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Commercial Renewable Energy Incentives Contained in the Emergency Economic Stabilization Act of 2008

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The Emergency Economic Stabilization Act of 2008[1] (the "Act") includes extensions of various renewable energy incentives, including the production tax credit and investment tax credit under Sections 45 and 48 of the Internal Revenue Code of 1986, as amended (the "Code"). In addition, the Act provides several additional benefits to investors in tax-incentivized transactions. Highlights of the energy provisions in the Act are outlined below.

EXTENSIONS AND MODIFICATIONS OF EXISTING PROGRAMS

Extension and Modification of the Production Tax Credit

- The Act provides for a one-year extension of the placed-in-service date for the Section 45 production tax credit ("PTC") for wind and refined coal facilities through 2009, and a two-year extension, through 2010, for closed-loop biomass, open-loop biomass, geothermal or solar energy, small irrigation, landfill gas, trash combustion, and qualified hydropower facilities.

- The Act expands the list of qualifying facilities eligible for the PTC to include those that generate electricity from marine and hydrokinetic renewable energy sources (e.g., waves, tides, current, free flowing water, and ocean thermal energy conversion) with a placed-in-service date through 2011.

- New expansion at existing closed-loop and open-loop biomass facilities is also now eligible for the PTC. Additionally, modifications are made to the definitions of refined coal (eliminating the increased market value test and increasing required emission reduction), trash facility (by substituting "uses" for "burns"), and non-hydroelectric dam.

Extension of the Investment Tax Credit and Alternative Minimum Tax Offset

- The Section 48 investment tax credit ("ITC") for solar energy, fuel cell, and microturbine property is extended eight years through 2016. The ITC can now be used to offset the alternative minimum tax ("AMT") for property placed-in-service in tax years beginning after October 3, 2008. Moreover, the Act increases the capacity cap for fuel cell property from $500 to $1,500 per half kilowatt.

- A new 10 percent ITC is provided for combined heat and power system property and geothermal heat pump systems, while qualified small wind energy property is now eligible for a 30 percent ITC. In addition, public utility property is now taken into account for purposes of the ITC.

Extension and Modification of Biodiesel and Renewable Diesel Credits

- The Act extends through 2009 the $1 per gallon PTC for biodiesel, the $1 per gallon PTC for diesel fuel created from biomass, and the 10 cents per gallon small biodiesel producer credit. Biodiesel imported and sold for export will not be eligible for the credit effective May 15, 2008.

- The Act also eliminates the requirement that renewable diesel must be produced using a thermal depolymerization process. Renewable diesel now includes jet fuel derived from biomass, but the Act clarifies that diesel fuel created by coprocessing biomass with a feedstock which is not biomass, such as petroleum, does not qualify as renewable diesel. However, such fuel is eligible for the 50 cents per gallon alternative fuel credit.

Extension and Modification of Alternative Fuel Credit

- The Act extends the alternate fuel excise tax credit under Section 6426 through 2009 for all eligible fuels except liquefied hydrogen, which maintains its expiration date of September 30, 2014. Compressed or liquefied biomass gas is now eligible for the alternative fuel credit, as is alternative fuel sold for use in aviation.

- Alternative fuel derived from a coal gasification facility will qualify for the credit if the facility separates and sequesters at least 50 percent of the facility's total carbon dioxide emissions beginning on October 1, 2009. This minimum standard rises to 75 percent on December 31, 2009.

Extension of Energy Efficient Commercial Buildings Deduction

- The Act extends for five years through 2013 the energy efficient commercial buildings deduction, which allows for a deduction equal to the cost of the energy efficient property installed in a commercial building during a taxable year. The maximum amount of the deduction cannot exceed $1.80 per square foot of the building, and the energy efficient property installed must meet a 50 percent energy savings standard.

Extension of Deferral Treatment for Sales of Electric Transmission Property

- The Act extends through 2009 the provision under Section 451(i) allowing for the recognition of gain ratably over 8 years for sales or dispositions implementing a Federal Energy Regulatory Commission or state electric restructuring policy.

Extension and Modification of Coal Investment Credits

- The Act creates $1.25 billion in new credits for advanced coal electricity projects under Section 48A, and $250 million in new credits for coal gasification projects under Section 48B.

- The credits will be awarded to the projects that capture and sequester the highest percentage of carbon dioxide emissions. At a minimum, coal

electricity projects must capture and sequester 65 percent of such project's carbon dioxide emissions to be considered for the new credits, while coal gasification projects must capture and sequester at least 75 percent. If a project is awarded credits and fails to maintain these minimum carbon standards, the credits will be recaptured. The Act also extends eligibility for Section 48B credits to gasification projects related to transportation grade liquid fuels.

Clean Renewable Energy Bonds

- The Act authorizes $800 million of new clean renewable energy bonds to finance facilities owned by governmental bodies, public power providers, and cooperative electric companies generating electricity from wind, closed-loop biomass, open-loop biomass, geothermal or solar energy, small irrigation, landfill gas, trash combustion, qualified hydropower, and marine renewable energy sources. The termination date for existing clean renewable energy bonds is also extended one year through 2009.

MISCELLANEOUS PROVISIONS

New Tax Credit for Carbon Dioxide Sequestration

- The Act establishes a new $20 carbon dioxide sequestration credit ("Carbon Credit") per metric ton of carbon dioxide captured from an industrial source and disposed of in secure geological storage, and a $10 Carbon Credit per ton of carbon dioxide captured from an industrial source and used in a qualified enhanced oil or natural gas recovery project. Qualifying facilities must capture at least 500,000 metric tons of carbon dioxide in a taxable year to be eligible.
- The Carbon Credit applies only in respect to carbon dioxide captured and disposed of or used within the United States before the end of the year in which 75 million metric tons of carbon dioxide has been captured from industrial sources and disposed of or used.

Expansion of Allowance for Facilities Producing Cellulosic Biofuel

- The Act expands the 50 percent bonus depreciation allowance provided in the year a facility producing cellulosic ethanol is placed-in-service to those facilities that produce any cellulosic biofuel.

Accelerated Depreciation of Smart Meters and Smart Grid Systems

- The Act allows taxpayers to recover the cost of smart meters and smart grid systems over a 10 year period, unless the property has qualified under a shorter recovery period. Prior law allowed for a 20 year recovery period.

Publicly Traded Partnership Income Treatment Related to Alternative Fuels

- The Act allows publicly traded partnerships to treat income and gains derived from the exploration, development, mining or production, processing, refining, or transportation of industrial source carbon dioxide, alcohol fuels and mixtures, biodiesel fuels and mixtures, and alternative fuels and mixtures as qualifying income.

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TAKEAWAYS

- The extensions of these subsidy programs were critical to the continued development of the renewable energy industry in the United States. The expansion of the types of energy sources qualifying for tax credits recognizes the rapid evolvement and increasing diversity of the renewable energy industry.
- The shorter extension dates for wind and refined coal facilities suggest that legislators may be less willing to commit to the current levels of subsidy with respect to these types of energy sources.
- The lengthy subsidy window provided to the ITC should allow ITC participants to develop and implement long-range planning opportunities for solar and fuel cell projects. The ability to use ITCs against the AMT should also provide a greater attractiveness to some ITC investors.
- The so-called "splash and dash" practice in the biodiesel industry will no longer qualify for tax credits effective May 15, 2008.

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[1] Signed into law by President Bush on October 3, 2008.