REPORT OF THE LEGISLATION COMMITTEE

This report summarizes federal energy legislation enacted into law from January 1 through December 31, 2008, specifically the Energy Improvement and Extension Act of 2008.*

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After a relatively long period in which federal energy law was enforced without major amendment, more recent shifts in the energy policy arena, including increased focus on renewable energy, energy efficiency and other means of reducing carbon dioxide emissions, led to the enactment of significant energy legislation in 2005,[1] 2007[2] and most recently in late 2008. The Energy Improvement and Extension Act of 2008 (Act) was ultimately included as part of the contentiously debated Emergency Economic Stabilization Act of 2008 which was signed into law by President Bush on October 3, 2008,[3] in response to disruptions in the economy and financial system. The Act adopts various energy tax incentives by amending several provisions of the Internal Revenue Code of 1986 (IRC)[4] and addresses four broad categories: (1) energy production incentives, including renewable energy, carbon mitigation, and coal provisions; (2) transportation and domestic fuel security; (3) energy conservation and efficiency; and (4) revenue provisions.

1. Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005).

2. Energy Independence and Security Act of 2007, Pub. L. No. 110-140, 121 Stat. 1492 (2007).

3. Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765 (2008) (Stabilization Act). The Energy Improvement and Extension Act of 2008, previously H.R. 1424, is contained in Division B of the Stabilization Act, 122 Stat. 3807-3861 [hereinafter, *The Act*].

4. Internal Revenue Code of 1986, Pub. L. No. 99-514, 100 Stat. 2095 (1986).

I. ENERGY PRODUCTION INCENTIVES

The energy production incentives portion of the Act[5] contains renewable energy incentives,[6] carbon mitigation, and coal provisions.[7] The provisions provide for extensions of and increases in existing tax credits as well as new tax credits and deferral of tax gains on certain transmission property.

A. Renewable Energy Incentives

1. Renewable Energy Credit

For wind and refined coal facilities, the Act extends for one year, *i.e.*, through January 1, 2010, the existing production tax credit in Section 45 of the IRC for producing electricity from these facilities.[8] For certain other facilities (including solar, geothermal, qualified hydropower, closed- and open-loop biomass, small irrigation, landfill gas, and trash combustion), the Act extends through January 1, 2011 the existing production tax credit. The Act also revises definitions and rules related to claiming the credit.

2. Production Credit for Electricity Produced from Marine Renewables

The Act adds a new subparagraph to section 45(c) of the IRC to provide a production tax credit, through January 1, 2012, for electricity produced from marine and hydrokinetic renewable energy.[9] Such renewable energy is derived from waves, tides, currents in oceans, free flowing water in rivers, lakes, or irrigation systems, and differentials in ocean temperature.

3. Energy Credit

For solar energy, fuel cell, and microturbine property, the current energy tax credit in section 48(a) of the IRC of thirty percent[10] is extended through 2016.[11] The Act establishes an energy credit for combined heat and power system property, also through 2016. The Act allows public utility property to qualify for energy credits and allows energy credits to offset the alternative minimum tax.

4. Energy Credit for Small Wind Property and Geothermal Heat Pump Systems

Qualified small wind energy property (with a capacity of not more than 100 kilowatts) and equipment that uses ground water or the ground as a thermal energy source to heat a structure are entitled to a 30 percent energy tax credit.[12] The tax credit extends through 2016.

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5. *The Act*, *supra* note 5, at I.
6. *The Act*, *supra* note 5, at I(A).
7. *The Act*, *supra* note 5, at I(B).
8. *The Act*, *supra* note 5, at § 101.
9. *The Act*, *supra* note 5, at § 102.
10. The energy credit for any taxable year is the energy percentage of the basis of each energy property placed in service during such taxable year.
11. *The Act*, *supra* note 5, at § 103.
12. *The Act*, *supra* note 5, at §§ 104 & 105.

5. Credit for Residential Energy Efficiency Property

The Act provides an eight year extension, through December 31, 2016, of the thirty percent individual tax credit for residential solar electric expenditures, thus eliminating the previous $2,000 cap.[13] Residential small wind energy property and geothermal heat pump systems are made eligible for tax credits up to $4,000 and $2,000, respectively. The tax credit may be allowed against the alternative minimum tax.

