount eligible to be expensed for a taxable year may not exceed the taxable income for that taxable year that is derived from the active conduct of a trade or business. Any amount that is not allowed as a deduction because of this limitation may be carried forward to succeeding taxable years, subject to similar limitations.

The Stimulus Act increases the maximum amount that a taxpayer may expense in 2008 from $128,000 to $250,000, and provides that the $250,000 amount is reduced (but not below zero) by the amount by which the cost of qualifying property placed in service during 2008 exceeds $800,000.

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HUNTON& WILLIAMS

UPDATE

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Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Washington Office
1900 K Street, NW
Washington, DC 20006-1109

Timothy L. Jacobs
(202) 955-1669
tjacobs@hunton.com

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.

New CREBs/QECBs

Our prior alert located at 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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HUNTON & WILLIAMS

UPDATE

October 2008

House and Senate Pass Extensions of Energy Tax Credits; President Likely to Sign

On October 3, 2008, the House passed H.R. 1424, the “Emergency Economic Stabilization Act of 2008” (the “Bill”) by a vote of 263-171. A copy of the Bill is available here. The Senate previously passed the Bill on October 1, 2008, by a vote of 74-25. Thus, the Bill will now be sent to the President for signature and the White House has issued two Statements of Administration Policy indicating that the President will sign the Bill. Statements of Administration Policies are available here, October 1 and October 3, 2008.

The energy tax provisions are contained in the “Energy Improvement and Extension Act of 2008” division of the Bill that is referenced as Division B. These provisions are identical to those contained in the Senate-passed version of H.R. 6049, and were described in detail in a prior alert.

If you have any questions relating to the Bill, please contact us.

Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

Atlanta • Austin • Bangkok • Beijing
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HUNTON& WILLIAMS

UPDATE

September 2008

Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

House Passes Bill to Extend Energy Tax Credit Provisions

On September 26, 2008, the House passed H.R. 7060, the "Renewable Energy and Job Act of 2008," (the "Bill"), by a vote of 257-166, and a copy of the Joint Committee on Taxation description of the Bill is available here.

The Bill differs from the substitute amendment to H.R. 6049 that the Senate passed on September 23 (the "Senate Bill"). See the "Senate Passes Bill to Extend Energy Tax Credit Provisions" Client Alert," September 2008.

Despite the passage of the Bill by the House, the enactment of energy tax credit extensions remains uncertain due to key differences between the House and Senate versions of the bills, particularly that the House version is fully offset while the Senate version is only partially paid for, but includes an AMT patch and disaster tax relief that are not included in the House version. The Senate has indicated that it will not consider the House version and the bodies may find themselves in a stalemate. The White House has endorsed the Senate version and has threatened to veto the House version. See the "Statement of Administration Policy." Because Congress is likely to return next week to work on the economic recovery act, they may be able to tackle the differences in the House and Senate bills as well.

Section 45

Extension

The Bill would extend the placed-in-service deadline for one year (through the end of 2009) for facilities producing electricity from wind. However, the Bill would extend the placed-in-service deadline for two years and three-quarters years (through the end of September 2011) for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, and qualified hydropower. The Bill would not provide an extension for refined coal or Indian coal facilities. Finally, the Bill would eliminate the credit phase out, and in addition, the Bill contains an *investment-based limitation* on the credit amount for facilities placed in service after 2009. This limitation is substantially similar to the provision contained in a prior House bill. See the "Ways & Means Committee Passes Extenders Bill" Client Alert from May 2008.

Marine/Hydrokinetic

The Bill also would add marine and hydrokinetic renewable energy as a qualified resource under section 45. These provisions are very similar to those in the Senate Bill. The Bill 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 would include any such facility placed in service after the date of enactment and before October 1, 2011, 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 would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Bill would eliminate such facilities as a separate category.

Qualified Hydropower Production

Similar to the Senate Bill, the Bill would modify 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.

Other Section 45 Provisions

Also similar to the Senate Bill, the Bill would modify the definition of trash combustion facility by replacing the requirement that it burn municipal solid waste with a requirement that it be a facility (other than a landfill gas facility) that uses municipal solid waste in order to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity. In addition, the Bill would allow 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.

Section 48

Similar to the Senate Bill, the Bill would extend for eight years placed-in-service deadline (through the end of 2016) for solar energy, fuel cell, and microturbine property. The Bill would also permit the energy credit determined under section 48 to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after the date of enactment. The Bill would repeal the public utility exception applicable to energy property owned by public utilities for periods after February 13, 2008, in taxable years ending after such date. Finally, the Bill would raise 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 the date of enactment.

Combined Heat and Power Property

Similar to the Senate Bill, the Bill would add a new category of energy property to section 48 for combined heat and power 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 (i) at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power and (ii) produces at least 20 percent of its total useful energy in the form of electrical or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Bill) which exceeds 60 percent (with a special rule for systems using biomass); and (D) which is placed in service before January 1, 2017. CHP property would be eligible for the 10 percent energy credit under section 48, subject to various limitations based on electrical or mechanical capacity.

Section 48A/48B

The Bill would increase the section 48A credit for IGCC and other advanced coal projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional $950 million in credits to qualifying projects. The Bill would also increase the section 48B credit for qualifying gasification projects from the current credit rate of 20 percent to 30 percent and to permit the allocation of an additional $150 million in credits to qualifying projects. The allocation would be effective on the

date of enactment and the increase in the credit rate would be effective for the additional allocations.

The Bill would require (a) qualifying Section 48A projects to include equipment which separates and sequesters at least 65 percent of the project's total carbon dioxide (70 percent in the case of a reallocation) and (b) qualifying Section 48B projects to include equipment which separates and sequesters at least 75 percent of total carbon dioxide emissions. The Bill would provide for recapture of the credit if a project fails to attain or maintain these required levels of sequestration. In selecting qualifying projects, the Bill would require the Secretary to give the highest priority to projects with the greatest separation and sequestration and high priority to applicants that have a research partnership with an eligible educational institution.

Finally, the Bill would also require public disclosure of projects receiving credit allocations, including the identity of the taxpayer and the amount of the credit awarded.

Clean Renewable Energy Bonds

Notably, the Bill does not contain an extension of the Clean Renewable Energy Bond program.

Other Provisions

The Bill also contains various other provisions which would, among other things:

- Provide a five-year extension of the energy efficient commercial building deduction under section 179D.
- Provide an eight-year extension of the tax credit for residential energy efficient property under section 25D and make various modifications to the program.
- Extend and modify various tax credits available for certain liquid renewable fuels, including biodiesel, renewable diesel, and other alternative fuels.

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Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

Senate Passes Bill to Extend Energy Tax Credit Provisions

On September 23, 2008, the Senate passed the "Energy Improvement and Extension Act of 2008" (substitute amendment to H.R. 6049) (the "Bill") by a vote of 93-2. A copy of the Bill is available here. The Administration has issued a Statement of Administration Policy supporting the prompt passage of the Bill, despite the fact that the Administration opposes several provisions in the Bill. A copy of the SAP is attached.

Senate Majority Leader Reid has urged the House to pass the Senate version of the Bill in its current form in order to prevent a conference and to allow the Bill to be enacted. However, indications are that the House plans to vote on an amendment in the nature of a substitute to the Senate version of the Bill. If so, either the Senate will need to pass the revised House version of the bill, or the House and Senate versions of H.R. 6049 will need to be reconciled in conference committee. If the bills go to conference committee, any agreed upon final bill would have to be passed once again by both the House and the Senate. Because Congress has turned much of its attention this week to the ailing financial markets, it is not clear whether they will be able to reconcile the different versions of the energy extenders package before they break for recess. Another option is to try to conference during recess and hope to pass a conference bill during a lame duck session in either November or December, but this is not likely to be as politically advantageous as sending a final bill to the President before heading home for the November elections.

Section 45

Extension

The Bill would extend 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 Bill would extend 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 Bill does not provide an extension for Indian coal facilities and solar facilities (under section 45). In addition, the Bill does not contain an investment-based limitation on the credit amount as proposed in various House-passed energy tax credit extension bills.

Marine/Hydrokinetic

The Bill also would add marine and hydrokinetic renewable energy as a qualified resource under section 45. The Bill 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 would include any such facility placed in service after the date of enactment and before January 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 would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Bill terminates these facilities as a separate category.

Qualified Hydropower Production

The Bill would modify 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.

Other Section 45 Provisions

The Bill would modify the definition of refined coal by deleting the increased market value requirement and increasing the emission reduction requirement for sulfur dioxide or mercury from 20 percent to 40 percent. The Bill would also modify the definition of qualified trash combustion facilities to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity. Finally, the Bill would allow 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.

Steel Industry Fuel

The Bill would also provide that steel industry fuel is refined coal for purposes of section 45. The Bill defines steel industry fuel as a fuel that (a) is produced by liquifying 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 legislative language at this time is unclear) per barrel-of-oil equivalent 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 that would allow such facility to produce steel industry fuel were placed-in-service, or (iii) October 1, 2008, and ends on the later of (x) December 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 January 1, 2010. The steel industry fuel amendments would be effective for fuel produced and sold from facilities placed in service after September 30, 2008.

Section 48

The Bill would extend for eight years the placed-in-service deadline (through the end of 2016) for solar energy, fuel cell, and microturbine property. The Bill would also permit the energy credit determined under section 48 to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after the date of enactment. The Bill would repeal the public utility exception applicable to energy property owned by public utilities for periods after February 13, 2008, in taxable years ending after such date. Finally, the Bill would raise 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 the date of enactment.

Combined Heat and Power Property

The Bill would add a new category of energy property to section 48 for combined heat and power property (“CHP property”). CHP property is defined as property comprising a system: (A) that 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) that produces (i) at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power and (ii) produces at least 20 percent of its total useful energy in the form of electrical

or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Bill) that exceeds 60 percent (with a special rule for systems using biomass); and (D) that is placed in service before January 1, 2017. CHP property would be eligible for the 10 percent energy credit under section 48, subject to various limitations based on electrical or mechanical capacity.

Small Wind Property

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

Geothermal Heat Pump Systems

Finally, the Bill would add 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 January 1, 2017. Such property would be eligible for a 10 percent energy credit.

Clean Renewable Energy Bonds

The Bill would create a new category of clean renewable energy bonds ("New CREBs") to finance qualified renewable energy facilities that (a) qualify under section 45 (other than refined coal or Indian coal facilities and without regard to placed-in-service dates), and (b) are owned by public power providers ("PPPs"), governmental bodies, or cooperative electric companies ("CECs"). A PPP is a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act.

The bond limitation for the New CREBs would be $800 million, of which no more than one-third may be allocated to projects of PPPs, governmental bodies, or CECs. Allocations to projects of PPPs would be made in such manner that the amount allocated to each such project bears the same ratio to the cost of such project as the maximum allocation limitation to projects of PPPs bears to the cost of all such projects.

Under the New CREBs program, 100 percent of the proceeds of New CREBs (less issuance costs of no more than 2 percent of the bond) and any investment earnings on such proceeds would be required to be used on capital expenditures for the project within three years of the date of issuance (with limited exceptions). The Bill also would provide that the tax credit rate for New CREBs is a rate that is 70 percent of the rate that would permit issuance of a New CREB without discount and interest cost to the issuer; the credit would be claimed against both regular and AMT tax liability; any unused credit could be carried forward; and credits could be "stripped" from the ownership of the bond, similar to the "stripping" of interest coupons for tax-exempt bonds.

Finally, the Bill extends the deadline for issuance of current allocations of "old" CREBs by one year — from December 31, 2008 to December 31, 2009.

The Bill would also create a new tax credit bond program for "qualified energy conservation bonds" ("QECBs"). The rules for QECBs are similar to those for New CREBs. Set forth below are the significant highlights of the QECB program under the Bill.

- QECB Purposes — projects related to reducing energy consumption in publicly-owned buildings by at least 20 percent; implementing green community programs; rural development involving renewable energy production; qualified facilities as determined under Section 45(d) (other than refined coal or Indian coal facilities and without regard to placed-in service dates) (i.e., the same projects that qualify under the New CREBs); certain research facilities generally involving increasing energy efficiency and reducing fossil fuel consumption; commuting facilities that reduce energy consumption (and pollution); certain demonstration projects; and energy efficiency public education campaigns.
- QECB Allocation — $800 million to be distributed among the States and further subdivided among large local governments (i.e., population of 100,000 or more), all proportionately based on population. Indian tribal governments are to be treated in the same manner as large local governments.

Section 48A/48B

The Bill would increase the section 48A credit for IGCC and other advanced coal projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional $1.25 billion in credits to qualifying projects. The Bill would also increase the section 48B credit for qualifying gasification projects from the current credit rate of 20 percent to 30 percent and to permit the

allocation of an additional $250 million in credits to qualifying projects. The allocation would be effective on the date of enactment and the increase in the credit rate would be effective for the additional allocations.

The Bill would require (a) qualifying Section 48A projects to include equipment which separates and sequesters at least 65 percent of the project's total carbon dioxide (70 percent in the case of a reallocation) and (b) qualifying Section 48B projects to include equipment which separates and sequesters at least 75 percent of total carbon dioxide emissions. The Bill would provide for recapture of the credit if a project fails to attain or maintain these required levels of sequestration. In selecting qualifying projects, the Bill would require the Secretary to give the highest priority to projects with the greatest separation and sequestration and high priority to applicants that have a research partnership with an eligible educational institution.

Finally, the Bill would also require public disclosure of projects receiving credit allocations, including the identity of the taxpayer and the amount of the credit awarded.

Other Provisions

The Bill also contains various other provisions that would, among other things:

- Provide a tax credit for the capture and sequestration of carbon dioxide at certain projects.
- Provide a five-year extension of the energy efficient commercial building deduction under section 179D.
- Provide an eight-year extension of the tax credit for residential energy efficient property under section 25D and make various modifications to the program.
- Extend and modify various tax credits available for certain liquid renewable fuels, including biodiesel, renewable diesel, and other alternative fuels.

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HUNTON & WILLIAMS

UPDATE

August 2008

Senate Fails to Pass Extenders Bill with Energy Tax Credit Extensions Two More Times

On July 30, 2008, the Senate, by a vote of 51 to 43, failed to invoke cloture on S. 3335, the "Jobs, Energy, Families, and Disaster Relief Act of 2008" (the "Senate Bill"), introduced last week by Senator Baucus. Even if the measure had passed the Senate, the Administration issued a Statement of Administration Policy stating that the President's advisors recommended a veto of the Senate Bill.

In May, the House of Representatives passed an extenders bill which was described in a previous alert (the "House Bill"). On July 29, the Senate, by a vote of 53-43, also failed to invoke cloture on the House Bill for the third time. Congress adjourned on Friday, August 1 and is not scheduled to return for substantive work until the second week of September. Thus, the legislative days remaining in the session to pass an extension of the expiring energy tax credits are limited.

The energy tax credit provisions in the Senate Bill and House Bill are substantially similar, which suggests that the House and Senate have reached tentative agreements on the substance of the energy tax credit extensions. However, differences still remain that continue to frustrate the enactment of the extensions, including the debate over whether the extensions should be offset and how. Specifically, several Senate Republicans have expressed concern over adopting permanent changes to the tax code to pay for temporary extensions of the energy tax provisions.

Contacts

Laura Ellen Jones
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8746
ljones@hunton.com

David S. Lowman Jr.
1900 K Street, NW
Washington, DC 20006-1109
(202) 419-2070
dlowman@hunton.com

Francine E. Friedman
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1669
tjacobs@hunton.com

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Hunton & Williams

Update

May 2008

Contacts

Laura Ellen Jones
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8746
ljones@hunton.com

David S. Lowman Jr.
1900 K Street, NW
Washington, DC 20006-1109
(202) 419-2070
dlowman@hunton.com

Timothy L. Jacobs
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1669
tjacobs@hunton.com

Douglas E. Lamb
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8513
dlamb@hunton.com

Ways & Means Committee Passes Extenders Bill

On May 15, 2008, the House Ways and Means Committee passed the “Energy and Tax Extenders Act of 2008” (H.R. 6049) (the “Bill”) by a vote of 25 to 12. The Bill includes $16.9 billion in energy tax incentives and is fully offset by certain tax changes. The Bill is expected to be considered by the full House of Representatives as early as this week (week of May 19). A copy of the Bill is available here and a copy of the Joint Committee on Taxation explanation is available here. The Senate Finance Committee is expected to mark up its version of the extenders bill (S. 2886) after the Memorial Day recess. The energy tax credit provisions contained in the Senate version of an extenders bill were described in a prior email alert.

Section 45

Extension

The Bill would extend for three years the placed-in-service deadline (through the end of 2011) for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste and qualified hydropower. However, the Bill would extend for only one year the placed-in-service deadline for wind facilities. Extensions were not provided for solar, refined coal and Indian coal facilities.

Marine/Hydrokinetic

The Bill also adds marine and hydrokinetic renewable energy as a qualified resource under Section 45. The Bill 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 nonmechanical 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 would include any such facility placed in service after the date of enactment and before January 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 would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Bill terminates these facilities as a separate category.

Phaseout Repeal/Investment-Based Limitation

The Bill repeals the current phaseout for facilities placed in service after 2008. The Bill replaces the phaseout with an *investment-based limitation* for facilities placed in service after 2009. This limitation is based on an “applicable percentage,” which is defined for any month as the percentage that yields over a 10-year period amounts of limitation that have a present value equal to 35 percent of the

eligible basis of the facility. For purposes of the calculation, the discount rate is the greater of 4.5 percent or 110 percent of the long-term federal rate.

The eligible basis of a facility is generally its basis at the time it is originally placed in service. However, special rules apply for determining the eligible basis of shared property at a project (e.g., allocation of shared property at a wind farm among separate wind facilities). Under the special rule, the basis of the "shared qualified property" is allocated in proportion to the projected generation from the qualified facilities. Also, in the case of a qualified geothermal facility, the eligible basis includes intangible drilling and development costs.

The Bill would provide a special election to treat all qualified facilities that are part of the same project and that are placed in service during the same calendar year as a single facility placed in service at either the midpoint of such year or the first day of the following calendar year.

Special rules would also be provided for calculating the credit for the first and last years of the 10-year credit period and for carrying forward any unused limitation and excess credit.

Qualified Hydropower Production

The Bill would modify the definition of a 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.

Other Section 45 Provisions

The Bill would modify the definition of qualified trash combustion facilities to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity. The Bill would also allow 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 Bill would modify the unrelated person rule to clarify that sales of electricity by a partnership to a regulated public utility partner would not fail the unrelated person rule and such sales would qualify for the credit.

Section 48

The Bill would extend for six years the placed-in-service deadline (through 2014) for solar energy, fuel cell and microturbine property. The Bill would also permit the energy credit determined under Section 48 to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after the date of enactment. The Bill would repeal the public utility exception applicable to energy property owned by public utilities for periods after February 13, 2008, in taxable years ending after such date. Finally, the Bill would raise 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 the date of enactment.

Combined Heat and Power Property

The Bill would add a new category of energy property to Section 48 for combined heat and power property ("CHP property"). CHP property is defined as property comprising a system: (A) that 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) that produces (i) at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power and (ii) produces at least 20 percent of its total useful energy in the form of electrical or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Bill) that exceeds 60 percent; and (D) that is placed in service before January 1, 2015. CHP property would be eligible for the 10 percent energy credit under Section 48, subject to various limitations based on electrical or mechanical capacity.

Clean Renewable Energy Bonds

The Bill would create a new category of clean renewable energy bonds ("New CREBs") to finance qualified renewable energy facilities that (a) qualify under Section 45 (other than refined coal or Indian coal facilities and without regard to placed-in-service dates), and (b) are owned by public power providers ("PPPs"), governmental bodies or cooperative electric companies ("CECs"). A PPP is a state utility with a service obligation, as such terms are defined in Section 217 of the Federal Power Act.

The bond limitation for the New CREBs would be $2 billion, of which no more than one-third may be allocated to projects of PPPs, governmental bodies or CECs. Allocations to projects of PPPs would be made in such a manner that the amount allocated to each such project bears the same ratio to the cost of such project as the maximum allocation limitation to projects of PPPs bears to the cost of all such projects.

Under the New CREBs program, 100 percent of the proceeds of New CREBs (less issuance costs of no more than 2 percent of the bond) and any investment earnings on such proceeds would be required to be used on capital expenditures for the project within three years of the date of issuance (with limited exceptions). The Bill also would provide that: the tax credit rate for New CREBs is a rate that is 70 percent of the rate that would permit issuance of a New CREB without discount and interest cost to the issuer; the credit would be claimed against both regular and AMT

tax liability; any unused credit could be carried forward; and credits could be "stripped" from the ownership of the bond, similar to the "stripping" of interest coupons for tax-exempt bonds.

Interestingly, under the Bill, a New CREB would also require the issuer to certify that applicable financial conflicts of interests laws are satisfied concerning the New CREB issuance. In addition, the Bill would provide that certain labor standards would apply to projects financed with New CREBs or the new tax credit bond program described below.

