

## NOTE & COMMENT

### AN OVERVIEW OF THE CHANGES MADE BY THE ENERGY TAX INCENTIVES ACT OF 2005

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*This note is an overview of the changes made by the Energy Tax Incentives Act of 2005.<sup>1</sup> As a word of caution, since this article is an overview, some provisions of the act have been simplified and others have been left out entirely. For instance, this article has left out all provisions applying to members of cooperatives and all provisions relating to excise taxes. For this reason, please consult a tax practitioner before taking any action based on the information contained in this article.*

*The article is organized into the following sections: credits for individuals relating to the taxpayer's residence, financial investment credit, alternative motor vehicle credits, business credits, and business deductions.*

I. CREDITS FOR INDIVIDUALS RELATED TO THE TAXPAYER'S	
RESIDENCE .....	68
A. The Residential Energy Efficient Property Credit .....	68
B. The Nonbusiness Energy Property Credit .....	69
II. FINANCIAL INVESTMENT CREDIT.....	70
A. Credit to Holders of Clean Renewable Energy Bonds .....	70
III. ALTERNATIVE MOTOR VEHICLE CREDITS .....	71
A. New Qualified Fuel Cell Credit .....	71
B. New Advanced Lean Burn Technology Motor Vehicle Credit .....	71
C. New Qualified Hybrid Motor Vehicle Credit.....	72
D. New Qualified Alternative Fuel Motor Vehicle Credit .....	74
E. Clean Fuel Vehicle Deduction.....	75
IV. BUSINESS CREDITS.....	75
A. New Energy Efficient Home Credit .....	75
B. Energy Efficient Appliance Credit .....	76
C. Credit for Production from Advanced Nuclear Power Facilities.....	78
D. Qualifying Advanced Coal Project Credit.....	79

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1. Energy Tax Incentives Act of 2005, Pub. L. No. 109-58, 119 Stat. 986 (2005) (codified as amended in scattered sections of 26 U.S.C.).

68	TEXAS JOURNAL OF OIL, GAS, AND ENERGY LAW	[Vol. 3
	E. Qualifying Gasification Project Credit .....	81
	F. Alternative Fuel Vehicle Refueling Property Credit .....	82
	G. Biodiesel and Renewable Diesel Used as Fuel Credit .....	83
	H. Research Credit .....	85
	I. Renewable Electricity Production Credit.....	85
	J. Energy Credit .....	87
	K. Credit for Producing Fuel from a Nonconventional Source ....	89
	L. Small Ethanol Producer Credit.....	90
V.	BUSINESS DEDUCTIONS .....	90
	A. Election to Expense Certain Refineries.....	90
	B. Energy Efficient Commercial Buildings Deduction.....	91
	C. Amortization of Geological and Geophysical Expenditures .....	92
	D. Percentage Depletion.....	93
	E. Depreciation .....	94
	F. Amortization of Pollution Control Facilities.....	94
	G. Net Operating Loss Deduction .....	95
	H. Deductions for Payments to a Nuclear Decommissioning Reserve Fund .....	95
VI.	CONCLUSION.....	96

## I. CREDITS FOR INDIVIDUALS RELATED TO THE TAXPAYER'S RESIDENCE

### A. *The Residential Energy Efficient Property Credit*

The Residential Energy Efficient Property Credit allows individuals a 30% credit for amounts paid by the taxpayer during the tax year for qualified solar electric property,<sup>2</sup> qualified solar water heating property, and qualified fuel cell property.<sup>3</sup> To qualify for this credit, the property must be used in a residence of the taxpayer located in the United States.<sup>4</sup> Qualified fuel cell property must be used in the *principal* residence of the taxpayer.<sup>5</sup>

Property used to heat water is Qualified solar water heating property if at least half of the energy used by the property to heat the water comes

2. The Tax Relief and Health Care Act of 2006 revised all the references in this section from photovoltaic property to solar electric property. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 206(b), 120 Stat. 2922 (2006) (codified as amended in scattered sections of 26 U.S.C.).

3. I.R.C. § 25D(a) (West 2007).

4. § 25D(d).

5. § 25D(d)(3).

from the sun.<sup>6</sup> The property must be certified for performance by the non-profit Solar Rating Certification Corporation or a comparable entity endorsed by the state in which the property is installed.<sup>7</sup> The maximum credit allowed is \$2,000 for any taxable year.<sup>8</sup>

Qualified solar electric property is property which uses solar energy to generate electricity.<sup>9</sup> The maximum credit allowed is \$2,000 for any taxable year.<sup>10</sup>

Qualified fuel cell property is an integrated system comprised of a fuel cell stack assembly and associated balance of plant components that converts fuel into electricity using electrochemical means with a nameplate capacity of at least 0.5 kilowatts of electricity using an electrochemical process and has an electricity-only generation efficiency greater than 30%.<sup>11</sup> The maximum amount of the credit is \$500 for each half kilowatt of capacity.<sup>12</sup>

This credit originally did not apply to any property placed in service after December 31, 2007.<sup>13</sup> Currently, the statute does not apply to any property placed in service after December 31, 2008.<sup>14</sup>

#### *B. The Nonbusiness Energy Property Credit*

The Nonbusiness Energy Property credit allows an individual a credit of 10% of the amount paid for qualified energy efficiency improvements that were installed during the tax year and 100% of the amount paid during the tax year for residential energy property expenditures.<sup>15</sup> To qualify for the credit, the improvements or property must be installed in the taxpayer's principal residence, which must be located in the United States.<sup>16</sup> The improvements or property must also be new property, not used property.<sup>17</sup>

Qualified energy efficiency improvements include any insulation material or system designed to reduce the heat loss or gain of a residence, exterior windows, skylights, exterior doors, and any metal roof that has appropriate pigmented coatings designed to reduce the heat gain of a residence.<sup>18</sup> The improvements must be reasonably expected to remain in

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6. § 25D(d)(1).

7. *Id.*

8. I.R.C. § 25D(b)(1)(B) (West 2007).

9. § 25D(d)(2).

10. § 25D(b)(1)(A).

11. §§ 25D(d)(3), 48(c)(1).

12. § 25D(b)(1)(C).

13. Energy Tax Incentives Act § 1335(a), amended by I.R.C. § 25D(g) (2006).

14. Tax Relief and Health Care Act of 2006 § 206; I.R.C. § 25D(g) (West 2007).

15. § 25C(a).

16. § 25C(c)(1)(A), (d)(1)(A).

17. *Id.*

18. § 25C(c)(2).

use for at least five years.<sup>19</sup>

Residential energy property includes electric heat water pumps; geothermal heat pumps; central air conditioners; natural gas, propane, or oil water heaters; natural gas, propane, or oil furnace or hot water boilers; and fans used in a natural gas, propane, or oil furnace.<sup>20</sup> In order to qualify for the credit the property must meet standards set out in I.R.C. § 25C(d) and regulations prescribed by the Secretary of the Treasury.<sup>21</sup>

The total credit is subject to a lifetime limitation of \$500.<sup>22</sup> For example, if the taxpayer had a \$300 credit in 2006, the taxpayer would be able to have no more than a \$200 credit in 2007.<sup>23</sup> In the case of exterior windows and skylights, the credit is subject to a lifetime limit of \$200.<sup>24</sup> The credit may not exceed \$50 for a fan used in a natural gas, propane, or oil furnace.<sup>25</sup> The credit may not exceed \$150 for a natural gas, propane, or oil furnace or hot water boiler.<sup>26</sup> The credit may not exceed \$300 for electric heat water pumps; geothermal heat pumps; central air conditioners; or natural gas, propane, or oil water heaters.<sup>27</sup>

The credit does not apply to any property placed in service after December 31, 2007.<sup>28</sup>

## II. FINANCIAL INVESTMENT CREDIT

### A. Credit to Holders of Clean Renewable Energy Bonds

This credit applies to taxpayers who hold a clean renewable energy bond on March 15th, June 15th, September 15th, December 15th, and/or the last day on which the bond is outstanding.<sup>29</sup> The credit for each of these dates is  $\frac{1}{4}$  of the annual credit.<sup>30</sup> The annual credit is the credit rate determined by the Secretary of the Treasury times the outstanding face amount of the bond.<sup>31</sup> This credit will be included in the taxpayer's gross income as interest income.<sup>32</sup> The Secretary will determine which bonds qualify by allocating the \$1.2 billion<sup>33</sup> national limit on these bonds as the

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19. I.R.C. § 25C(c)(1)(C) (West 2007).

20. § 25C(d).

21. *Id.*

22. § 25C(b)(1).

23. *See id.*

24. I.R.C. § 25C(b)(2) (West 2007).

25. § 25C(b)(3)(A), (d)(5).

26. § 25C(b)(3)(B).

27. § 25C(b)(3)(C), (d)(3).

28. § 25C(g).

29. I.R.C. § 54(a), (b)(4) (West 2007).

30. § 54(b)(1).

