Tax-Related Renewable Energy Provisions in the Stimulus Act

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On February 17, 2009, President Obama signed into law the American Recovery and Reinvestment Act of 2009 (the "Act"). The new law is the centerpiece of President Obama's efforts to create jobs and revive the economy and includes over $787 billion in spending and tax incentives.

In particular, the Act represents a multi-prong approach to stimulating innovation and encouraging investment in the energy and clean technology sectors. It includes new energy-related spending and tax incentives as well as expands existing tax incentives for businesses and individuals. A summary of certain key provisions is provided below.

NEW PROGRAMS

Grants for Renewable Energy Investment

In lieu of taking the Production Tax Credit or the Investment Tax Credit (discussed below under "Expanded Business Tax Credits and Programs"), the Act permits project developers to apply to the Secretary of Treasury for a non-discretionary grant equal to 30% of the cost of an eligible project. The grant is not subject to federal income tax and, similar to rules applicable to the Investment Tax Credit, the basis in the project is subject to a 15% reduction (in effect, reducing the amount of depreciation available). Developers must place in service or begin construction of the eligible project during 2009 or 2010. For projects that begin construction in 2009 or 2010, the project must be placed in service before the date that eligibility for the Investment Tax Credit would expire. The grant is intended to assist developers who are facing a dearth of investors interested in the benefits of tax credits due to the current adverse market conditions and who themselves lack sufficient tax liabilities to fully benefit from tax credits.

Advanced Energy Manufacturing Credit

The Act provides for a 30% tax credit for investment in qualified advanced energy manufacturing projects that are certified by the Secretary of Treasury. This credit expands renewable energy tax credits to an entirely new set of companies. Qualifying projects include re-equipping, expanding or establishing manufacturing facilities that produce:

- Property designed to be used to produce energy from renewable resources;
- Fuel cells, microturbines, or energy storage systems, for use with electric or hybrid-electric motor vehicles;

- Electric grids to support the transmission of intermittent sources of renewable energy, including storage of that energy;
- Property designed to capture and sequester carbon dioxide emissions;
- Property designed to refine or blend renewable fuels, other than fossil fuels, or to produce energy conservation technologies, including energy-conserving lighting technologies and smart grid technologies;
- Certain plug-in electric vehicles or components designed specifically for use with those vehicles, including electric motors, generators, and power control units; and
- Other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Secretary of Treasury.

The credit only applies to the portion of the basis of qualified property that is constructed, reconstructed or erected after February 17, 2009. A total of $2.3 billion in credits will be allocated by the Department of Treasury through a competitive bidding process. The Secretary of Treasury must establish a certification program by mid-August 2009. Applications must be received within 2 years from the date the Department of Treasury begins accepting applications.

EXPANDED BUSINESS TAX CREDITS AND PROGRAMS

Production Tax Credit

The Act extends the Production Tax Credit, in the case of qualifying wind generation facilities, to projects placed-in-service on or before December 31, 2012, and extends the placed in service deadline to December 31, 2013 for qualifying geothermal, biomass, hydropower, landfill gas, waste-to-energy, marine and hydrokinetic facilities. In addition, the $4,000 cap for small wind projects is removed. The Production Tax Credit provides a tax credit over a period of 10 years based upon electricity generated during that time period.

Investment Tax Credit

The Act increases the scope of the Investment Tax Credit to allow facilities that would qualify for the Production Tax Credit to make an irrevocable election to take the Investment Tax Credit instead. The Investment Tax Credit is a 30% tax credit in the year a qualifying project is placed in service. This 30% credit was previously only available to a more limited group of renewable projects, including certain qualifying solar facilities.

Note that, under the Act, subsidized energy financing no longer reduces the benefit of the Investment Tax Credit with respect to qualified property that is constructed, reconstructed or erected after December 31, 2008. Subsidized energy financing is financing provided under a federal, state or local program, a principal purpose of which is to provide subsidies for projects designed to conserve or reduce energy.

New Clean Renewable Energy Bonds

The Act increases the national bond volume limitation for new CREBs to $2.4 billion. The previous limitation was $800 million. CREBs are designed to finance certain renewable or clean energy projects that are owned by public power providers, governmental bodies or cooperative electric companies. Instead of receiving interest payments, the holder of a CREB receives a quarterly tax credit. The increased limitation for new CREBs represents a significant opportunity for governmental bodies and other qualifying entities which will need to act quickly to position themselves for an application.