The Bill would also create a new tax credit bond program for "qualified energy conservation bonds" ("QECBs"). The rules for QECBs are similar to those for New CREBs. Set forth below are the significant highlights of the QECB program under the Bill.

- QECB Purposes — projects related to reducing energy consumption in publicly owned buildings by at least 20 percent; implementing green community programs; rural development involving renewable energy production; qualified facilities as determined under Section 45(d) (other than refined coal or Indian coal facilities and without regard to placed-in service dates) (i.e., the same projects that qualify under the New CREBs); certain research facilities generally involving increasing energy efficiency and reducing fossil fuel consumption; commuting facilities that reduce energy consumption (and pollution); certain demonstration projects; and energy efficiency public education campaigns.
- QECB Allocation — $3 billion to be distributed among the states and further subdivided among large local governments (i.e., with populations of 100,000 or more), all proportionately based on population. Indian tribal governments are to be treated in the same manner as large local governments.

Section 48A/48B

The Bill would increase the Section 48A credit for IGCC and other advanced coal projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional $1.25 billion in credits to qualifying projects. The Bill would also increase the Section 48B credit for qualifying gasification projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional $250 million in credits to qualifying projects. The allocation would be effective on the date of enactment and the increase in the credit rate would be effective for the additional allocations.

The Bill would require (a) qualifying Section 48A projects to include equipment that separates and sequesters at least 65 percent of the project's total carbon dioxide (70 percent in the case of a reallocation) and (b) qualifying Section 48B projects to include equipment that separates and sequesters at least 75 percent of total carbon dioxide emissions. The Bill would provide for recapture of the credit if a project fails to attain or maintain these required levels of sequestration. In selecting qualifying projects, the Bill would require the secretary to give the highest priority to projects with the greatest separation and sequestration and high priority to applicants that have a research partnership with an eligible educational institution.

The Bill would also require public disclosure of projects receiving credit allocations, including the identity of the taxpayer and the amount of the credit awarded. The Bill also prescribes certain requirements for modifying competitive certification awards and closing agreements about Section 48A projects.

Excelsior Energy Receives Second Round Section 48A Tax Credit Allocation

On May 7, 2008, Excelsior Energy announced that it received an allocation of $133.5 million in Section 48A tax credits for its Mesaba project. A copy of the press release is available here. To date, none of the Treasury, the IRS or the Department of Energy has announced the results of the second round of allocations.

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HUNTON & WILLIAMS

UPDATE

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Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

David S. Lowman Jr.
(804) 788-8789
dlowman@hunton.com

Timothy L. Jacobs
(804) 788-8362
tjacobs@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

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

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.

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February 2009

Contacts

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Timothy L. Jacobs
(202) 955-1669
tjacobs@hunton.com

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.

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HUNTON& WILLIAMS

UPDATE

February 2009

Contacts

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Timothy L. Jacobs
(202) 955-1669
tjacobs@hunton.com

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 permanent 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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HUNTON & WILLIAMS

UPDATE

January 2009

Contacts

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Timothy L. Jacobs
(202) 955-1669
tjacobs@hunton.com

Senate Finance Committee Releases Stimulus Bill; House Ways & Means Committee Passes House Version of Bill

On January 22, 2009, the House Ways & Means Committee, by a vote of 24-13, passed the tax titles of the "American Recovery and Reinvestment Tax Act of 2009," as amended by Chairman Rangel. The energy tax credit provisions in the bill were unchanged and are the same described in our previous alert. The Joint Committee on Taxation also released a description of the House Bill as introduced and a description of the changes made by the Chairman's amendment. The House of Representatives is expected to vote on the bill on Wednesday, January 28, 2009.

On January 23, 2009, the Senate Finance Committee released a summary of its version of the stimulus package (the "Senate Bill") and the Joint Committee on Taxation also released a description of the Senate Bill. (Statutory language for the Senate Bill is not yet available). The Senate Bill is scheduled to be marked-up by the Senate Finance Committee on Tuesday, January 27, 2009.

The energy tax credit provisions in the Senate Bill are very similar to the provisions contained in the bill passed by the House Ways & Means Committee on the previous day. However, the provisions are not identical, and the differences between the two bills will need to be reconciled.

Both appear to contain identical provisions regarding: (1) the extension of the Section 45 tax credit, (2) the election to claim investment tax credits in lieu of production tax credits, and (3) the repeal of the reduction in Section 48 tax credit basis due to the use of subsidized energy financing/private activity bonds. These provisions were described in our prior alert.

The Senate Bill does *not* contain the provision which would authorize the Department of Energy to provide grants in lieu of production or investment tax credits. However, the Senate Bill contains certain provisions, not contained in the House version of the stimulus package, which would:

- Permit taxpayers to carryback general business credits claimed in 2008 and 2009 for five years (rather than one year).
- Permit taxpayers to use general business credits carried to 2008 and 2009 to offset their entire income tax liability. In addition, taxpayers may carryback general business credits claimed in 2008 and 2009 to offset their entire income tax liability in the prior five years.
- 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, (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, or (4) manufacture equipment for use for carbon capture or sequestration.

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. 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.

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HUNTON & WILLIAMS

UPDATE

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Contacts

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Timothy L. Jacobs
(202) 955-1669
tjacobs@hunton.com

Senate Finance Committee Passes Stimulus Bill; House of Representatives Passes Its Version of Stimulus Bill

On January 28, 2009, the House of Representatives passed the House version of the stimulus bill by a vote of 244–188. The energy tax credit provisions were not modified and remain as described in our prior alert.

Also, on January 28, 2009, the Senate Finance Committee, by a vote of 14–9, passed the tax title of the "American Recovery and Reinvestment Tax Act of 2009," as amended by Chairman Baucus. The Chairman's Mark modified several of the energy tax credit provisions. Accordingly, there are now additional differences between the Senate and House versions of the energy tax title of the stimulus packages that will need to be reconciled in conference committee. The Joint Committee on Taxation released a description of the changes made by the Chairman's Mark. A draft of the legislative language for the tax provisions in the Senate stimulus bill is available here. The Senate is expected to vote on the bill sometime next week.

The Chairman's Mark made the following modifications to the energy tax credit provisions included in the original version of the Senate stimulus bill:

- The investment tax credit election in lieu of production tax credits would be available for certain Section 45 projects placed in service before the applicable deadline for such facilities under Section 45 of the Code, as modified by the stimulus bill. Accordingly, the ITC election generally would be available for Section 45 projects through the end of 2013 (2012 for wind). The prior Senate version of the bill (and the current House version) would have permitted only the election for Section 45 projects placed in service in 2009 and 2010.
- The proposed investment tax credit for qualified advanced energy manufacturing projects would be expanded to include projects that re-equip, expand or establish a manufacturing facility for property that is designed to refine or blend renewable fuels (but not fossil fuels), to produce renewable energy or to produce energy conservation technologies (including energy-conserving lighting technologies and smart grid technologies).

The Chairman's Mark also added the following energy tax credit modification:

- The Section 45Q tax credit for carbon dioxide sequestration would be modified to require that carbon dioxide used as a tertiary injectant

must be adequately secured and not escape into the atmosphere in order to qualify for the $10/metric ton tax credit. This provision would be effective for carbon dioxide captured after the date of enactment.

Finally, the draft legislative language provides additional information regarding certain energy tax credit provisions contained in the bill. (Note: It is unclear whether the bracketed provisions were included in the version of the bill that passed the Senate Finance Committee. The final, as-passed legislative language is not yet available.)

- Bracketed language in Section 1103 of the bill would repeal the credit limitation for the use of "subsidized energy financing" or private activity bond proceeds for Sections 48A (IGCC and other advanced coal-based generation projects), 48B (gasification projects) and 45K (fuel from a nonconventional source, but only with respect to subsidized energy financing).
- Section 1302 of the bill provides additional information regarding the proposed investment tax credit for qualified advanced energy manufacturing projects. Bracketed language would (a) eliminate the credit limitation for "subsidized energy financing" and private activity bond proceeds discussed above, (b) provide a limit on the amount of the credit available with respect to any one project, (c) provide certain to-be-determined selection criteria and priorities, (d) provide for a review and a redistribution of credits if certifications for certain projects are revoked and (e) provide for public disclosure of the successful applicants and the amount of credit received by the applicant. The bill also would (i) make the qualified progress expenditures rules available with respect to the credit and (ii) provide a definition of the "eligible property" for purposes of the credit (essentially, property that is "necessary" for the production of the qualifying equipment).

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HUNTON& WILLIAMS

UPDATE

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Contacts

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Timothy L. Jacobs
(202) 955-1669
tjacobs@hunton.com

Senate Finance Committee Releases Stimulus Bill; House Ways & Means Committee Passes House Version of Bill

On January 22, 2009, the House Ways & Means Committee, by a vote of 24-13, passed the tax titles of the “American Recovery and Reinvestment Tax Act of 2009,” as amended by Chairman Rangel. The energy tax credit provisions in the bill were unchanged and are the same described in our previous alert. The Joint Committee on Taxation also released a description of the House Bill as introduced and a description of the changes made by the Chairman’s amendment. The House of Representatives is expected to vote on the bill on Wednesday, January 28, 2009.

On January 23, 2009, the Senate Finance Committee released a summary of its version of the stimulus package (the “Senate Bill”) and the Joint Committee on Taxation also released a description of the Senate Bill. (Statutory language for the Senate Bill is not yet available). The Senate Bill is scheduled to be marked-up by the Senate Finance Committee on Tuesday, January 27, 2009.

The energy tax credit provisions in the Senate Bill are very similar to the provisions contained in the bill passed by the House Ways & Means Committee on the previous day. However, the provisions are not identical, and the differences between the two bills will need to be reconciled.

Both appear to contain identical provisions regarding: (1) the extension of the Section 45 tax credit, (2) the election to claim investment tax credits in lieu of production tax credits, and (3) the repeal of the reduction in Section 48 tax credit basis due to the use of subsidized energy financing/ private activity bonds. These provisions were described in our prior alert.

The Senate Bill does *not* contain the provision which would authorize the Department of Energy to provide grants in lieu of production or investment tax credits. However, the Senate Bill contains certain provisions, not contained in the House version of the stimulus package, which would:

- Permit taxpayers to carryback general business credits claimed in 2008 and 2009 for five years (rather than one year).
- Permit taxpayers to use general business credits carried to 2008 and 2009 to offset their entire income tax liability. In addition, taxpayers may carryback general business credits claimed in 2008 and 2009 to offset their entire income tax liability in the prior five years.
- 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, (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, or (4) manufacture equipment for use for carbon capture or sequestration.

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. 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.

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Contacts

Laura Ellen Jones
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-8746
ljones@hunton.com

David S. Lowman, Jr.
1900 K Street, NW
Washington, DC 20006-1109
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1980
dweisblat@hunton.com

Cameron N. Cosby
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074
(804) 788-8604
ccosby@hunton.com

Timothy L. Jacobs
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1669
tjacobs@hunton.com

House Ways and Means Committee Releases Stimulus Bill

On January 16, 2009, House Ways & Means Committee Chairman Rangel released the legislative language for the "American Recovery and Reinvestment Tax Act of 2009" (the "Bill"). In addition to various tax incentives for individuals, the Bill contains tax incentives for business, including extensions and modifications of certain energy tax credit provisions. A copy of the Bill is attached here.

Section 45

Section 1601 of 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

Section 48

Section 1602 of 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 in 2009 or 2010.

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 to 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.

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. Section 1603 of the Bill would repeal this limitation.

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. Section 1603 of the Bill would repeal this limitation (on a permanent 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) and 25D (residential energy efficient property) of the Code, effective for taxable years beginning after December 31, 2008.

Grants In Lieu of Tax Credits

Section 1721 of the Bill would provide grants rather than tax credits for certain specified energy property which is placed in service in 2009 or 2010. A taxpayer must apply to the Secretary of Energy in order to receive the grant. The Bill would provide that the Secretary of Energy shall provide such grants within 60 days of the application, the grants would be subject to the requirements of this section, and the application must be received before October 1, 2011. Section 1721(h) of the Bill would provide appropriations to the Secretary of Energy "such sums as may be necessary to carry out this section." Accordingly, Section 1721 sets no limitation on the amount of grants that the Secretary of Energy may make under this section. And, considering the mandatory "shall" language in Section 1721, it does not appear that the Secretary would have any discretion in providing the grants beyond the procedural requirements for the application. Rather, the grants would function in the same manner as the tax credits and be "off-the-shelf" in nature.

The grant would be 30% of the basis of such property in the case of: (1) wind, closed-loop, open-loop, geothermal, landfill gas, trash, hydropower and marine/hydrokinetic facilities, as described in section 45(d) of the Code (accordingly, similar to the investment tax credit election described above, it appears that only certain property would be eligible for a grant), (2) qualified fuel cell property (defined in section 48(c)(1) of the Code, but subject to the $1,500 per 0.5 kw limitation), (3) solar property (described in section 48(a)(3)(A)(i) or (ii) of the Code), or (4) any qualified small wind energy property (defined in section 48(c)(4) of the Code). The grant would be 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 geothermal currently is only eligible for a 10% investment tax credit under section 48 of the Code, this grant would allow 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 Energy would be directed to apply rules similar to section 50 of the Code. However, in the case of recapture, the Secretary of Energy would provide for the recapture of the "appropriate percentage of the grant amount in such manner as the Secretary of Energy determines appropriate." Accordingly, the Secretary of Energy has the discretion to shorten, lengthen or otherwise modify the 5-year recapture

period with respect to Section 1721 grants. In addition, the Secretary of Energy is directed not to make grants to any Federal, State, or local government (or any subdivision, agency, or instrumentality thereof) or any 501(c) organization which is tax-exempt.

Section 1604 of the Bill would amend section 48 of the Code to provide that if a taxpayer receives a grant under Section 1721 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 1721 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 1721 grant will be determined without regard to prior reductions to the basis of the property due to credits.

Section 1604 of the Bill would also provide that Section 1721 grants are not includible in the gross income of a taxpayer, but the amount of the Section 1721 grant will be taken into account in determining the basis of the property, except that the basis of such property shall be 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 1721 grant.

Proposed Extensions of Business Tax Provisions

The Bill also would extend two provisions previously enacted by the Economic Stimulus Act of 2008 (the "Stimulus Act") that affect business taxpayers. The extensions of the business provisions are explained below.

Extension of Bonus Depreciation Allowance for Certain Property

The Stimulus Act provided for an additional first-year depreciation deduction under Section 168(k) of the Internal Revenue Code of 1986, as amended (the "Code"), equal to 50 percent of the adjusted basis of qualified property. In order for property to be "qualified property" eligible for the additional first-year depreciation deduction, it has to meet certain requirements under Section 168(k) of the Code. The Bill would modify two of these requirements: (1) that the taxpayer must purchase the property within the "applicable time period" and (2) that the property must have been placed in service after December 31, 2007, and before January 1, 2009. The provision allowing for a one-year extension of the placed in service date for certain property would also be extended.

As originally enacted by the Stimulus Act, the applicable time period for acquired property is (1) after December 31, 2007, and before January 1, 2009, but only if no binding written contract for the acquisition is in effect before January 1, 2008, or (2) pursuant to a binding written contract that was entered into after December 31, 2007, and before January 1, 2009. With respect to property that is manufactured, constructed or produced by the taxpayer for use by the taxpayer, the taxpayer must begin the manufacture, construction or production of the property after December 31, 2007, and before January 1, 2009.

For certain property eligible for an extended placed in service date, a special rule limits the amount of costs eligible for the additional first-year depreciation. With respect to such property, only the portion of the basis that is properly attributable to the costs incurred before January 1, 2009, is eligible for the additional first-year depreciation.

The Bill would extend the applicable time period during which a taxpayer must purchase property to be eligible for the additional first-year depreciation deduction. Under the Bill, the applicable time period for acquired property would be (1) after December 31, 2007, and before January 1, 2010, but only if no binding contract for the acquisition is in effect before January 1, 2008, or (2) pursuant to a binding written contract that was entered into after December 31, 2007, and before January 1, 2010. With respect to property that is manufactured, constructed or produced by the taxpayer for use by the taxpayer, the Bill would provide that the taxpayer must begin the manufacture, construction or production of the property after December 31, 2007, and before January 1, 2010.

The Bill would also modify the placed in service requirement so that for property to be eligible for the additional first-year depreciation deduction, it must be placed in service after December 31,

2007, and before January 1, 2010. For certain property with a recovery period of 10 years or longer and certain transportation property, an extension of the placed in service date of one year (i.e., to January 1, 2011) would still be available. The limitation on the amount of costs eligible for the additional first-year depreciation for such property would be changed to include only the portion of the basis that is properly attributable to costs incurred before January 1, 2010.

Extension of the Temporary Increase in Limitations on Expensing Certain Depreciable Business Assets

Taxpayers that satisfy limitations on annual investment may elect under Section 179 of the Code to deduct (or "expense") the cost of qualifying property, rather than to recover such costs through depreciation deductions. In general, qualifying property is defined as depreciable tangible personal property purchased for use in the active conduct of a trade or business.

The Stimulus Act increased the maximum amount that a taxpayer could expense in taxable years beginning in 2008 from $128,000 to $250,000, and provided that the $250,000 amount was to be reduced (but not below zero) by the amount by which the cost of qualifying property placed in service during 2008 exceeds $800,000. The Bill would extend this temporary increase in the maximum amount a taxpayer can expense under Section 179 of the Code to taxable years beginning in 2009.

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UPDATE

October 2008

House and Senate Pass Extensions of Energy Tax Credits; President Likely to Sign

On October 3, 2008, the House passed H.R. 1424, the "Emergency Economic Stabilization Act of 2008" (the "Bill") by a vote of 263-171. A copy of the Bill is available here. The Senate previously passed the Bill on October 1, 2008, by a vote of 74-25. Thus, the Bill will now be sent to the President for signature and the White House has issued two Statements of Administration Policy indicating that the President will sign the Bill. Statements of Administration Policies are available here, October 1 and October 3, 2008.

The energy tax provisions are contained in the "Energy Improvement and Extension Act of 2008" division of the Bill that is referenced as Division B. These provisions are identical to those contained in the Senate-passed version of H.R. 6049, and were described in detail in a prior alert.

If you have any questions relating to the Bill, please contact us.

Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

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Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
(202) 955-1980
dweisblat@hunton.com

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

House Passes Bill to Extend Energy Tax Credit Provisions

On September 26, 2008, the House passed H.R. 7060, the "Renewable Energy and Job Act of 2008," (the "Bill"), by a vote of 257-166, and a copy of the Joint Committee on Taxation description of the Bill is available here.

The Bill differs from the substitute amendment to H.R. 6049 that the Senate passed on September 23 (the "Senate Bill"). See the "Senate Passes Bill to Extend Energy Tax Credit Provisions" Client Alert," September 2008.

Despite the passage of the Bill by the House, the enactment of energy tax credit extensions remains uncertain due to key differences between the House and Senate versions of the bills, particularly that the House version is fully offset while the Senate version is only partially paid for, but includes an AMT patch and disaster tax relief that are not included in the House version. The Senate has indicated that it will not consider the House version and the bodies may find themselves in a stalemate. The White House has endorsed the Senate version and has threatened to veto the House version. See the "Statement of Administration Policy." Because Congress is likely to return next week to work on the economic recovery act, they may be able to tackle the differences in the House and Senate bills as well.

Section 45

Extension

The Bill would extend the placed-in-service deadline for one year (through the end of 2009) for facilities producing electricity from wind. However, the Bill would extend the placed-in-service deadline for two years and three-quarters years (through the end of September 2011) for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste, and qualified hydropower. The Bill would not provide an extension for refined coal or Indian coal facilities. Finally, the Bill would eliminate the credit phase out, and in addition, the Bill contains an *investment-based limitation* on the credit amount for facilities placed in service after 2009. This limitation is substantially similar to the provision contained in a prior House bill. See the "Ways & Means Committee Passes Extenders Bill" Client Alert from May 2008.

Marine/Hydrokinetic

The Bill also would add marine and hydrokinetic renewable energy as a qualified resource under section 45. These provisions are very similar to those in the Senate Bill. The Bill 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 would include any such facility placed in service after the date of enactment and before October 1, 2011, 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 would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Bill would eliminate such facilities as a separate category.

Qualified Hydropower Production

Similar to the Senate Bill, the Bill would modify 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.

Other Section 45 Provisions

Also similar to the Senate Bill, the Bill would modify the definition of trash combustion facility by replacing the requirement that it burn municipal solid waste with a requirement that it be a facility (other than a landfill gas facility) that uses municipal solid waste in order to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity. In addition, the Bill would allow 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.

Section 48

Similar to the Senate Bill, the Bill would extend for eight years placed-in-service deadline (through the end of 2016) for solar energy, fuel cell, and microturbine property. The Bill would also permit the energy credit determined under section 48 to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after the date of enactment. The Bill would repeal the public utility exception applicable to energy property owned by public utilities for periods after February 13, 2008, in taxable years ending after such date. Finally, the Bill would raise 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 the date of enactment.