31. § 54(b)(2).

32. § 54(g).

33. The Tax Relief and Health Care Act of 2006 changed the national limitation from \$800,000,000 to \$1.2 billion. *See* Tax Relief and Health Care Act of 2006 § 202(a)(1).

Secretary deems appropriate.<sup>34</sup> This credit originally did not apply to bonds issued after December 31, 2007.<sup>35</sup> Currently, the credit does not apply to bonds issued after December 31, 2008.<sup>36</sup>

### III. ALTERNATIVE MOTOR VEHICLE CREDITS

These credits are available to both individuals and businesses.<sup>37</sup> All of the following credits require that the vehicle be new, not used; the vehicle must be acquired for use or lease by the taxpayer, not for resale; and the vehicle must be made by a manufacturer.<sup>38</sup> The credits are available for vehicles placed in service by the taxpayers during the taxable year.<sup>39</sup> The vehicle must be used within the United States.<sup>40</sup>

#### A. *New Qualified Fuel Cell Credit*

In order to qualify for this credit, a vehicle must be propelled by at least one cell that can convert chemical energy directly into electricity by combining oxygen with hydrogen fuel which is stored on board the vehicle.<sup>41</sup> In the case of passenger automobiles and light trucks, the vehicle must have received a certificate that it meets or exceeds the Bin 5 Tier II emission level for that make and model year vehicle.<sup>42</sup>

The base amount of the credit varies from \$8,000 to \$40,000<sup>43</sup> depending on the weight of the vehicle.<sup>44</sup> There is an additional amount of credit available for vehicles that reach certain fuel efficiency levels, of between \$1,000 and \$4,000, depending on the level of fuel efficiency reached.<sup>45</sup>

This credit does not apply to vehicles purchased after December 31, 2014.<sup>46</sup>

#### B. *New Advanced Lean Burn Technology Motor Vehicle Credit*

In order to qualify for this credit, a passenger automobile or light truck must have an internal combustion engine which is designed to operate

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34. I.R.C. § 54(g) (West 2007). For further information on the requirements for bonds to qualify, see § 54.

35. Energy Tax Incentives Act of 2005 § 1303(a), amended by I.R.C. § 54(m) (2006).

36. Tax Relief and Health Care Act of 2006 § 202(a)(3); I.R.C. § 54(m) (West 2007).

37. I.R.C. § 30B(g) (West 2007).

38. § 30B(b)(3), (c)(3), (d)(3)(A), (e)(4)(A), (e)(5)(A).

39. § 30B(b)(1), (c)(1), (d)(1), (e)(1), (e)(5)(A).

40. § 30B(h)(7).

41. § 30B(b)(3)(A).

42. I.R.C. § 30B(b)(3)(B) (West 2007).

43. For vehicles placed in service after Dec. 31, 2009, the credit ranges from \$4,000 to \$40,000. § 30B(b)(1)(A).

44. § 30B(b)(1).

45. § 30B(b)(2).

46. § 30B(j)(1).

primarily using more air than is necessary for complete combustion of the fuel, incorporates direct injection, and has at least 125% of the 2002 model year city fuel economy.<sup>47</sup> If the vehicle has a gross vehicle weight rating of 6,000 pounds or less, then the vehicle must have a certificate that it meets or exceeds the Bin 5 Tier II emission standard.<sup>48</sup> If the vehicle has a gross vehicle weight rating of more than 6,000 pounds but not more than 8,500 pounds, then the vehicle must have a certificate that it meets or exceeds the Bin 8 Tier II emission standard.<sup>49</sup>

The base amount of the credit varies between \$400 and \$2,400 depending on the fuel economy.<sup>50</sup> There is an additional conservation credit that varies between \$250 and \$1,000 depending on lifetime fuel savings.<sup>51</sup>

The credit does not apply to vehicles purchased after December 31, 2010.<sup>52</sup> This credit is also subject to a phaseout period that begins the second calendar quarter after the calendar quarter in which the manufacturer sells the 60,000th of that type of qualified vehicle for use in the United States.<sup>53</sup> Only sales after December 31, 2005 are counted.<sup>54</sup> The IRS has issued a notice stating that the phaseout period began on October 1, 2006 for advanced lean burn technology motor vehicles, and hybrid passenger automobiles and light trucks manufactured by Toyota.<sup>55</sup> Only 50% of the credit is allowed for the first two calendar quarters of the phase-out period, only 25% of the credit is allowed for the third and fourth calendar quarters of the phase-out period, and no credit is allowed thereafter.<sup>56</sup>

### *C. New Qualified Hybrid Motor Vehicle Credit*

A vehicle qualifies for this credit if it is propelled by onboard sources of stored energy which are both (1) an internal combustion or heat engine using consumable fuel and (2) a rechargeable energy storage system.<sup>57</sup> If the vehicle has a gross vehicle weight rating of less than 8,500 pounds, the vehicle must be a passenger automobile or light truck to qualify for this credit.<sup>58</sup> Passenger automobiles and light trucks with a gross vehicle weight rating of up to 8,500 pounds must have a maximum

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47. I.R.C. § 30B(c)(3)(A).

48. § 30B(c)(3)(A)(iv)(I).

49. § 30B(c)(3)(A)(iv)(II) (West 2007).

50. § 30B(c)(2)(A)(i).

51. I.R.C. § 30B(c)(2)(B) (West 2007).

52. § 30B(j)(2).

53. § 30B(f)(2).

54. *Id.*

55. I.R.S. Notice 2006-78, 2006-41 I.R.B. 675.

56. I.R.C. § 30B(f)(3) (West 2007).

57. § 30B(d)(3)(A)(i).

58. § 30B(d)(3)(A).

available power of at least 4%, have received a certificate of conformity under the Clean Air Act, and must meet or exceed the equivalent qualifying California low emission vehicle standard for that make and model year.<sup>59</sup> Passenger automobiles or light trucks with a gross vehicle weight of 6,000 pounds or less must have a certificate that it meets or exceeds the Bin 5 Tier II emission standard.<sup>60</sup> Passenger automobiles or light trucks with a gross vehicle weight rating of more than 6,000 pounds but not more than 8,500 pounds must have a certificate that it meets or exceeds the Bin 8 Tier II emission standard.<sup>61</sup> Vehicles with a gross vehicle weight rating in excess of 8,500 pounds must have an internal combustion or heat engine which has received a certificate of conformity that it meets the emission standards set for 2004 through 2007 model year diesel heavy duty engines or Ottocycle heavy duty engines, as applicable under the Clean Air Act.<sup>62</sup> Vehicles with a gross vehicle weight rating of more than 8,500 pounds but not more than 14,000 pounds must have a maximum available power of at least 10%.<sup>63</sup> Vehicles with a gross vehicle weight rating of more than 14,000 pounds must have a maximum available power of at least 15%.<sup>64</sup>

For passenger automobiles and light trucks with a gross vehicle weight rating not in excess of 8,500 pounds, the base amount of the credit varies between \$400 and \$2,400 depending on the fuel economy.<sup>65</sup> For passenger automobiles and light trucks with a gross vehicle weight rating not in excess of 8,500 pounds, there is an additional conservation credit that varies between \$250 and \$1,000 depending on lifetime fuel savings.<sup>66</sup> For vehicles with a gross vehicle weight rating of more than 8,500 pounds, the credit varies depending on the vehicle's city fuel economy.<sup>67</sup> For vehicles with a gross vehicle weight rating of more than 8,500 pounds but not more than 14,000 pounds, the credit varies from \$1,500 to \$3,000.<sup>68</sup> For vehicles with a gross vehicle weight rating of more than 14,000 pounds but not more than 26,000 pounds, the credit varies from \$3,000 to \$6,000.<sup>69</sup> For vehicles with a gross vehicle weight rating of more than 26,000 pounds, the credit varies from \$6,000 to \$12,000.<sup>70</sup>

For passenger automobiles and light trucks with a gross vehicle weight

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59. § 30B(d)(2)(A), (d)(3)(A)(ii)-(iii)(I).

60. § 30B(d)(2)(A), (d)(3)(A)(ii)(I).

61. I.R.C. § 30B(d)(2)(A), (d)(3)(A)(ii)(II) (West 2007).

62. § 30B(d)(3)(A)(iv).

63. § 30B(d)(3)(A)(iii)(II).

64. § 30B(d)(3)(A)(iii)(III).

65. § 30B(d)(2)(A)(i), (c)(2)(A)(i).

66. I.R.C. § 30B(d)(2)(A)(ii), (c)(2)(B) (West 2007).

67. See § 30B(d)(2)(B)(ii)-(iii).

68. § 30B(d)(2)(B)(ii)-(iii)(I).

69. § 30B(d)(2)(B)(ii)-(iii)(II).

