

ENERGY UPDATE

Energy Tax Provisions in the American Recovery and Reinvestment Act of 2009

January 29, 2009

On January 28, 2009, the House of Representatives passed the American Recovery and Reinvestment Act of 2009 (H.R. 1) on a vote of 244 to 188. The House stimulus bill includes a \$275 billion tax package that was approved by the House Ways and Means Committee on January 22, 2009, by a vote of 24 to 13.

On January 27, 2009, the Senate Finance Committee approved by a vote of 14 to 9 a \$342 billion version of the tax package. The Senate version of the stimulus bill (S. 1) is expected to be considered by the full Senate beginning the week of February 2, 2009.

Congressional leaders have said they want to have the stimulus bill complete in time to be sent to President Obama before Congress breaks for the Presidents Day recess.

The House bill would extend and expand several energy tax provisions for both businesses and individuals and would provide some general tax incentives relevant to businesses in the energy industry. Although there are some significant differences, most of the energy-related and general tax provisions in the Senate bill generally mirror

those in the House bill, with the notable exception being a new grant program that is unique to the House bill. The Senate bill, however, includes a number of provisions that are not contained in the House bill.

Business Tax Provisions

The House bill would extend the placed-in-service deadline for various facilities eligible for the production tax credit (PTC) under section 45 of the Internal Revenue Code. For wind facilities, the deadline would be extended until the end of 2012 (a three-year extension), and for closed-loop biomass, open-loop biomass, geothermal, landfill gas, trash, and qualified hydropower facilities, the deadline would be extended until the end of 2013 (a three-year extension). For marine and hydrokinetic renewable energy facilities, the deadline would be extended until the end of 2013 (a two-year extension). The Senate bill contains the same provision.

The House bill also would permit an irrevocable election to treat certain renewable energy facilities that are described in section 45 and placed in service in 2009 or 2010 as “energy property” so as

to qualify for the investment tax credit (ITC) under section 48 in an amount equal to 30 percent of the taxpayer's basis in such property. These facilities would include wind, closed-loop biomass, open-loop biomass, geothermal, landfill gas, trash, qualified hydropower, and marine and hydrokinetic renewable energy facilities, but only if no PTCs have been allowed under section 45 with respect to such facilities and the taxpayer makes an irrevocable election to have the ITC provision apply. If the taxpayer elects to have the ITC provision apply, no PTCs would be allowed with respect to the facility subject to the election. The Senate bill contains the same provision, except the election would apply to facilities placed in service through the expiration of the applicable section 45 PTC.

In addition, the House bill would provide for grants from the Department of Energy (DOE) to taxpayers who place in service specified energy property during 2009 or 2010. The grants would be intended to reimburse the taxpayers for a portion of the cost of the energy facilities and would be in lieu of section 45 PTCs or section 48 ITCs, as applicable. The grants would be equal to 30 percent of the basis of certain qualified energy producing facilities, including facilities using wind, closed-loop biomass, open-loop biomass, geothermal, landfill gas, trash, qualified hydropower, and marine and hydrokinetic renewable energy, as well as qualified fuel cell, solar, and qualified small wind energy property. The amount of the grants would be equal to 10 percent of the basis of certain qualified microturbine, combined heat and power, and geothermal

heatpump property. For qualified fuel cell, qualified microturbine, and combined heat and power property, the grants would be subject to the same dollar limitations applicable to the section 48 ITC for such property. Certain tax-exempt entities would not be eligible to receive the grants. The House bill would provide that the grants would not be includible in the gross income of the taxpayers, but the grants would be taken into account in determining the basis of the facilities to which the grants relate (i.e., the basis would be reduced by 50 percent of the grant amount). In addition, any ITCs previously claimed by taxpayers for progress expenditures would be recaptured. The Secretary of Energy would apply rules similar to those under section 50 in making the grants. Thus, the grants would be subject to recapture over a five-year period if the applicable facility is disposed of or ceases to be a qualified renewable energy facility. The Senate bill does not contain the DOE grant program.