Combined Heat and Power Property

Similar to the Senate Bill, the Bill would add a new category of energy property to section 48 for combined heat and power 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 (i) at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power and (ii) produces at least 20 percent of its total useful energy in the form of electrical or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Bill) which exceeds 60 percent (with a special rule for systems using biomass); and (D) which is placed in service before January 1, 2017. CHP property would be eligible for the 10 percent energy credit under section 48, subject to various limitations based on electrical or mechanical capacity.

Section 48A/48B

The Bill would increase the section 48A credit for IGCC and other advanced coal projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional $950 million in credits to qualifying projects. The Bill would also increase the section 48B credit for qualifying gasification projects from the current credit rate of 20 percent to 30 percent and to permit the allocation of an additional $150 million in credits to qualifying projects. The allocation would be effective on the

date of enactment and the increase in the credit rate would be effective for the additional allocations.

The Bill would require (a) qualifying Section 48A projects to include equipment which separates and sequesters at least 65 percent of the project's total carbon dioxide (70 percent in the case of a reallocation) and (b) qualifying Section 48B projects to include equipment which separates and sequesters at least 75 percent of total carbon dioxide emissions. The Bill would provide for recapture of the credit if a project fails to attain or maintain these required levels of sequestration. In selecting qualifying projects, the Bill would require the Secretary to give the highest priority to projects with the greatest separation and sequestration and high priority to applicants that have a research partnership with an eligible educational institution.

Finally, the Bill would also require public disclosure of projects receiving credit allocations, including the identity of the taxpayer and the amount of the credit awarded.

Clean Renewable Energy Bonds

Notably, the Bill does not contain an extension of the Clean Renewable Energy Bond program.

Other Provisions

The Bill also contains various other provisions which would, among other things:

- Provide a five-year extension of the energy efficient commercial building deduction under section 179D.
- Provide an eight-year extension of the tax credit for residential energy efficient property under section 25D and make various modifications to the program.
- Extend and modify various tax credits available for certain liquid renewable fuels, including biodiesel, renewable diesel, and other alternative fuels.

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Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

Senate Passes Bill to Extend Energy Tax Credit Provisions

On September 23, 2008, the Senate passed the "Energy Improvement and Extension Act of 2008" (substitute amendment to H.R. 6049) (the "Bill") by a vote of 93-2. A copy of the Bill is available here. The Administration has issued a Statement of Administration Policy supporting the prompt passage of the Bill, despite the fact that the Administration opposes several provisions in the Bill. A copy of the SAP is attached.

Senate Majority Leader Reid has urged the House to pass the Senate version of the Bill in its current form in order to prevent a conference and to allow the Bill to be enacted. However, indications are that the House plans to vote on an amendment in the nature of a substitute to the Senate version of the Bill. If so, either the Senate will need to pass the revised House version of the bill, or the House and Senate versions of H.R. 6049 will need to be reconciled in conference committee. If the bills go to conference committee, any agreed upon final bill would have to be passed once again by both the House and the Senate. Because Congress has turned much of its attention this week to the ailing financial markets, it is not clear whether they will be able to reconcile the different versions of the energy extenders package before they break for recess. Another option is to try to conference during recess and hope to pass a conference bill during a lame duck session in either November or December, but this is not likely to be as politically advantageous as sending a final bill to the President before heading home for the November elections.

Section 45

Extension

The Bill would extend 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 Bill would extend 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 Bill does not provide an extension for Indian coal facilities and solar facilities (under section 45). In addition, the Bill does not contain an investment-based limitation on the credit amount as proposed in various House-passed energy tax credit extension bills.

Marine/Hydrokinetic

The Bill also would add marine and hydrokinetic renewable energy as a qualified resource under section 45. The Bill 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 would include any such facility placed in service after the date of enactment and before January 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 would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Bill terminates these facilities as a separate category.

Qualified Hydropower Production

The Bill would modify 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.

Other Section 45 Provisions

The Bill would modify the definition of refined coal by deleting the increased market value requirement and increasing the emission reduction requirement for sulfur dioxide or mercury from 20 percent to 40 percent. The Bill would also modify the definition of qualified trash combustion facilities to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity. Finally, the Bill would allow 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.

Steel Industry Fuel

The Bill would also provide that steel industry fuel is refined coal for purposes of section 45. The Bill defines steel industry fuel as a fuel that (a) is produced by liquifying 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 legislative language at this time is unclear) per barrel-of-oil equivalent 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 that would allow such facility to produce steel industry fuel were placed-in-service, or (iii) October 1, 2008, and ends on the later of (x) December 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 January 1, 2010. The steel industry fuel amendments would be effective for fuel produced and sold from facilities placed in service after September 30, 2008.

Section 48

The Bill would extend for eight years the placed-in-service deadline (through the end of 2016) for solar energy, fuel cell, and microturbine property. The Bill would also permit the energy credit determined under section 48 to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after the date of enactment. The Bill would repeal the public utility exception applicable to energy property owned by public utilities for periods after February 13, 2008, in taxable years ending after such date. Finally, the Bill would raise 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 the date of enactment.

Combined Heat and Power Property

The Bill would add a new category of energy property to section 48 for combined heat and power property (“CHP property”). CHP property is defined as property comprising a system: (A) that 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) that produces (i) at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power and (ii) produces at least 20 percent of its total useful energy in the form of electrical

or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Bill) that exceeds 60 percent (with a special rule for systems using biomass); and (D) that is placed in service before January 1, 2017. CHP property would be eligible for the 10 percent energy credit under section 48, subject to various limitations based on electrical or mechanical capacity.

Small Wind Property

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

Geothermal Heat Pump Systems

Finally, the Bill would add 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 January 1, 2017. Such property would be eligible for a 10 percent energy credit.

Clean Renewable Energy Bonds

The Bill would create a new category of clean renewable energy bonds ("New CREBs") to finance qualified renewable energy facilities that (a) qualify under section 45 (other than refined coal or Indian coal facilities and without regard to placed-in-service dates), and (b) are owned by public power providers ("PPPs"), governmental bodies, or cooperative electric companies ("CECs"). A PPP is a State utility with a service obligation, as such terms are defined in section 217 of the Federal Power Act.

The bond limitation for the New CREBs would be $800 million, of which no more than one-third may be allocated to projects of PPPs, governmental bodies, or CECs. Allocations to projects of PPPs would be made in such manner that the amount allocated to each such project bears the same ratio to the cost of such project as the maximum allocation limitation to projects of PPPs bears to the cost of all such projects.

Under the New CREBs program, 100 percent of the proceeds of New CREBs (less issuance costs of no more than 2 percent of the bond) and any investment earnings on such proceeds would be required to be used on capital expenditures for the project within three years of the date of issuance (with limited exceptions). The Bill also would provide that the tax credit rate for New CREBs is a rate that is 70 percent of the rate that would permit issuance of a New CREB without discount and interest cost to the issuer; the credit would be claimed against both regular and AMT tax liability; any unused credit could be carried forward; and credits could be "stripped" from the ownership of the bond, similar to the "stripping" of interest coupons for tax-exempt bonds.

Finally, the Bill extends the deadline for issuance of current allocations of "old" CREBs by one year — from December 31, 2008 to December 31, 2009.

The Bill would also create a new tax credit bond program for "qualified energy conservation bonds" ("QECBs"). The rules for QECBs are similar to those for New CREBs. Set forth below are the significant highlights of the QECB program under the Bill.

- QECB Purposes — projects related to reducing energy consumption in publicly-owned buildings by at least 20 percent; implementing green community programs; rural development involving renewable energy production; qualified facilities as determined under Section 45(d) (other than refined coal or Indian coal facilities and without regard to placed-in service dates) (i.e., the same projects that qualify under the New CREBs); certain research facilities generally involving increasing energy efficiency and reducing fossil fuel consumption; commuting facilities that reduce energy consumption (and pollution); certain demonstration projects; and energy efficiency public education campaigns.
- QECB Allocation — $800 million to be distributed among the States and further subdivided among large local governments (i.e., population of 100,000 or more), all proportionately based on population. Indian tribal governments are to be treated in the same manner as large local governments.

Section 48A/48B

The Bill would increase the section 48A credit for IGCC and other advanced coal projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional $1.25 billion in credits to qualifying projects. The Bill would also increase the section 48B credit for qualifying gasification projects from the current credit rate of 20 percent to 30 percent and to permit the

allocation of an additional $250 million in credits to qualifying projects. The allocation would be effective on the date of enactment and the increase in the credit rate would be effective for the additional allocations.

The Bill would require (a) qualifying Section 48A projects to include equipment which separates and sequesters at least 65 percent of the project's total carbon dioxide (70 percent in the case of a reallocation) and (b) qualifying Section 48B projects to include equipment which separates and sequesters at least 75 percent of total carbon dioxide emissions. The Bill would provide for recapture of the credit if a project fails to attain or maintain these required levels of sequestration. In selecting qualifying projects, the Bill would require the Secretary to give the highest priority to projects with the greatest separation and sequestration and high priority to applicants that have a research partnership with an eligible educational institution.

Finally, the Bill would also require public disclosure of projects receiving credit allocations, including the identity of the taxpayer and the amount of the credit awarded.

Other Provisions

The Bill also contains various other provisions that would, among other things:

- Provide a tax credit for the capture and sequestration of carbon dioxide at certain projects.
- Provide a five-year extension of the energy efficient commercial building deduction under section 179D.
- Provide an eight-year extension of the tax credit for residential energy efficient property under section 25D and make various modifications to the program.
- Extend and modify various tax credits available for certain liquid renewable fuels, including biodiesel, renewable diesel, and other alternative fuels.

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Contacts

Laura Ellen Jones
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8746
ljones@hunton.com

David S. Lowman, Jr.
1900 K Street, NW
Washington, DC 20006-1109
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1980
dweisblat@hunton.com

Timothy L. Jacobs
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1669
tjacobs@hunton.com

IRS Issues Interim Section 48 Guidance for Fuel Cell and Microturbine Projects

On August 25, 2008, the Internal Revenue Service issued Notice 2008-68 which provides interim guidance under Section 48 for fuel cells and microturbines (the "Notice"). A copy of the Notice is attached. Generally, the Notice recites the statutory requirements under Section 48 applicable to fuel cells and microturbines, but the Notice also provides additional guidance regarding certain of these requirements, as described below. In addition, while the Notice provides guidance relating to fuel cell and microturbines, certain of the guidance discussed below may also be applicable to other Section 48 projects, including solar and geothermal projects. The Notice is effective for property placed in service after August 25, 2008, but taxpayers may apply the provisions of the Notice to property placed in service after December 31, 2005 and before January 1, 2009.

Background

Section 48 provides a 30 percent investment tax credit for "qualified fuel cell property," which is a fuel cell power plant that (a) has a nameplate capacity of at least 0.5 kilowatt of electricity using an electrochemical process, (b) has an electricity-only generation efficiency greater than 30 percent, and (c) is within the credit period (after December 31, 2005 and before January 1, 2009). Section 48 also provides a 10 percent investment tax credit for "qualified microturbine property," which is a stationary microturbine power plant that (a) has a nameplate capacity of less than 2,000 kilowatts, (b) has an electricity-only generation efficiency of not less than 26 percent at International Standard Organization (ISO) conditions, and (c) is within the credit period (after December 31, 2005 and before January 1, 2009).

Additional Guidance

The Notice provides the following additional guidance:

- Determination of Nameplate Capacity — The nameplate capacity of a fuel cell power plant is the maximum electrical output of a generator as rated by the manufacturer at the normal operating conditions designated by the manufacturer. The nameplate capacity of a stationary microturbine power plant is the maximum electrical output of a generator as rated by the manufacturer and determined at ISO conditions.

- Certain Treasury Regulations Made Applicable — The Notice provides that certain Treasury Regulations apply for purposes of determining whether the original use of the property begins with

the taxpayer (Treas. Reg. § 1.48-2), whether depreciation (or amortization) is allowable to the taxpayer with respect to the property (Treas. Reg. § 1.48-1(b), when property is placed in service (Treas. Reg. § 1.46-3(d), and the basis of property (Treas. Reg. § 1.46-3(a) and (c)).

- Subsidized Energy Financing — The Notice clarifies that for purposes of Section 48(a)(4), "subsidized energy financing" does not include "a grant includible in gross income under § 61, a nontaxable government grant, or a credit against state or local taxes."
- Leased Facilities — The Notice states that the fuel cell or microturbine credit is allowed to the lessor of such a project if depreciation (or amortization) with respect to such project is allowable to the lessor.
- Mobile Fuel Cell Plants — The fuel cell tax credit is allowed with respect to a mobile fuel cell power plant if the plant otherwise meets the requirements under certain sections of the Notice.
- Generation Efficiency of a Fuel Cell Power Plant — The electricity-only generation efficiency of a fuel cell power plant may be determined in accordance with the ANSI/ASME PTC 50-2002 Fuel Cell Power Systems Performance standards or equivalent testing procedures under normal operating conditions using the lower heating value of the primary fuel.
- Generation Efficiency of a Stationary Microturbine Power Plant — The electricity-only generation efficiency of a stationary microturbine power plant may be determined in accordance with the ASME PTC 22-2005 Gas Turbines standards or equivalent testing procedures under ISO conditions using the lower heating value of the primary fuel.
- ISO Conditions — ISO conditions for purposes of determining both the nameplate capacity and generation efficiency of a stationary microturbine power plant are 59 degrees Fahrenheit, 60 percent relative humidity, and 14.696 psia.

For additional information, contact any of the attorneys listed on this alert, or visit our Energy Tax Credits Practice at www.hunton.com.

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Contacts

Laura Ellen Jones
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8746
ljones@hunton.com

David S. Lowman Jr.
1900 K Street, NW
Washington, DC 20006-1109
(202) 419-2070
dlowman@hunton.com

Francine E. Friedman
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1536
ffriedman@hunton.com

Timothy L. Jacobs
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1669
tjacobs@hunton.com

Senate Fails to Pass Extenders Bill with Energy Tax Credit Extensions Two More Times

On July 30, 2008, the Senate, by a vote of 51 to 43, failed to invoke cloture on S. 3335, the "Jobs, Energy, Families, and Disaster Relief Act of 2008" (the "Senate Bill"), introduced last week by Senator Baucus. Even if the measure had passed the Senate, the Administration issued a Statement of Administration Policy stating that the President's advisors recommended a veto of the Senate Bill.

In May, the House of Representatives passed an extenders bill which was described in a previous alert (the "House Bill"). On July 29, the Senate, by a vote of 53-43, also failed to invoke cloture on the House Bill for the third time. Congress adjourned on Friday, August 1 and is not scheduled to return for substantive work until the second week of September. Thus, the legislative days remaining in the session to pass an extension of the expiring energy tax credits are limited.

The energy tax credit provisions in the Senate Bill and House Bill are substantially similar, which suggests that the House and Senate have reached tentative agreements on the substance of the energy tax credit extensions. However, differences still remain that continue to frustrate the enactment of the extensions, including the debate over whether the extensions should be offset and how. Specifically, several Senate Republicans have expressed concern over adopting permanent changes to the tax code to pay for temporary extensions of the energy tax provisions.

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Hunton & Williams
Update

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Contacts

Christopher J. Ayers
One Bank of America Plaza
Suite 1400
421 Fayetteville Street
Raleigh, NC 27601
(919) 899-3129
cayers@hunton.com

Eric W. Hurlocker
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8644
ehurlocker@hunton.com

Laura Ellen Jones
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8746
ljones@hunton.com

Audrey C. Louison
1900 K Street, NW
Washington, DC 20006-1109
(202) 778-2262
alouison@hunton.com

Mark W. Menezes
1900 K Street, NW
Washington, DC 20006-1109
(202) 419-2122
mmenezes@hunton.com

Linda L. Walsh
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1526
lwalsh@hunton.com

Oregon PUC Rules in Favor of Third Party Solar Projects

On July 31, 2008, the Oregon Public Utility Commission ("Oregon PUC") issued an order in *In the Matter of Honeywell International, Inc. and Pacificorp*, Oregon PUC Docket DR-40, Order No. 08-388 (July 31, 2008), addressing a wide range of issues related to net-metering facilities that may signal a new trend in net-metering regulations. In the proceeding the Oregon PUC evaluated the regulatory ramifications for solar Energy Services Agreements ("ESAs") offered by Honeywell to customers whereby Honeywell finances, builds, owns and operates a solar photovoltaic system located on a customer's premises and sells the electricity generated by the solar facility to the customer. The customer enters into a net-metering arrangement with its electric utility under which energy produced by the solar facility in excess of the customer's load is delivered to the electric distribution system, and the customer receives a credit against the electricity it purchases from the utility.

Honeywell and Pacificorp had jointly requested that the Oregon PUC address questions related to the applicability of various Oregon utilities laws and regulations with respect to Honeywell's net-metering program.

In issuing the ruling, the Oregon PUC determined that Honeywell's customers are entitled to utilize net metering based on the statutory definition of net metering. The Oregon PUC also found that the legislature intended the term "customer-generator" to mean a "user of the net-metering facility" and determined that Honeywell's customers satisfied the definition. The Oregon PUC stated that the omission of ownership requirements in the current statutory framework did not compel customers to own any portion of the net-metering facility, but it reserved the right to impose ownership requirements in the future. The order also declined to address federal issues raised by some parties questioning whether such sales constituted wholesale sales of electricity, but noted FERC's recent pronouncement that no sale is deemed to occur in conjunction with the practice of net metering. Finally, the Oregon PUC determined that Honeywell is not a public utility under Oregon law.

The Oregon ruling clears the way for solar equipment providers to market ESAs to individual customers without risk of violating current Oregon utility regulations. The ruling also serves as one of the nation's first rulings directly addressing the issue of third party ownership of equipment used to produce power covered by net-metering arrangements. Several other states have identified potential issues regarding third party ownership of net-metering facilities, but have not, as yet, provided definitive guidance as to whether customers or equipment providers should be regulated as public utilities or as retail electricity providers. The issue has created concern in the solar industry at a time when net metering is becoming available in many states. While the Oregon decision clears the way for ESAs only within Oregon, it may be a bellwether as other states analyze their net-metering programs.

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UPDATE

June 2008

Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Washington Office
1900 K Street, NW
Washington, DC 20006-1109
(804) 788-8218 fax

David S. Lowman, Jr.
(202) 419-2070
dlowman@hunton.com

Timothy L. Jacobs
(202) 955-1669
tjacobs@hunton.com

IRS Issues "Unrelated Person" Guidance in a Revised Open-Loop Biomass Notice

On June 25, 2008, the Internal Revenue Service issued Notice 2008-60 (the "Notice"), which modifies Notice 2006-88 (section 45 guidance for electricity produced from open-loop biomass, the "Old Notice")) in certain respects, and which provides favorable guidance on the provisions requiring a sale to an unrelated person for purposes of all section 45 resources, including refined coal and Indian coal. A copy of the Notice is attached.

With respect to electricity produced from open-loop biomass, the Notice reflects amendments to the Code enacted since the publication of the Old Notice, which: (1) extended the placed in service deadline from before January 1, 2008 to January 1, 2009, and (2) deleted the requirement that solid, nonhazardous, cellulosic waste materials or lignin material be "segregated from other waste materials." The Notice also deletes the so-called "net sales rule" and corresponding examples contained in the Old Notice. That rule provided that if a taxpayer sold electricity produced from open-loop biomass to an unrelated person and the taxpayer (or a related person) simultaneously purchased electricity from an unrelated person for use at the same location, the electricity sale would be treated only as a sale to an unrelated person to the extent that the electricity sold exceeded the electricity purchased.

The Notice also provides that electricity or coal will be treated as sold to an unrelated person if the ultimate purchaser of the electricity or coal is not related to the taxpayer that produced the electricity or coal. Accordingly, intermediate sales of the electricity or coal to a related person will be ignored if such related person ultimately sells the electricity or coal to a person that is unrelated to the producer. This guidance favorably addresses a recent issue raised of whether sales of electricity by a partnership to a utility that (1) owns more than 50 percent of the interests in such partnership and (2) ultimately sells the electricity to its customers are sales to an "unrelated person" for purposes of section 45.

The effective date of the Notice is the same as the effective date for the Old Notice. Thus, intermediate sales that have occurred since the Old Notice was issued would be covered by the Notice on a retroactive basis. The Notice also provides that any modifications made by the Notice to the Old Notice will not be applied adversely to taxpayers for electricity produced before July 28, 2008.

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HUNTON& WILLIAMS

UPDATE

May 2008

Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Washington Office
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Andrew R. Kintzinger
(202) 955-1837
akintzinger@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Timothy L. Jacobs
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

Farm Bill Enacted; House Passes Extenders Bill—President Threatens Veto

Farm Bill

On May 21, 2008, the House, by a vote of 316-108, overrode the President's veto of the "Food, Conservation, and Energy Act of 2008" (H.R. 2419, the "Farm Bill"). The following day, the Senate, by a vote of 82-13, also overrode the veto. Not all of the bill, however, became law. The version of the bill sent to the President was missing the international food and trade title. The tax title of the bill, however, was enacted into law.