70. § 30B(d)(2)(B)(ii)-(iii)(III).

rating not more than 8,500 pounds, the credit does not apply to vehicles purchased after December 31, 2010.<sup>71</sup> For vehicles with a gross vehicle weight rating of more than 8,500 pounds, the credit does not apply to vehicles purchased after December 31, 2009.<sup>72</sup> This credit is also subject to a phaseout period that begins the second calendar quarter after the calendar quarter in which the manufacturer sells the 60,000th of that type of qualified vehicle for use in the United States.<sup>73</sup> Only sales after December 31, 2005 are counted.<sup>74</sup> The IRS has issued a notice stating that the phaseout period began on October 1, 2006 for advanced lean burn technology motor vehicles, and hybrid passenger automobiles and light trucks manufactured by Toyota.<sup>75</sup> Only 50% of the credit is allowed for the first two calendar quarters of the phaseout period, 25% of the credit is allowed for the third and fourth calendar quarters of the phase out period, and no credit is allowed thereafter.<sup>76</sup>

#### *D. New Qualified Alternative Fuel Motor Vehicle Credit*

A vehicle qualifies for 100% of this credit if it is capable of operating only on an alternative fuel.<sup>77</sup> A vehicle may qualify for 90% of this credit if it is a 90/10 mixed-fuel vehicle, meaning that it operates on not less than 90% alternative fuel and not more than 10% petroleum-based fuel.<sup>78</sup> A vehicle may qualify for 70% of this credit if it is a 75/25 mixed-fuel vehicle, meaning that it operates on not less than 75% alternative fuel and not more than 25% petroleum-based fuel.<sup>79</sup> Mixed-fuel vehicles must also be certified by the manufacturer as being able to perform efficiently in normal operation on a combination of an alternative fuel and a petroleum fuel.<sup>80</sup> Mixed-fuel vehicles must either have a certificate of conformity under the Clean Air Act or have an order certifying that the vehicle meets the same requirements as vehicles sold or leased in California and meets or exceeds the low emission vehicles standard for that make and model year vehicle.<sup>81</sup>

The base credit is between \$2,500 and \$20,000 depending on the gross vehicle weight rating of the vehicle.<sup>82</sup> There is an additional credit of between \$1,500 and \$12,000 depending on the gross vehicle weight rating

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71. I.R.C. § 30B(j)(2) (West 2007).

72. *Id.*

73. § 30B(f).

74. § 30B(f)(2).

75. I.R.S. Notice 2006-78, 2006-41 I.R.B. 675.

76. I.R.C. § 30B(f)(3) (West 2007).

77. § 30B(e)(4)(A)(i).

78. § 30B(e)(5)(A)(ii), (e)(5)(D).

79. § 30B(e)(5)(A)(i), (e)(5)(C).

80. § 30B(e)(5)(B).

81. *Id.*

82. I.R.C. § 30B(e)(1)-(3) (West 2007).

of the vehicle if the vehicle has a certificate under the Clean Air Act and meets or exceeds the most stringent standard available for certification under the Clean Air Act for that make and model year vehicle, or has an order certifying that the vehicle meets the same requirements as vehicles which may be sold or leased in California and meets or exceeds the most stringent standard for certification under the State laws of California for that make and model year vehicle.<sup>83</sup>

#### *E. Clean Fuel Vehicle Deduction*

The Energy Tax Incentives Act of 2005 accelerated the termination of this deduction.<sup>84</sup> The deduction previously applied to property placed in service prior to January 1, 2007.<sup>85</sup> The deduction currently applies to property placed in service prior to January 1, 2006.<sup>86</sup>

### IV. BUSINESS CREDITS

#### *A. New Energy Efficient Home Credit*

This credit is available for contractors who construct homes (or substantially reconstruct and rehabilitate homes) and manufacturers of manufactured homes.<sup>87</sup> The home must be acquired from the contractor or manufacturer by a person who will use the home as a residence *during the taxable year*.<sup>88</sup> The home must be located in the United States.<sup>89</sup> The construction (or reconstruction and rehabilitation) of the home must be substantially completed after August 8, 2005.<sup>90</sup>

Contractors are eligible for a \$2,000 credit for each home that is certified to have an annual level of heating and cooling energy consumption that is at least 50% below the annual level of heating and cooling energy consumption of a comparable home.<sup>91</sup> Building envelope component improvements must be certified to account for at least 1/5 of the 50% reduction.<sup>92</sup> The home must also be certified to be constructed in accordance with the standards of chapter 4 of the 2003 International Energy Conservation Code.<sup>93</sup> The home must also be certified to have heating and cooling efficiencies that correspond to the minimum allowed

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83. *Id.*

84. Energy Tax Incentives Act, 42 U.S.C.A. § 1348 (West 2007).

85. Job Creation and Worker Assistance Act of 2002, Pub. L. No. 107-147, § 606(a)(2), 116 Stat. 21 (codified as amended in scattered sections of 26 U.S.C.).

86. I.R.C. § 179A(f) (West 2007).

87. I.R.C. § 45L(a)(1), (b)(1), (b)(3) (West 2007).

88. § 45L(a)(1)(B).

89. § 45L(b)(2)(A).

90. § 45L(b)(2)(B), (b)(3).

91. § 45L(a)(2)(A), (c)(1)(A).

92. I.R.C. § 45L(c)(1)(B) (West 2007).

93. § 45L(c)(1)(A)(i).

under the regulations established under the National Appliance Energy Conservation Act of 1987.<sup>94</sup>

Manufacturers are eligible for the \$2,000 credit for homes that meet the above qualifications and conform to the Federal Manufactured Home Construction and Safety Standards.<sup>95</sup> Manufacturers are eligible for a lesser \$1,000 per home credit if the home meets the qualifications for the \$2,000 credit with the exception that the home is certified to have an annual level of heating and cooling energy consumption which is at least 30% below (instead of 50% below) the annual level of heating and cooling energy consumption of a comparable home.<sup>96</sup> Building envelope component improvements must be certified to account for at least 1/3 of the 30% reduction.<sup>97</sup> To qualify for the lesser credit, the home must also meet the requirements established under the Energy Star Labeled Homes program.<sup>98</sup>

This credit originally did not apply to homes acquired after December 31, 2007.<sup>99</sup> Currently the credit does not apply to homes acquired after December 31, 2008.<sup>100</sup>

#### *B. Energy Efficient Appliance Credit*

This credit is available for manufacturers of clothes washers, dishwashers or refrigerators.<sup>101</sup> The total credit is not allowed to exceed \$75,000,000 for all taxable years.<sup>102</sup> For instance, if a taxpayer claimed a credit of \$40,000,000 in 2006, then the taxpayer could claim no more than a \$35,000,000 credit in 2007.<sup>103</sup> The credit is further limited to 2% of the average annual gross receipts of the taxpayer for the three taxable years preceding the year in which the credit is claimed.<sup>104</sup>

For manufacturers of clothes washers, the credit is determined by the following formula: \$100 multiplied by (the number of clothes washers that meet the requirements of the Energy Star program in effect for clothes washers in 2007 produced by the taxpayers in the United States, minus the average number of qualifying clothes washers that meet the requirements of the Energy Star program which are in effect for clothes washers in 2007 produced by the taxpayer in the United States during the

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94. § 45L(c)(1)(A)(ii).

95. § 45L(a)(2)(A), (c)(2).

96. § 45L(a)(2)(B), (c)(3)(A), (c)(1)(A).

97. I.R.C. § 45L(c)(3)(A), (c)(1)(B) (West 2007).

98. § 45L(c)(3)(B).

99. Energy Tax Incentives Act of 2005 § 1332(a), *amended by* I.R.C. § 45L(g) (2006).

100. Tax Relief and Health Care Act of 2006 § 205; § 45L(g).

101. I.R.C. § 45M(b)(1) (West 2007).

102. § 45M(e)(1).

103. *Id.*

104. § 45M(e)(3).

preceding three calendar year period).<sup>105</sup> The clothes washers must be residential model clothes washers.<sup>106</sup> The credit is available for residential style coin-operated washers.<sup>107</sup> The credit only applies to clothes washers manufactured in the 2006 or 2007 calendar year.<sup>108</sup>

For manufacturers of dishwashers, the credit is determined by the following formula: \$32.31<sup>109</sup> multiplied by (the number of dishwashers that meet the requirements of the Energy Star program that are in effect for dishwashers in 2007 produced by the taxpayers in the United States minus the average number of qualifying dishwashers that meet the requirements of the Energy Star program that are in effect for dishwashers in 2007 produced by the taxpayer in the United States during the preceding three calendar year period).<sup>110</sup> The dishwashers must be residential dishwashers subject to the energy conservation standards established by the Department of Energy.<sup>111</sup> The credit only applies to dishwashers manufactured in the 2006 or 2007 calendar year.<sup>112</sup>

For manufacturers of refrigerators, the credit is determined in three parts.<sup>113</sup> The first part is determined by the following formula: \$75 multiplied by (the number of refrigerators that consume 15-20% less kilowatt hours per year than the 2001 energy conservation standards produced by the taxpayers in the United States minus 110% of the average number of qualifying refrigerators that consume 15-20% less kilowatt hours per year than the 2001 energy conservation standards produced by the taxpayer in the United States during the preceding three calendar year period).<sup>114</sup> This part of the credit only applies to refrigerators manufactured in the 2006 calendar year.<sup>115</sup> This part of the credit may not exceed \$20,000,000.<sup>116</sup> The second part is determined by the following formula: \$125 multiplied by (the number of refrigerators that consume 20-25% less kilowatt hours per year than the 2001 energy conservation standards produced by the taxpayers in the United States minus 110% of the average number of qualifying refrigerators that consume 20-25% less kilowatt hours per year than the 2001 energy conservation standards produced by the taxpayer in the United States

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105. § 45M(a)(2), (b)(1)(B)(ii), (c)(1).

