

New Bailout Legislation Contains Many Favorable Renewable Energy Tax Provisions

On October 3, President Bush signed into law the much-publicized bailout legislation (H.R. 1424). As part of the legislation, there were three separate tax acts, including the Energy Improvement and Extension Act of 2008 (2008 Energy Act). The 2008 Energy Act contains anticipated extensions of the Section 45¹ Production Tax Credit (PTC) and Section 48 Energy Credit (ITC) provisions that were set to expire at the end of this year. The 2008 Energy Act also contains a variety of other energy-related tax incentives with the hopes of spurring investment in renewable energy. Below is an overview of the key energy tax incentives included in the 2008 Energy Act.

Commercial Wind and Solar Credits Extended and Enhanced

Section 45 generally allows a credit based on the amount of electricity sold to an unrelated taxpayer that is produced at a qualified renewable energy facility over a 10-year period beginning on the date the facility is placed in service. Over the 10 years, the owners of the qualified facilities are thus able to offset their federal taxes due with the credits generated from the sale of this electricity. Under the legislation, the “placed in service” date for qualified facilities under the PTC was extended for qualified facilities placed in service before January 1, 2010 in the case of wind and refined coal,² and for qualified facilities placed in service before January 1, 2011 in the case of other renewable sources.³ The PTC also was expanded to include qualified facilities that generate electricity from marine and hydrokinetic sources (e.g., waves and tides)⁴

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and expands the definition of biomass facilities to now include new power generation units placed in service at existing facilities that were already placed in service.⁵ By allowing the placed in service date to be extended, Congress has given developers more time to seek financing for various renewable energy projects that may have been stalled due to the current credit crunch.

Section 48 provides a purchaser of qualified solar property a credit equal to 30 percent of the cost of the property purchased. The purchaser of the property is essentially allowed to reduce their federal taxes due by 30 percent of the cost of the qualified solar equipment in the year of purchase. Typically, commercial solar projects are owned through investment partnerships where investors are allocated the beneficial credit that they can utilize on the federal tax returns with the developers as the effective operator of the energy property. Under the legislation, the 30 percent ITC for commercial solar energy property and qualified fuel cell property and the 10 percent investment tax credit for microturbines, both were extended through 2016. Importantly, these credits may now be used to offset the alternative minimum tax (AMT) and repeals the restrictions on public utility property being eligible for the energy credit.

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Solar Credits Expanded and Now Include Small Wind Turbines for Homeowners

In addition to extending the ITC for commercial investments in renewable energy, the 2008 Energy Act expands the credit to homeowners who invest solar generating property. The 2008 Energy Act extends the credit for property placed in service before January 1, 2017⁶ and removes the \$2,000 credit cap on most qualifying energy property purchased. Thus, a purchaser of qualified solar property generally will receive a 30 percent credit available as an offset against its taxes due on his individual return.⁷ Importantly, the expanded energy credit also is available as an offset against an individual's AMT.⁸ Added to the list of eligible energy property that qualifies for the 30 percent ITC is the purchase of a qualifying small wind turbine (defined as those with rated capacities of 100 kilowatts or less)⁹ for residential or commercial applications. The credit, which is capped at \$4,000, applies to wind turbines placed in service before December 31, 2016. As with the other provisions, this new provision of the ITC credit can be used to offset AMT.

Energy-Efficient Commercial Building Property Credit Extended

A deduction is allowed in an amount equal to the cost of "energy-efficient commercial building property" placed in service during the tax year. The maximum deduction for any building for any tax year is the excess of the product of \$1.80, and the square footage of the building, over the aggregate amount of the deduction for the building for all earlier tax years.¹⁰ This provision, which was set to expire at the end of this year, was extended though property placed in service after Dec. 31, 2013. Commercial property owners will have more time under this extension to install items, such as energy-efficient lighting and other energy-efficient retrofits to take advantage of this federal tax incentive.

Changes to Energy-Related Tax Credit Bonds

The 2008 Energy Act provides a one-year extension of the credit rules applicable to energy-related tax credit bonds and creates two new categories of qualified tax credit bonds to provide financing for energy-related purposes.¹¹ The Act extends the ability for states, public power providers, and electric cooperatives to issue Clean Renewable Energy Bonds (CREBs) under existing programs through December 31, 2009.¹² The 2008 Energy

Act also authorizes New CREB bonds to finance facilities that generate electricity from wind, closed-loop biomass, open-loop biomass, geothermal, small irrigation, qualified hydropower, landfill gas, marine renewable and trash combustion facilities¹³ and Qualified Energy Conservation Bonds to finance state and local government initiatives designed to reduce greenhouse emissions.¹⁴

Miscellaneous Provisions

In a measure to reduce existing carbon emissions predominately from coal-fired electric plants, the 2008 Energy Act increases the existing qualifying coal gasification project credit to 30 percent of qualifying purchases in any given year (up from 20 percent).¹⁵ The 2008 Energy Act also creates a carbon dioxide sequestration credit. The carbon dioxide sequestration credit for any tax year is an amount equal to the sum of \$20 per metric ton of qualified carbon dioxide captured by the taxpayer at a qualified facility and disposed of by the taxpayer in secure geological storage. It also is available at \$10 per metric ton of qualified carbon dioxide which is captured by the taxpayer at a qualified facility and used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project.¹⁶ The carbon dioxide sequestration credit is subject to the rules that for general business credits under Section 38 and is effective for carbon dioxide captured after date of enactment of the 2008 Energy Act.