Qualified Forestry Conservation Bonds

The Farm Bill would create a new category of tax credit bonds, Qualified Forestry Conservation Bonds ("QFCBs"). QFCBs are tax credit bonds issued by a state or a section 501(c)(3) organization for the acquisition (from an unrelated person) of forest and forest land that meets the following requirements: (1) some portion of the land is adjacent to US Forest Service land; (2) at least one-half of the land must be transferred to the US Forest Service at no net cost and not more than one-half of the land may remain with or be donated to a State; (3) all of the land must be subject to a habitat conservation plan for native fish approved by the US Fish and Wildlife Service; and (4) the land must be at least 40,000 acres. QFCBs have a total allocation of $500 million which must be allocated within 24 months as the Secretary deems appropriate. The Secretary must also solicit QFCB allocation applications within 90 days of the date of enactment.

QFCBs are similar to Clean Renewable Energy Bonds and other tax credit bonds. However, there are some distinct differences between the programs. For example, QFCB tax credits may be "stripped"—the ownership of the QFCB and the entitlement to the tax credit may be separated. In addition, QFCBs generally are subject to the arbitrage requirements. However, proceeds invested during the three-year spending period are not subject to the arbitrage restrictions. Additional details regarding QFCBs are available in the attached Conference Report excerpt.

Section 48A and 48B

The Farm Bill would also amend Sections 48A and 48B of the Code to direct the Treasury Secretary to modify the terms of a certification award and closing agreement when the modification: (1) is consistent with the objectives of such section; (2) is requested by the recipient of the award; and (3) involves moving the project site to improve the potential to capture and sequester carbon dioxide emissions, reduce costs of transporting feedstock,

and serve a broader customer base. The Secretary must also consult with other relevant Federal agencies (e.g., the Department of Energy) when considering a modification. Such modification, however, is not required if the Secretary determines that the modification would result in an increase in the taxpayer's tax credit amount or would result in the project not being originally certified.

Extenders Bill

On May 21, 2008, the House, by a vote of 263-160, passed the "Renewable Energy and Job Creation Act of 2008" (the "Extenders Bill"). The energy tax credit provisions contained in the Extenders Bill were described in a previous alert. On the same day, the President issued a Statement of Administration Policy (the "SAP") that threatened a veto of the Extenders Bill in its current form due to its opposition to the revenue-raising provisions. The SAP states that the "administration supports the extension of the renewable energy production tax credit in the bill and believes that it can be improved" by "consolidating the [PTC] and other clean energy incentives into a single, expanded program with the following features: the incentive should be carbon weighted; technology-neutral; long lasting; and should take into account our Nation's energy security needs." The SAP, however, provides that the administration is "concerned about expensive and highly inefficient tax credit bonds for renewable energy production and conservation efforts." In addition, the administration strongly opposes the provision in the Extenders Bill that would make Davis-Bacon Act prevailing wage requirements applicable to Clean Renewable Energy Bond projects. The SAP notes that this provision also would result in a veto by the President.

CRS Report on Tax Credit Bonds

On April 28, 2008, the Congressional Research Service updated its report on Tax Credit Bonds. A copy of the report is attached here. The report generally describes the Qualified Zone Academy Bonds, Clean Renewable Energy Bonds and Gulf Tax Credit Bonds programs and includes a section evaluating an investment in tax credit bonds versus other bonds.

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UPDATE

May 2008

Contacts

Laura Ellen Jones
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8746
ljones@hunton.com

David S. Lowman Jr.
1900 K Street, NW
Washington, DC 20006-1109
(202) 419-2070
dlowman@hunton.com

Timothy L. Jacobs
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1669
tjacobs@hunton.com

Douglas E. Lamb
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8513
dlamb@hunton.com

Ways & Means Committee Passes Extenders Bill

On May 15, 2008, the House Ways and Means Committee passed the "Energy and Tax Extenders Act of 2008" (H.R. 6049) (the "Bill") by a vote of 25 to 12. The Bill includes $16.9 billion in energy tax incentives and is fully offset by certain tax changes. The Bill is expected to be considered by the full House of Representatives as early as this week (week of May 19). A copy of the Bill is available here and a copy of the Joint Committee on Taxation explanation is available here. The Senate Finance Committee is expected to mark up its version of the extenders bill (S. 2886) after the Memorial Day recess. The energy tax credit provisions contained in the Senate version of an extenders bill were described in a prior email alert.

Section 45

Extension

The Bill would extend for three years the placed-in-service deadline (through the end of 2011) for facilities producing electricity from closed-loop biomass, open-loop biomass, geothermal energy, municipal solid waste and qualified hydropower. However, the Bill would extend for only one year the placed-in-service deadline for wind facilities. Extensions were not provided for solar, refined coal and Indian coal facilities.

Marine/Hydrokinetic

The Bill also adds marine and hydrokinetic renewable energy as a qualified resource under Section 45. The Bill 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 nonmechanical 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 would include any such facility placed in service after the date of enactment and before January 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 would be one-half of the full credit amount. Note that the definition of marine and hydrokinetic renewable energy facilities subsumes small irrigation facilities and, consequently, the Bill terminates these facilities as a separate category.

Phaseout Repeal/Investment-Based Limitation

The Bill repeals the current phaseout for facilities placed in service after 2008. The Bill replaces the phaseout with an *investment-based limitation* for facilities placed in service after 2009. This limitation is based on an "applicable percentage," which is defined for any month as the percentage that yields over a 10-year period amounts of limitation that have a present value equal to 35 percent of the

eligible basis of the facility. For purposes of the calculation, the discount rate is the greater of 4.5 percent or 110 percent of the long-term federal rate.

The eligible basis of a facility is generally its basis at the time it is originally placed in service. However, special rules apply for determining the eligible basis of shared property at a project (e.g., allocation of shared property at a wind farm among separate wind facilities). Under the special rule, the basis of the "shared qualified property" is allocated in proportion to the projected generation from the qualified facilities. Also, in the case of a qualified geothermal facility, the eligible basis includes intangible drilling and development costs.

The Bill would provide a special election to treat all qualified facilities that are part of the same project and that are placed in service during the same calendar year as a single facility placed in service at either the midpoint of such year or the first day of the following calendar year.

Special rules would also be provided for calculating the credit for the first and last years of the 10-year credit period and for carrying forward any unused limitation and excess credit.

Qualified Hydropower Production

The Bill would modify the definition of a 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.

Other Section 45 Provisions

The Bill would modify the definition of qualified trash combustion facilities to cover facilities that gasify municipal solid waste and then burn the gas to generate electricity. The Bill would also allow 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 Bill would modify the unrelated person rule to clarify that sales of electricity by a partnership to a regulated public utility partner would not fail the unrelated person rule and such sales would qualify for the credit.

Section 48

The Bill would extend for six years the placed-in-service deadline (through 2014) for solar energy, fuel cell and microturbine property. The Bill would also permit the energy credit determined under Section 48 to be used as a credit against the alternative minimum tax, effective for credits determined in taxable years beginning after the date of enactment. The Bill would repeal the public utility exception applicable to energy property owned by public utilities for periods after February 13, 2008, in taxable years ending after such date. Finally, the Bill would raise 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 the date of enactment.

Combined Heat and Power Property

The Bill would add a new category of energy property to Section 48 for combined heat and power property ("CHP property"). CHP property is defined as property comprising a system: (A) that 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) that produces (i) at least 20 percent of its total useful energy in the form of thermal energy that is not used to produce electrical or mechanical power and (ii) produces at least 20 percent of its total useful energy in the form of electrical or mechanical power (or a combination thereof); (C) has an energy efficiency percentage (as defined in the Bill) that exceeds 60 percent; and (D) that is placed in service before January 1, 2015. CHP property would be eligible for the 10 percent energy credit under Section 48, subject to various limitations based on electrical or mechanical capacity.

Clean Renewable Energy Bonds

The Bill would create a new category of clean renewable energy bonds ("New CREBs") to finance qualified renewable energy facilities that (a) qualify under Section 45 (other than refined coal or Indian coal facilities and without regard to placed-in-service dates), and (b) are owned by public power providers ("PPPs"), governmental bodies or cooperative electric companies ("CECs"). A PPP is a state utility with a service obligation, as such terms are defined in Section 217 of the Federal Power Act.

The bond limitation for the New CREBs would be $2 billion, of which no more than one-third may be allocated to projects of PPPs, governmental bodies or CECs. Allocations to projects of PPPs would be made in such a manner that the amount allocated to each such project bears the same ratio to the cost of such project as the maximum allocation limitation to projects of PPPs bears to the cost of all such projects.

Under the New CREBs program, 100 percent of the proceeds of New CREBs (less issuance costs of no more than 2 percent of the bond) and any investment earnings on such proceeds would be required to be used on capital expenditures for the project within three years of the date of issuance (with limited exceptions). The Bill also would provide that: the tax credit rate for New CREBs is a rate that is 70 percent of the rate that would permit issuance of a New CREB without discount and interest cost to the issuer; the credit would be claimed against both regular and AMT

tax liability; any unused credit could be carried forward; and credits could be "stripped" from the ownership of the bond, similar to the "stripping" of interest coupons for tax-exempt bonds.

Interestingly, under the Bill, a New CREB would also require the issuer to certify that applicable financial conflicts of interests laws are satisfied concerning the New CREB issuance. In addition, the Bill would provide that certain labor standards would apply to projects financed with New CREBs or the new tax credit bond program described below.

The Bill would also create a new tax credit bond program for "qualified energy conservation bonds" ("QECBs"). The rules for QECBs are similar to those for New CREBs. Set forth below are the significant highlights of the QECB program under the Bill.

- QECB Purposes — projects related to reducing energy consumption in publicly owned buildings by at least 20 percent; implementing green community programs; rural development involving renewable energy production; qualified facilities as determined under Section 45(d) (other than refined coal or Indian coal facilities and without regard to placed-in service dates) (i.e., the same projects that qualify under the New CREBs); certain research facilities generally involving increasing energy efficiency and reducing fossil fuel consumption; commuting facilities that reduce energy consumption (and pollution); certain demonstration projects; and energy efficiency public education campaigns.
- QECB Allocation — $3 billion to be distributed among the states and further subdivided among large local governments (i.e., with populations of 100,000 or more), all proportionately based on population. Indian tribal governments are to be treated in the same manner as large local governments.

Section 48A/48B

The Bill would increase the Section 48A credit for IGCC and other advanced coal projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional $1.25 billion in credits to qualifying projects. The Bill would also increase the Section 48B credit for qualifying gasification projects from the current credit rate of 20 percent to 30 percent and permit the allocation of an additional $250 million in credits to qualifying projects. The allocation would be effective on the date of enactment and the increase in the credit rate would be effective for the additional allocations.

The Bill would require (a) qualifying Section 48A projects to include equipment that separates and sequesters at least 65 percent of the project's total carbon dioxide (70 percent in the case of a reallocation) and (b) qualifying Section 48B projects to include equipment that separates and sequesters at least 75 percent of total carbon dioxide emissions. The Bill would provide for recapture of the credit if a project fails to attain or maintain these required levels of sequestration. In selecting qualifying projects, the Bill would require the secretary to give the highest priority to projects with the greatest separation and sequestration and high priority to applicants that have a research partnership with an eligible educational institution.

The Bill would also require public disclosure of projects receiving credit allocations, including the identity of the taxpayer and the amount of the credit awarded. The Bill also prescribes certain requirements for modifying competitive certification awards and closing agreements about Section 48A projects.

Excelsior Energy Receives Second Round Section 48A Tax Credit Allocation

On May 7, 2008, Excelsior Energy announced that it received an allocation of $133.5 million in Section 48A tax credits for its Mesaba project. A copy of the press release is available here. To date, none of the Treasury, the IRS or the Department of Energy has announced the results of the second round of allocations.

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UPDATE

May 2008

Contacts

Laura Ellen Jones
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8746
ljones@hunton.com

David S. Lowman Jr.
1900 K Street, NW
Washington, DC 20006-1109
(202) 419-2070
dlowman@hunton.com

David B. Weisblat
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1980
dweisblat@hunton.com

Cameron N. Cosby
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8604
ccosby@hunton.com

Timothy L. Jacobs
1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1669
tjacobs@hunton.com

IRS Rules Solar System at Low-Income Housing Project Not Financed with Private Activity Bond Proceeds

On May 16, 2008, the Internal Revenue Service released PLR 200820011 which holds that a taxpayer was not required to reduce its basis in a solar system subsequently installed at a low-income housing project. The housing project, but not the solar system, was financed using the proceeds of private activity bonds. A copy of the PLR is available by clicking here.

In PLR 200820011, the taxpayer was a partnership which was formed to construct, operate, manage, etc. a low-income housing project that was expected to be eligible for the low-income housing credit under section 42 of the Code. The cost of the housing project was funded by various sources, including the proceeds of multifamily housing revenue bonds (i.e., proceeds of a private activity bond within the meaning of section 141 of the Code). At the time the taxpayer acquired the land and obtained the financing for the project, the project's plans and budget included only conventional energy systems. However, the taxpayer contemplated adding a solar system to the project at a later date. Accordingly, the bond loan documents were amended to allow the taxpayer to add the solar system provided that the system was redundant, not financed with bond loan proceeds, and not used as collateral for the bond loan. The taxpayer later added the "redundant" solar system to the project which the taxpayer anticipated would be eligible for section 48 tax credits.

Section 48(a)(4) provides for a reduction in basis for purposes of the section 48 investment tax credits if the property is financed (in whole or in part) by (i) subsidized energy financing, or (ii) the proceeds of a private activity bond (within the meaning of section 141) the interest on which is exempt from tax under section 103.

The Service concluded that the taxpayer was not required to reduce its basis in the solar system because: (i) the bond loan documents contain language prohibiting the bond loan proceeds from being used as financing for the system, (ii) bond loan proceeds were not used to finance the system, (iii) the system is redundant, and (iv) the system is not and cannot be used as collateral for the bond loan.

Private letter rulings may not be used or cited as precedent and are only applicable to the taxpayer who requested the ruling.

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Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

David S. Lowman Jr.
(804) 788-8789
dlowman@hunton.com

Timothy L. Jacobs
(804) 788-8362
tjacobs@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

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

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.

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Contacts

Richmond Office
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

David S. Lowman, Jr.
(804) 788-8789
dlowman@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Timothy L. Jacobs
(804) 788-8362
tjacobs@hunton.com

Energy Tax Provisions Removed from Stimulus; House Introduces Energy Tax Bill

On February 7, 2008, the House and Senate passed a fiscal stimulus package which did not contain an extension of the various energy tax credit provisions. The provisions were dropped after the Senate again failed by one vote to invoke cloture and limit debate on the bill. The President signed the bill into law on February 13, 2008. While the stimulus package does not contain an extension of the tax credits, it contains a bonus depreciation provision which may be applicable to energy tax credit property if the various requirements are met. Details regarding such requirements are provided in the attached Client Alert.

On February 13, 2008, House Ways & Means Committee Chairman Rangel introduced the "Renewable Energy and Energy Conservation Tax Act of 2008" (the "House Bill"). The provisions of the House Bill are substantially similar (but not identical) to the provisions contained in the energy bill passed by the House of Representatives last December. Again, the extension of the various energy tax provisions is funded, in part, by revenue raised through a repeal or reduction in tax incentives that are available to oil and gas companies. The House may vote on this legislation the week after the Presidents Day recess (the week of February 25th). However, in light of prior opposition in the Senate and by the President to the proposed revenue raiser, the outlook on the enactment of these energy tax incentive provisions continues to be uncertain.

Section 45 Provisions

Extension of Placed in Service Date

The placed in service deadline for most qualified facilities would be extended for three years, from January 1, 2009, to January 1, 2012. However, the placed in service deadline for solar facilities (January 1, 2006) and refined coal and Indian coal production facilities (January 1, 2009) would not be extended.

Limitation of Credit Amount

The phase out of the credit would be eliminated and replaced with a limitation of the credit based on the investment in a facility essentially equal to 35 percent of the capital costs of the facility. This limitation would be effective only for facilities placed in service after December 31, 2009. Under the limitation, the Section 45 tax credits with respect to a facility for any taxable year may not exceed the eligible basis of the facility multiplied by an "applicable percentage" for the month the facility is placed in service. If a facility's production is more or less than the limitation amount, excess amounts may be carried forward, but not beyond the facility's 10-year credit period.

A taxpayer may make an election to treat all qualified facilities that are part of the same project and placed in service in the same calendar year as one facility that is placed in service at the mid-point of the calendar year, or the first day of the following calendar year.

The applicable percentage will be determined by the Secretary of Treasury and will be a percentage "which [yields] over a 10-year period amounts of limitation…which [has] a present value equal to 35 percent of the eligible basis of the facility." The present value will be determined as of the last day of the first year of the 10-year credit period and will use a discount rate equal to the greater of (i) 4.5 percent or (ii) 110 percent of the Federal long-term rate under section 1274(d) for the month preceding the month for which the percentage is determined.

The "eligible basis" of the facility is the basis of the facility determined at the time the facility is placed in service and the portion of the basis of any "shared qualified property which is properly allocable to such facility." Shared qualified property is property which qualifies for 5-year MACRS under section 168(e)(3)(B)(vi) which (i) a qualified facility will require for utilization of such facility, and (ii) is not a "qualified facility." For example, certain material handling equipment used in connection with an open-loop biomass facility that would not be part of the "qualified facility" under IRS Notice 2006-88 and which qualifies for 5-year MACRS would be included in the eligible basis of the facility for purposes of the credit limitation calculation. In addition, the bill provides that the eligible basis of a geothermal facility includes intangible drilling and development costs described in section 263(c) even though such costs are expensed.

Modifications to Trash Combustion and Open- and Closed-Loop Facility Definitions

The House 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 House Bill would also provide that a new unit placed in service in connection with an open-loop biomass facility or a closed-loop biomass facility would qualify for the tax credits to the extent of the increased amount of electricity produced at the facility by reason of such unit. However, the provision does not define what equipment would constitute a "new unit."

Addition of Marine Renewables

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 non-mechanical 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, 2012 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.

Section 48 Provisions

The House Bill would extend the 30 percent ITC for solar and fuel cell property for eight years (from January 1, 2009 to January 1, 2017). The bill would also increase the tax credit limitation of $500 per 0.5 kilowatt of capacity for qualified fuel cell property to $1,500. 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 House Bill did not contain an expansion of the 30 percent ITC to include combined heat and power system property as was contained in the prior energy tax bill passed by the House.

Clean Renewable Energy Bonds and Other Tax Credit Bonds

The House Bill would create a new category of clean renewable energy bonds ("New CREBs") to finance qualified renewable energy facilities that (a) qualify under Section 45 (other than refined

coal or Indian coal facilities and without regard to placed-in-service dates), and (b) are owned by public power providers ("PPPs") or cooperative electric companies ("CECs"). Interestingly, the House Bill excludes facilities owned by governmental bodies. The bond limitation for the New CREBs would be $2 billion, of which not more than 60 percent of the total would be allocated to PPPs, and not more than 40 percent would be allocated to CECs. Allocations to PPP projects would be made *pro rata* to each project compared to the total amount requested. As an example, if $1.5 billion is requested in allocation of New CREBs for PPP projects, each PPP project would receive 80 percent of its requested allocation. On the other hand, allocations of CEC projects would be made in a manner determined by Treasury.

Under the New CREBs program, 100 percent of the proceeds of New CREBs (less issuance costs of no more than 2 percent of the bond) and any investment earnings on such proceeds would be required to be used on capital expenditures for the project within three years of the date of issuance (with limited exceptions). The House Bill also would provide that the tax credit rate for New CREBs is a rate that is 70 percent of the rate that would permit issuance of a New CREB without discount and interest cost to the issuer; the credit would be claimed against both regular and AMT tax liability; any unused credit could be carried forward; and credits could be "stripped" from the ownership of the bond, similar to the "stripping" of interest coupons for tax-exempt bonds. Interestingly, under the House Bill, a New CREB would also require the issuer to certify that applicable conflicts of interests laws are satisfied in regard to the New CREB issuance. In addition, the House Bill would provide that certain labor standards would apply to projects financed with New CREBs or the new tax credit bond program described below.

The House Bill would also create a new tax credit bond program for "qualified energy conservation bonds" ("QECBs"). The rules for QECBs are similar to those for New CREBs.

Set forth below are the significant highlights of the QECB program under House Bill.

- QECB Purposes - projects related to reducing energy consumption in public buildings by at least 20 percent; implementing green community programs; rural development involving renewable energy production; qualified facilities as determined under Section 45(d) (other than refined coal or Indian coal facilities and without regard to placed-in-service dates) (i.e., the same projects that qualify under the New CREBs); certain research facilities generally involving increasing energy efficiency and reducing fossil fuel consumption; commuting facilities that reduce energy consumption (and pollution); certain demonstration projects; and energy efficiency public education campaigns.
- QECB Allocation - $3.6 billion to be distributed among the states and further subdivided among large local governments (i.e. population of 100,000 or more), all proportionately based on population. Indian tribal governments are to be treated in the same manner as large local governments.