106. I.R.C. § 45M(f)(3).

107. *Id.*

108. § 45M(b)(1)(B)(i).

109. The Energy Savings Amount in 2007, as calculated in § 45M(b)(2) and using the July 26, 2007 draft for the 2007 version of Form 8909, was \$32.31. See I.R.S. Form 8909 (2007) (draft July 26, 2007).

110. § 45M(a)(2), (b)(1)(A)(ii), (c)(1).

111. I.R.C. § 45M(f)(2) (West 2007).

112. § 45M(b)(1)(A)(i).

113. § 45M(b)(1)(C).

114. § 45M(a)(2), (b)(1)(C)(i)(II), (c)(2).

115. § 45M(b)(1)(C)(i)(I).

116. I.R.C. § 45M(e)(2) (West 2007).

during the preceding three calendar year period).<sup>117</sup> This part of the credit only applies to refrigerators manufactured in the 2006 or 2007 calendar year.<sup>118</sup> The third part is determined by the following formula: \$175 multiplied by (the number of refrigerators that consume at least 25% less kilowatt hours per year than the 2001 energy conservation standards produced by the taxpayers in the United States minus 110% of the average number of qualifying refrigerators that consume at least 25% less kilowatt hours per year than the 2001 energy conservation standards produced by the taxpayer in the United States during the preceding three calendar year period).<sup>119</sup> This part of the credit only applies to refrigerators manufactured in the 2006 or 2007 calendar year.<sup>120</sup> The refrigerators must be residential model automatic defrost refrigerator-freezers which have an internal volume of at least 16.5 cubic feet.<sup>121</sup>

### C. Credit for Production from Advanced Nuclear Power Facilities

This credit is available for the owner of a nuclear facility with a reactor design approved after December 31, 1993 by the Nuclear Regulatory Commission, which uses nuclear energy to produce electricity and was placed in service after August 8, 2005 and before January 1, 2021.<sup>122</sup> This credit is only available for reactors that produce electricity in the United States or a possession of the United States.<sup>123</sup> The credit is only available if the Secretary of the Treasury has allocated a portion of the national megawatt capacity limitation to the facility.<sup>124</sup> The credit is calculated by multiplying \$.018 and the kilowatt hours of electricity sold to an unrelated person during the taxable year, provided that the electricity sold was produced at the nuclear facility during the eight years beginning on the date the facility was originally placed in service.<sup>125</sup> The credit is limited if the nameplate capacity exceeds the portion of the national megawatt capacity that the Secretary allocated to the facility.<sup>126</sup> The tentative credit is multiplied by the percentage determined by taking the national megawatt capacity limitation allocated to the facility and dividing it by the total megawatt nameplate capacity of the facility.<sup>127</sup> The credit is limited to \$125,000,000 per 1000 megawatts of national megawatt

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117. § 45M(a)(2), (b)(1)(C)(ii)(II), (c)(2).

118. § 45M(b)(1)(C)(ii)(I).

119. § 45M(a)(2), (b)(1)(C)(iii)(II), (c)(2).

120. § 45M(b)(1)(C)(iii)(I).

121. I.R.C. § 45M(f)(4) (West 2007).

122. I.R.C. § 45J(d) (West 2007).

123. §§ 45J(e), 45(e)(1).

124. § 45J(b); See I.R.S. Notice 2006-40, 2006-18 I.R.B. 855 (describing the application procedure to request an allocation of the national megawatt capacity limitation).

125. § 45J(a).

126. § 45J(b)(1).

127. *Id.*

capacity limitation allocated to the facility.<sup>128</sup> The credit is also subject to a phaseout if the Secretary's determination of the annual average contract price per kilowatt hour of electricity generated from the same qualified energy resource and sold in the previous year in the United States exceeds \$.08 as adjusted by inflation.<sup>129</sup>

#### *D. Qualifying Advanced Coal Project Credit*

This credit is available for taxpayers who place qualified investment property in service during the taxable year that is part of a qualified advanced coal project.<sup>130</sup> The construction, reconstruction or erection of the project must be completed by the taxpayer or the project must be acquired by the taxpayer.<sup>131</sup> If the project is acquired by the taxpayer, then the original use of the investment property must begin with the taxpayer.<sup>132</sup> The property must be depreciable or amortizable property.<sup>133</sup>

A qualified advanced coal project must be certified by the Secretary of the Treasury.<sup>134</sup> The project must use an advanced coal-based generation technology to power a new electric generation unit or to retrofit or re-power an existing electric generation unit.<sup>135</sup> The fuel input for the project must be at least 75% coal when complete.<sup>136</sup> The project must consist of one or more electric generation units at one site with a total nameplate generating capacity of at least 400 megawatts.<sup>137</sup> The project must be located in the United States.<sup>138</sup> In order for the project to be approved by the Secretary, the applicant must provide evidence that a majority of the project's output is reasonably expected to be utilized.<sup>139</sup> The applicant must also provide proof of ownership or control of a site of sufficient size to allow the project to be constructed and to operate on a long term basis.<sup>140</sup> The applicant must also receive all federal and state environmental authorizations or reviews necessary to begin construction

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128. I.R.S. Notice 2006-40, 2006-18 I.R.B. 855, at § 2.

129. See I.R.C. §§ 45J(c)(2), 45(e)(2)(C). I.R.C. § 45(b)(1), as implemented by The Energy Tax Incentives Act of 2005, has been copied into § 45J(c)(2) pursuant to The Gulf Opportunity Zone Act of 2005. See Energy Tax Incentives Act of 2005 § 1306(a) and Gulf Opportunity Zone Act of 2005, Pub. L. No. 109-135, § 402(d)(1), 119 Stat. 2577 (codified as amended in scattered sections of 26 U.S.C.A.).

130. I.R.C. § 48(a)-(b) (West 2007).

131. I.R.C. § 48A(b)(1)(A) (West 2007).

132. § 48A(b)(1)(A)(ii).

133. § 48A(b)(1)(B).

134. § 48A(e)(1). See I.R.S. Notice 2007-52, 2006-11 I.R.B. 595 § 5 (containing the application procedure to request certification).

135. § 48A(e)(1)(A).

136. I.R.C. § 48A(e)(1)(B) (West 2007).

137. § 48A(e)(1)(C).

138. § 48A(e)(1)(F).

139. § 48A(e)(1)(D).

140. I.R.C. § 48A(e)(1)(E) (West 2007).

of the project.<sup>141</sup> If the project is not to retrofit or re-power an existing electric generation unit, the applicant must have either purchased the main steam turbines for the project or entered into a binding contract to purchase them.<sup>142</sup> If the applicant has entered into a binding contract to purchase them, then the contract may be contingent upon certification of the project by the Secretary.<sup>143</sup>

The total amount of credits that the Secretary of the Treasury is allowed to certify under this program is \$800,000,000 for integrated gasification combined cycle projects and \$500,000,000 for projects that use other advanced coal-based generation technologies.<sup>144</sup> An integrated gasification combined cycle project is an electric unit which produces electricity by converting coal to synthesis gas which is used to fuel a combined-cycle plant which produces electricity from both a combustion turbine and a steam turbine.<sup>145</sup> In order to qualify to be advanced coal-based generation technology, the unit must meet certain performance standards for emissions found in I.R.C. § 48A(f)(1)(B)<sup>146</sup> and either use integrated gasification combined cycle technology or have a designed net heat rate of 8530 Btu/kWh (40% efficiency).<sup>147</sup> If the unit was in existence on August 8, 2005, then in order to qualify to be advanced coal-based generation technology, the unit must meet certain performance standards for emissions found in I.R.C. § 48A(f)(1)(B); the unit must achieve a minimum efficiency of 35%; and the unit must have an overall thermal design efficiency improvement, compared to the efficiency of the unit as operated, of not less than 7% for coal of more than 9,000 Btu per pound, 6% for coal of 7,000 to 9,000 Btu per pound, or 4% for coal of less than 7,000 Btu per pound.<sup>148</sup> In determining which qualifying advanced coal projects to certify, the Secretary will certify capacity in relatively equal amounts between projects that use bituminous coal as a primary feedstock, projects that use sub-bituminous coal as a primary feedstock and projects that use lignite as a primary feedstock.<sup>149</sup> The Secretary will give a high priority to projects that include greenhouse gas capture capability, increased by-product utilization, and other benefits.<sup>150</sup>

The credit is 20% of the basis of property placed in service during the

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141. § 48A(e)(2)(A).