The 2008 Energy Act provides a tax incentive to purchase plug-in electric vehicles.¹⁷ The credit will range from \$2,500 to \$7,500 for qualifying vehicles and will be available to the vehicle owner, including the lessor of a vehicle subject to a lease. The new provision further encourages early buyers by stipulating that the credit will be phased out after the 250,000th plug-in electric vehicle has been sold.

The 2008 Energy Act adds a new fringe benefit to employees who are bicycle commuters. Employees will be allowed to have wages paid pre-tax to offset for reasonable expenses (up to \$20 a month) incurred by the employee during the calendar year for the purchase and repair of a bicycle, bicycle improvements and bicycle storage, provided that the bicycle is regularly used for travel between the employee's residence and place of employment and the employee does not receive any other qualified transportation fringe benefit.¹⁸

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- 5 Effective for property placed in service after Oct. 3, 2008.
- 6 Section 25D(g).
- 7 Section 25D(a)(1).
- 8 Section 25D(c)(2).
- 9 Section 48(c)(4)(C).
- 10 Section 179D.
- 11 State and local governments may issue non-interest-bearing obligations, tax credit bonds where the taxpayer holding the bond on a credit allowance date is entitled to a credit against regular income tax and AMT liabilities.
- 12 See Section 54 for generally qualifications and requirements.
- 13 See Section 54C.
- 14 See Section 54D.
- 15 See generally Section 48B regarding the application procedures for receiving the credit.
- 16 See generally Section 45Q for definitions.
- 17 Section 30D. Effective for tax years beginning after Dec. 31, 2008.
- 18 Section 132(f). Effective for taxable years beginning after December 31, 2008.

Endnotes

- 1 Unless otherwise stated, all references to “Section” are to the Internal Revenue Code of 1986 (the Code), and all references to “Treas. Reg. Sec.” are to the Treasury Regulations promulgated thereunder (the Regulations).
- 2 Section 45(d).
- 3 Section 45(d). Other sources include facilities that generate electricity from closed-loop biomass, open-loop biomass, geothermal, small irrigation, qualified hydropower, landfill gas, marine renewable and trash combustion facilities.
- 4 Under the 2008 Energy Act, small irrigation power facilities are now part of the definition of marine and hydrokinetic renewable energy facilities for purposes of the placed in service date.

Hannah Dowd McPhelin of Pepper Hamilton Joins Ranks of LEED-Accredited Professionals

Hannah Dowd McPhelin, an attorney in Pepper Hamilton LLP’s Philadelphia office, has been certified as a LEED-Accredited Professional (LEED AP) by the Green Building Certification Institute (GBCI). The LEED AP program was developed by the U.S. Green Building Council (USGBC) in conjunction with its LEED (Leadership in Energy and Environmental Design) Green Building Rating Systems.

In becoming a LEED AP, Ms. McPhelin joins a small group of attorneys – estimated to be fewer than 65 nationwide – who understand the significance of “green” building trends on the future of the building industry and have successfully sought accreditation in green building standards.

In obtaining her certification, Ms. McPhelin focused on LEED-NC, the rating system developed for new construction and major renovations that is designed to

guide and distinguish high-performance commercial and institutional projects, including office buildings, high-rise residential buildings, government buildings, recreational facilities, manufacturing plants and laboratories.

Ms. McPhelin focuses her practice on real estate matters and other business transactions, including the acquisition and sale of commercial real estate properties and leasing of office, retail and industrial properties, representing both landlords and tenants. She is a member of Pepper Hamilton’s Real Estate Practice Group and the firm’s Sustainability and Climate Change Team.

She is the second Pepper Hamilton lawyer to become LEED accredited. Vicki R. Harding, a partner in the firm’s Detroit office, was the first Michigan-based attorney to achieve that designation. In obtaining her certification, Ms. Harding focused on LEED-CI, the rating system

developed for tenants who want to obtain LEED certification of their leased premises.

The LEED Green Building Rating System promotes global adoption of sustainable green building and development practices by creating and implementing universally understood and accepted tools and performance criteria.

LEED professional accreditation distinguishes professionals with the knowledge and skills to facilitate the integrated design process and streamline LEED certification. LEED APs have demonstrated a thorough understanding of green building practices and principles and the LEED Rating System.

While more than 43,000 people have become LEED APs since USGBC launched the professional accreditation program in 2001, based on the GBCI directory, it is estimated that fewer than 65 are attorneys.

More information about the U.S. Green Building Council and LEED rating systems is available at www.usgbc.org/leed.

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