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Biofuel Tax Incentives Revisited: The Stimulus Bill Stimulating Renewable Energy

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“To truly transform our economy, to protect our security, and save our planet from the ravages of climate change, we need to ultimately make clean, renewable energy the profitable kind of energy.” Barack Obama, speaking to a Joint Session of Congress, February 24, 2009.¹

In the December 2008 issue of the *Florida Tax Bulletin*, we published an article on biofuel tax policy, stressing the importance to Florida of creating broader tax incentives for ethanol and other biofuels. After submission of the article, Congress passed the Energy Improvement and Extension Act of 2008 (“Energy Improvement Act”)², which made a number of changes to the provisions mentioned in our article. For instance, the Energy Improvement Act extended the income and excise tax credits for biodiesel and renewable diesel used as fuel through 2009, and increased the rates of such credits. The Energy Improvement Act also provided for the treatment of certain income and gains from alcohol, biodiesel, and alternative fuels and mixtures as qualifying income for publicly traded partnerships. However, the Energy Improvement Act still did not adequately address the issues raised in our first article.

Since his inauguration, President Obama has given numerous speeches, including the state of the union address, stressing the importance of renewable energy to his administration and his commitment to enacting carbon emission legislation.

The first step towards the creation of a more comprehensive plan for renewable energy by the new administration has been taken with the passage of the American Recovery and Reinvestment Act of 2009 (the “Stimulus Bill”)³. The Stimulus Bill contains multiple provisions regarding using renewable energy incentives.

First, the Stimulus Bill extends and expands various renewable energy incentives that were already in force in the Code. For instance, the Stimulus Bill extends the credit in Code Section 45 for electricity produced from renewable resources, including both open-loop and closed-loop biomass facilities.⁴ Additionally, the Stimulus Bill repeals limitations on the credit in Code Section 48 for qualified small wind energy property and property financed by subsidized energy financing or industrial development bonds.⁵

One of the most significant changes to the renewable energy incentives of the Stimulus Bill is the addition of a new provision which allows taxpayers who would otherwise be eligible for the production tax credit in Code Section 45 to elect instead to take an investment tax credit under Code Section 48.⁶ The production tax credit is calculated based on the electrical output of the qualifying renewable energy facilities, while an investment tax credit is calculated based on the capital investment in the qualifying renewable energy projects. The investment tax credit, equal to thirty percent (30%) of the cost of the facility in the year it is placed in service, is available for facilities placed in service between January 1, 2009 and January 1, 2014 (or January 1, 2013 for wind facilities). Because the investment tax credits are allowed when the qualifying property is placed into service, this helps to offset the upfront investments required to get the renewable energy project off the ground. Therefore, the investment tax credit should serve as a better stimulus for the creation of renewable energy projects. Prior to the Stimulus Bill enactment, the investment tax credit was only available for renewable energy projects involving geothermal, solar, or fuel cells systems. The Stimulus Bill extends the investment tax credit to those renewable energy projects that previously were only eligible for production tax credit, including, most importantly for Florida's agricultural industry, both open and closed-loop biomass facilities.

The Stimulus Bill expands the definition of a manufacturing facility for purposes of tax exempt bond financing under Code Section 144 to include any facility used in the manufacturing, creation, or production of tangible or intangible property, which is described in section 197(d)(1)(C)(iii).⁷ Although not directly applicable to renewable energy, this provision may be an incentive to the development of new methods and procedures for the creation of better, more efficient biofuels by subsidizing the cost of the facilities and the development of technology.

The Stimulus Bill also creates a new manufacturing incentive in the form of a tax credit for investment in a qualifying advanced energy product, including (i) property used to produce energy from renewable resources, (ii) property designed to refine or blend renewable fuels, and (iii) other property designed to reduce greenhouse gas emissions. The incentive is thirty percent (30%) of the qualified investment with respect to qualifying property, limited by the amount designated by the Secretary as eligible for the credit.⁸

In addition to the tax incentives for renewable energy, the Stimulus Bill also creates a grant program where taxpayers otherwise eligible for the production tax credit or investment tax credit for specific property may instead apply to the Department of Energy for a grant of up to thirty percent (30%) of the cost basis of the qualifying facility.⁹ This should act as a further incentive for renewable energy production.

Along with the passage of the Stimulus Bill, since the publication of our first article, President Obama has released his proposed budget.¹⁰ In our earlier article, we mentioned that a commitment to renewable energy would require both an increase to the incentives in the Tax Code for renewable energy and a decrease in the existing incentives for fossil fuels. With his budget, President Obama proposes to eliminate \$32 billion of oil and gas preferences. Combined with the provisions in the Stimulus Bill, this represents a significant step in the right direction towards committing to alternative sources of energy, specifically biomass based energy.

On top of the tax provisions, the budget proposal provides that the Department of the Interior will ensure companies are “diligently” developing their existing leases or risk losing them, so-called “use it or lose it.” The budget proposes charging new fees on non-producing Gulf of Mexico leases, in order to provide an incentive for companies to start producing from these leases or relinquish them. The proposed budget estimates that the new fee on non-producing leases would raise an estimated \$1.2 billion total during the 2010-2019 period. The budget also calls for ending federal funding for an ultra-deepwater oil and gas research and development program.

Although all of these provisions just add to the patch-work nature of the policy regarding biofuel incentives and renewable energy in general, the swiftness with which the actions have been taken are proof of the dedication of the current administration to creating alternative forms of energy. However, there is some concern that the limited duration of many of the provisions, set by their terms to expire within the next few years, will impact the ability of interested parties to take part in thoughtful planning and development of long-term alternative fuel projects. Given Florida’s potential to be a biofuel powerhouse, these provisions are definitely steps in the right direction, but more permanent and comprehensive actions are needed.

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About Dean Mead:

Dean Mead is a commercial law firm that provides full-service legal representation to businesses and individuals throughout Florida. The firm has 50 lawyers practicing in Orlando, Fort Pierce and Viera.

¹ Climate bill needed to ‘save our planet,’ says Obama. Samuelsohn, Darren. <http://www.nytimes.com/cwire/2009/02/25/25climatewire-emissions-bill-needed-to-save-our-planet--oba-9849.html> (Retrieved March 2, 2009).

² P.L. 110-343.

³ P.L. 111-5.

⁴ Section 1101 of the Stimulus Bill.

⁵ Section 1103 of the Stimulus Bill.

⁶ Section 1102 of the Stimulus Bill.

⁷ Section 1301 of the Stimulus Bill.

⁸ Section 1302 of the Stimulus Bill.

⁹ Section 1603 of the Stimulus Bill.

¹⁰ A copy of the proposed budget can be found on the White House website at <http://www.whitehouse.gov/omb/budget/fy2009/>.