Qualified Energy Conservation Bonds

The Act increases the national bond volume limitation for QECBs issued by state and local governments and certain other qualifying entities to $3.2 billion. The previous limitation was $800 million. QECBs are designed to finance a broad range of conservation programs. Instead of receiving interest payments, the holder of a QECB receives a quarterly tax credit. Based on past experience, we expect that these bonds will be oversubscribed, so qualifying entities will need to act quickly to position themselves for an application.

Alternative-Energy Refueling

The Act increases the tax credit for qualified alternative-energy refueling properties from 30% to 50%, and the maximum credit is increased from $30,000 to $50,000. Hydrogen refueling property is not eligible for the 50% tax credit and remains at 30%; however, the Act increases the maximum credit available to hydrogen refueling properties to $200,000. Qualified refueling properties must be placed in service during 2009 or 2010. These changes will largely benefit investments in certain clean-fuel stations.

Bonus Depreciation Extended

The Act extends the temporary “bonus depreciation” provision enacted by Congress in 2008. Businesses may now recover the costs of certain capital expenditures faster than the ordinary depreciation schedule would allow. Businesses may immediately write off 50% of the cost of certain depreciable property purchased before January 1, 2010 for use in the United States. The property must be placed in service before January 1, 2010; however, certain aircraft and long-production-period property must be placed in service before January 1, 2011. A taxpayer manufacturing, constructing or producing property for its own use meets the timely acquisition requirement if the taxpayer begins such manufacture, construction or production before January 1, 2010.

EXPANDED TAX CREDITS FOR INDIVIDUALS

Residential Energy Efficient Property Credit

This provision permits individual taxpayers to take a tax credit of 30% of expenditures for qualified solar water heating, geothermal heat pump, fuel cell, small wind energy and solar electric property made during the tax year. Under prior law, expenditures made from subsidized energy financing were not taken into account for the purposes of this credit or the Non-Business Energy Property Credit (described below). The Act removes this limitation for the purposes of both credits. In addition, the Act removes all credit caps for qualified solar water heating, geothermal heat pump and small wind energy property, while retaining the credit cap for qualified fuel cell property. The credit cap for qualified fuel cell property is $500 per 0.5 kilowatt of capacity of the fuel cell property to which the expenditure relates.

Non-Business Energy Property Credit

The Act increases the personal tax credit for energy-efficient improvements to homes in the United States owned and used by individual taxpayers as their principal residence. The credit is increased from 10% to 30% through December 31, 2010. The Act also establishes an aggregate $1,500 cap to the credit, replacing item-specific caps under the previous law. Energy-efficient improvements that are eligible for the credit include “building envelope components” such as certain types of energy-efficient insulation, windows, skylights, doors and roofs, and “qualified energy property” such as certain types of energy-efficient water heaters, heat pumps, central air conditioners, biomass fuel stoves, hot water boilers and main air circulating fans.

Credits Related to Electric Vehicles

The Act establishes new credit limits for purchases of new qualified plug-in electric drive motor vehicles, capped at $7,500 for all such vehicles. The new credit limits are applicable to vehicles purchased after December 31, 2009. The Act eliminates the termination date for the credit, which previously had been set at December 31, 2014, and modifies the phase-out of the credit such that the phase-out is triggered at 200,000 vehicles sold, instead of 250,000. Other limits may apply to this credit, including limits that apply if the vehicle is depreciable property (i.e., used in a business), sold to certain tax-exempt entities or is used primarily outside of the United States.

The Act provides for a new credit applicable to purchases of certain low-speed and 2- or 3-wheeled plug-in vehicles. Such purchases must be made before December 31, 2011. The credit is equal to 10% of the cost of any such qualified vehicle, with a cap of $2,500. The Act also includes a plug-in conversion credit of 10% of the cost of converting a vehicle into a qualified plug-in motor vehicle. The conversion credit is capped at $4,000.

If you would like additional information on this topic, please contact Nicola Lemay or Sharon C. Lincoln of Foley Hoag’s Tax Group.

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