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Contacts

[Laura Ellen Jones](#)

Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(804) 788-8746
ljones@hunton.com

[David S. Lowman, Jr.](#)

1900 K Street, NW
Washington, DC 20006-1109
(202) 419-2070
(804) 788-8789
dlowman@hunton.com

[David B. Weisblat](#)

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1980
dweisblat@hunton.com

[Timothy L. Jacobs](#)

1900 K Street, NW
Washington, DC 20006-1109
(202) 955-1669
(804) 788-8362
tjacobs@hunton.com

House Bill Would Create Refundable Tax Credit Program

On February 4, 2010, Congressman Earl Blumenauer, joined by a group of cosponsors from the House Committee on Ways and Means, introduced [H.R. 4599](#), the “Renewable Energy Expansion Act of 2010” (the “House Bill”). The House Bill, if enacted, would (i) provide an election to receive a refundable tax credit and (ii) make the refundable tax credit available for 2011 and 2012 projects. The House Bill also provides certain helpful clarifications as compared to the existing Treasury Grant program, but otherwise is expected to carry forward the taxpayer-friendly guidance under that program. The provisions would be incorporated into new Internal Revenue Code (“Code”) Section 6451.

Refundable Credit

The House Bill provides an election with respect to any specified energy property originally placed in service by the taxpayer during the taxable year. If the election is made, the taxpayer will be treated as making a payment against the taxpayer’s income tax for the taxable year, equal to the applicable percentage of the basis of such property. Importantly, the deemed payment is not treated as made until the later of the due date of the return of such tax or the date on which such return is filed. The House Bill makes various clarifying amendments to the

procedures applicable to refundable tax credits to include the deemed payment.

Thus, unlike the Treasury Grant program, the deemed payment under new Code Section 6451 would be treated as a tax payment, may be applied as an offset or credit to outstanding tax liabilities or current year taxes due, and would be subject to the Code’s other procedures applicable to refundable tax credits. More importantly, the deemed payment would not be payable within 60 days of submission of an application, but only after the close of the taxable year in which the property is placed in service and only on or after the due date for filing the return for that taxable year (in some cases, corporate taxpayers may file a tentative claim for refund of their estimated tax payments immediately following the close of the taxable year — this provision is included in the House Bill).

Extension

The current Treasury Grant program is applicable to specified energy property (i) placed in service in 2009 or 2010 or (ii) placed in service after 2010 and before the applicable credit termination date, but only if construction of such property began in 2009 or 2010. The House Bill does not affect the current Treasury Grant and the expectations

of applicants who intend to apply for the Treasury Grant in 2010. In other words, those applicants will have the benefit of the 60-day mandatory payment period prescribed in Section 1603 of the American Recovery and Reinvestment Act of 2009 (“ARRA”) and will not have to wait until 2011 when tax returns are due to “claim” the refund.

The House Bill provides an election, however, for those taxpayers with 2009 or 2010 projects who prefer the refundable tax credit regime. Taxpayers might prefer the refundable tax credit over the Treasury Grant, for example, because of the familiarity of dealing with the IRS rules and tax procedures or because of the favorable clarifications included in the House Bill as compared to the Treasury Grant program. In addition, the House Bill extends the period for receiving the refundable tax credit to include the 2011 and 2012 years. Taxpayers may receive the refundable tax credit for specified energy property (i) placed in service in 2011 or 2012, or (ii) placed in service after 2012 and before the applicable credit termination date, but only if construction of such property began in 2011 or 2012. Thus, for 2011 and 2012 projects, taxpayers must rely on the refundable tax credit provisions and do not have the option of applying for the Treasury Grant (absent an extension of ARRA Section 1603).