6. New Clean Renewable Energy Bonds

The Act extends through 2009 the authority to issue renewable energy bonds and authorizes $800 million of such new bonds to finance qualifying renewable energy facilities that generate electricity.[14] The bonds are allocated among: (1) state, local, and tribal governments; (2) public power providers; and (3) electric cooperatives.

7. Credit for Steel Industry Fuel

For a facility producing steel industry fuel placed in service before January 1, 2010, the Act grants a tax credit to a producer of steel industry fuel.[15] Steel industry fuel is defined as liquefied coal waste sludge distributed on coal and used as a feedstock for the manufacture of coke.

8. Special Rule to Implement Federal Energy Regulatory Commission and State Electric Restructuring Policy

The Act extends the deferral of the taxable gain from a vertically integrated electric utility's sale of transmission property to an independent transmission company.[16] The sale must be approved by the Federal Energy Regulatory Commission. The tax deferral is extended through 2009.

B. Carbon Mitigation and Coal Provisions

1. Expansion and Modification of Advanced Coal Project Investment Credit

For advanced coal-based generation technology projects, the Act provides a thirty percent investment tax credit and increases the aggregate credits available to $2.55 billion.[17] The investment tax credit is also made available for a project that separates and sequesters at least sixty-five percent of the project's total carbon dioxide emissions and provides for a recapture of credit for failure to sequester.

2. Expansion and Modification of Coal Gasification Investment Credit

The Act increases the current investment tax credit for coal gasification investment to thirty percent.[18] The Act also expands aggregate credits.

13. *The Act*, *supra* note 5, at § 106.
14. *The Act*, *supra* note 5, at § 107.
15. *The Act*, *supra* note 5, at § 108.
16. *The Act*, *supra* note 5, at § 109.
17. *The Act*, *supra* note 5, at § 111.
18. *The Act*, *supra* note 5, at § 112.

3. Temporary Increase in Coal Excise Tax; Funding of Black Lung Disability Trust Fund; and Special Rules for Refund of the Coal Excise Tax to Certain Coal Producers and Exporters

The Act extends the coal excise tax and restructures the Black Lung Disability Trust Fund debt.[19] In addition, the Act establishes special rules for certain coal producers and exporters to receive a refund of coal excise taxes paid for coal exported.[20]

4. Tax Credit for Carbon Dioxide Sequestration

The Act establishes a tax for industrial source carbon dioxide that is sequestered.[21] The tax credit is equal to $20 per metric ton of carbon dioxide captured and disposed of in secure geological storage and $10 per metric ton of carbon dioxide captured and used as a tertiary injectant in a qualified enhanced oil or natural gas recovery project.

5. Certain Income and Gains Relating to Industrial Source Carbon Dioxide Treated As Qualifying Income for Publicly Traded Partnerships

Publicly traded partnerships are allowed to report as qualifying income certain income and gains related to industrial source carbon dioxide.[22]

6. Carbon Audit of the Tax Code

The Secretary of the Treasury is directed to enter into an agreement with the National Academy of Sciences to review the IRC to identify specific tax provisions that have the most significant effects on greenhouse gas emissions and estimate the magnitude of those effects.[23] A report to Congress must be submitted within two years of the enactment of the Act.

II. TRANSPORTATION AND DOMESTIC FUEL SECURITY

The transportation and domestic fuel security title of the Act contains and clarifies various tax incentives.[24] The incentives include tax credits for biofuels production, plug-in electric vehicles, and bicycle commuting, among other provisions.

A. Clarification that Credits for Fuel are Designed to Provide an Incentive for United States Production

The Act closes the so-called "splash and dash" loophole, effective May 15, 2008.[25] As enacted, all alcohol, biodiesel, and renewable diesel that is imported into the United States, splash blended with gasoline, diesel, or another taxable fuel, and then exported for consumption or use abroad is not eligible for the mixture credits as of May 15, 2008. Imported alcohol, biodiesel, and renewable

19. *The Act*, *supra* note 5, at § 113.
20. *The Act*, *supra* note 5, at § 114.
21. *The Act*, *supra* note 5, at § 115.
22. *The Act*, *supra* note 5, at § 116.
23. *The Act*, *supra* note 5, at § 117.
24. *The Act*, *supra* note 5, at II.
25. *The Act*, *supra* note 5, at § 203.

diesel that is blended with gasoline, diesel, or another taxable fuel and then sold for use or consumption within the United States remains eligible for the credit.

