



Renewable Energy Alert

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Many renewable energy provisions in 2008 bailout legislation

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Although the Emergency Economic Stabilization bill began as relatively brief legislation directed only at the crisis in the financial markets, it soon morphed into a behemoth of a bill that included nearly 150 pages of energy incentives. The name of the resulting act dramatically expanded, too, becoming the gargantuan “Emergency Economic Stabilization Act of 2008, Energy Improvement and Extension Act of 2008, and Tax Extenders and Alternative Minimum Tax Relief Act of 2008.” We’ll call it the “Bailout Act” in this alert, and we’ll cover only the energy provisions. Please go to our website (<http://www.nixonpeabody.com>) for other client alerts related to other parts of the Bailout Act.

As to energy, the provisions are so extensive that it is too early to provide a detailed analysis of the new rules. Indeed, even a comprehensive summary of the rules would be so broad that it would go on for several pages, addressing details and tax provisions that apply to dozens of industries. In the interest of being reasonably comprehensive, and yet as brief as possible, we thought it would be useful to have a summary of the energy tax credits and incentives in which our clients are most interested. Accordingly, this discussion emphasizes renewables in a commercial context, and only briefly touches on credits available to home owners and tax benefits and changes that apply to other sources of energy, like coal and conventional oil and gas. It is *not* a complete summary; please contact us with your thoughts and questions about these and other provisions of the new law.

The Extenders. The Bailout Act extends the placed-in-service (PIS) date for several tax credits:

- *Wind:* The production tax credit (PTC; found in Section 45 of the Tax Code) for producing electricity from qualified wind now applies to facilities PIS before the end of 2009.
- *Other PTCs:* The PTC for producing electricity from closed- and open-loop biomass, geothermal, small irrigation power; municipal solid waste; trash combustion; and qualified hydropower applies to facilities PIS before the end of 2011.

- *Solar*: The 30% investment tax credit for energy (or *Energy Credit*, found in Section 48 of the Code) for solar applies to facilities PIS before the end of 2016.
- *Fuel Cells*: The 30% Energy Credit for qualified fuel cell property applies to facilities PIS before the end of 2016, **and** there is an increase in the credit limit from \$500 to \$1,500 per 500 W of capacity.
- *Microturbines*: The 10% Energy Credit for microturbine property applies to facilities PIS before the end of 2016.

New Credits. The Bailout Act provides

- *Marine/Hydrokinetic*: a new PTC for marine and hydrokinetic renewable energy (including energy derived from waves, tides, rivers, lakes, streams, irrigation systems, canals, and differentials in ocean temperature; PIS after October 3, 2008, and before the end of 2011),
- *Combined Heat and Power*: a new 10% Energy Credit for combined heat and power system property (with a maximum size of 50 MW or a mechanical energy capacity of 67,000 hp, or an equivalent combination; PIS before 2017),
- *Small Wind*: a 30% Energy Credit for “small commercial wind property” (but with a \$4,000 annual cap per taxpayer; PIS before 2017), and
- *Geothermal Heat Pump*: a 10% Energy Credit for geothermal heat pump systems (PIS before 2017).

New Rules and Definitions. The Bailout Act amends the definitions of, and provides new rules for, the following facilities:

- Open-loop biomass facilities
- Closed-loop biomass facilities
- Trash combustion facilities (now, simply, “trash facilities”)
- Nonhydroelectric dams

Some of these new rules apply to property placed in service after October 3, 2008, while others apply to property PIS after December 31, 2008.

Alternative Minimum Tax. The Bailout Act allows the Energy Credit (remember, that’s solar, fuel cell, and the other credits in Section 48, including the new Energy Credits described under the heading “New Credits,” above, but not the PTC, which already has a limited exclusion for wind) to be used to reduce the alternative minimum tax. This use applies to tax years beginning after October 3, 2008, and the carryback of credits from those years.

Public Utility Property. The Bailout Act repeals the restrictions that did not allow “public utility property” to be eligible for the Energy Credit. The change is effective for periods after February 13, 2008, in tax years ending after that date.

Coal. The Bailout Act provides a variety of new and amended coal-related provisions, including (a) increasing the investment tax credit rate to 30% for power generation projects using certain advanced coal technologies, (b) increasing the maximum credit amounts allocable for these projects to \$2.55 billion, (c) increasing the investment tax credit rate for coal gasification projects to 30%, and (d) increasing the aggregate credit amounts for coal gasification projects by \$250 million. It also extends the PIS date for refined coal facilities (eligible for the PTC) to December 31, 2009. For coal produced and sold from facilities PIS after December 31, 2008, the Bailout Act increases emissions standards on the refined coal, and modifies its definition to require that it either meet the market value test or be considered “steel industry fuel”. The Bailout Act also requires the secretary of the Treasury to work with the National Academy of Sciences for a comprehensive review of Tax Code provisions related to carbon and other greenhouse gas emissions.

CREBs and QECBs. The Bailout Act extends the termination date for existing clean renewable energy bonds (CREBs) by one year through 2009. It also authorizes \$800 million of *new* CREBs 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 facilities. The Bailout Act also authorizes the issuance of qualified energy conservation bonds (QECBs) to finance local government conservation and greenhouse gas reduction projects. The new CREB and QECB provisions are effective for obligations issued after October 3, 2008.

Fuels. The Bailout Act makes many changes with respect to fuels, most notably that

- cellulosic biofuel plants are eligible for the bonus depreciation that applies to biomass ethanol plants,
- the rates of income and excise tax credits for biodiesel and renewable diesel are increased and extended through 2009, and
- foreign-produced fuel that is used or sold for use outside the United States is disqualified from the income and excise tax credits for alcohol, biodiesel, and alternative fuels.

Energy Efficient Buildings and Homes. The Bailout Act extends the energy efficient buildings deduction provided in Section 179D of the Tax Code for five years, through December 31, 2013, and it extends through 2009 the \$2,000 per home tax credit—found in Section 45L of the Tax Code—that applies to building contractors.

Other Provisions Applicable to Individuals. As we noted at the beginning of this alert, the Bailout Act modifies or extends a variety of other credits relevant to personal residences. Space does not permit us to address all of the modifications and new credits adequately, but here are a few:

- The Bailout Act extends the PIS date for claiming the 30% credit for “residential energy efficient property.” The credit for this property is now extended to property PIS before the end of 2016, the definition is expanded to include qualified small wind and qualified geothermal heat pumps, and the credit can now be used to offset the alternative minimum

tax. (The prior law covered property that generated heat or electricity from solar power and qualified fuel cell property only).

- The Bailout Act also eliminates the \$2,000 limitation on the ability to use the credit in the case of solar expenditures for tax years after 2008.
- It also adds a credit for biomass stoves, modifies the rules for energy efficient appliances and water heaters, and extends and modifies the up-to-\$500 energy efficient home tax credit.
- A new credit is provided for plug-in electric drive vehicles.

And lest we forget, the Bailout Act permits employers to give a \$20 per month reimbursement that is tax free for bicycle commuters!

Please feel to contact us if you'd like to hear greater detail about these or any other provisions of the new law. Please contact Forrest David Milder at 617-345-1055 (fmilder@nixonpeabody.com), or Jim Duffy at 617-345-1129 (jduffy@nixonpeabody.com).

*This is one in a series of alerts addressing the 2008 bailout legislation and the nation's current credit crisis. To view related alerts, and to see how Nixon Peabody can help you anticipate and respond to the challenges and opportunities facing businesses in these uncertain times, please visit our **Financial Recovery Team website page**.*