

MEMORANDUM

October 21, 2008

RE: New Clean Renewable Energy Bonds

BACKGROUND

In October 2008, as part of the Energy Improvement Extension Act of 2008, which was included in the Emergency Economic Stabilization Act of 2008 (the “*Act*”), Congress enacted Section 54C of the Internal Revenue Code of 1986, as amended (the “*Code*”), permitting a qualified issuer (defined below) to issue new clean renewable energy bonds to finance qualified projects (defined below). Owners of new clean renewable energy bonds will receive a tax credit if they own new clean renewable energy bonds on one or more quarterly credit allowance dates. This memorandum contains a brief summary of the provisions governing the issuance of new clean renewable energy bonds.

The new clean renewable energy bonds are governed by Section 54C and 54A of the Code and new clean renewable energy bonds are different from clean renewable energy bonds that are governed by Section 54 of the Code. The Act extended the period during which clean renewable energy bonds could be issued pursuant to Section 54 of the Code from a deadline of December 31, 2008 to a deadline of December 31, 2009.

Owners of new clean renewable energy bonds are provided a federal income tax credit to offset their regular federal income tax liability, rather than receiving interest on the bonds. The amount of the credit is treated as interest and is included in gross income. The owners will receive the credit if they hold a new clean renewable energy bond on one or more credit allowance dates. The amount of the credit with respect to any credit allowance date is twenty-five percent of the annual credit determined with respect to the bond. The annual credit is equal to seventy percent of the product of the credit rate (determined by the Secretary of the Treasury for the date on which the bond was sold) multiplied by the outstanding face amount of the bond.

The credit allowance dates are March 15, June 15, September 15 and December 15, and also include the last day on which the bond is outstanding. In the case of a bond issued, redeemed or maturing between credit allowance dates, the amount of the credit will be a ratable portion of the credit based on the portion of the three-month period during which the bond is outstanding. The credit rate is determined daily and is the rate the Secretary estimates will generally permit the issuance of new clean renewable energy bonds with a specified maturity or redemption date without discount and without interest cost to the qualified issuer. The applicable credit rate is determined as of the first day on which there is a binding, written contract for the sale or exchange of the new clean renewable energy bond.

In general, the credit for any taxable year cannot exceed the sum of regular tax liability plus the alternative minimum tax over the sum of most credits allowable under the Code. Any excess credit can be carried to the succeeding taxable year.

NEW CLEAN RENEWABLE ENERGY BONDS

New clean renewable energy bonds are taxable bonds issued by a qualified issuer that satisfy certain requirements. The requirements that must be satisfied to constitute an issue of new clean renewable energy bonds include the following:

- (i) the bonds must be issued by a qualified issuer pursuant to an allocation by the Secretary of a portion of the nationwide volume limitation (discussed below);
- (ii) 100 percent of the available project proceeds of the issue must be used for capital expenditures incurred by governmental bodies, public power providers or cooperative electric companies (all as defined below) for one or more qualified renewable energy facilities;
- (iii) the qualified issuer must designate the bonds as new clean renewable energy bonds; and
- (iv) the bonds must comply with special expenditure rules (discussed below).

Although new clean renewable energy bonds are taxable bonds, two rules governing tax-exempt bonds issued by State or local governments are applicable to new clean renewable energy bonds. These rules are the arbitrage rules and restrictions under Section 148 of the Code as modified by Section 54A and the reporting requirements under Section 149(e) of the Code, each of which is discussed below.

QUALIFIED RENEWABLE ENERGY FACILITY

The term “qualified renewable energy facility” means a qualified facility (as determined generally under Section 45(d) of the Code without regard to paragraph (8) and paragraph (10) and to any placed-in-service date) owned by a public power provider, a governmental body or a cooperative electric company. Appendix A, attached hereto, provides a more detailed listing of qualified facilities that may be treated as qualified renewable energy facilities.

PUBLIC POWER PROVIDER

A “public power provider” means a State utility with a service obligation, as such terms are defined in Section 217 of the Federal Power Act as in effect on October 3, 2008, the date of enactment of the Act.