B. Inclusion of Cellulosic Biofuel in Bonus Depreciation for Biomass Ethanol Plant Property

The Act amends Section 168 of the IRC to allow a bonus depreciation allowance for biomass ethanol plant property producing any kind of cellulosic biofuel.[26] Before the Act was enacted, fuel producers could write off fifty percent of the cost of facilities that produce cellulosic biomass ethanol (for facilities placed in service before January 1, 2013). Now the tax benefit is available for facilities that produce other cellulosic biofuels (*e.g*., biodiesel).

C. Credits for Biodiesel and Renewable Diesel

The Act amends Section 40A of the IRC to extend through 2009 the $1.00 per gallon production tax credit for biodiesel and diesel fuel derived entirely from biomass, as well as the ten cents per gallon credit for small biodiesel producers.[27] The amendment also eliminates the "agri-biodiesel" distinction in the biodiesel credits, making the $1 per gallon mixture credit and biodiesel credit feedstock-neutral. Also eliminated were requirements that renewable diesel fuel be produced using a thermal depolymerization process. However, diesel fuel created by co-processing biomass with other non-biomass feedstocks (*e.g.*, natural gas) is still only eligible for the fifty cents per gallon alternative fuel tax credit.

D. Extension and Modification of Alternative Fuel Credit

Also extended through 2009 are excise tax credits for alternative fuel (except hydrogen) and fuel mixtures (amending IRC Section 6426(d)). The definition of alternative fuels has been expanded to include Liquefied Petroleum Gas, Compressed Natural Gas (CNG), Liquefied Natural Gas, and jet fuel derived from biomass gas.[28]

E. Income and Gains Related to Certain Fuels and Mixtures

The Act allows for businesses to treat income from transportation or storage of alternative fuels as qualifying income under the IRC's publicly traded partnership rules.[29] The incentive applies to income and gains relating to alcohol fuels and mixtures, biodiesel fuels and mixtures, and other fuels and mixtures.

F. Credit for New Qualified Plug-In Electric Drive Motor Vehicles

The Act creates a new tax credit for new qualified plug-in electric drive motor vehicles. The credit ranges from $2,500 to $15,000, and can be claimed through the end of the first quarter after the quarter in which more than 250,000 qualified vehicles are sold in the United States.[30]

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26. *The Act*, *supra* note 5, at § 201.
27. *The Act*, *supra* note 5, at § 202.
28. *The Act*, *supra* note 5, at § 204.
29. *The Act*, *supra* note 5, at § 208.
30. *The Act*, *supra* note 5, at § 205.

G. Alternative Fuel Vehicle Refueling Property Credit

The thirty percent tax credit for alternative fuel vehicle refueling property is extended through 2010.[31] Alternative refueling property includes E85 and CNG stations, and electric recharging stations are also now included.

H. Exclusion from Heavy Truck Tax for Idling Reduction Units and Advanced Insulation

A new heavy truck excise tax exclusion was created for the cost of idling reduction devices and advanced insulation installation in refrigerated trucks.[32] Idling reduction devices include auxiliary power units used to power heating and air conditioning.

I. Transportation Fringe Benefit to Bicycle Commuters

Under a provision aimed specifically at encouraging employers to reward workers' efforts to reduce carbon footprints, employees will now be allowed to exclude from their gross income any reimbursements for bicycle commuting expenses.[33]

J. Election to Expense Certain Refineries; Taxable Income Limit on Percentage Depletion for Certain Oil and Natural Gas Production

The Act extends two important tax incentives for traditional oil and gas business interests. It extends the taxpayer election to expense costs of certain refinery property through 2013 and expands this benefit to refineries that process oil sands- or shale-derived crude.[34] The Act also extends the suspension of the taxable income limit on percentage depletion for oil and natural gas produced from marginal wells.[35]

III. ENERGY CONSERVATION AND EFFICIENCY

Title III of the Act contains several provisions designed to promote energy conservation and efficiency. The provisions extend existing tax incentives, add new incentives and modify depreciation allowances for advanced electricity delivery systems and property used in recycling certain materials.

