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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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