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IRS Announces Section 48A Special Allocation Round

On February 13, 2008, the IRS issued Notice 2008-26 which announces and describes the procedures for a special allocation round for $133,500,000 of Section 48A tax credits for IGCC projects using bituminous coal as a primary feedstock. This special allocation round is to accelerate the reallocation of the tax credits that were forfeited by TECO after it abandoned the plans for its proposed IGCC plant. Click here for additional information.

For this special allocation round, the application for DOE certification must be postmarked after February 13, 2008 and on or before May 2, 2008 and the application to the IRS must be postmarked after February 13, 2008 and before June 3, 2008. Generally, the same application procedures as set forth in Notice 2007-52 apply for purposes of this special allocation round. Taxpayers that previously applied for an allocation of Section 48A tax credits for a bituminous IGCC project must resubmit an application in order to be considered during this special allocation round. Taxpayers will be notified by July 31, 2008 as to whether they received an allocation of Section 48A tax credits. A copy of Notice 2008-26 is attached.

Contacts

Richmond Office
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Timothy L. Jacobs
(804) 788-8362
tjacobs@hunton.com

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Contacts

Richmond Office
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Second Round CREB Allocations; CREB Extension Removed from Stimulus Package

CREB Allocation

On February 8, 2008, the Internal Revenue Service released Information Release 2008-016 which provides information regarding the second round allocations of Clean Renewable Energy Bonds (CREB) awarded for 312 projects. The Service received 342 applications requesting $897 million in CREB allocations. Approximately $477 million of CREBs were awarded in the second round (the additional $77 million were from first round CREB allocations that were returned). In the second round, governmental bodies received allocations ranging from $15,000 to $2,950,000, and cooperatives received allocations ranging from $300,000 to $30,000,000. A copy of the CREB Information Release is available by clicking here. Information regarding the 310 projects which received CREB allocations (and whose applicants consented to disclosure) is available by clicking here.

Stimulus Package

On February 7, 2008, the House and Senate passed a fiscal stimulus package which did not contain an extension of the CREB program (or other energy tax incentives). The provisions were dropped after the Senate again failed by one vote to invoke cloture and limit debate on the bill. It is expected, however, that an energy tax package may be introduced and debated by the House of Representatives next week. Again, the extension of the various energy tax provisions (including CREBs) is expected to be funded, in part, by revenue raised through a repeal or reduction in tax incentives that are available to oil and gas companies. In light of prior opposition in the Senate and by the President to this revenue raiser, the outlook on the ultimate enactment of such energy tax incentives continues to be uncertain.

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Contacts

Richmond Office
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

David S. Lowman, Jr.
(804) 788-8789
dlowman@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Timothy L. Jacobs
(804) 788-8362
tjacobs@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
Hunton & Williams LLP
1900 K Street NW
Washington, DC 20006
(202) 955-1500
(202) 778-2201 fax

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Senate Finance Committee Passes Extension of Energy Tax Credit Provisions

On January 30, 2008, the Senate Finance Committee passed, by a vote of 14-7, the Economic Stimulus Act of 2008 (the "Senate Bill"). The Senate Bill contains a one-year extension of the placed-in-service deadline (through December 31, 2009) for the Section 45 production tax credit for the production of electricity from certain renewable resources. The one-year extension would also apply to refined coal facilities, but would not apply to solar or Indian coal facilities. The Senate Bill also contains a one-year extension of the 30 percent investment tax credit under Section 48 for solar energy property and qualified fuel cell power plants and the 10 percent investment tax credit under Section 48 for qualifying stationary micro-turbine power plants.

The Senate Bill would provide an additional $400 million in Clean Renewable Energy Bonds ("CREBs"), which must be issued prior to January 1, 2010. Under current law, an equal amount of principal must be paid by the qualified issuer during each *calendar year* that the CREB is outstanding. Accordingly, CREBs issued near the end of the calendar year are required to make a principal payment before the end of the year. However, the Senate Bill would modify the CREBs' amortization requirement such that amortization is not required until after the first 12-month period that the CREBs are outstanding and would eliminate the requirement to make a principal payment at the end of the first *calendar year*.

Copies of the Joint Committee on Taxation's description of the original version of the Senate Bill and the Chairman's Modification to the Senate Bill are attached: http://www.house.gov/jct/x-11-08.pdf and http://www.house.gov/jct/x-8-08.pdf.

The Senate is expected to consider and vote on the Senate Bill on Monday. However, as with past energy tax legislation, the proposals again could be removed in an effort to conform the Senate Bill to the Recovery Rebates and Economic Stimulus for the American People Act of 2008 (the "House Bill"), passed by the House of Representatives on January 29, 2008. The House Bill did not contain any extensions of energy tax credit provisions and certain House and Senate leaders are concerned that additional provisions will delay the passage of an economic stimulus package. Moreover, if the energy tax credit provisions survive a vote on the Senate floor, the provisions would also have to survive a House-Senate conference to reconcile the differences between the two bills. Accordingly, despite strong bipartisan support, the passage of the proposals in the Senate Bill remains uncertain.

The House Bill and the Senate Bill also contain provisions that would provide for additional depreciation deductions for certain qualified property. The Senate Bill would provide an additional depreciation deduction equal to 25 percent of the adjusted basis of qualified property for the first and second taxable years.

The House Bill would provide an additional depreciation deduction equal to 50 percent of the adjusted basis of qualified property for the first taxable year. If enacted, such additional depreciation deductions may be available for projects that also qualify for Section 45 or 48 tax credits, provided that the various requirements are met and the property is placed in service before January 1, 2009.

For additional information, visit the Energy Tax Credit Practice and the Clean Renewable Energy Bonds Practice.

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Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

David S. Lowman Jr.
(804) 788-8789
dlowman@hunton.com

James F. Miller
(202) 955-1934
jfmiller@hunton.com

Francine E. Friedman
(202) 955-1536
ffriedman@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Timothy L. Jacobs
(804) 788-8362
tjacobs@hunton.com

President Signs Energy Bill Into Law; Energy Tax Provisions Not Included

On December 18, 2007, the House passed, by a vote of 314-100, the Senate version of H.R. 6, which did not contain an extension of various energy tax credit provisions as proposed in the original House-passed version of the bill. Accordingly, the placed-in-service deadline for Section 45 and Section 48 and the Clean Renewable Energy Bonds (CREBs) and Section 48A/48B programs were not extended. On December 19, the President signed H.R. 6 into law. Senate and House leaders have stated that they will bring back the energy tax package for a vote in the early part of 2008.

However, there are several provisions in the Senate version of the Farm Bill (H.R. 2419) and the Tax Technical Corrections Act of 2007 (H.R. 4195 and S. 2374) that would amend several of these energy tax credit programs. The differences between the House and Senate versions of the farm bill will need to be resolved in a conference committee. The bill is currently expected to be completed by January 2008. The technical corrections bill provisions were added to the military tax bill (H.R. 3997) which passed the House on December 18 and is expected to pass the Senate in the near future.

Section 45

The Senate-passed version of the farm bill would provide an exception to the requirement that the Section 45 tax credit for certain types of government financing for any financing to farmers, ranchers, or rural small businesses issued by the Secretary of Agriculture under authority granted by section 9006 of the Farm Security and Rural Investment Act of 2002. This provision would be effective for facilities placed in service after the date of enactment of the bill.

The technical corrections bill contains provisions which would (i) eliminate the requirement that open-loop biomass be segregated from other waste materials in order to qualify for the section 45 tax credit, (ii) clarify that the limitation on the credit amount for facilities that co-fire closed-loop biomass with other fuels based on the thermal content of the closed-loop biomass applies only once, and (iii) clarify that the production from wind facilities placed in service prior to June 30, 1999 that is sold under certain pre-1987 contracts is not disqualified solely due to a change in ownership of the facilities after June 30, 1999.

Section 48

The Senate-passed version of the farm bill would create a new 30% investment tax credit (capped at $4,000 per year) for qualified residential and commercial applications of small wind energy property (100 kilowatts or less and which meets the performance standard of the American Wind Energy Association). The credit would be allowed for expenditures after

December 31, 2007 for property placed in service prior to January 1, 2009.

Section 48A/48B

The technical corrections bill provides that the Secretary of Treasury is directed to modify the terms of any competitive certification award and any associated closing agreement under section 48A or 48B (in consultation with the other relevant Federal agencies, including the Department of Energy) where the modification: (a) is consistent with the objectives of this provision, (b) is requested by the taxpayer, and (c) involves moving the project site to improve the potential to capture and sequester carbon dioxide emissions, reduce costs of transporting feedstock, and serve a broader customer base, unless the Secretary determines that (y) the dollar amount of tax credits available to the taxpayer would increase or (z) the modification would result in the project not being originally certified. The provision was previously included in the version of the House energy bill.

CREBs and Other Tax Credit Bonds

The Senate-passed version of the farm bill would create two new categories of tax credit bonds: Rural Renaissance Bonds with a total allocation of $400 million for projects such as rural electric, distance learning and telemedicine programs, rural telephone, broadband access, and rural community facility programs, and Qualified Forestry Conservation Bonds (QFCB) with a total allocation of $500 million for qualified forestry projects designed to acquire land subject to native fish habitat conservation plans for conservation purposes. Note that the bill would allow the QFCB tax credits to be stripped (i.e., the bill allows for the separation of the ownership of the QFCB and the entitlement to the tax credit). However, this provision does not apply to Rural Renaissance Bonds.

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Contacts

Richmond Office
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

David S. Lowman, Jr.
(804) 788-8789
dlowman@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Washington Office
Hunton & Williams LLP
1900 K Street NW
Washington DC 20006
(202) 955-1500
(202) 778-2201 fax

James F. Miller
(202) 955-1934
jfmiller@hunton.com

House Passes Energy Tax Bill—Extension and Modification of Section 45

Yesterday, the House of Representatives passed, by a vote of 235-181, an energy bill that would extend and modify various energy tax credits, including the section 45 tax credit for the production of electricity from renewable energy resources. The provisions are substantially similar to the energy tax bill which passed the House earlier this year (H.R. 2776), but certain revisions have been made to the provisions.

However, today, the Senate rejected a motion to limit debate on the bill and thus, failed to consider the House energy bill. Accordingly, the prospects for passage of an energy bill with a tax title remains highly uncertain. In addition, President Bush has threatened to veto the bill in its current form. A copy of the Statement of Administration Policy can be obtained by clicking here.

Clean Renewable Energy and Conservation Tax Act of 2007 (House Version)

The placed in service deadline for most qualified facilities would be extended for four years, from January 1, 2009, to January 1, 2013. However, the placed in service deadline for solar facilities (January 1, 2006) and refined coal and Indian coal production facilities (January 1, 2009) would not be extended.

The phase out of the credit would be eliminated and replaced with a limitation of the credit based on the investment in a facility essentially equal to 35% of the capital costs of the facility. This limitation would be effective only for facilities placed in service after December 31, 2008. Under the limitation, the Section 45 tax credits with respect to a facility for any taxable year may not exceed the eligible basis of the facility multiplied by an "applicable percentage" for the month the facility is placed in service. If a facility's production is more or less than the limitation amount, excess amounts may be carried forward, but not beyond the facility's 10-year credit period. A taxpayer may make an election to treat all qualified facilities that are part of the same project and placed in service in the same calendar year as one facility that is placed in service at the mid-point of the calendar year or the first day of the following calendar year.

The applicable percentage will be determined by the Secretary of Treasury and will be a percentage "which [yields] over a 10-year period amounts of limitation…which [has] a present value equal to 35% of the eligible basis of the facility." The present value will be determined as of the last date of the 1st year of the 10-year credit period and will use a discount rate equal to the greater of (i) 4.5% or (ii) 110% of the Federal long-term rate under

section 1274(d) for the month preceding the month for which the percentage is determined. This is a change from H.R. 2776 which provided that the discount rate would be the average annual interest rate of tax-exempt obligations issued in the prior month having a term of ten years or more.

The "eligible basis" of the facility is the basis of the facility determined at the time the facility is placed in service and the portion of the basis of any "shared qualified property which is properly allocable to such facility." Shared qualified property is property which qualifies for 5-year MACRS under section 168(e)(3)(B)(vi) which is not a "qualified facility." For example, certain material handling equipment used in connection with an open-loop biomass facility that would not be part of the "qualified facility" under IRS Notice 2006-88 and which qualifies for 5-year MACRS would be included in the eligible basis of the facility for purposes of the credit limitation calculation. In addition, the bill provides that the eligible basis of a geothermal facility includes intangible drilling and development costs described in section 263(c) even though such costs are expensed.

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 non-mechanical 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, 2013 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.

Tax Technical Corrections Act of 2007 Introduced

The House and the Senate each introduced identical tax technical correction bills on November 15, 2007. (H.R. 4195 and S. 2374). However, no action has been taken on the bills to date.

The bills contain technical corrections which would (i) eliminate the requirement that open-loop biomass be segregated from other waste materials in order to qualify for the section 45 tax credit, (ii) clarify that the limitation on the credit amount for facilities that co-fire closed-loop biomass with other fuels based on the thermal content of the closed-loop biomass applies only once, and (iii) clarify that the production from wind facilities placed in service prior to June 30, 1999 which is sold under certain pre-1987 contracts are not disqualified solely due to a change in ownership of the facilities after June 30, 1999.

A copy of the Joint Committee on Taxation's explanation of the bills can be obtained by clicking here.

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Hunton & Williams LLP
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Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

David S. Lowman, Jr.
(804) 788-8789
dlowman@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Timothy L. Jacobs
(804) 788-8362
tjacobs@hunton.com

House Passes Energy Tax Bill—Extension and Modification of Section 48

Yesterday, the House of Representatives passed, by a vote of 235-181, an energy bill that would extend and modify various energy tax credits, including the section 48 investment tax credit for certain energy projects. The provisions are a combination of the provisions contained in the energy tax bill which passed the House earlier this year (H.R. 2776) and the Senate version of the energy tax bill (S.A. 1704), and certain revisions have been made to some of the provisions.

However, today, the Senate rejected a motion to limit debate on the bill and thus, failed to consider the House energy bill. Accordingly, the prospects for passage of an energy bill with a tax title remains highly uncertain. In addition, President Bush has threatened to veto the bill in its current form. A copy of the Statement of Administration Policy can be obtained by clicking here.

Clean Renewable Energy and Conservation Tax Act of 2007 (House Version)

The bill would extend the 30% ITC for solar, fuel cell and stationary microturbine power plants for eight years (from January 1, 2009 to January 1, 2017). The bill would also increase the tax credit limitation of $500 per 0.5 kilowatt of capacity for qualified fuel cell property to $1,500. 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 bill would also expand the 30% ITC to include combined heat and power system property. Such term would include a system that (a) 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 thermal energy, (b) that has an electrical capacity of not more than 50 MW or a mechanical energy capacity of not more than 67,000 horsepower, or an equivalent combination of electrical and mechanical energy capacities, (c) produces at least 20% of its total energy in (i) thermal energy (not used to produce electrical/mechanical power), and (ii) electrical/mechanical power, (d) has an "energy efficiency percentage" in excess of 60 percent (as determined under the statute), and (e) is placed in service before January 1, 2017. If the combined heat and power system has an electrical capacity in excess of 15 MW or a mechanical energy capacity of more than 20,000 horsepower, or an equivalent combination of electrical and mechanical energy capacities (the "applicable capacity"), the amount of the credit is proportionately reduced by the applicable capacity over the capacity of the system. If the system uses at least 90% closed- or open-loop biomass (as defined under section 45 of the Code), the 60% energy efficiency requirement is waived, but the amount of the credit would be proportionately reduced to the extent that the energy efficiency of such system is less than 60%.

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Contacts

Richmond Office
Hunton & Williams LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
(804) 788-8218 fax

David S. Lowman, Jr.
(804) 788-8789
dlowman@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Timothy L. Jacobs
(804) 788-8362
tjacobs@hunton.com

House Passes Energy Tax Bill—Extension and Modification of Sections 48A & 48B

Yesterday, the House of Representatives passed, by a vote of 235-181, an energy bill that would extend and modify various energy tax credits, including the section 48A tax credit for advanced coal-based generation projects and the section 48B tax credit for certain gasification projects. The provisions are substantially similar to the proposed contained in the Senate energy tax bill (S.A.1704), but certain revisions have been made to the provisions.

However, today, the Senate rejected a motion to limit debate on the bill and thus, failed to consider the House energy bill. Accordingly, the prospects for passage of an energy bill with a tax title remains highly uncertain. In addition, President Bush has threatened to veto the bill in its current form. A copy of the Statement of Administration Policy is available by clicking here.

Clean Renewable Energy and Conservation Tax Act of 2007 (House Version)

The section 48A tax credit for qualified advanced coal projects would be increased from (a) 15% (for IGCC projects) or (b) 20% (for other advanced coal-based generation projects other than IGCC), to 30% of the qualified investment for the taxable year. The amount of aggregate credits permitted would be increased by $1.0 billion for IGCC projects and $500 million for advanced coal-based generation projects other than IGCC for projects the application for which is submitted "during the three-year period beginning at the earlier of (a) February 21, 2009 or (b) or the date prescribed by the Secretary.

The bill would also add a new requirement for the additional allocation of $1.5 billion for other advanced coal-based generation technology projects: the project must include equipment to separate and sequester 65% (70% in the case of an application for reallocated credits) of the project's total carbon dioxide emissions. If a project receives an allocation of section 48A tax credits and fails to attain or maintain the required separation and sequestration of carbon dioxide, the credits will be subject to recapture under rules to be provided by the Secretary of Treasury. In addition, the bill provides that the highest priority for an allocation of tax credits will be given to projects with the greatest separation and sequestration percentage of total carbon dioxide emissions, and also provides an additional priority category for applicants who have a research partnership with certain educational institutions.

The bill would increase the section 48B tax credit for qualifying gasification projects from 20% to 30% of the qualified investment for the taxable year. In addition, the

list of eligible entities for the credit would be expanded to include projects that employ domestic gasification applications related to transportation grade liquid fuels. Finally, the total amount of tax credits that may be allocated under the program would be increased by $500 million which would only be available for qualifying gasification projects that include equipment to separate and sequester 75% of the project's total carbon dioxide emissions. Similar to the proposed amendments to Section 48A described above, if a project fails to attain or maintain the required separation and sequestration of carbon dioxide, the credits will be subject to recapture under rules to be provided by the Secretary of Treasury. In addition, the bill provides that the highest priority for an allocation of tax credits will be given to projects with the greatest separation and sequestration percentage of total carbon dioxide emissions, and also provides an additional priority category for applicants who have a research partnership with certain educational institutions.

Finally, the bill provides that the Secretary of Treasury is directed to modify the terms of any competitive certification award and any associated closing agreement under section 48A or 48B (in consultation with the other relevant Federal agencies, including the Department of Energy) where the modification: (a) is consistent with the objectives of this provision, (b) is requested by the taxpayer, and (c) involves moving the project site to improve the potential to capture and sequester carbon dioxide emissions, reduce costs of transporting feedstock, and serve a broader customer base, unless the Secretary determines that (y) the dollar amount of tax credits available to the taxpayer would increase or (z) the modification would result in the project not being originally certified.

DOE Provides Information Regarding Second Round Section 48A and 48B Tax Credit Applications

On December 5, 2007, the Department of Energy issued a News Release which stated that it had received five applications for the second round of Section 48A and 48B tax credits before the October 31, 2007 deadline. Two applications were received requesting a total of $258 million in Section 48A tax credits. Information regarding the type of projects (IGCC or other than IGCC) and the primary coal feedstock were not provided. Three applications were received requesting a total of $390 million in Section 48B tax credits. Click here for a link to the DOE News Release.

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Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219

David S. Lowman, Jr.
(804) 788-8789
dlowman@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Timothy L. Jacobs
(804) 788-8362
tjacobs@hunton.com

IRS Issues Safe Harbor Guidance for Partnership Flip Structures in Wind Deals

On October 19, 2007, the Internal Revenue Service (the "IRS") issued Revenue Procedure 2007-65 (the "Revenue Procedure"), establishing a "safe harbor" for so-called "flip" structures for partners and partnerships that own and produce electricity from qualified wind energy facilities for purposes of section 45 of the Internal Revenue Code (the "Code"). If the partners and partnerships satisfy the requirements set forth in the Revenue Procedure, the IRS will not challenge the allocation of section 45 wind energy production tax credits by the partnership that is otherwise in accordance with the partnership allocation rules.

The Revenue Procedure indicates that the safe harbor applies to any partnership (the "Project Company") between a project developer (the "Developer") and one or more investors (the "Investors"), with the Project Company owning and operating the project containing the wind facilities (the "Wind Farm"). In order to qualify for the safe harbor, the partners and the partnership must satisfy the following 12 requirements:

(1) The Investor's investment return must be reasonably anticipated to be derived from both section 45 credits and participation in operating cash flow.

(2) The Developer must have a minimum 1% interest in all partnerships items, including section 45 credits.

(3) The Investor must have a minimum interest in partnership income and gain equal to 5% of its largest share of such items during its ownership of an interest in the partnership.

(4) The Investor must make and maintain at least a 20% minimum investment (not protected against loss) in the Project Company, but reduced for distributions of cash flow.

(5) At least 75% of the Investor's capital contributions must be fixed and determinable and not contingent in amount or certainty of payment.