A. Credit for Investment in Qualified Energy Conservation Bonds

The Act modifies Section 54A of the IRC to create a new tax credit for investing in government issued bonds for a qualified energy conservation purpose.[36] Such bonds are "qualified" if 100 percent of the bond's proceeds go toward qualified conservation purposes. Qualified conservation purposes include a wide variety of projects including renewable energy facilities and mass commuting facilities.

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31. *The Act*, *supra* note 5, at § 207.
32. *The Act*, *supra* note 5, at § 206.
33. *The Act*, *supra* note 5, at § 211.
34. *The Act*, *supra* note 5, at § 209.
35. *The Act*, *supra* note 5, at § 210.
36. *The Act*, *supra* note 5, at § 301.

B. *Credit for Nonbusiness Energy Property*

The Act amends Section 25C of the IRC to extend the tax credit for noncommercial energy production and makes energy efficient biomass stoves eligible for this tax credit.[37] The provisions modify requirements for water heaters, geothermal heat pumps and energy efficiency projects to be eligible for a tax credit.

C. *Deduction for Energy Efficient Commercial Buildings*

The Act extends the tax deduction for energy efficient commercial buildings from 2008 through 2013, by amendment to Section 179D of the IRC.[38]

D. *Credit for New Energy Efficient Homes*

The Act extends the tax credit for new construction of energy efficient homes from 2008 through 2009, pursuant to a modification of Section 179D of the IRC.[39]

E. *Modification of Credit for Energy Efficient Appliances Produced After 2007*

The Act modifies requirements in the tax code to enable household appliances produced after 2007 to be eligible for a tax credit.[40]

F. *Exempt Facility Bonds for Qualified Green Building and Sustainable Design Projects*

The Act extends the tax exempt status of bonds issued to finance the construction of certain projects. Such projects are designated as a green building and sustainable design projects from 2009 through fiscal year 2012.[41]

G. *Depreciation Allowance for Smart Meters and Smart Grid Systems*

The Act accelerates the allowable time period to calculate depreciation for advanced electric transportation and metering equipment from twenty years to ten years.[42]

H. *Depreciation Allowance for Certain Reuse and Recycling Property*

A fifty percent depreciation allowance is created for certain facilities used to process and collect certain recyclable materials. Eligible materials include fibers, scrap and metals.[43]

IV. REVENUE PROVISIONS

Title IV of the Act includes various revenue provisions related to oil and gas production. This part of the act provides tax credit deduction limits for

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37. *The Act*, *supra* note 5, at § 302.
38. *The Act*, *supra* note 5, at § 303.
39. *The Act*, *supra* note 5, at § 304.
40. *The Act*, *supra* note 5, at § 305.
41. *The Act*, *supra* note 5, at § 307.
42. *The Act*, *supra* note 5, at § 306.
43. *The Act*, *supra* note 5, at § 308.

domestic production, amendments related to foreign tax credits, and the increase and extension of the tax rate associated with an oil spill liability fund.

A. Limitation of Deduction for Income Attributable to Certain Domestic Production

The Act applies a three percent reduction to the tax credit for income regarding the domestic production of oil, gas and related products.[44]

B. Treatment of Certain Oil and Gas Related Income for Purposes of the Foreign Tax Credit

The different treatment of foreign oil and gas extraction income and foreign oil related income is eliminated with regard to the foreign tax credit.[45] The modification includes a reduction in the amount of foreign oil and gas taxes in certain instances.

C. Broker Reporting of Customer's Basis in Securities Transactions

The Act expands the reporting requirements applicable to investment brokers regarding securities transactions.[46] Brokers must report the adjusted basis of publicly traded securities owned by their customers.

D. Federal Unemployment Tax Act Surtax

The Act extends the Federal Unemployment Tax Act (FUTA) temporary surtax, which otherwise would have expired after 2008.[47] The 0.2 percent surtax is extended through 2009.

E. Increase and Extension of Oil Spill Liability Trust Fund Tax

The Act increases and extends the Oil Spill Liability Trust Fund financing rate.[48] The rate is eight cents per barrel for crude oil and petroleum products through 2016, and nine cents per barrel through 2017. The tax is extended through 2017.

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44. *The Act*, *supra* note 5, at § 401.
45. *The Act*, *supra* note 5, at § 402.
46. *The Act*, *supra* note 5, at § 403.
47. *The Act*, *supra* note 5, at § 404.
48. *The Act*, *supra* note 5, at § 405.

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