GOVERNMENTAL BODY

A “governmental body” means any State (the term “State” is defined in Section 54A of the Code to include the District of Columbia and any possession of the United States) or Indian tribal government, or any political subdivision thereof.

COOPERATIVE ELECTRIC COMPANY

A “cooperative electric company” means a mutual or cooperative electric company described in Section 501(c)(12) or Section 1381(a)(2)(C) of the Code.

QUALIFIED ISSUER

A “qualified issuer” means (i) a public power provider; (ii) a cooperative electric company; (iii) a governmental body; (iv) a clean renewable energy bond lender, which is defined as a lender that is a cooperative owned by, or has outstanding loans to, 100 or more cooperative electric companies and is in existence on February 1, 2002 (including any affiliated entity controlled by such lender); or (v) a not-for-profit electric utility that has received a loan or loan guarantee under the Rural Electrification Act.

100 PERCENT TEST

As discussed above, the Code requires that 100 percent of the available project proceeds of an issue of new clean renewable energy bonds be used for one or more qualified renewable energy facilities. “Available project proceeds” means the excess of (i) the proceeds from the sale of an issue (and investment earnings thereon) over (ii) the issuance costs financed by the issue (to the extent that such costs do not exceed two percent of such proceeds). Thus, it appears that no more than two percent of the proceeds of an issue can be used for costs of issuance.

SPECIAL EXPENDITURE RULES

As of the date of issuance of the new clean renewable energy bonds, the qualified issuer must reasonably expect that (i) 100 percent of the available project proceeds of the issue will be spent for one or more qualified purposes within three years of the date of issuance of the bonds (although this period may be extended by the Secretary, if requested prior to the end of the three-year period, due to reasonable cause and if the expenditures for qualified purposes will continue to proceed with due diligence); and (ii) a binding commitment with a third party to spend at least ten percent of such available project proceeds will be incurred within six months of the date of issuance. To the extent the 100 percent test is not met by the close of the three-year period discussed above, all nonqualified bonds must be redeemed within 90 days of the end of the period. The amount of nonqualified bonds required to be redeemed is determined in the same manner as used under Section 142 of the Code for exempt facility bonds.

SPECIAL ARBITRAGE RULES

The qualified issuer must comply with the arbitrage rules of Section 148 of the Code with respect to the proceeds of the issue. However, an issue will not be treated as failing to comply with the arbitrage rules by reason of any investment of available project proceeds during the expenditure period (i.e., the three year period from the date of issuance).

An issue will also not be treated as failing to comply with the arbitrage rules under Section 148 by reason of any fund that is expected to be used to repay such issue if (i) such fund is funded at a rate not more rapid than equal annual installments; (ii) such fund is funded in a manner reasonably expected to result in an amount not greater than an amount necessary to repay the issue; and (iii) the yield on such fund is not greater than the discount rate used by the Secretary to calculate the maturity limitation of the issue (discussed immediately below).

MATURITY LIMITATION

The maturity of an issue of new clean renewable energy bonds cannot exceed the maximum term determined by the Secretary. The Secretary will determine the maximum term for bonds issued during a calendar month by using the term that will result in the present value of the obligation to repay the principal on the bond being equal to fifty percent of the face amount of such obligation. Such present value will be determined by using as a discount rate the average annual interest rate of tax-exempt obligations having a term of ten years or more which are issued during the month.

STRIPPED CREDITS

The Secretary is permitted to issue regulations concerning the separation of the tax credit from the underlying bonds. In general, there may be a separation (including at issuance) of the ownership of a qualified tax credit bond and the entitlement to the credit with respect to such bond. In the case of any such separation, the credit will be allowed to the person who on the credit allowance date holds the instrument evidencing the entitlement to the credit and not the holder of the bond.

In the case of such separation, the rules of Section 1286 (tax treatment of stripped bonds) will apply to the qualified tax credit bond as if it were a stripped bond and to the credit as if it were a stripped coupon.