142. § 48A(e)(2)(B).

143. § 48A(e)(2)(B).

144. § 48A(d)(3).

145. I.R.C. § 48A(c)(7) (West 2007).

146. These performance standards for emissions were modified by the Tax Relief and Health Care Act of 2006. *See* Tax Relief and Health Care Act of 2006 § 203(a).

147. I.R.C. § 48A(f)(1) (West 2007).

148. § 48A(f)(1), (f)(3).

149. § 48A(e)(3)(A).

150. § 48A(e)(3)(B).

taxable year for integrated gasification combined cycle projects.<sup>151</sup> The credit is 15% of the basis of property placed in service during the taxable year for other advanced coal-based generation technology projects.<sup>152</sup> The basis of the property is reduced if the property is financed by subsidized energy financing or a private activity bond with tax exempt interest.<sup>153</sup> The taxpayer may be able to make an election to claim the credit for expenditures made for property that is not placed in service in the taxable year if the expenditures are properly chargeable to a capital account and the property is self-constructed.<sup>154</sup> This credit is limited by the at risk rules of I.R.C. § 49 and the special rules of I.R.C. § 50, including recapture and ineligibility of property used outside of the United States.<sup>155</sup>

#### *E. Qualifying Gasification Project Credit*

This credit is available for taxpayers who place qualified investment property in service during the taxable year that is part of a qualified gasification project.<sup>156</sup> A qualified gasification project employs any process that converts a solid or liquid product from coal, petroleum residue, biomass, or other materials which are recovered for their energy or feedstock value into a synthesis gas composed primarily of carbon monoxide and hydrogen for direct use or subsequent chemical or physical conversion.<sup>157</sup> The construction, reconstruction, or erection of the project must be completed by the taxpayer or the project must be acquired by the taxpayer.<sup>158</sup> If the project is acquired by the taxpayer, then the original use of the investment property must begin with the taxpayer.<sup>159</sup> The property must be depreciable or amortizable property.<sup>160</sup>

A qualified gasification project must be certified by the Secretary of the Treasury.<sup>161</sup> The application for certification must be principally intended for use in a domestic project that employs domestic gasification applications related to chemicals, fertilizers, glass, steel, petroleum residues, forest products, and agriculture including feedlot and dairy operations.<sup>162</sup> The Secretary will certify the amount of investment that

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151. § 48A(a)(1), (d)(3)(B)(i).

152. I.R.C. § 48A(a)(2), (d)(3)(B)(ii) (West 2007).

153. §§ 48A(b)(2), 48(a)(4).

154. See § 48A(b)(3); I.R.S. Notice 2007-52, 2007-26 I.R.B. 1456 § 9.

155. See §§ 49-50.

156. I.R.C. § 48B(b)(1) (West 2007).

157. § 48B(c)(1)(A), (c)(2).

158. § 48B(b)(1)(A).

159. § 48B(b)(1)(A)(ii).

160. § 48B(b)(i)(B).

161. I.R.C. § 48B(d) (West 2007); I.R.S. Notice 2007-53, 2007-26 I.R.B. 1474 § 5 (containing the application procedure to request certification).

162. § 48B(c)(1)(B), (c)(7).

will be eligible for the credit.<sup>163</sup> The total amount of credit that the Secretary may allocate under this program may not exceed \$350,000,000.<sup>164</sup> The amount of credit requested may not exceed \$130,000,000 per project.<sup>165</sup> In order to qualify for certification the applicant must have sufficiently documented that (1) the applicant is financially viable without the receipt of additional federal funding associated with the proposed project, (2) the applicant will provide sufficient information to ensure that the qualified investment is spent efficiently and effectively, (3) a market exists for the products of the proposed project, (4) the fuels identified with the gasification technology will comprise at least 90% of the fuels required by the project for the production of chemical feedstocks, liquid transportation fuels, or co-production of electricity, and (5) the project team is competent in the construction and operation of the gasification technology proposed.<sup>166</sup>

The credit is 20% of the basis of property placed in service during the taxable year that is a necessary part of the gasification technology of a qualifying gasification project.<sup>167</sup> The basis of the property is reduced if the property is financed by subsidized energy financing or a private activity bond with tax exempt interest.<sup>168</sup> The taxpayer may be able to make an election to claim the credit for expenditures made for property that is not placed in service in the taxable year if the expenditures are properly chargeable to a capital account and the property is self-constructed.<sup>169</sup> This credit is not allowed for the same property that a credit is allowed under the Qualifying Advanced Coal Project Credit.<sup>170</sup> This credit is limited by the at risk rules of I.R.C. § 49 and the special rules of I.R.C. § 50, including recapture and ineligibility of property used outside of the United States.<sup>171</sup>

#### *F. Alternative Fuel Vehicle Refueling Property Credit<sup>172</sup>*

This credit is available to a taxpayer that places a qualified alternative fuel vehicle refueling property in service during the taxable year.<sup>173</sup> Qualified alternative fuel vehicle refueling property is property for the

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163. § 48B(c)(1)(c).

164. § 48B(d)(1).

165. I.R.S. Notice 2007-53, 2007-26 I.R.B. 1474, § 5.02(6); *see also* § 48B(a), (c)(1)(C).

166. I.R.C. § 48B(d)(3); *see also* I.R.S. Notice 2007-53, 2007-26 I.R.B. 1474, § 5 (listing additional criteria).

167. § 48B(a), (b)(1), (c)(3).

168. §§ 48B(b)(2), 48(a)(4).

169. *See* § 48B(b)(3); I.R.S. Notice 2007-53, 2007-26 I.R.B. 1474, § 8.

170. § 48B(e); *see also* I.R.S. Notice 2007-53, 2007-26 I.R.B. 1474, § 5.02(6).

171. *See e.g.* I.R.C. §§ 38, 46(4), 49(a)(1)(C)(iv), 50(a)(1)(A) (West 2007).

172. The Gulf Opportunity Zone Act of 2005 made minor changes to the calculation of credit for individuals and the credit for property used by tax exempt entities that are beyond the scope of this article. *See* Gulf Opportunity Zone Act of 2005 § 402(k).

173. I.R.C. § 30C(a) (West 2007).

storage or dispensing of a clean-burning fuel into the fuel tank of a motor vehicle propelled by such fuel if the storage or dispensing of the fuel is at the point where such fuel is delivered to the fuel tank of a motor vehicle.<sup>174</sup> Unless the fuel is a mixture of diesel and biodiesel, at least 85% of the fuel must be ethanol, natural gas, compressed natural gas, liquefied natural gas, liquefied petroleum gas or hydrogen.<sup>175</sup> The fuel may also be a mixture of biodiesel and diesel determined without regard to any use of kerosene and containing at least 20% biodiesel.<sup>176</sup> Unless the property is used as the principal residence of the taxpayer, the property must be of a character subject to the allowance for depreciation.<sup>177</sup> The original use of the property must begin with the taxpayer.<sup>178</sup> The property must be used inside the United States.<sup>179</sup> The property cannot be expensed under I.R.C. § 179.<sup>180</sup>

The credit is 30% of the cost of the property.<sup>181</sup> The credit is limited to \$30,000.<sup>182</sup> The credit is limited to \$1,000 for property used as the principal residence of the taxpayer.<sup>183</sup> The basis of the property is reduced by the portion of the property used to calculate the credit.<sup>184</sup> If the property ceases to be qualifying property, then the benefit of the credit may be subject to recapture.<sup>185</sup> The taxpayer may elect not to take the credit.<sup>186</sup> The credit applies to property placed in service after December 31, 2005.<sup>187</sup> In the case of property related to hydrogen, the credit does not apply to any property placed in service after December 31, 2014.<sup>188</sup> In the case of any other property, the credit does not apply to any property placed in service after December 31, 2009.<sup>189</sup>

#### *G. Biodiesel and Renewable Diesel Used as Fuel Credit*

Prior to the Energy Tax Incentives Act of 2005, this credit was composed of the biodiesel mixture credit and the biodiesel credit.<sup>190</sup> The

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174. §§ 30C(c)(1), 179A(d)(3)(A).

175. § 30C(e)(1)(A).

176. § 30C(c)(1)(B).

177. §§ 30C(c)(1)-(c)(2), 179A(d)(1).

178. I.R.C. §§ 30C(c)(1), 179A(d)(2) (West 2007).

179. §§ 30C(c)(e)(3), 50(b)(1).

180. § 30C(e)(3).

181. § 30C(a).

182. § 30C(b)(1).

183. I.R.C. §§ 30C(b), (c)(2), 179A(d)(1) (West 2007).

184. § 30C(e)(1).