(6) Neither the Developer, the Investors nor any related parties may have a purchase option at a price less than fair market value (determined at the time of exercise).

(7) The Developer (or party related to the Developer) may not have a purchase option exercisable earlier than five years after the wind facility is first placed into service.

(8) Neither the Project Company nor the Investors may have a put option with respect to the Wind Farm, property included in the Wind Farm, or interest in the Project Company.

(9) No person may guarantee or otherwise insure the Investor the right to any allocation of the section 45 credit.

(10) The Project Company must bear the risk of wind availability (no guarantees except from third parties if the Project Company or an Investor directly pays the cost of or premium for such guarantee).

(11) The Developer (or a party related to the Developer) may not lend any Investor the funds or guarantee any indebtedness with respect to acquisition of its interest.

(12) Section 45 credits must be allocated in accordance with the partnership rules (e.g., in the same manner as receipts from the sale of electricity produced at the Wind Farm are allocated).

The Revenue Procedure provides two illustrations of the safe harbor rules. One of those examples involves a partnership in which the Investor is initially allocated 99.5% of the Project Company's gross income or loss and section 45 credits. The Revenue Procedure indicates that this partnership will not satisfy the safe harbor requirements (which requires the Developer to have at least a 1% interest in such items) and states that the Project Company's classification as a valid partnership would be closely scrutinized by the IRS. Thus, it appears that in certain circumstances the IRS may use the Revenue Procedure to challenge transactions that fail to meet its requirements.

The Revenue Procedure states that it applies only to partners or partnerships with section 45 production tax credits from renewable resources from wind and does not apply to any other tax credits. Based on this statement, it is not clear that the IRS will apply the safe harbor in the context of other section 45 production tax credits or other tax credit investments. The IRS also indicates that the Revenue Procedure is intended to provide guidance to taxpayers in lieu of taxpayers requesting a letter ruling, and the IRS will not rule on any issues under the Code's partnership rules for partnerships claiming the credit under section 45. The Revenue Procedure is effective for transactions entered on or after the date of its publication in the Internal Revenue Bulletin. Nevertheless, the IRS will not challenge a transaction entered into prior to the effective date that satisfies all of the requirements of the Revenue Procedure.

A copy of the Revenue Procedure can be obtained by clicking here.

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CLIENT ALERT

August 2007

Contacts

Richmond Office
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

David S. Lowman Jr.
(804) 788-8789
dlowman@hunton.com

Douglas E. Lamb
(804) 788-8513
dlamb@hunton.com

Washington Office
1900 K Street, NW
Washington, DC 20006

James Forrest Miller
(202) 955-1934
jfmiller@hunton.com

House Energy Tax Bill Passed; White House Threatens Veto

On Saturday, August 4, the House passed its energy tax bill, H.R. 2776, by a vote of 220 to 189. As we have previously noted, the House energy tax bill contains a four-year extension of the Section 45 facility placed-in-service deadline, an eight-year extension of the investment tax credit for solar and certain other types of facilities, and an extension of the CREB program. The various energy tax credit extensions are "paid for," in part, by a repeal of the Section 199 manufacturing tax deduction for oil and gas producers, which Republicans and the White House have argued would hurt domestic oil and gas production and increase dependence on foreign oil. In a Statement of Administration Policy (SAP), the President's senior advisors have recommended that the President veto this bill and the energy bill, H.R. 3221. The SAP also notes:

H.R. 2776 also includes $8 billion in expensive and highly inefficient tax credit bonds for renewable energy production and conservation efforts. Current law already provides sufficient federal assistance to encourage these efforts. The Administration has concerns with the overall structure and overall cost of some of the production and investment tax credit incentives in H.R. 2776 as well.

A copy of the SAP is attached. Before a final bill can be sent to the President, the Senate will need to pass energy tax legislation as well. In June 2007, the Senate failed to pass its energy tax bill, however, the Senate is likely to take up the House bill in September. If the Senate considers the House energy tax bill, it is expected to pass a significantly different bill (in the form of an "amendment in the nature of a substitute"). The House and Senate will then hold a conference on the energy tax provisions. If the Senate does not pass an energy tax title, conference on the overall energy bill may proceed and it will include the House energy tax provisions as a starting point for conference discussions.

We will continue to keep you posted with updates as developments occur and encourage you to share any questions or concerns you have regarding the energy tax proposals as the bill is not yet finalized and work remains before it will be sent to the President.

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CLIENT ADVISORY

December 2006

Contacts

Richmond, VA
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219

David S. Lowman, Jr.
(804) 788-8789
dlowman@hunton.com

Laura Ellen Jones
(804) 788-8746
ljones@hunton.com

Visit the firm's Energy Practice on www.hunton.com.

House and Senate Pass Bill to Extend and Modify Various Energy Tax Credit Provisions

In the early morning hours of Saturday, December 9, 2006, the Senate passed the Tax Relief and Health Care Act of 2006 (the "Bill") after the Bill passed the House on Friday. The Bill contains various provisions that extend and modify certain energy tax credits and is expected to be signed into law by President Bush.

Extension of Section 45 Placed-in-Service Deadline

Section 45 of the Code provides a tax credit for the production of electricity from certain renewable resources from facilities that are placed in service before a certain date. Section 201 of the Bill extends the Section 45 placed-in-service deadline for one year (through December 31, 2008) for facilities that generate electricity from wind, closed-loop biomass, open-loop biomass, geothermal, small irrigation power, municipal solid waste (landfill gas and trash), and hydropower. The placed-in-service deadlines for solar facilities (before January 1, 2006), refined coal facilities (before January 1, 2009) and Indian coal facilities (before January 1, 2009) were not extended.

Extension and Expansion of Clean Renewable Energy Bonds

Clean Renewable Energy Bonds (CREBs) are a type of tax credit bond which provide governmental bodies and mutual and cooperative electric companies access to interest free capital for certain facilities that produce electricity from the Section 45 renewable energy resources (listed above) and for refined coal facilities. Section 202 of the Bill provides an additional $400,000,000 of CREBs (increased from $800,000,000 to $1,200,000,000), no more than $250,000,000 of which may be allocated to qualified borrowers that are governmental bodies. In addition, the Bill extends the authority to issue CREBs for one year, through December 31, 2008.

The Joint Committee on Taxation's ("JCT") explanation of the Bill provides that it is "expected that the additional [CREB] authority will be allocated through a new application process similar to that set forth in Notice 2005-98" which was issued by the IRS last December. The JCT explanation also notes that it is "expected that Congress will review the efficacy of the program, including the efficacy of imposing limitations on allocations to projects for governmental bodies, before granting additional extensions."

Modification of Sulfur Dioxide Removal Requirement for Section 48A Subbituminous Coal Projects

Section 48A provides an investment tax credit for certain advanced coal-based

generation projects. In order to qualify, a project must (i) be certified by the Department of Energy ("DOE"), (ii) receive an allocation of tax credits from the Internal Revenue Service (the "IRS"), and (iii) meet certain requirements set forth in Section 48A. One such requirement is that the generating unit must be "designed to meet" certain emission performance requirements, including 99 percent removal of sulfur dioxide.

DOE recently announced that it did not certify any of the Section 48A IGCC or other projects using subbituminous coal based on the belief that such projects could not meet the 99 percent sulfur dioxide removal requirement. Section 203 of the Bill modifies the sulfur dioxide removal requirement for projects that use subbituminous coal to provide that the requirement is satisfied if the project is designed either to remove 99 percent of the sulfur dioxide or to achieve an emission limit of 0.04 pounds of sulfur dioxide/MMBtu, on a 30-day average. This amendment is effective for Section 48A applications submitted after October 2, 2006, i.e., the second round of Section 48A allocations.

Extension of Section 48 Tax Credits

Section 48 provides an investment tax credit of 30 percent for certain solar energy property and fuel cell power plants (limited to $500 for each 0.5 kilowatt of capacity) for periods after December 31, 2005 and before January 1, 2008. Section 48 also provides an investment tax credit for certain stationary microturbine power plants equal to the lesser of 10 percent of the basis of the property or $200 for each for kilowatt of capacity for periods after December 31, 2005 and before January 1, 2008. Section 207 of the Bill would extend the credit at the current credit rates for an additional year, through December 31, 2008.

Modification of Section 45K Tax Credit for Coke and Coke Gas Facilities

Section 45K currently provides for a phase-out of the credits based on the reference price of oil for the calendar year in which the sale of the qualified fuel occurs. Section 211 of the Bill amends Section 45K of the Code to provide that the phase-out of the credit does not apply to facilities for the production of coke or coke gas which were placed in service (i) prior to January 1, 1993 or (ii) after June 30, 1998 and before January 1, 2010. In addition, the Bill clarifies that facilities that produce petroleum-based coke (pet coke) or coke gas do not qualify for the credit.

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Contacts

Richmond
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

Laura Ellen Jones
ljones@hunton.com
(804) 788-8746

David S. Lowman, Jr.
dlowman@hunton.com
(804) 788-8789

IRS Issues Section 45 Guidance Regarding Open-Loop Biomass Facilities

On September 26, 2006, the Internal Revenue Service issued Notice 2006-88 which provides interim guidance, pending the issuance of regulations, regarding the tax credit under Section 45 of the Internal Revenue Code for electricity produced from open-loop biomass.

Section 45 of the Code provides a tax credit for the production of electricity from wind, closed-loop biomass, open-loop biomass, geothermal energy, solar energy, small irrigation power, municipal solid waste (trash combustion and landfill gas) and hydropower. For electricity produced from open-loop biomass, the credit currently is 1.0 cents per kilowatt hour.

In order to qualify for Section 45 credits, a facility using agricultural livestock waste nutrients to generate electricity must be placed in service after October 22, 2004, and before January 1, 2008, and have a nameplate capacity of at least 150 kilowatts. A facility using open-loop biomass other than agricultural livestock waste nutrients must be placed in service prior to January 1, 2008. The credit period depends on when the facility was placed in service:

- For facilities placed in service after August 8, 2005, the credit period is ten years from the placed-in-service date.
- For facilities placed in service after October 21, 2004, and on or before August 8, 2005, the credit period is five years from the placed-in-service date.
- For facilities placed in service before October 22, 2004, the credit period is five years beginning January 1, 2005.

The Notice defines a "qualified open-loop biomass facility" for purposes of Section 45 as including "all burners and boilers (whether or not burning open-loop biomass), any handling and delivery equipment that supplies fuel directly to and is integrated with such burners and boilers, steam headers, turbines, generators, and all other depreciable property necessary to the production of electricity." Equipment for collection, processing, or storage of open-loop biomass; transformers and other equipment used for the transmission of electricity; and ancillary site improvements (e.g., roadways and fencing) are excluded from the definition of a facility. Each power plant that is operated as a "separate integrated unit" is treated as a separate facility for purposes of section 45.

The Notice also confirms that the "80/20 test" will apply to determine the placed-in-service date of an open-loop biomass facility. The 80/20 test is set forth in Revenue Ruling 94-31 and generally

provides that a facility will have a new placed-in-service date if, after an addition or improvement to an existing facility, less than 20 percent of the facility's total fair market value (the cost of the new property plus the value of the used property) is attributable to used or original equipment. Conversely, a facility will maintain its original placed-in-service date if, after an addition or improvement to a facility, more than 20 percent of the facility's total fair market value is attributable to used or original equipment.

The Notice provides that co-firing of open-loop biomass with fuels other than fossil fuels is permitted. A taxpayer can only claim credits on the electricity produced from open-loop biomass, however, if the electricity produced from the other fuel is a qualified resource under Section 45 and the facility is placed in service within the time period specified for that other qualified resource. Accordingly, if a facility co-fires open-loop biomass with municipal solid waste (as defined under section 45(c)(6)), the credit is available for all electricity produced from the facility if the facility is owned by the taxpayer and was placed in service after October 22, 2004, and before January 1, 2008. If the electricity produced from the other fuel does not qualify under this rule, the amount of the credit will be determined based on the thermal content of the open-loop biomass as compared to the thermal content of all fuels.

Co-firing open-loop biomass with fossil fuels is permitted only to the extent necessary for startup and flame stabilization and the electricity produced from fossil fuel does not qualify for the credit. If more fossil fuel is used than is necessary for start-up and flame stabilization, the biomass is not "open-loop biomass" and the electricity produced from the biomass does not qualify for the credit. Again, the amount of the credit will be determined based on the thermal content of the open-loop biomass as compared to the thermal content of all fuels.

The Notice provides that to the extent a taxpayer sells electricity to an unrelated person and the taxpayer (or a related person) simultaneously purchases electricity from an unrelated person for use at the same location, the sale of the electricity will be treated as a sale to an unrelated person only to the extent the amount of electricity sold exceeds the amount of electricity purchased (i.e., if 100 kilowatt hours are sold and 60 kilowatt hours are purchased, the credit is only available with respect to 40 kilowatt hours).

The Notice also clarifies that (1) a cogeneration facility producing both electricity and steam or heat may be a qualified open-loop biomass facility, (2) wood bark and lignin material recovered from spent pulping liquors qualifies as open-loop biomass, and (3) electricity is treated as produced from both open-loop biomass and other fuels if the fuels are commingled during combustion (i.e., co-firing), the steam produced from the fuels is commingled, or the electricity produced from the fuels is commingled before transmission to the purchaser.

Finally, the Notice states that the IRS and Treasury Department are developing regulations under section 45 regarding open-loop biomass facilities. Accordingly, "the Service will not issue private letter rulings regarding Section 45 as it relates to open-loop biomass. In addition, the Service will not rule on any issues under Subchapter K for partnerships claiming the credit under Section 45." Accordingly, the no-rule position for Section 45 open-loop biomass facilities remains in effect.

A copy of Notice 2006-88 is available at: http://www.irs.gov/pub/irs-drop/n-06-88.pdf.

Related Links on www.hunton.com:

Energy Practice

Energy & Infrastructure Practice

Energy Tax Credits Practice

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HUNTON & WILLIAMS

Tax Credit Bonds and Clean Renewable Energy Bonds

Hunton & Williams LLP has used its substantial federal tax, renewable energy and tax-exempt bond practices and its significant experience with the Clean Renewable Energy Bond (CREB) and Qualified Zone Academy Bond (QZAB) programs to develop a broad energy tax credit bond practice. Our energy tax credit bond practice group currently assists clients with the CREB program and the recently enacted New CREB and Qualified Energy Conservation Bond (QECB) programs. Hunton & Williams works with a wide range of clients participating in the energy tax credit bond arena, including:

- electric cooperatives,
- governmental entities at the state and local levels,
- investors, underwriters and lenders, and
- financial advisors.

Our lawyers have served as tax, bond, lender's and borrower's counsel in many tax advantaged transactions, including CREBs, QZABs, federal tax credits for renewable energy projects and federal tax-exempt bonds. Our experience is expansive and includes obtaining allocations, structuring such transactions to comply with state and federal law, drafting all the documents, and issuing the requisite tax opinions. Our renewable energy experience has exposed our lawyers to the complex legal issues involving the large number of projects eligible for energy tax credit bond financing. Coupled with our national tax-exempt financing experience, we can assist any energy tax credit bond participant. We are building our energy tax credit bond practice through a multidisciplinary team of lawyers focusing in tax, public finance, renewable energy, securities, real estate and environmental law. This breadth of experience, including our CREB and QZAB knowledge, allows us to address any issue in an energy tax credit bond transaction.

HUNTON & WILLIAMS

Energy Tax Credits

Hunton & Williams LLP lawyers have extensive experience in energy tax credit transactions, including Section 29/45K, Section 45, Section 48, Section 48A, Section 48B and renewable fuels tax credit transactions. Our lawyers have worked with a wide range of clients in all aspects of transactions from due diligence through audits of transactions. In addition, our lawyers have represented clients before Congress, the Treasury Department and Internal Revenue Service in order to preserve and extend the benefits of the credits for taxpayers.

Section 45 Tax Credits

Hunton & Williams is applying its substantial experience regarding Section 29 tax credit transactions (described below in further detail) to projects involving Section 45 tax credits for the production and sale of electricity from certain renewable sources, including wind, open-loop biomass, landfill gas, geothermal deposits and refined coal. Over the past several years, our lawyers have advised clients and potential clients regarding the applicability of Section 45 tax credits to various transactions and have monitored and explained legislative proposals included in various energy bills regarding the extension and expansion of Section 45 tax credits. In addition, our lawyers were active in the successful efforts to extend the Section 45 tax credit and have worked with members of Congress, the Department of the Treasury and the Internal Revenue Service to assist clients in clarifying and interpreting Section 45 requirements.

The firm has extensive experience in structuring wind projects in the United States and Europe. We have represented sponsors, lenders and off-takers in connection with the development and financing of wind farms, both land-based and offshore. Currently, our tax, corporate, real estate and environmental lawyers are representing several clients in Section 45 tax credit transactions, including the purchase of developed and undeveloped facilities, the structuring of commercial arrangements for the operation of facilities at host sites, and the structuring of and the sale of interests in developed facilities. Our lawyers also are assisting clients in all stages of these transactions, including performing due diligence regarding the facilities and sites, creating and analyzing various structures for the purchase of facilities and commercial arrangements for the facilities, and meeting with the Internal Revenue Service in advance of requesting private letter rulings regarding the transactions.

This practice is led by **David Lowman**, who works regularly with **Richard May** on legislative and Internal Revenue Service National Office matters, with **Cameron Cosby** and **Laura Ellen Jones** on purchase and sale transactions. The practice is supported by a number of corporate, real estate and environmental lawyers.

Renewable Fuels Tax Credits

Over the past few years, Hunton & Williams has advised various clients regarding the availability of and procedures for claiming income and excise tax credits with respect to various renewable and alternative fuels including biodiesel, renewable diesel, and liquid fuels derived from coal and biomass. Our lawyers have assisted clients in all stages of these transactions, including performing due diligence

regarding the renewable fuel production processes, the structuring of commercial arrangements for transactions, and meeting with the Internal Revenue Service in advance of requesting private letter rulings regarding the transactions.

This practice is led by **David Lowman**, who works regularly with **Richard May** on legislative and Internal Revenue Service National Office matters.

Section 48 Tax Credits

Hunton & Williams has assisted multiple clients in connection with development and financing of, and investment in, projects involving Section 48 investment tax credits for solar projects. Currently, our tax, corporate, real estate and environmental lawyers are representing multiple clients in Section 48 solar transactions, including the structuring of commercial arrangements for the operation of facilities at host sites, and the structuring of sale-leaseback transactions of solar facilities. Our lawyers also are assisting clients in all stages of these transactions, including preparing and advising responses to requests for offers, performing due diligence regarding the facilities and sites, creating and analyzing various structures for the sale-leaseback of facilities and commercial arrangements for the facilities.

Laura Ellen Jones, **Leslie Juan** and **David Weisblat** regularly work on Section 48 solar investment tax credit transactions and have extensive experience in the tax aspects of leases and project finance of energy facilities. The practice is supported by a number of corporate, real estate and environmental lawyers.

Section 48A and 48B Tax Credits

Hunton & Williams has assisted several clients in connection with applications to the Department of Energy for certification and the Internal Revenue Service for an allocation of Section 48A and 48B tax credits for certain advanced coal-based generation and gasification projects. In addition, our lawyers met with the Internal Revenue Service to discuss the establishment of the Section 48A and 48B tax credit programs and have worked with the Internal Revenue Service in clarifying and interpreting Section 48A and 48B requirements.

This practice is led by **Laura Ellen Jones**, who works regularly with **David Lowman** and **Richard May** on legislative and Internal Revenue Service National Office matters.

Section 29 Tax Credits

Hunton & Williams lawyers have extensive experience with projects involving Section 29 tax credits for the production and sale of nonconventional fuels, including synthetic fuel produced from coal (both synfuel and coke), landfill gas, coalbed methane and other types of qualifying oil and gas properties. Our tax, corporate, real estate and environmental lawyers have represented clients in all aspects of Section 29 tax credit transactions, including the purchase of undeveloped facilities and interests in developed facilities; the sale of developed facilities and interests in developed facilities; the structuring of commercial arrangements for the relocation and operation of facilities at host sites, including electric generation facility sites, coal mines and coal transloading sites; and the purchase by electric utilities of synthetic fuel for use in power generation. Our lawyers have assisted clients in all stages of

these transactions, including performing due diligence regarding the facilities and sites, creating and analyzing various structures for the purchase of facilities and commercial arrangements for the facilities, relocating facilities, requesting private letter rulings regarding the transactions, and representing clients in audits.

Our lawyers have played a pivotal role in representing members of the Section 29 synthetic fuel industry before Congress, the Treasury Department and the Internal Revenue Service in order to preserve the benefit of the Section 29 credit for taxpayers. In 2000 and 2001, our lawyers worked with the Treasury, the IRS and Members of Congress to resolve issues presented in Rev. Proc. 2000-47 regarding the Section 29 credit for the production and sale of synthetic fuel produced from coal. In 2003, our lawyers again worked with Treasury, the Internal Revenue Service and members of Congress to resolve issues presented in Announcement 2003-46 regarding the scientific validity of test procedures and results regarding "significant chemical change" for synthetic fuels. Our lawyers have also represented clients comprising a substantial portion of the synthetic fuel industry in connection with an investigation of Section 29 tax credits by the U.S. Senate Permanent Subcommittee on Investigations. Additionally, our lawyers have represented clients before the Internal Revenue Service in connection with numerous private letter rulings and audits and have assisted clients in the establishment and maintenance of audit compliance programs.