CONFLICT OF INTEREST

The issuer of new clean renewable energy bonds must certify that (i) applicable state and local law requirements governing conflicts of interest are satisfied with respect to such issue; and (ii) if the Secretary prescribes additional conflict of interest rules governing the appropriate Members of Congress, Federal, State and local officials, and their spouses, such additional rules are satisfied with respect to such issue.

INFORMATION REPORTING

In connection with the issuance of new clean renewable energy bonds, a qualified issuer will be required to file with the Internal Revenue Service a report similar to those currently required to be filed with respect to tax-exempt obligations.

VOLUME LIMITATION

The Code restricts the amount of new clean renewable energy bonds that can be issued nationwide to \$800,000,000. Section 54C requires that (i) not more than one third of the nationwide volume limitation may be allocated to qualified projects of public power providers; (ii) not more than one third percent of the nationwide volume limitation may be allocated to qualified projects of governmental bodies; and (iii) not more than one third percent of the nationwide volume limitation may be allocated to qualified projects of cooperative electric companies.

After the Secretary determines the qualified projects of public power providers that are appropriate for receiving an allocation of the nationwide volume limitation, the Secretary will, to the maximum extent practicable, make allocations among such projects such that the amount allocated to each such project bears the same ratio to the cost of such project as the volume limitation bears to the cost of all such projects. The Secretary will make allocations of the amount of nationwide volume limitation among qualified projects of governmental bodies and cooperative electric companies, respectively, in such manner as the Secretary determines is appropriate.

EFFECTIVE DATE

The provisions of Section 54C of the Code apply to all new clean renewable energy bonds issued after October 3, 2008, the date of enactment of the Act.

APPENDIX A

The term “qualified renewable energy facility” as defined by Section 54C of the Code means any qualified facility (as determined under Section 45(d) without regard to paragraph (8) and paragraph (10) and to any placed-in-service date) owned by a governmental body, public power provider or cooperative electric company. Accordingly, a qualified renewable energy facility may generally consist of:

- (1) a wind facility – a facility using wind to produce electricity (this facility does not include a facility with respect to which any qualified small wind energy expenditure (as defined in Section 25D(d)(4)) is taken into account in determining the credit under such section);
- (2) a closed-loop biomass facility – a facility using closed-loop biomass, (as defined in Section 45(c) of the Code) to produce electricity or, if owned by the taxpayer prior to January 1, 2011, a facility using closed-loop biomass to produce electricity which is modified to use closed-loop biomass to co-fire with coal, with other biomass, or with both, but only if the modification is approved under the Biomass Power for Rural Development Programs or is part of a pilot project of the Commodity Credit Corporation;
- (3) an open-loop biomass facility – a facility using open-loop biomass (as defined in Section 45(c) of the Code) to produce electricity and in the case of a facility using agricultural livestock waste nutrients, the nameplate capacity rating of which is not less than 150 kilowatts;
- (4) a geothermal or solar energy facility – a facility using geothermal energy (as defined in Section 45(c) of the Code) or solar energy to produce electricity (not including a facility described in Section 48(a)(3) of the Code the basis of which is taken into account by the taxpayer for purposes of determining the energy credit under Section 48 of the Code);
- (5) a small irrigation power facility – a facility using small irrigation power (as defined in Section 45(c) of the Code) to produce electricity;
- (6) a landfill gas facility – a facility producing electricity from gas derived from the biodegradation of municipal solid waste (as defined in Section 45(c) of the Code);
- (7) a trash facility – a facility (other than a landfill gas facility) that uses municipal solid waste (as defined in Section 45(c) of the Code) to produce electricity;
- (8) a qualified hydropower facility – a facility engaged in qualified hydroelectric production (as defined in Section 45 of the Code); and
- (9) a marine and hydrokinetic renewable energy facility – a facility producing electricity from marine and hydrokinetic renewable energy (as defined in Section 45 of the Code) which has a nameplate capacity of at least 150 kilowatts.