185. §§ 30C(e)(5), 179A(e)(4); Treas. Reg. § 1.179A-1 (1994).

186. § 30C(e)(4).

187. Energy Tax Incentives Act of 2005 § 1342(c).

188. I.R.C. § 30C(g)(1) (West 2007).

189. § 30C(g)(2).

190. American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 302(a), 118 Stat. 1418 (2004) (codified as amended in scattered sections of 26 U.S.C.A.).

credit now includes the small agri-biodiesel producer credit.<sup>191</sup> The small agri-biodiesel producer credit is \$.10 for each gallon of qualified agri-biodiesel production produced by an eligible small agri-biodiesel producer.<sup>192</sup> An eligible small agri-biodiesel producer is someone who at all times during the tax year had a productive capacity for agri-biodiesel not in excess of 60,000,000 gallons.<sup>193</sup>

Qualified agri-biodiesel production must be used by the eligible small agri-biodiesel producer or sold by the eligible small agri-biodiesel producer during the taxable year. If the eligible small agri-biodiesel producer uses the qualified agri-biodiesel production, then it must be used by the eligible small agri-biodiesel producer in the production of a qualified biodiesel mixture in its trade or business or as a fuel in its trade or business.<sup>194</sup> If the eligible small agri-biodiesel producer sells the qualified agri-biodiesel production, then the producer must sell at the retail price and place the qualified agri-biodiesel production in the fuel tank of the buyer.<sup>195</sup> If the eligible small agri-biodiesel producer does not meet these qualifications when it sells the fuel, then the agri-biodiesel may still be qualified agri-biodiesel production if the producer sells the qualified agri-biodiesel production to a third party who (1) uses it in the production of a qualified biodiesel mixture in its trade or business, (2) uses it as a fuel in its trade or business, or (3) sells it at retail and places it in the fuel tank of the buyer.<sup>196</sup> If the small agri-biodiesel producer credit is granted, then any person who does not use the fuel for the purposes described above is taxed at a rate of \$.10 per gallon of fuel used for other purposes.<sup>197</sup>

The Energy Tax Incentives Act also provided that renewable diesel, other than agri-biodiesel, will be treated the same as biodiesel for the purposes of both the biodiesel mixture credit and the biodiesel credit.<sup>198</sup> However, the renewable diesel credit is calculated at the rate of \$1.00 per gallon instead of the normal \$.50 per gallon.<sup>199</sup>

The biodiesel and renewable diesel used as fuel credit does not apply to any sale or use after December 31, 2008.<sup>200</sup> Prior to the Energy Tax Incentives Act of 2005, this credit did not apply to any sale or use after December 31, 2006.<sup>201</sup>

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191. I.R.C. § 40A(a)(3) (West 2007).

192. § 40A(b)(5)(A).

193. § 40(e)(1).

194. *Id.*

195. *Id.*

196. *Id.*

197. I.R.C. § 40A(d)(3)(C) (West 2007).

198. § 40A(f)(1), (f)(2)(B).

199. § 40A(f)(2)(A).

200. § 40A(g).

201. American Jobs Creation Act § 302(a).

### *H. Research Credit*

The Energy Tax Incentives Act of 2005 added to the research credit 20% of the amount paid or incurred in carrying on a trade or business (including contributions) to an energy research consortium.<sup>202</sup> The Gulf Opportunity Act of 2005 disallowed the consideration of any amounts paid or incurred for energy research conducted outside of the United States, the Commonwealth of Puerto Rico, or any possession of the United States for this part of the credit.<sup>203</sup> An energy research consortium is a tax exempt § 501(c)(3) organization that is organized and operated primarily to conduct energy research.<sup>204</sup> If the energy research consortium is not a tax exempt § 501(c)(3) organization, then it must be organized and operated primarily to conduct energy research in the public interest.<sup>205</sup> The energy research consortium may not be a private foundation.<sup>206</sup> At least five unrelated people must have paid or incurred expenses to the energy research consortium for energy research during the calendar year in which the tax year of the energy research consortium began.<sup>207</sup> During that calendar year, no single person may have paid or incurred more than 50% of the total amounts received by the energy research consortium for energy research.<sup>208</sup>

The Energy Tax Incentives Act of 2005 also allowed taxpayers to receive a 100% credit for qualified contracted energy research expenses paid or incurred to an eligible small business, an institution of higher education, or a Federal laboratory for qualified research.<sup>209</sup> Prior to the act, only 65% of the amount paid or incurred would be considered contract research expenses.<sup>210</sup> To qualify, the taxpayer may not own 50% or more of the eligible small business.<sup>211</sup> The eligible small business must have an annual average of 500 or fewer employees during either of the preceding two calendar years.<sup>212</sup>

### *I. Renewable Electricity Production Credit*

The renewable electricity production credit is 1.5 cents per kilowatt hour of electricity produced by a qualified energy resource and qualified facility and sold to an unrelated person during that tax year. The credit only applies to the kilowatts produced during the 10 year period,

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202. Energy Tax Incentives Act § 1351(a); I.R.C. § 41(a)(3) (West 2007).

203. Gulf Opportunity Zone Act of 2005 § 402(1)(1).

204. I.R.C. § 41(f)(6)(A)(i)(I) (West 2007).

205. § 41(f)(6)(A)(i)(II).

206. § 41(f)(6)(A)(ii).

207. § 41(f)(6)(A)(iii).

208. § 41(f)(6)(A)(iv).

209. I.R.C. § 41(b)(3)(D)(i) (West 2007).

210. § 41(b)(3)(A).

211. § 41(b)(3)(D)(ii).

212. § 41(b)(3)(D)(iii)(I).

beginning on the date the facility was originally placed into service. The Energy Tax Incentives Act of 2005 included qualified hydropower production as a qualified energy resource eligible for this credit.<sup>213</sup> The credit for qualified hydropower production is limited to half of the credit otherwise available.<sup>214</sup>

For a hydroelectric dam placed in service on or before August 8, 2005, qualified hydropower production is the percentage of average annual hydropower production at the facility attributable to the efficiency improvements or additions of capacity placed in service after August 8, 2005. This amount is determined by using the same water flow information used to determine a historic average annual hydropower production baseline for the facility.<sup>215</sup> This percentage and baseline must be certified by the Federal Energy Regulatory Commission.<sup>216</sup> In order for a non-hydroelectric dam to qualify, the facility must (1) be licensed by the Federal Energy Regulatory Commission, (2) meet all applicable environmental, licensing, and regulatory requirements, (3) be placed in service prior to August 8, 2005, (4) not have produced electric power on August 8, 2005, and (5) have turbines or other generating devices added to the facility after August 8, 2005 to produce hydroelectric power.<sup>217</sup> However, a non-hydroelectric dam still does not qualify if there is any enlargement of the diversion structure, construction or enlargement of a bypass channel, or the impoundment or any withholding of additional water from the natural stream channel.<sup>218</sup> If the non-hydroelectric dam qualifies, the qualified hydropower production is the hydropower production from the facility for the taxable year.<sup>219</sup> This credit originally only applied to facilities, improvements, and additions to capacity placed in service prior to January 1, 2008.<sup>220</sup> Currently the credit only applies to facilities, improvements, and additions to capacity placed in service prior to January 1, 2009.<sup>221</sup>

The Energy Tax Incentive Act of 2005 also created a credit for Indian coal production facilities.<sup>222</sup> The credit is \$1.50 per ton of Indian coal produced by the taxpayer and sold by the taxpayer during the taxable year.<sup>223</sup> The coal must be produced at an Indian coal production facility

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213. Energy Tax Incentives Act of 2005 § 1301(c)(1); I.R.C. § 45(c)(1)(H) (West 2007).

214. I.R.C. § 45(b)(4)(A) (West 2007).

215. § 45(c)(8).

216. § 45(c)(8)(B)(i).

217. § 45(c)(8)(C).

218. § 45(c)(8)(C)(iii).

219. I.R.C. § 45(c)(8)(A)(ii) (West 2007).

220. Energy Tax Incentives Act of 2005 § 1301(f)(3) (2005), *amended by* I.R.C. § 45(d)(9) (2006).

221. Tax Relief and Health Care Act of 2006 § 201; I.R.C. § 45(d)(9) (West 2007).

222. § 45(e)(10).