The Senate bill would provide a 30 percent credit for investment in qualified property used in a qualified advanced energy manufacturing project. A qualified advanced energy manufacturing project would be a project that re-equips, expands, or establishes a manufacturing facility for the production of property designed to produce energy from the sun, wind, or geothermal deposits; designed to manufacture fuel cells, microturbines, or energy storage systems for electric or hybrid-electric motor vehicles; designed to manufacture electric grids to support the transmission of intermittent sources of renewable energy; or designed

to manufacture equipment used for carbon capture or sequestration. There would be a number of requirements to constitute qualified property. The credits would be available only for projects certified by the Secretary of Treasury, in consultation with the Secretary of Energy, in an aggregate amount up to \$2 billion. The House bill does not contain a similar credit.

Among the provisions of general applicability, the House bill would provide for an election to extend the carryback period under section 172(b) for a net operating loss (NOL) from any taxable year ending in 2008 or 2009 (or, if elected by the taxpayer, the NOL from any taxable year beginning in 2008 or 2009) from two years to any of three, four or five years. If a taxpayer elects the extended carryback period, the applicable NOL would be permanently reduced by 10 percent. The election would not be available to entities that received funding from the Troubled Asset Relief Program. The House bill also would effectively suspend the rule that provides that a taxpayer's NOL deduction cannot reduce the taxpayer's alternative minimum taxable income by more than 90 percent, in the case of any alternative tax NOL deduction attributable to carrybacks from taxable years ending during 2008 or 2009 and carryovers to taxable years ending during 2008 and 2009. The Senate bill contains a similar provision except the full value of the NOL would be allowed without the 10 percent reduction.

The Senate bill also would provide for an extension of the carryback period under section 39(a) for general business credits from 2008 and 2009 from one year to five

years and allow business credits carried to taxable years ending in 2008 and 2009 to offset a taxpayer's entire net income tax (i.e., without regard to present-law limitations). The House bill does not contain an extension of general business credit carryback period.

The House bill also would provide for a one-year extension of the acquisition and placed-in-service dates applicable to the 50 percent additional depreciation deduction (the so-called "bonus depreciation") allowed pursuant to section 168(k) for certain qualified property. In addition, the House bill would extend for taxable years beginning in 2009 the \$250,000 limit on the amount of depreciable property that can be expensed under section 179 and the \$800,000 phase-out threshold. The Senate bill contains similar provisions for bonus depreciation and depreciable property expensing.

The Senate bill would modify the section 45Q credit for carbon sequestration, which is \$10 per metric ton of qualified carbon dioxide that 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, to require that the carbon dioxide be sequestered in permanent geologic storage. The Senate bill also would modify the plug-in electric drive motor vehicle credit under section 30D by increasing the level at which the credit phase-out begins from 250,000 vehicles to 500,000 vehicles, and it would provide a new 10 percent credit for low-speed vehicles, motorcycles, and three-wheeled vehicles. The House bill does not contain similar provisions.

Other notable changes for businesses in both the House and Senate bills include:

- The removal of the \$4,000 limitation on the section 48 ITC for qualified small wind energy property and the repeal of the provision that limits the amount of the section 48 ITC for qualified small wind energy property that is financed by subsidized energy financing or the proceeds of private activity bonds.
- An increase in the amount of “new clean renewable energy bonds” authorized under section 54C by \$1.6 billion to a total of \$2.4 billion.
- An increase in the amount of “qualified energy conservation bonds” authorized under section 54D by \$2.4 billion to a total of \$3.2 billion.
- A temporary increase in the credit available under section 30C for alternative fuel vehicle refueling property. For refueling property that does not relate to hydrogen that is placed in service during 2009 and 2010, the credit rate would be increased from 30 percent to 50 percent of the cost of such property, and the limitation on the amount of the credit would be increased from \$30,000 to \$50,000 for depreciable property and from \$1,000 to \$2,000 for other property. For hydrogen-related refueling property that is placed in service during 2009 and 2010, the 30 percent credit rate would not be changed, but the limitation on the amount of the credit would be increased from \$30,000 to \$200,000.

- The addition to the section 41 research credit of a new 20 percent credit for expenses paid or incurred in 2009 and 2010 for certain qualified energy research relating to the fields of fuel cells and battery technology, renewable energy, energy conservation technology, efficient transmission and distribution of electricity, and carbon capture and sequestration.

