



Tax Credit Alert

Recent developments in tax credits

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“Bailout Bill” includes reauthorization of the New Markets Tax Credit program and expansion of the Historic Tax Credit

By Andrew Potts

By now, few will be unaware that on Friday, October 3, President Bush signed into law H.R. 1424 (the “Emergency Act”)—the massive financial “bailout” package that has so dominated the news of late. Amid frantic efforts to secure passage, in the final days before its enactment the bill came to include two expansions of the federal Rehabilitation Tax Credit (RTC; including the Historic Tax Credit [HTC]), as well as a one-year reauthorization of the New Markets Tax Credit (NMTC). The final bill is known as the Emergency Economic Stabilization Act of 2008, Energy Improvement and Extension Act of 2008, and Tax Extenders and Alternative Minimum Tax Relief Act of 2008. As its name suggests, it also includes an extension of energy tax incentives and other provisions. A separate Client Alert is available from Nixon Peabody regarding these energy incentives provisions.

The NMTC set out in Section 45D of the Internal Revenue Code (the “Code”) provides a 39% income tax credit for qualified equity investments in certain community development entities so long as those entities in turn lend or invest substantially all those dollars into qualified businesses that are active in low-income communities.

The Emergency Act extends the NMTC program for one more year by authorizing the Department of Treasury’s CDFI Fund to allocate an additional \$3.5 billion in NMTC authority in 2009. This allocation translates into an additional \$1.365 billion in NMTC and matches the \$3.5 billion in NMTC authority being allocated in 2008. The 2008 authority is being allocated as part of the so-called Round 6 national competition, the results of which are expected in the next several weeks. The CDFI Fund has not yet announced the timing for any Round 7 competition for allocating the new 2009 authority, but on the basis of earlier statements by officials at the CDFI Fund, the new competition could be on about the same schedule as before. Last year, the application was released on December 28, and applications were due on March 5, 2008.

Section 47 of the Code provides for two RTCs. The better known of these credits is the Historic Tax Credit, which affords a 20% income tax credit for “qualified rehabilitation expenditures” incurred in connection with the “substantial rehabilitation” of a “certified historic structure.” Section 47 also provides for a 10% credit for expenditures incurred in the rehabilitation of older, non-historic buildings built before 1936. The HTC is commonly used to help finance both commercial and rental housing projects, whereas the 10% credit is available only for non-residential buildings. The HTC is often twinned with the NMTC on commercial or mixed-use rehab projects located in low-income communities.

The first RTC-related provision of the new Emergency Act extends for another year the increases in the RTC that were included in the Gulf Opportunity Zone Act of 2005 (the “GO Zone Act”). That legislation provided for numerous federal tax incentives for areas along the Gulf Coast affected by hurricanes Katrina and Rita. Section 1400N(h) of the GO Zone Act increased the HTC from 20% to 26% and increased the 10% credit to 13% for buildings in the GO Zone. However, the GO Zone Act allowed this increase only on expenditures incurred through December 31, 2008. Some GO Zone rehab projects are not yet complete and were facing the prospect of reverting to the 20% (or 10%) credit rates on work that could not be finished by year’s end. The Emergency Act extends the higher credit rates for GO Zone projects to expenditures paid or incurred through December 31, 2009.

The second RTC-related provision of the new Emergency Act increases the HTC from 20% to 26% and increases the 10% credit to 13% for buildings in midwestern areas afflicted by severe weather this past summer. The “Midwestern Disaster Area” covers portions of the states of Arkansas, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, and Wisconsin, but only if they were declared a major disaster area by the president on or after May 20, 2008, and before August 1, 2008, by reason of severe storms, tornados, or flooding. State maps of eligible areas are available at <http://www.fema.gov/news/disasters.fema>. Eligible areas include portions of Des Moines, IA; Indianapolis, IN; Little Rock, AR; Madison, WI; Milwaukee, WI; Omaha, NE; St. Louis, MO; and Saginaw, MI. The midwestern RTC provision generally functions like that of the GO Zone, although there are important differences in eligibility and timing.

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