

On the Subject

Energy & Commodities Advisory

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Both the House and the Senate have proposed bills extending certain expiring tax provisions related to energy.

Extending the GREEN Tax Incentives: Senate and House Bill Comparison

On December 9, 2009, the House passed H.R. 4213, the Tax Extenders Act of 2009 (the House Bill), which contained several energy-related provisions. The Senate is currently considering a substitute amendment to the House bill introduced by Senators Max Baucus (D-MT) and Harry Reid (D-NV) on March 1, 2010, entitled the American Workers, State, and Business Relief Act of 2010 (the Senate Bill). The Senate voted on March 9, 2010, to end debate on the Senate Bill and is expected to finish its work on the bill imminently. Below is a summary of the energy-related provisions in the Senate Bill, as well as some of the differences between the energy-related provisions in the House Bill and those in the Senate Bill. The Senate Bill would take the following action:

- Extend the \$1 per gallon credits for biodiesel and renewable diesel fuels pursuant to Internal Revenue Code (Code) Section 40A through 2010
- Extend the excise tax credits and payments for biodiesel and renewable diesel fuels pursuant to Code Sections 6426 and 6427 through 2010
- Extend the excise tax credits and payments for alternative fuels and alternative fuel mixtures pursuant to Code Sections 6426 and 6427 through 2010 (except for liquefied hydrogen fuels, which retain an expiration date of September 30, 2014)
- Extend the period for claiming a production tax credit (PTC) pursuant to Code Section 45 for biomass facilities placed in service prior to October 22, 2004, from a five-year period to a six-year period (thus extending this PTC for one year, through 2010)

- Extend the PTC pursuant to Code Section 45 for refined coal production facilities to facilities placed in service through 2010, including (pursuant to a recent amendment) extending and expanding such PTC for refined coal production facilities producing steel industry fuel
- Extend the Code Section 45H PTC for low sulfur diesel fuel through 2010
- Extend the Code Section 45K PTC for producing fuel from coke or coke gas through 2010
- Extend the new energy-efficient home credit pursuant to Code Section 45L through 2010
- Extend the research credit pursuant to Code Section 41 through 2010
- Extend the new markets tax credit pursuant to Code Section 45D through 2010 and provide an additional \$5 billion in available credit allocations for 2010
- Extend the rule permitting taxpayers to expense environmental remediation costs under Code Section 198 through 2010 for expenditures paid or incurred after December 31, 2009
- Pursuant to a recent amendment, permit cash grants in lieu of Code Section 45M energy-efficient appliance tax credits

The Senate Bill also provides certain offset provisions that relate to energy. One such provision is an exclusion of unprocessed fuels from the cellulosic biofuel producer credit. This exclusion effectively excludes the paper byproduct “black liquor” from eligibility for the cellulosic biofuel producer credit in Code Section 40, as well as from the alternative fuel and fuel mixture credit against excise taxes in Code Section 6426. In addition, the Senate Bill provides an offset in the form of codification of the economic substance doctrine. This provision imposes a 40 percent strict liability penalty on underpayments attributable to a transaction lacking economic substance (unless the transaction was disclosed, in which case the penalty is 20 percent). Previously, the penalty for underpayments of tax was 20 percent. Several of these proposals were also discussed in the Obama

administration's 2011 budget proposal. For more information, see McDermott's *On the Subject "Key Energy-Related Tax Provisions in the 2011 Budget Proposal."*

The House Bill contains fewer of the energy-related provisions discussed above. Like the Senate Bill, the House Bill extends the biodiesel and renewable diesel fuel income tax and excise tax credit and payments through 2010, extends the research credit through 2010, extends the new market tax credits through 2010, and extends the election to expense environmental remediation costs through 2010. With respect to the alternative fuel credit, the House Bill extends the credit through 2010 for compressed or liquefied natural gas, and liquefied petroleum gas (other than for use as fuel in a forklift), but leaves the credit to expire on December 31, 2009, in any other case.

Furthermore, the offset provisions of the Senate Bill highlighted here were not included in the House Bill. The House's offset provisions instead focus on taxing the "carried interests" of investment fund managers as ordinary income. The Senate Bill favors funding the tax cuts through, among other items, codification of the economic substance doctrine and exclusion of black liquor from the cellulosic fuels credit.

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