223. The credit increases to \$2.00 per ton for calendar years beginning after 2009. § 45(e)(10)-(e)(10)(B)(i)(II).

during the seven year period beginning on January 1, 2006 and must be sold by the taxpayer to an unrelated person during that seven year period.<sup>224</sup> The coal must be produced within the United States.<sup>225</sup> An Indian coal production facility is a facility that produces Indian coal and was placed in service prior to January 1, 2009.<sup>226</sup> Indian coal is coal produced from coal reserves which were either owned by an Indian tribe on June 14, 2005 or were held in trust by the United States for the benefit of an Indian tribe or its members on June 14, 2005.<sup>227</sup>

The Energy Tax Incentives Act of 2005 additionally removed the provision that formerly allowed lessees or operators of government-owned facilities using poultry waste to produce electricity to qualify for the renewable electricity production credit.<sup>228</sup>

The Energy Tax Incentives Act of 2005 increased the period that the credit would be available from five years to ten years for open-loop biomass facilities, small irrigation power facilities, geothermal facilities, solar energy facilities, landfill gas facilities, and trash combustion facilities placed in service after August 8, 2005.<sup>229</sup>

The Energy Tax Incentives Act of 2005 extended the definition of qualified facilities for wind facilities, closed-loop biomass facilities, open-loop biomass facilities, small irrigation power facilities, geothermal facilities, landfill gas facilities, and trash combustion facilities to facilities placed in service prior to January 1, 2008.<sup>230</sup> The Tax Relief and Health Care Act of 2006 extended the definition of qualified facilities for wind facilities, closed-loop biomass facilities, open-loop biomass facilities, small irrigation power facilities, geothermal facilities, landfill gas facilities, and trash combustion facilities to facilities placed in service prior to January 1, 2009.<sup>231</sup> Neither of these statutes changed the definition of qualified facilities for solar energy facilities from the previous definition of facilities placed in service prior to January 1, 2006.<sup>232</sup>

### *J. Energy Credit*

The Energy Tax Incentives Act of 2005 included qualified fuel cell property in the definition of property that qualifies for this credit.<sup>233</sup>

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224. § 45(e)(10)(A).

225. § 45(e)(1), (e)(10)(C).

226. I.R.C. § 45(d)(10) (West 2007).

227. § 45(c)(9)(A).

228. Energy Tax Incentives Act of 2005 § 1301(f)(3).

229. Energy Tax Incentives Act of 2005 § 1301(b)(1); I.R.C. §§ 45(b)(4)(B), (d)(3)-(7) (West 2007).

230. Energy Tax Incentives Act of 2005 § 1301(a)(2); § 45(d).

231. Tax Relief and Health Care Act of 2006 § 201; § 45(d).

232. § 45(d)(4).

233. Energy Tax Incentives Act of 2005 § 1336(a); I.R.C. § 48(a)(3)(A)(iv) (West 2007).

Qualified fuel cell property is a fuel cell power plant which has a nameplate capacity of at least 0.5 kilowatt of electricity using an electrochemical process and has an electricity-only generation efficiency of more than 30%.<sup>234</sup> A fuel cell power plant is an integrated system consisting of a fuel cell stack assembly and associated balance of plant components which converts a fuel into electricity using electrochemical means.<sup>235</sup> The credit is 30% of the basis of the qualified fuel cell property placed in service during the taxable year.<sup>236</sup> However, the credit is limited to \$500 for each 0.5 kilowatt of capacity of the qualified fuel cell property.<sup>237</sup> This credit did not originally include any qualified fuel cell property placed in service after December 31, 2007.<sup>238</sup> The Tax Relief and Health Care Act of 2006 extended the credit to include qualified fuel cell property placed in service until December 31, 2008.<sup>239</sup>

The Energy Tax Incentives Act of 2005 included qualified microturbine property in the definition of property that qualifies for this credit.<sup>240</sup> Qualified microturbine property is a stationary microturbine power plant which has a nameplate capacity of less than 2,000 kilowatts and has an electricity-only generation efficiency of not less than 26% at International Standard Organization conditions.<sup>241</sup> A stationary microturbine power plant is an integrated system consisting of a gas turbine engine, a combustor, a recuperator or regenerator, a generator or alternator, and an associated balance of plant components which converts fuel into electricity and thermal energy.<sup>242</sup> The credit is 10% of the basis of the qualified microturbine property placed in service during the taxable year.<sup>243</sup> However, the credit is limited to \$200 for each kilowatt of capacity of the qualified microturbine property.<sup>244</sup> This credit did not originally include any qualified microturbine property placed in service after December 31, 2007.<sup>245</sup> The Tax Relief and Health Care Act of 2006 extended the credit to include qualified microturbine property placed in service until December 31, 2008.<sup>246</sup>

The Energy Tax Incentives Act of 2005 included equipment which uses solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight in the definition of property that qualifies for this

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234. I.R.C. § 48(c)(1)(A) (West 2007).

235. § 48(c)(1)(C).

236. § 48(a).

237. § 48(c)(1)(B).

238. Energy Tax Incentives Act of 2005 § 1336(b), *amended by* I.R.C. § 48(c)(1)(E) (2006).

239. Tax Relief and Health Care Act of 2006 § 207(2), I.R.C. § 48(c)(1)(E) (West 2007).

240. Energy Tax Incentives Act of 2005 § 1336(a); § 48(a)(3)(A)(iv).

241. § 48(c)(2)(A).

242. § 48(c)(2)(C).

243. § 48(a).

244. I.R.C. § 48(c)(2)(B) (West 2007).

245. Energy Tax Incentives Act of 2005 § 1336(b), *amended by* I.R.C. § 48(c)(2)(E) (2006).

246. Tax Relief and Health Care Act of 2006 § 207(2); § 48(c)(2)(E).

credit.<sup>247</sup> The credit for this type of property is 30% of the basis of the property placed in service during the taxable year.<sup>248</sup> Originally this change only applied to property placed in service before January 1, 2008, but The Tax Relief and Health Care Act of 2006 extended this change to property placed in service before January 1, 2009.<sup>249</sup>

The Energy Tax Incentives Act of 2005 increased the credit for equipment which uses solar energy to generate electricity to heat or cool a structure, provide hot water for use in a structure, or provide solar process heat from 10 to 30% for periods ending before January 1, 2008.<sup>250</sup> The Tax Relief and Health Care Act of 2006 extended this period to January 1, 2009.<sup>251</sup> The Energy Tax Incentives Act of 2005 disallowed this credit for property used to generate energy for the purposes of heating a swimming pool.<sup>252</sup>

#### *K. Credit for Producing Fuel from a Nonconventional Source*<sup>253</sup>

The Energy Tax Incentives Act of 2005 changed the way that this credit applies to fuels sold after January 1, 2003.<sup>254</sup> There is an old exception that extends the credit for certain facilities producing qualified fuels that are either gas produced from biomass or liquid, gaseous, or solid synthetic fuels produced from coal sold before January 1, 2008.<sup>255</sup> This old exception applies to facilities that produce coke or coke gas only if the original use of the facility began with the taxpayer.<sup>256</sup> The Energy Tax Incentives Act of 2005 created an additional exception to the January 1, 2003 limit that facilities producing coke or coke gas may fall under.<sup>257</sup> The new exception extends the credit to coke and coke gas sold for a four year period beginning on the later of January 1, 2006 or the date that the facility is placed in service.<sup>258</sup> The extension applies to facilities that were placed in service before January 1, 1993 or after June 30, 1998 and before January 1, 2010.<sup>259</sup> The credit under this new exception is limited by only taking into account the amount of qualified fuels sold that does not

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247. Energy Tax Incentives Act of 2005 § 1337(b); § 48(a)(3)(A)(ii).

248. I.R.C. § 48(a) (West 2007).

249. Energy Tax Incentives Act of 2005 § 1336(b), *amended by* I.R.C. § 48(a)(3)(A)(ii) (2006).

250. Energy Tax Incentives Act of 2005 § 1337(a); § 48(a)(2)(A)(i)(II), (a)(3).

251. Tax Relief and Health Care Act of 2006 § 207(1); § 48(a)(2)(A)(i)(II).

252. Energy Tax Incentives Act of 2005 § 1337(c); § 48(a)(3)(A)(i).

253. I.R.C. § 29 (2000) was re-designated by the Energy Tax Incentives Act of 2005 as I.R.C. § 45 (2006). *See* Energy Tax Incentives Act of 2005 § 1322(a)(1).

254. *See* I.R.C. § 45K(e)(2) (West 2007).

255. § 45K(f)(1), (c)(1)(B)(ii), (c)(1)(C), (e)(2).

256. § 45K(f)(2).

257. *See* Energy Tax Incentives Act of 2005 § 1321(a).

258. § 45K(g)(1).