Correlation to Treasury Grant

The refundable tax credit provisions are intended to carry forward the taxpayer-friendly provisions and guidance under the Treasury Grant program. Specifically, new Code Section 6451 provides the same applicable

percentages (30 percent and 10 percent, respectively), definitions of specified energy property, credit termination dates and restrictions for nontaxpayers as ARRA Section 1603. In addition, [Congressman Blumenauer’s Statement for the Record](#) provides the following assurances regarding the favorable Treasury Guidance under ARRA Section 1603:

The Renewable Energy Expansion Act allows taxpayers to elect to receive a tax credit that functions as a direct payment for investing in or producing renewable energy. The amount of the payment is tailored to equal the subsidy provided under the American Recovery and Reinvestment Act’s energy grant program. The legislation provides taxpayers the option to receive this new credit or to use the ARRA-created grant program, depending on which program best matches their needs. The legislation also ensures the smooth continuation of our underlying commitment to clean, renewable energy by carrying forward existing guidance and making technical changes to improve the underlying program. Finally, the legislation extends the credit until January 1, 2013.

We expect that similar statements will be incorporated into the legislative history, providing taxpayers the opportunity of anticipating the type of guidance Treasury and the IRS will apply in administering new Code Section 6451.

The House Bill requires that the taxpayer provide information to the “Secretary (in consultation with the Secretary of Energy).” If the taxpayer fails to provide the required information verifying the proper amount to

be treated as a deemed payment under new Code Section 6451, then the taxpayer will not be treated as having made an election and no deemed payment will be treated as having been made. It is not clear whether the process described in this paragraph will involve the same process as the current Treasury Grant program (involving the Assistant Fiscal Secretary in Treasury and the National Renewable Energy Laboratory [“NREL”]), or whether the IRS — as the delegate of the “Secretary” under the Code — in consultation with NREL, will administer this preliminary “information” process. Obviously, the IRS will administer the refund, offset and credit procedures applicable to the refundable tax credit as part of the “secondary” refund process.

The House Bill carries forward the provision in ARRA Section 1603 specifically excluding the Treasury Grant payment from gross income. However, it is not clear that the refundable tax credit would trigger income inclusion in the first instance. It likewise is not clear whether the refundable tax credit may be treated as an increase in a partner’s outside basis in his or her partnership interest, as most practitioners believe is the result under the Treasury Grant program. Finally, similar to the Treasury Grant, depending on whether a particular state tax regime conforms to the Code and as of what particular date, the receipt of the refund might be subject to tax on the state level.

Favorable Clarifications

The House Bill does make some significant clarifications with respect to ARRA Section 1603 and the Treasury Grant Guidance, in favor

of taxpayers. These clarifications, however, would be applicable only to the refundable tax credit program.

First, the House Bill eliminates certain issues relating to the normalization rules applicable to regulated utilities. The House Bill provides that Code Section 50(d)(2), which incorporates the former restrictions on normalization under the old investment tax credit rules, shall not apply with respect to property placed in service by a person in the trade or business of furnishing or selling electrical energy if any law or regulation requires that not less than a certain amount of the electrical energy so furnished or sold by such person be derived from one or more renewable resources.

Second, ARRA Section 1603 disqualified all Code Section 501(c) organizations, regardless of whether they pay tax on the activity in which

the specified energy property is employed as unrelated trade or business income. The House Bill clarifies, consistent with the investment tax credit rules, that Code Section 501(c) organizations that pay unrelated trade or business income tax are not disqualified from receiving the refundable tax credit. The House Bill, however, extends the disqualified nontaxpayer rules to cover organizations that are tax exempt under Code Section 401(a) (certain stock bonus, pension or profit-sharing plans).

Third, ARRA Section 1603 provided an “all or nothing” rule for partnerships (and other pass-through entities) with disqualified nontaxpayer partners. In other words, no matter what percentage the disqualified partner owned in the partnership, the partnership would not be eligible to apply for the Treasury Grant. The House Bill changes this rule, providing that partnerships and

subchapter S corporations will be disqualified only to the extent of the proportionate shares owned by the disqualified partners or S corporation shareholders. The House Bill specifically incorporates the tax-exempt partnership rules in Code Section 168(h)(6), excluding, however, the tax-exempt controlled entity rules of Code Section 168(h)(6)(F) — another favorable clarification for taxpayers.

Finally, the House Bill eliminates the restrictions on the ability of real estate investment trusts (REITs) to utilize the refundable tax credit. These restrictions had been incorporated by Code Section 50(d)(1), which, in turn, incorporated the old investment tax credit restrictions. The Treasury Grant Guidance provides that these restrictions apply for purposes of the Treasury Grant program.