Representative engagements and transactions involving Section 29 tax credit transactions include:

- Purchases of over a dozen synthetic fuel facilities
- Commercial arrangements for the operation of over a dozen synthetic fuel facilities, including site leases, coal and synthetic fuel supply agreements, coal and synthetic fuel handing agreements, sales agency agreements, coal consulting agreements, and operation and maintenance agreements
- Obtaining multiple private letter rulings regarding the qualification of synthetic fuel facilities for Section 29 tax credits
- Multiple transactions for the purchase of partnership interests in synthetic fuel facilities
- Multiple transactions for the sale of partnership interests in synthetic fuel facilities to large financial institutions and energy companies
- Multiple transactions involving the commercial arrangements to provide host site, operate Section 29 synthetic fuel merchant facilities, and act as sales agent for the synthetic fuel facility owner
- Obtaining multiple private letter rulings regarding sales transactions of partnership interests in synthetic fuel facilities
- Representation of several taxpayers in connection with audits regarding Section 29 tax credits

Energy Tax Credits

- Negotiation of tax indemnity insurance policies for Section 29 tax credits
- Multiple transactions for the purchase of landfill gas facilities and commercial arrangements for the operation of the landfill gas facilities
- Obtaining three private letter rulings regarding the qualification of landfill gas facilities for Section 29 tax credits
- Transactions for the purchase of coke batteries and commercial arrangements for the operation of the coke batteries
- Sales of interests in coke batteries to large financial institutions
- Obtaining three private letter rulings regarding the qualification of coke batteries for Section 29 tax credits

This practice is led by **David Lowman**, who works regularly with **Richard May** on legislative and Internal Revenue Service National Office matters, with **Cameron Cosby** and **Laura Ellen Jones** on purchase and sale transactions. The practice is supported by a number of corporate, real estate and environmental lawyers.

HUNTON & WILLIAMS

Landfill Gas

Hunton & Williams LLP lawyers have extensive experience in landfill gas transactions throughout the United States, including landfill gas transactions that qualify for Section 29 or Section 45 tax credits. Our lawyers have worked with a wide range of clients in all aspects of these transactions, including performing comprehensive due diligence on more than 100 landfill gas facilities and sites, providing regulatory, tax, and project financing advice. Our lawyers also offer environmental advice pertaining to facility siting and operation, permitting, rulemaking, compliance and enforcement. We guide clients working through vulnerability assessments, legal contingency plans, and emergency planning associated with landfill gas facilities. We also handle creating and analyzing various structures for the purchase of facilities and the commercial arrangements for the projects. Our lawyers negotiate landfill gas rights agreements, leases, environmental indemnity agreements, and agreements for the purchase and sale of landfill gas for use in electric generation, industrial burner-tip applications, and gas pipeline distribution. In addition, we represent clients in tax audits and federal and state legislative matters regarding landfill gas and before federal, state and local agencies.

Our lawyers have obtained several private letter rulings from the Internal Revenue Service on Section 29 landfill gas matters, including seminal rulings on a number of fundamental issues related to qualification for the credit. In addition, our lawyers have worked with members of Congress, the Department of the Treasury, and the IRS to assist clients in clarifying and interpreting Section 45 requirements. Our lawyers were active in the successful efforts to extend the Section 45 tax credit for landfill gas facilities and a technical correction to section 45 to clarify the facilities that will qualify for the tax credit.

Representative engagements and transactions involving landfill gas include:

- Represented client in connection with the acquisition of interests in several landfill gas collection and landfill gas-to-energy projects.
- Represented client in connection with the purchase of six landfill gas-to-energy projects.
- Represented client in connection with bid for purchase of seventeen landfill gas-to-energy projects.
- Represented client in connection with landfill gas projects in New York and South Carolina. Provided client with due diligence regarding tax credits, greenhouse gas credits, environmental compliance, regulatory permits, and project documentation and advised on project structuring.
- Represented a client in connection with 23 landfill gas projects located in Illinois, Arizona, New Jersey and Virginia, where the client owns and operates the gas collection system and energy facilities.

Landfill Gas

- Represented a group of related landfill companies in connection with several landfill gas operating projects and development projects in Virginia and North Carolina. Provided client with advice regarding structuring, legislative, pipeline safety and regulatory matters, commercial arrangements with landfills and gas purchasers, medium term project financing in a private placement of debt with John Hancock and the ultimate sale of the companies to a major industry player.
- Assisted client in the environmental permitting and licensing of a project to burn landfill gas from a regional landfill at several emission units at a pulp and paper mill.
- Counsel to lender on project financing of two 4 MW landfill gas electric generation projects being developed by Ameresco. Conducted comprehensive due diligence review; drafted and negotiated financing documents.
- Counsel to lender on proposed project financing of portfolio of up to 10 landfill gas generation projects being developed by a German developer in the United States. Conducted due diligence on project contracts.
- Counsel to purchaser in potential acquisition of a landfill gas facility used to deliver energy to Dupont plant. Conducted due diligence review of facility and contracts; negotiated terms of purchase.
- Counsel to purchaser in the acquisition of interests in a landfill gas collection facility and landfill gas-to-energy facility in Virginia.
- Counsel to purchaser in the acquisition of a section 29 landfill gas collection facility in Northern Pennsylvania.
- Counsel to purchaser in the acquisition of a section 29 landfill gas collection facility in Southeastern Pennsylvania.
- Counsel to purchaser in acquisition of a 3 MW section 45 landfill gas-to-energy project in Illinois.
- Counsel to purchaser in the acquisition of multiple section 29 landfill gas collection facilities in Texas.
- Counsel to purchaser in the acquisition of section 29 landfill gas collection facility in Virginia.
- Counsel to purchaser in the acquisition of section 29 landfill gas collection facility in Georgia.
- Negotiated environmental liability and risk-sharing provisions of contracts for purchase of interests in landfill gas facilities in the Richmond and Tidewater areas of Virginia.

HUNTON & WILLIAMS

Energy and Infrastructure

Hunton & Williams LLP has a dynamic Energy and Infrastructure practice, with more than 150 lawyers in 19 offices around the world dedicated full time to advising clients on a broad range of energy and infrastructure matters, including project development and acquisition financing, regulatory and environmental issues, corporate transactions and financial restructuring. Hunton & Williams project finance practice is ranked by *The American Lawyer* as one of the top worldwide.

Clients include underwriters and private equity funds, unregulated power companies, regulated electric and gas utilities, multinational banks and institutional lenders, coal and transportation companies, RTOs, ISOs, power marketers and independent electric transmission companies, as well as federal, state and local governments on every continent. Projects range from large desalination and wastewater treatment plants, major coal- and gas-fired power plants, gas storage and LNG facilities, traditional oil and gas pipelines and toll roads, to smaller renewable energy facilities using a wide variety of nonconventional fuels.

In the regulatory arena, Hunton & Williams regularly appears before FERC and state agencies in matters concerning utility acquisitions, regulation of interstate and intrastate gas pipelines, power pooling and power marketing, market-based rate authority and hydroelectric licensing. The firm also frequently advises clients regarding SEC reporting and compliance and represents clients before the Nuclear Regulatory Commission. Hunton & Williams, which is counsel to the New York ISO, advises several regional transmission organizations.

Project Development and Finance

For years, Hunton & Williams has been involved with project development and acquisition financing and has often served as lead counsel in connection with high-profile acquisitions and leveraged leases. The firm represented Progress Energy in its $7 billion acquisition of Florida Progress; TXU in both the $1.9 billion sale of TXU Gas Company and the $500 million sale of TXU Fuel Company; Energy Transfer Partners in its recent $1 billion acquisition of the Houston Pipe Line Companies from AEP; and the investors in the $1.7 billion leveraged lease financing for AEP's Rockport Generating Station.

The firm has also frequently represented public and privately held companies as bidders and sellers in auction sales. Hunton & Williams lawyers recently represented AIG in connection with the $750 million purchase of 25 power plants from El Paso; Sithe Energy in connection with both the $1.6 billion purchase of 27 plants in PJM and the $700 million purchase of 6 Boston Edison plants; and Dynegy in connection with its $265 million sale of 11 California plants.

Our transaction lawyers have extensive experience with the full range of complex commercial and financing documents. We have negotiated and drafted off-take, EPC, fuel acquisition, tolling and O&M contracts, as well as debt and equity arrangements. In addition, Hunton & Williams has substantial knowledge in the complex regulatory, financial and commercial issues involved in project restructuring

and has advised lenders, asset managers and project sponsors in connection with acquisitions and divestitures of distressed generating assets. Our lawyers have broad experience in developing, structuring and restructuring virtually every type of energy and infrastructure project.

Oil and Gas

Domestically and internationally, Hunton & Williams has significant experience with upstream and midstream oil and gas projects. Energy lawyers in Texas, New York, Washington, London and Bangkok advise pipeline companies, gas utilities, equity investors and lenders on matters involving LNG sale and purchase agreements, the development and financing of gas distribution projects, gas storage facilities, and LNG re-gasification and gas liquefaction projects throughout the world. We have advised major petroleum producers on oil and gas litigation matters and on the development and negotiation of joint venture arrangements for offshore oil and gas exploration in the South China Sea and the North Sea; governments on regulatory regimes; energy companies on the acquisition of upstream oil and gas interests in the United States; and state-owned companies on the midstream distribution, sale and regulatory treatment of natural gas sourced from indigenous fields.

The firm has extensive experience assisting pipeline companies with regulatory, environmental, corporate and litigation issues. This experience includes working on numerous pipeline matters with the OPS, the NTSB, EPA and DOJ, as well as various state agencies that regulate pipeline activities. In addition to advising on matters related to pipeline permitting, ratemaking and other regulatory issues, our energy lawyers regularly advise on:

- pipeline marketing arrangements, including capacity and commodities-related transactions
- gas processing and treating, construction and development projects
- oil and gas drilling and production sharing agreements
- general contractor services agreements and multi-affiliate cost-sharing arrangements
- financing, capital infusion and debt restructuring
- gas gathering, processing, distribution and transportation agreements
- gas liquids treating and sales agreements
- oil and gas royalty and production payment transactions

Renewable Energy and Nonconventional Fuels

Beyond traditional power project development, Hunton & Williams has extensive experience in developing and financing electric generation projects using nonconventional fuels, including municipal solid waste, waste coal, landfill gas, hydroelectric power and biomass.

Energy and Infrastructure

The firm has extensive experience in structuring wind projects in the United States and Europe. We have represented sponsors, lenders and off-takers, including Enron Wind, Catamount, ABN Amro, Rabobank and TXU in connection with the development and financing of wind farms both land-based and offshore. Our lawyers, who were active in the successful efforts to extend the Production Tax Credit provided by section 45 of the Internal Revenue Code, frequently advise clients on structuring wind farm transactions.

Additionally, our practice with projects involving section 29 tax credits for the production and sale of nonconventional fuels includes synthetic fuel produced from coal (both synfuel and coke), landfill gas, coalbed methane, and other types of qualifying oil and gas properties. The firm has represented clients in all aspects of section 29 tax credit transactions, including performing due diligence regarding the facilities and sites; creating and analyzing various structures for the purchase of or commercial arrangements for the facilities; relocating facilities; requesting private letter rulings regarding the transactions; and audits by the IRS. Hunton & Williams lawyers have also played a pivotal role in representing members of the section 29 synthetic fuel industry before Congress, Treasury and the IRS in order to preserve the benefit of the section 29 credit for taxpayers. We have also represented clients in connection with the investigation of section 29 tax credits by the U.S. Senate.

Coal

In addition to work on projects involving waste coal and synthetic fuel produced from coal, Hunton & Williams lawyers have represented project sponsors and lenders in connection with some of the largest conventional coal-fired power projects in the United States, Asia, Africa and Australia, including Consolidated Power in Pakistan; Videocon in India; Collie in Western Australia; and Pottawatomic, Thames and Cedar Bay in the United States We currently advise developers on permitting and development matters for new coal-fired projects in the United States Hunton & Williams lawyers have also advised equity lease investors in connection with lease arrangements for more than a dozen other coal-fired generating facilities, including the $1 billion lease financing for Eskom in South Africa and the Springerville lease financing in the United States Our lawyers have advised clients with respect to coal leases and coal mining agreements, domestic and foreign sales agreements, brokerage contracts and agency agreements. The firm has also represented clients regarding the acquisition and disposition of major coal and mining operations, including the $2 billion sale of Peabody Coal Mining Company.

Nuclear

Hunton & Williams has been involved in the legal aspects of the civilian nuclear business from its outset, beginning with the licensing of the Carolinas-Virginia Test Reactor in the 1960s. During the reactor construction years of the 1970s and 1980s, our lawyers worked on the licensing of 10 commercial reactors at six sites. We represented nuclear facilities owned by various utilities, including Long Island Lighting Company's Shoreham reactor, before the NRC and other regulatory agencies. We also represented industry-wide coalitions of utility companies in several major NRC rulemaking proceedings, including those involving standards for emergency core cooling systems, reporting of the environmental effects of the

nuclear fuel cycle, use of mixed uranium-plutonium oxide fuel in power reactors, and qualifications of reactor operators.

Our lawyers have negotiated contracts for reactor construction, fuel acquisition and disposition, insurance, and other aspects of reactor operation and maintenance, and have worked on the following types of matters:

- Analysis and evaluation of nuclear assets in connection with corporate mergers, acquisitions and reorganizations and related licensing issues
- NRC enforcement proceedings for both corporate licensees and individuals accused of wrongdoing, involving alleged violations of NRC safety regulations and alleged discrimination against persons raising safety concerns
- Department of Labor enforcement proceedings against licensees, involving alleged retaliation against persons raising safety concerns under § 211 of the Energy Reorganization Act
- "Safety Conscious Work Environment" issues
- offsite radiological preparedness issues
- materials licensing issues
- domestic and international transportation issues, before NRC and DOT
- ISFSI licensing and other spent fuel disposition issues
- decommissioning funding issues
- Price-Anderson Act and related insurance issues
- participation in NEI-led industry-wide initiatives to the NRC, such as revision of NRC Reactor Assessment Program, revision of NRC Enforcement Policy, and revision of NRC Discrimination Policy.

Desalination and Water Treatment
During the past decade Hunton & Williams attorneys have advised diverse water sector clients in hundreds of projects valued collectively in excess of $4.5 billion. Hunton & Williams has extensive experience with the full range of issues related to water projects, including regulation, public procurement, construction and engineering, operations, fuel supply, dispute resolution and funding.

In connection with water projects and wastewater issues, the firm has advised such clients as General Electric, Bank of America, Duke Power Company, the American Water Works Association, BNP Paribas, Compagnie des Eaux, Hyflux, Dan River Corporation and U.S. Filter. Hunton & Williams lawyers have served as counsel in connection with the financing of water and sewer systems for numerous counties and municipalities in the United States, including the City of Atlanta.

Hunton & Williams has also worked on desalination and water treatment facilities around the globe. In the United Arab Emirates, Hunton & Williams attorneys represented bidding consortia of Total, Fina and Tractebel, S.A., for the development of combined sea water desalination and power projects on a long-term BOOT basis, including the Taweelah A1 Project (80 MIGD), the Taweelah A2 Project (50 MIGD) and the Shuweihat Project (100 MIGD). Hunton & Williams was lead counsel for the SingSpring Pte. desalination and electric generating facility in Singapore. The firm served as project counsel for the development and operation of 25 water and wastewater treatment facilities in western China. We were international counsel for Chase in connection with the financing of a wastewater treatment facility in Izmit; for Philip Morris Capital in connection with the lease financing of a wastewater treatment facilities in the Netherlands; and for the underwriter in connection with a sewage system and water treatment facility in Argentina. Hunton & Williams has also represented several national governments in the privatization of their water and sewage systems, including the governments of Thailand, Gambia and the U.S. Territory of Guam, and counseled the government of Uganda in drafting and negotiating various water use agreements, including an agreement establishing riparian rights among the countries bordering the Nile River.

Mining

Hunton & Williams has advised lenders, mining companies and international development agencies around the world in connection with a wide variety of mining projects.

For example, the firm was counsel to Standard Bank London and West LB, the lead arrangers for the Kansanshi Copper Mine (2003 African Mining Deal of the Year, according to *Project Finance Magazine*), and has also advised Standard Bank London in connection with financing of gold mines in Nevada and New Guinea as well as copper, gold and silver mines in Chile and Peru. Recently, our lawyers have advised the Royal Bank of Scotland in connection with a cobalt mine, and advised Barclay's and ABN AMRO in connection with gold and zinc mines. We served as lead counsel for OPIC in connection with financing for a rutile mine in Sierra Leone and have counseled project sponsors in connection with the development and financing for lignite mines in Texas, an anthracite coal mine in China and mining concessions in Mauritania and Mali.

Energy Regulation and Restructuring

Hunton & Williams has extensive experience in dealing with applications, major rulemakings and contested case proceedings before FERC. Our lawyers have advised clients in connection with the acquisition of distressed generating assets, electric industry restructuring and the development of competitive markets. The firm also has substantial experience in all aspects of electric generation and transmission rates.

Hunton & Williams lawyers are experienced in the rules and regulations governing transmission access and pricing, and have frequently represented clients in

connection with issues related to exempt wholesale generators, foreign utility companies and PURPA-qualifying facilities.

Throughout its history, Hunton & Williams has represented clients in matters covering the entire spectrum of state and municipal electric and gas utility regulation. The firm has participated actively in electric and gas utility rulemaking and contested case proceedings throughout the United States that have involved both traditional and cutting-edge revenue requirements and rate-design concepts, including traditional rate of return and cost-of-service issues and emerging issues such as incentive and performance-based rate design.

Hunton & Williams lawyers have obtained certificates of convenience and necessity for both electric generating facilities and transmission lines from regulatory authorities in numerous states and have represented electric utilities in prudence proceedings before state regulatory authorities, including proceedings that determined the ability of utilities to include in rates their investments in nuclear generating facilities. Hunton & Williams has advised electric utilities on many specialized regulatory matters such as management prudence, power plant performance standards, fuel reconciliations and emission allowances. The firm's lawyers are also actively involved in rate and other proceedings before state and municipal regulatory authorities for natural gas distribution utilities. We represent electric utilities and project developers in state avoided cost ratemaking and in competitive bidding for power supplies.

Hunton & Williams represents energy clients in administrative rulemaking and contested proceedings relating to the unbundling of vertically integrated utilities, affiliate codes of conduct, stranded cost recovery, and unbundled cost of service for regulated electric transmission and distribution utilities. The firm has been actively involved in creating protocols and rules for competitive markets for capacity, energy, and ancillary services. We have assisted clients in transforming power pools into independent system operators, advised an ISO in connection with operation of a regional transmission grid and energy market, represented entities forming a transco and RTO, and advised clients concerning antitrust, competition, and regulatory issues relating to reliability councils, regional energy broker systems, and wholesale energy transactions.

For more than a decade Hunton & Williams has also played a role in the privatization and regulatory reform of wholesale and retail energy markets around the world, advising governments, financial institutions, investors, project sponsors and operators regarding energy sector restructuring, privatizing gas pipelines, electric generating facilities, mines and transportation facilities. The firm has frequently represented The World Bank in connection with the privatization of state-owned facilities and the development of new privately owned energy infrastructure projects. Our lawyers have been involved with evolving public policy relating to the restructuring of wholesale and retail energy markets and transmission grid operations. On the state and federal levels, the firm has had extensive involvement in legislation to require transmission open access and foster competition in the generation and retail sale of electricity.

Energy and Infrastructure

Public-Private Partnerships

Hunton & Williams provides a full range of legal services in connection with the development, financing and restructuring of public-private infrastructure projects. Our lawyers regularly assist clients in obtaining federal and state aid, in creating tax-efficient structures that provide access to the capital markets, and in drafting and negotiating joint venture agreements, design-build contracts, indentures, leases and other project documents.

The firm has advised on numerous transportation projects involving highways and bridges, airports and airlines, transit systems, rail equipment and aircraft. We represented the underwriters in connection with refinancing the senior debt on the Dulles Greenway (a private toll road serving Dulles Airport). Hunton & Williams also served as special project counsel and bond counsel in the development and financing of the $350 million Pocahontas Parkway (a bridge and toll road project); as bond counsel in connection with the Chesapeake Expressway Toll Road; as issuer's counsel in connection with the issuance of more than $1 billion in tax-exempt general revenue and refunding bonds for the expansion and related improvements at Hartsfield International Airport; and as bond counsel for the Metropolitan Washington Airports Authority in connection with the issuance of $253 million in flexible term PFC revenue notes. Worldwide, the firm has represented issuers, equity investors, lenders and lessees in connection with other transportation projects, including domestic and cross-border financings of locomotives, rail cars, aircraft and other transportation equipment valued in excess of $30 billion. Hunton & Williams has represented lessees and equity investors around the globe in the chartering of oil and chemical tankers, cargo ships, deep-water drilling ships, cable-laying ships and car-passenger ferries.

