BROWN RUDNICK BERLACK ISRAELS LLP

CLIENT ALERT

Energized Legislation: JOBS Bill Passes in the Senate

Includes Key Energy Tax Credits

The Jumpstart Our Business Strength ("JOBS") Bill (S. 1637) passed by a 92-5 vote in the Senate on May 11, 2004. The bill includes extensive energy-related amendments to the Internal Revenue Code, particularly with respect to extending renewable tax credits. This Alert provides a brief summary of the legislative prospects for the bill and the various energy-related tax proposals. It is important to note that all of these provisions are subject to negotiation with the House, and things could still change dramatically before any or all of S.1637 becomes law.

What to Expect Next

The House of Representatives, under the leadership of Bill Thomas, Chairman of Ways and Means, has been struggling to find consensus for a version of the JOBS bill and, prior to the Senate's action, was at least 25 votes short of success.

Chairman Thomas is now leaning toward introducing a new bill modeled after the Senate-passed version in the hope of securing quick passage and then working out the details in a Conference Committee. Realizing that the "energy" provisions are expensive, it remains unclear at this time whether or not they will be included in the House bill. Some of these provisions may be included, and some may not. In any event, the upcoming House floor action will only be a prelude to the real bargaining that will occur later, inside the offices of the Congressional Leadership and those appointed to the Conference Committee.

One thing is sure: the many tax "sweeteners" put into the Senate bill assure significant support and are likely to be important in final passage of the underlying legislation.

Nothing is certain, however, and getting to Conference may well be a problem if there is a partisan dispute over including one or more "non-germane" provisions in the bill.

Such provisions may include an increase in the federal minimum wage, enhanced overtime obligations for employers, and the extension of unemployment benefits, to name a few.

Fights like this have become the "way" of the Senate, with the minority party (*i.e.,* the Democrats) holding up the Conference in order to get their way on one or more of these provisions.

Our best guess today is that the Congress does indeed send a bill – with most of the energy tax credits – to the President before adjourning in October.

Our second-best guess is that the matter will hit a partisan wall and, in a December lame duck session, the Congress will pass a very stripped-down bill – without the energy or other tax breaks – just to satisfy the demands of our European trading partners.

The Energy Components

Salient energy provisions of S. 1637 are set out below.

Renewable Energy Credits. Essentially, S.1637 would extend the Section 45 renewable energy credit at the rate of 1.8 cents per kilowatt hour, with no further adjustments for inflation.

Wind facilities qualify for a 10-year, 1.8 cents per kwh credit, provided the facility is placed in service before Jan. 1, 2007.

Certain other facilities are also eligible for a 1.8 cents per kwh credit for 10 years, but they must be placed in service during the period Jan. 1, 2005 through December 31, 2006. These are facilities based on the following resources: agricultural waste nutrients, geothermal, solar, municipal biosolids and recycled sludge, and small irrigation hydro.

For municipal solid waste, the credit is available for only five years. Most biomass qualifies for the 10-year credit if the facility is placed in service during the period Jan. 1, 2005 through December 31, 2006.

However, there is also a credit for open-loop and closed-loop co-fire facilities placed in service prior to Jan. 1, 2005, with a credit of 1.2 cents per kwh for open-loop biomass facilities placed in service prior to the legislation's date of enactment. The credit is limited to five years for biomass facilities placed in service prior to date of enactment.

Certain tax-exempt organizations (municipal power authorities, electric cooperatives and the Tennessee Valley Authority) will be eligible to obtain certifications for these credits and to sell, trade or assign them, or use them to offset certain debt payments.

Alternate Vehicles and Fuels. S.1637 provides incentives for alternative vehicles (*e.g.,* vehicles that run exclusively on natural gas, ethanol and certain other substances; battery and fuel cell vehicles; and hybrid trucks) and alternative fuels, including a small ethanol producer credit. The Senate bill once again restores the credit for energy-efficient heating and cooling equipment, and certain other items, which had been dropped in Conference when this legislation was last considered.

Coal Facilities. S.1637 includes production and investment tax credits for clean coal facilities and advanced clean coal facilities. Shorter amortization periods for pollution control equipment are not part of the bill. The credits apply to electricity generating facilities totaling no more than 7,500 MW of generating capacity nationwide, with smaller limits for the facilities themselves.

There is a production credit for electricity generated from facilities under 4000 MW that are retrofitted, repowered or replaced with currently available clean coal technology within 10 years of the date of enactment.

Qualifying facilities must improve efficiency by 5% and achieve specific emission requirements. A second incentive is a 10% investment tax credit for advanced clean coal technology, but only if the facility qualifies for an advanced clean coal production tax credit that varies, depending upon the year the facility is placed in service. Again, certain tax-exempt organizations will be eligible to obtain certifications for these credits and dispose of them or apply them to debt payments.

Section 29 Credits. Amendments to Section 29 of the Tax Code (providing a credit for fuel from a nonconventional source, such as oil from shale and tar sands, and gas from geo-pressured brine) provide a three-year placed in service window for new wells. The credit is $3 per barrel (or BTU equivalent) for production from all Section 29 sources, except synthetic fuels from coal.

Synthetic fuels from coal must meet new requirements. This credit is also not adjusted for inflation. All production is subject to a daily average cap of 200,000 cubic feet. The provision also adds viscous oil, refined coal, coalmine gas and agricultural waste as new nonconventional sources.

Additionally, the provision allows taxpayers to claim a tax credit on qualifying liquid, gaseous or solid synthetic fuels produced from coal (including lignite) for facilities placed in service after December 31, 2004 and before January 1, 2007.

Facilities placed in service after December 31, 1979 and before January 1, 1993, which produce coke, coke gas or natural gas and byproducts produced by coal gasification from lignite, are eligible for the credit on qualified fuels produced and sold before January 1, 2006. The 200,000 cubic feet limit does not apply to this production.

Section 29 is also added to the list of general business credits, allowing the credit to be carried forward.

Electric Utility Restructuring. The energy tax package provides an 8-year period to recognize gain from an electric transmission transaction. This package also modifies the rules for cooperatives, as well as the rules for qualified nuclear decommissioning funds.

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