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 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).