HUNTON& WILLIAMS

Climate Change Law and Policy

The Hunton & Williams LLP global Climate Change Law and Policy practice assists clients with challenges and opportunities emerging from regulatory and corporate responses to climate change. In this multifaceted practice, attorneys litigate climate change-related matters in the United States, assist clients with carbon reduction projects and trading around the world, and support the development of corporate institutional climate policies and strategies. The practice's strong government relations group closely tracks legislative and regulatory developments at state, federal and international levels and advises clients in the US, the European Union, and elsewhere in the world on climate policy issues. Hunton & Williams also has experience advising public companies on the disclosure of climate-related risks as part of their obligations under US Securities and Exchange Commission rules and the Public Company Accounting Reform and Investor Protection Act of 2002 (Sarbanes-Oxley Act). The firm's climate change practice spans four distinct areas:

- Carbon Projects, Finance and Trading
- Regulatory Compliance
- Litigation
- Policy Monitoring and Lobbying

Areas of law implicated in the regulation and reduction of greenhouse gas emissions include tax, capital markets, trade, corporate, property, administrative, tort, criminal, finance and environmental. A multidisciplinary approach is essential to anticipating and successfully managing the risks inherent in this field.

As a full-service firm, Hunton & Williams is experienced in all these substantive areas of law, and possesses the strategic, policy development, political, technical and financial skills to know how to implement the best course of action for a company contemplating a voluntary or compliance-driven greenhouse gas reduction strategy. The firm's network of 19 global offices and ties to local counsel with climate change experience in numerous other jurisdictions offers a seamless opportunity to meet most corporate climate change needs. This service was recognized when Hunton & Williams was recently given top rankings by Chambers Global, Chambers USA and Chambers Europe for its climate change practice and was voted "Best Law Firm" for US Emissions Markets by the readers of *Environmental Finance* magazine.

Based on client and industry interviews, Chambers Global described the firm's Climate Team as "making a big splash," and a "frequent choice for clients and in-house counsel seeking climate change expertise." Chambers Europe noted the practice is "particularly well regarded for its skill in carbon trading" and Chambers USA noted the firm's "fantastic Clean Air Act practice and historic experience of cap and trade systems" as well as its "great reputation for climate litigation." Chambers Global also points to the "'distinguishing factor' of Hunton & Williams to be its 'prompt and practical advice on a whole variety of climate change issues.'"

A. Carbon Projects, Finance and Trading

Hunton & Williams' active Carbon Projects, Finance and Trading team assists both regulated entities and financial actors entering and participating in the growing global carbon markets. The team represents several of the world's leading originators and developers of greenhouse gas emission reduction projects acting both on a voluntary basis and under the purview of the Kyoto Protocol's Joint Implementation (JI) and Clean Development Mechanism (CDM).

Clients also actively trade European Union Allowances (EUAs); Emission Reduction Units (ERUs) and Certified Emission Reductions (CERs) within the European Union's Emissions Trading Scheme (EU ETS). Team lawyers regularly draft customized primary and secondary emission reduction purchase agreements (ERPAs) and also have extensive experience working with standardized ISDA, IETA and EFET forms.

The firm is active in both the primary and secondary greenhouse gas emission reduction credit and allowance markets, representing originators, aggregators, buyers and sellers in the primary market, and brokers, trading houses, hedge funds, investment banks, government bodies and compliance purchasers in the secondary markets. The team regularly represents US and foreign-based entities participating in both the compliance and voluntary carbon markets for hedging, speculative, and pre-compliance purposes.

Many clients operate in industrialized and developing countries alike and are affected by the laws, regulations, and business cultures of multiple jurisdictions. The team's global practice frequently works with clients to make cross-border carbon projects and trades seamless transactions and helps clients meet the challenges posed by a varied and ever-changing patchwork of both climate-related laws and business opportunities.

Companies that are not subject to emission reduction obligations are seeking to gain experience, skills, contacts and other benefits from reducing or offsetting their greenhouse gas emissions.

Many carbon offset projects create viable, diversified investment opportunities, particularly for energy and electric generating companies. Renewable energy is emerging as a significant component of energy companies' portfolios and firm lawyers have worked in several aspects in this field, including structuring and financing power projects, and advising on renewable energy certificate (REC) trading and ownership. The firm's renewable energy practice directly complements the climate change practice.

Selected Experience

- Negotiate ISDA, IETA and EFET and bespoke carbon trading documentation on behalf of several major financial institutions and trading houses to enable trading EUAs, CERs, ERUs and AAUs;

Climate Change Law and Policy

- Draft and advise on ERPAs for primary and secondary transactions of greenhouse gas emission reductions around the world under the CDM and JI mechanisms of the Kyoto Protocol, and in the voluntary markets;
- Represent leading CDM project developers, consultancies, and brokers;
- Advise on the trading and development of financial and physical carbon-related products on all the major global carbon exchanges;
- Draft primary and secondary voluntary emission reduction purchase agreements for purchase and sale of verified emission reductions (VERs) using the Voluntary Carbon Standard and other voluntary standards for use both in US and European markets;
- Advise on the tax consequences of trading carbon in the United States;
- Advise on the efficient structuring, documentation and operation of several major carbon funds and carbon-related investment funds;
- Advise major US companies on options for hedging and investing in carbon assets in anticipation of future regulation of greenhouse gas emissions in the United States;
- Advise US companies on pre-compliance carbon purchase strategies and options;
- Structure the merger of two carbon asset management companies;
- Advise on the partial acquisition of a carbon offset project developer;
- Advise on the listing of several carbon-related firms on the Alternative Investment Market (AIM) of the London Stock Exchange; and
- Assist with the project financing of many renewable energy projects around the world and the transaction of attendant greenhouse gas emission reductions.

A comprehensive carbon projects, finance and trading experience list is available upon request.

Related Professionals

- P. Scott Burton
- John Deacon
- Audrey C. Louison
- Manuel E. Maisog
- Martin Thomas
- David B. Weisblat

- Malcolm C. Weiss
- Matthew Williams
- Elisabeth Blunsdon
- Anju Sanehi
- Steven Banks
- Rafael D. B. Figueiredo
- Edward Humphries
- Robert D. Marsh
- Joshua Z. Mishoe
- James W. Rubin
- Scott J. Stone
- Tauna M. Szymanski

B. Regulatory Compliance

Governments at all levels increasingly are seeking to regulate the emission of greenhouse gases. Many US states already have enacted legislation to address climate change, such as California's Global Warming Solutions Act of 2006 that aims to reduce statewide emissions to 1990 levels by 2020. Several cap-and-trade bills are working their way through the US Congress, and the US Environmental Protection Agency is assessing the implications of regulating carbon dioxide under existing environmental laws and regulations. In addition, new or expanded regulatory programs to promote low-carbon energy technologies, carbon capture and storage, and other climate-related technologies are being introduced at federal and state levels.

Worldwide, the European Union introduced a mandatory emissions trading system in 2005 and is working to extend its limits on carbon dioxide emissions to 2020. At the international level, negotiations are underway on a new climate change treaty to take effect after the Kyoto Protocol's first commitment period ends in 2012. Although the outcome is still uncertain, countries are attempting to reach a new agreement by the end of 2009.

Hunton & Williams lawyers help clients prepare for and efficiently manage compliance with the emerging laws and regulations dealing with greenhouse gas emission reductions, including with the Kyoto Protocol, the European Union's Emissions Trading Scheme, the US Regional Greenhouse Gas Initiative, California's A.B. 32 and the Western Climate Initiative. The firm also provides strategic assistance to clients from all jurisdictions in assessing the relevant regulatory and

trading regimes and addressing their potential impact on corporate and governmental operations.

The firm counsels major industrial clients on the environmental implications of the Sarbanes-Oxley Act of 2002 and US SEC disclosure requirements. Hunton & Williams lawyers recognize the growing corporate trend to disclose climate risks and help clients design and implement environmental management systems that capture the information necessary to allow them to determine whether and how to disclose climate-related information and to respond to shareholder concerns about climate change.

Selected Experience

- Advise carbon project developers on Kyoto Protocol, Clean Development Mechanism (CDM) and Joint Implementation (JI) procedures for completing projects and generating resulting certified emission reductions (CERs) and emission reduction units (ERUs);
- Advise US companies on the possible impact of regulation of greenhouse gas emissions under the Clean Air Act in the aftermath of *Massachusetts v. EPA*;
- Advise US electric utilities on state and regional variations in regulating greenhouse gas emissions;
- Advise US companies on the reporting of greenhouse gas emissions and reductions under various state, regional, federal and private registry programs;
- Advise on the operation of and business implications of the European Union's Emissions Trading Scheme (EU ETS), including issues with cross-border trading of EUAs, CERs, ERUs and AAUs; and
- Advise carbon project developers and buyers of CERs and ERUs of compliance procedures under various national rules.

Related Professionals

- Lucas C. Bergkamp
- F. William Brownell
- P. Scott Burton
- John Deacon
- Norman W. Fichthorn
- Andrea Bear Field
- Kevin J. Finto
- Manuel E. Maisog

- Belynda Reck
- Steven P. Solow
- Martin Thomas
- David B. Weisblat
- Malcolm C. Weiss
- Matthew Williams
- Allison D. Wood
- Elisabeth Blunsdon
- Anju Sanehi
- David J. van Hoogstraten
- Steven Banks
- Rafael D. B. Figueiredo
- Aaron M. Flynn
- Edward Humphries
- Robert D. Marsh
- Joshua Z. Mishoe
- James W. Rubin
- Scott J. Stone
- Tauna M. Szymanski

C. Litigation

Hunton & Williams is playing a leading role in the litigation of climate change issues in the US courts. The firm represents clients in disputes involving governmental authority to regulate greenhouse gas emissions and in tort suits seeking monetary and injunctive damages for past emissions of greenhouse gases. Hunton & Williams has successfully defended electric utility companies in responding to these efforts.

Selected Experience

- *Native Village of Kivalina v. ExxonMobil Corp.*, No. C08-01138-SBA (filed Feb. 26, 2008). Hunton & Williams represents five electric utility companies in connection with a case brought by the City and Native Village of Kivalina, Alaska, in the US District Court for the Northern District of California against 23

energy sector companies. Plaintiffs claim that defendants' greenhouse gas emissions result in increased temperatures that allegedly have melted sea ice near the village, exposing it to storms and eroding the land on which it sits. Plaintiffs advance four legal theories: (1) public nuisance; (2) private nuisance; (3) civil conspiracy against some of the defendants; and (4) concert of action. Plaintiffs seek monetary damages for the cost of relocation, which they estimate to be between $95 million and $400 million.

- *In re Deseret Power Electric Cooperative*, PSD Appeal No. 07-03 (EAB, filed Oct. 1, 2007). Sierra Club challenged before the US Environmental Protection Agency's Environmental Appeals Board (EAB) EPA's issuance of a Prevention of Significant Deterioration (PSD) preconstruction permit to Deseret Power under the Clean Air Act on the ground that the permit did not impose emission limits for carbon dioxide. Sierra Club claimed carbon dioxide is a pollutant "subject to regulation" under the Act based on a statutory provision requiring monitoring and reporting of power plants' carbon dioxide emissions. Hunton & Williams filed an amicus brief on behalf of the Utility Air Regulatory Group in support of EPA and the permittee, arguing that nothing has occurred that triggers carbon dioxide emission controls under the PSD program, that EPA's interpretation of "subject to regulation" is entitled to deference and supported by case law, and that Sierra Club sought relief that exceeds the Board's authority. The EAB specifically requested Hunton & Williams to present oral argument on behalf of its client.

- *Sunflower Electric Power Corp. v. Kansas Dept. of Health and Environment*, Case No. 07-99567-A (Kansas Supreme Court). Hunton & Williams represents Sunflower Electric Power Company in connection with a PSD permit application to construct two new coal-fired electricity generating units at an existing facility in western Kansas. In October 2007, the Secretary of the Kansas Department of Health and Environment denied the application on the grounds that the carbon dioxide emissions from the proposed units constituted a substantial endangerment to health and the environment under Kansas law. Following Sunflower's challenge to the denial in the Kansas Court of Appeals, the Kansas Supreme Court acted sua sponte to assume jurisdiction over the case, where it is pending.

- *Comer v. Murphy Oil USA, Inc.*, No. 07-60756 (5th Cir., appeal docketed Sept. 28, 2007). Mississippi residents claimed defendants' greenhouse gas emissions contributed to global climate change, intensified Hurricane Katrina, and resulted in hurricane-related damages to plaintiffs. Hunton & Williams worked on behalf of its clients and coordinated with other counsel to obtain dismissal of this state-law tort case. The US District Court for the Southern District of Mississippi dismissed the case with respect to all defendants in August 2007, holding that adjudication of the suits would violate the political question doctrine and that plaintiffs lacked legal standing. The plaintiffs have appealed that decision to the US Court of Appeals for the Fifth Circuit.

Climate Change Law and Policy

- *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007). Hunton & Williams lawyers represented the Utility Air Regulatory Group as a respondent before the US Court of Appeals for the District of Columbia Circuit and the US Supreme Court supporting the US Environmental Protection Agency's denial of a rulemaking petition seeking limits under the Clean Air Act on motor vehicles' greenhouse gas emissions to address global climate change. EPA denied the petition on the grounds that the Act does not give it authority to regulate greenhouse gas emissions and that in any event it would decline to exercise such authority in the circumstances presented by the petition. The D.C. Circuit affirmed EPA's action, but, in a 5-to-4 decision, the Supreme Court reversed, holding that the Act's definition of "air pollutant" encompasses greenhouse gases and that EPA had not provided an adequate rationale for denying the petition. The Supreme Court and the D.C. Circuit have remanded the case for further consideration by EPA. Hunton & Williams attorneys are involved in remand proceedings and in advising clients of the implications of the Supreme Court's decision.

- *New York v. EPA*, No. 06-1322 (D.C. Cir., filed Apr. 7, 2006). Hunton & Williams represented the Utility Air Regulatory Group in supporting EPA's decision that it lacked authority under the Clean Air Act to establish "new source performance standards" for greenhouse gas emissions from new and modified electric utility steam generating units. The US Court of Appeals for the District of Columbia Circuit remanded this case in light of the Supreme Court's decision in *Massachusetts v. EPA*, described above, but rejected the petitioners' request (which was opposed by Hunton & Williams' client and other parties) that the court summarily reverse and vacate EPA's decision.

- *Connecticut v. American Electric Power Co.*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005), appeals pending, Nos. 05-5104-cv, 05-5119-cv (2d Cir.). Eight states and three land trusts filed lawsuits against five utilities alleging that the utilities' carbon dioxide emissions contribute to the "nuisance" of global climate change. Working jointly with other counsel, Hunton & Williams lawyers filed motions to dismiss these cases, arguing, among other things, that the suits impermissibly sought judicial relief that would circumvent policies set by the President and Congress to address global climate change concerns, in violation of constitutional separation of powers principles. Agreeing with the utilities' separation of powers argument, the district court dismissed the suits under the "political question" doctrine. Hunton & Williams and other counsel are defending the utilities in the plaintiffs' appeal to the US Court of Appeals for the Second Circuit, which in June 2006 heard oral argument in the litigation.

Related Professionals

- F. William Brownell
- Norman W. Fichthorn
- Belynda Reck
- Shawn Patrick Regan

- William L. Wehrum
- Allison D. Wood
- Aaron M. Flynn
- James W. Rubin

D. Policy Monitoring and Advocacy

Hunton & Williams plays an active role in monitoring international, regional, national, state, and local climate change policy developments and advocating on behalf of clients. The firm has a particular focus on US national and state-level climate initiatives, the policies of the member states of the European Union, and those of several countries in Asia. Hunton & Williams lawyers have experience working with the United Nations Framework Convention on Climate Change and the Kyoto Protocol as well as programs to develop alternatives to those international agreements. Firm lawyers previously have been employed at a senior level within the United States government in past climate negotiations and in senior capacities dealing with climate change on Capitol Hill. In addition to tracking international policy and regulatory developments, the firm advises clients on the US domestic legal and regulatory response to climate change concerns and energy and security issues. Hunton & Williams lawyers have been actively involved in the development of emerging greenhouse gas regulatory regimes in California and the rest of the Western United States.

Hunton & Williams has taken the lead in advising energy companies, insurance and re-insurance entities, and others on the risks and liability issues posed by carbon capture and storage (CCS) projects by organizing the CCS Alliance. The CCS Alliance was formed by companies and entities sharing a common interest in removing impediments to investment in and development of CCS technologies posed by risk and liability issues arising as a matter of law and public policy.

Selected Experience

- Regularly brief companies on US regional and state policy and statutory developments with regard to climate change;
- Advise and comment on the development of California's landmark A.B. 32 - the Global Warming Solutions Act;
- Analyze optimal policy options and advise a major transportation company on strategies for reducing exposure to future regulation of greenhouse gas emissions in the United States;
- Draft response of major electric utility to April 2006 US Senate Energy and Natural Resources Committee conference on the design of a mandatory cap-and-trade program in the United States;

Climate Change Law and Policy

- Draft and submit comments to the US EPA and state environment agency rulemaking proceedings under the Underground Injection Control program regarding the injection and long-term storage of carbon dioxide for purposes of carbon capture and storage;
- Closely track bills addressing climate change in the states and the US Congress;
- Prepare position papers on liability regarding potential greenhouse gas regulation in various jurisdictions;
- Prepare comments and testimony relating to proposed US federal-level legislation on greenhouse gas emissions;
- Monitor and lobby on state and federal US legislation on greenhouse gas emission regulation and voluntary reduction programs, including the climate change programs in the 2005 Energy Policy Act and the Regional Greenhouse Gas Initiative;
- Monitor legislative and policy developments in the European Union's Emissions Trading Scheme;
- Monitor and lobby on other state and federal US legislation and regulation on renewable energy; and
- Regularly attend and monitor developments at the United Nations climate negotiations.

Related Professionals

- Lucas C. Bergkamp
- F. William Brownell
- Frederick R. Eames
- Brent A. Fewell
- Andrea Bear Field
- Mark W. Menezes
- Joseph C. Stanko Jr.
- William L. Wehrum
- Malcolm C. Weiss
- Allison D. Wood
- Anju Sanehi

Climate Change Law and Policy

- David J. van Hoogstraten
- Robert D. Marsh
- James W. Rubin
- Scott J. Stone
- Tauna M. Szymanski

HUNTON& WILLIAMS

Counsel
Capital Finance & Real Estate

Washington
(202) 955-1837 Phone
(202) 778-2201 Fax
akintzinger@hunton.com

Andrew R. Kintzinger

Practice focuses on federal securities and tax laws applicable to municipal bonds. Substantial experience in SEC compliance and enforcement matters and IRS examination and audit matters. Representation as bond, underwriter's, special disclosure and special tax counsel on governmental bonds and private activity bonds. IRS private letter ruling requests and federal legislation. Counsel for municipal bond matters before the IRS and SEC.

Relevant Experience

- Counsel for all municipal bond financings, including multifamily, single-family, 501(c)(3), airport, and higher education issues.
- Tax representation for issuers and underwriters in "targeted" IRS audits.
- Representation of issuer clients in IRS examinations/program audits.
- Representation of municipal finance counsel on IRS audit and SEC compliance/enforcement matters.
- Representation of clients on tax audit disclosure matters.

Membership

- Member, Iowa State Bar
- Member, Minnesota State Bar
- Member, Washington State Bar
- Member, District of Columbia Bar
- Member, Past President, National Association of Bond Lawyers ("NABL")
- Director and Founding Fellow, American College of Bond Counsel
- Board of Directors, Dartmouth Partners in Community Service, a Program of Dartmouth College

Speeches

- Speaker, Tax Audit and Enforcement Topics, Seattle Northwest Securities Corporation, 2004 Spring Conference
- Speaker, Tax Considerations in Financing Religious-affiliated Education Facilities, National Association of Higher Education Facilities Authorities Annual Conference, April 2003
- Speaker, SEC 2nd Annual Municipal Marketplace Roundtable, October 2002

Andrew R. Kintzinger
Counsel
Capital Finance & Real Estate

- Panelist and Moderator, NABL Bond Attorneys' Workshops, 1986-2006
- Speaker, Tax Audit Disclosure, NABL Tax and Securities Law Institute, 2003-2004

Publications

- Editorial Advisor, *Municipal Finance Journal*, Civic Research Institute
- NABL/ABA Disclosure Rules of Counsel In State and Local Government Securities Offerings, Second Edition
- Editorial Board, LexisNexis - National Association of Bond Lawyers, Federal Securities Laws of Municipal Bonds Deskbook, 2003, 2005

Pro Bono Work

- Low Income Housing Tax Credits

Education

- J.D., University of Iowa College of Law, with distinction, Articles Editor, *Iowa Law Review*, 1981
- A.B., Dartmouth College, *magna cum laude*, 1977