Individual Tax Provisions

Noteworthy changes for individuals in both the House and Senate bills include:

- An increase from 10 percent to 30 percent in the credit rate for amounts paid or incurred for qualified energy efficiency improvements under section 25C, and an increase in the limit on the aggregate amount of such credits to \$1,500 for taxable years beginning in 2009 and 2010; the extension of the placed-in-service deadline for such property by one year until December 31, 2010; and the repeal of the limitation on the amount of the credit allowed to individuals with respect to expenditures made from subsidized energy financing for nonbusiness energy property under section 25C.
- The removal of the limitations on the section 25D credit for expenditures made for solar water heating property (currently a \$2,000 limit), small wind property (currently a \$4,000 limit), and geothermal heat pumps (currently a \$2,000 limit); and the repeal of the limitation on the amount of the credit allowed to individuals with respect to expenditures made

from subsidized energy financing for residential energy-efficient property under section 25D.

For more information about H.R. 1, S. 1 or any other matter raised in this Client Update, please contact your usual Mayer Brown lawyer or one of the following lawyers.

Jeffrey G. Davis
+1 202 263 3390
Jeffrey.Davis@mayerbrown.com

Robert E. Glennon
+1 202 263 3330
reglennon@mayerbrown.com

Robert Z. Kelley
+1 202 263 3376
rkelley@mayerbrown.com

Robert A. Kelman
+1 312 701 7145
rkelman@mayerbrown.com

Arthur C. Walker Jr.
+1 202 263 3283
awalker@mayerbrown.com

Mayer Brown is a leading global law firm with approximately 1,000 lawyers in the Americas, 300 in Asia and 500 in Europe. Our Asia presence was enhanced by our combination with JSM (formerly Johnson Stokes & Master), one of the largest and oldest Asia law firms. We serve many of the world's largest companies, including a significant proportion of the Fortune 100, FTSE 100, DAX and Hang Seng Index companies and more than half of the world's largest investment banks. We provide legal services in areas such as Supreme Court and appellate; litigation; corporate and securities; finance; real estate; tax; intellectual property; government and global trade; restructuring, bankruptcy and insolvency; and environmental.

OFFICE LOCATIONS AMERICAS: Charlotte, Chicago, Houston, Los Angeles, New York, Palo Alto, São Paulo, Washington
ASIA: Bangkok, Beijing, Guangzhou, Hanoi, Ho Chi Minh City, Hong Kong, Shanghai
EUROPE: Berlin, Brussels, Cologne, Frankfurt, London, Paris

ALLIANCE LAW FIRMS Mexico City (Jáuregui, Navarrete y Nader); Madrid (Ramón & Cajal); Italy and Eastern Europe (Tonucci & Partners)

Please visit our web site for comprehensive contact information for all Mayer Brown offices.

www.mayerbrown.com

This Mayer Brown LLP publication provides information and comments on legal issues and developments of interest to our clients and friends. The foregoing is not a comprehensive treatment of the subject matter covered and is not intended to provide legal advice. Readers should seek specific legal advice before taking any action with respect to the matters discussed herein.

IRS CIRCULAR 230 NOTICE. Any advice expressed herein as to tax matters was neither written nor intended by Mayer Brown LLP to be used and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed under US tax law. If any person uses or refers to any such tax advice in promoting, marketing or recommending a partnership or other entity, investment plan or arrangement to any taxpayer, then (i) the advice was written to support the promotion or marketing (by a person other than Mayer Brown LLP) of that transaction or matter, and (ii) such taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.

© 2009. Mayer Brown LLP, Mayer Brown International LLP, and/or JSM. All rights reserved.

Mayer Brown is a global legal services organization comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP, a limited liability partnership established in the United States; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales; and JSM, a Hong Kong partnership, and its associated entities in Asia. The Mayer Brown Practices are known as Mayer Brown JSM in Asia. "Mayer Brown" and the "Mayer Brown" logo are the trademarks of the individual Mayer Brown Practices in their respective jurisdictions.