259. *Id.*

exceed an average barrel-of-oil equivalent of 4,000 barrels per day.<sup>260</sup>

#### *L. Small Ethanol Producer Credit*

The Energy Tax Incentives Act of 2005 changed the definition of who can qualify for this credit.<sup>261</sup> To qualify for this credit, an eligible small ethanol producer may have a production capacity for alcohol not in excess of 60,000,000 gallons.<sup>262</sup> Prior to this change, an eligible small ethanol producer would qualify only if it had a production capacity for alcohol not in excess of 30,000,000 gallons.<sup>263</sup>

### V. BUSINESS DEDUCTIONS

#### *A. Election to Expense Certain Refineries*

This election is available for taxpayers that place qualified refinery property in service during the taxable year.<sup>264</sup> The election allows the taxpayer to expense 50% of the cost of the qualified refinery property placed in service during the taxable year.<sup>265</sup> The election is only revocable with the consent of the Secretary of Treasury.<sup>266</sup>

A qualified refinery is any refinery located in the United States which is designed to serve the primary purpose of processing liquid fuel from crude oil or qualified fuels.<sup>267</sup> Qualified fuels include: oil produced from shale and tar sands; gas produced from geopressured brine, Devonian shale, coal seams, a tight formation, or biomass; and liquid, gaseous, or solid synthetic fuels produced from coal, including such fuels when used as feedstocks.<sup>268</sup>

Qualified refinery property is any portion of a qualified refinery that enables the existing qualified refinery to increase total volume output, not including asphalt or lube oil, by 5% or more on an average daily basis or enables the existing qualified refinery to process qualified fuels at a rate which is greater than 25% of the total throughput of such qualified refinery on an average daily basis.<sup>269</sup> A qualified refinery property may also be a qualified refinery that is separate from any existing refinery.<sup>270</sup> The original use of the property must begin with the taxpayer.<sup>271</sup> The

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260. I.R.C. § 45K(g)(1), (g)(2)(A) (West 2007).

261. See Energy Tax Incentives Act of 2005 § 1347(a).

262. I.R.C. § 40(g)(1) (West 2007).

263. *Id.*

264. I.R.C. § 179C(a) (West 2007).

265. *Id.*

266. § 179C(b)(2).

267. § 179C(d).

268. I.R.C. § 45K(c) (West 2007).

269. I.R.C. § 179C(c)(1)(C), (e) (West 2007).

270. § 179C(c)(1)(C).

271. § 179C(c)(1)(A).

property must be placed in service after August 8, 2005 and before January 1, 2012.<sup>272</sup> If the property is originally placed in service by the taxpayer after August 8, 2005 and sold and leased back to the taxpayer within three months of the date the property was originally placed in service, then the property shall be treated as being placed in service no earlier than the date the property is first used under the leaseback.<sup>273</sup> If the property is not self-constructed property, then the property must be placed in service before January 1, 2008.<sup>274</sup> The construction of the property must be subject to a written binding construction contract entered into before January 1, 2008.<sup>275</sup> The property does not qualify if there was a written binding contract for the construction of the property in effect on or before June 14, 2005.<sup>276</sup> The property must meet all applicable environmental laws in effect on the date that the property was placed in service.<sup>277</sup> The property does not qualify if the primary purpose of the property is use as a topping plant, asphalt plant, lube oil facility, crude or product terminal, or blending facility.<sup>278</sup> The property also does not qualify if it is built solely to comply with consent decrees or projects mandated by federal, state, or local governments.<sup>279</sup>

#### *B. Energy Efficient Commercial Buildings Deduction*

This deduction is available for energy efficient commercial building property placed in service during the taxable year.<sup>280</sup> The deduction is the lesser of the cost of the property placed in service during the taxable year or \$1.80 per square foot of the building.<sup>281</sup> The total amount of deductions for the building for all taxable years cannot exceed \$1.80 per square foot of the building.<sup>282</sup>

Energy efficient commercial building property is property that is installed on or in any building within the scope of Standard 90.1-2001 of the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America as it was in effect on April 2, 2003.<sup>283</sup> The building must be located within the United States.<sup>284</sup> The property must be installed as part of the interior lighting systems; the heating, cooling, ventilation, and hot water systems;

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272. § 179C(c)(1)(B).

273. § 179C(c)(2).

274. I.R.C. § 179C(c)(1)(F)(ii) (West 2007).

275. § 179C(c)(1)(F)(i).

276. § 179C(c)(1)(E).

277. § 179C(c)(1)(D).

278. § 179C(f)(1).

279. I.R.C. § 179C(f)(2) (West 2007).

280. § 179D(a).

281. § 179D(a), (b)(1).

282. § 179D(b)(2).

283. § 179D(c)(1)(B)(ii), (c)(2).

284. I.R.C. § 179D(c)(1)(B)(i) (West 2007).

or the building envelope.<sup>285</sup> The property must be depreciable or amortizable property.<sup>286</sup> The property must be certified by the Secretary of the Treasury as being installed as part of a plan designed to reduce the total annual energy and power costs of the interior lighting, heating, cooling, ventilation, and hot water systems of the building by 50% or more than a building which meets the minimum requirements of Standard 90.1-2001 mentioned above.<sup>287</sup>

There is a lesser deduction limited to \$0.60 per square foot of the building when the property meets all of the above qualifications except the total annual energy and power costs of the interior lighting, heating, cooling, ventilation, and hot water systems of the building are not reduced by 50% of a building which meets the minimum requirements of Standard 90.1-2001.<sup>288</sup> To qualify for this lesser deduction the property must be energy efficient lighting property; energy efficient heating, cooling, ventilation, and hot water property; or energy efficient building envelope property.<sup>289</sup> The property must be certified to reduce the total annual energy and power costs of the interior lighting, heating, cooling, ventilation, and hot water systems of the building by 16 2/3% or more than a building which meets the minimum requirements of Standard 90.1-2001.<sup>290</sup> There is also an interim rule in effect until the Treasury publishes final regulations under I.R.C. § 179D with different qualifications for energy efficient lighting property.<sup>291</sup>

Any deduction allowed as an Energy Efficient Commercial Buildings Deduction reduces the basis of the business property.<sup>292</sup>

This deduction originally did not apply to property placed in service after December 31, 2007.<sup>293</sup> Currently the credit does not apply to property placed in service after December 31, 2008.<sup>294</sup>

### *C. Amortization of Geological and Geophysical Expenditures*

Prior to the Energy Tax Incentives Act of 2005, geological and geophysical expenses were capitalized by the lessee as part of the cost of acquiring the mineral property.<sup>295</sup> The taxpayer conducted a

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285. § 179D(c)(1)(C).

286. § 179D(c)(1)(A).

287. § 179D(c)(1)(D). Section 4 of I.R.S. Notice 2006-52, 2006-26 I.R.B. 1175 contains the application procedure to request certification for the lesser deduction discussed below.

288. §§ 179D(d)(1)(A), (c)(1)(D).

289. I.R.S. Notice 2006-52, 2006-26 I.R.B. 1175, § 2.02(b).

290. *Id.* §§ 2.03(1)(a), 2.04(1)(b), 2.05(1)(b).

291. *Id.* §§ 2.03(b); § 179D(f). Under the interim rule, the deduction may be even less than the \$0.60 per square foot of the building. See I.R.S. Notice 2006-52, 2006-52, 2006-26 I.R.B. 1175. § 2.03(2)(b).

292. I.R.C. § 179D(e) (West 2007).

293. Energy Tax Incentives Act of 2005 § 1331(a), *amended by* I.R.C. § 179D(h) (2006).

294. Tax Relief and Health Care Act of 2006 § 204; § 179D(h).

295. John S. Dzienkowski, Robert J. Peroni & Jack N. Pritzker, An Overview of the

reconnaissance test on the property which created areas of interest,<sup>296</sup> then allocated the geological and geophysical expenses to these areas of interest.<sup>297</sup> The taxpayer received a loss deduction for areas of interest that were abandoned.<sup>298</sup> This method was abandoned by the Energy Tax Incentives Act of 2005 in favor of an amortization method.<sup>299</sup>

Geological and geophysical expenses are now capitalized and amortized over a 24 month period beginning with the midpoint of the taxable year during which they are paid or incurred.<sup>300</sup> No deduction is allowed if the property with respect to which the geological and geophysical expenses were paid or incurred is retired or abandoned.<sup>301</sup> If the property is retired or abandoned, the taxpayer continues to amortize the geological and geophysical expenses as if the property had not been retired or abandoned.<sup>302</sup>

In 2006, the 24 month amortization period was extended for major integrated oil companies to 5 years.<sup>303</sup> A major integrated oil company must be a producer of crude oil which has an average daily worldwide production of crude oil of at least 500,000 barrels for the taxable year and which had gross receipts in excess of \$1,000,000,000 for its last taxable year ending during the 2005 calendar year.<sup>304</sup> To be a major integrated oil company, the company and one or more related persons to the company must engage in the refining of oil, and the average daily refinery runs must exceed 75,000 barrels.<sup>305</sup>

#### *D. Percentage Depletion*

The Energy Tax Incentives Act of 2005 changed when certain taxpayers were excluded from taking percentage depletion.<sup>306</sup> The taxpayer is excluded when the taxpayer or one or more related persons to the taxpayer engages in the refining of oil and the average daily refinery runs of the taxpayer and the one or more related persons exceeds 75,000 barrels.<sup>307</sup> Prior to this act, the taxpayer was excluded when the taxpayer or a related person engaged in the refining of crude oil and on any day

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Principals of Natural Resource Taxation 16 (2006) (unpublished outline, on file with authors).

296. *Id.*

297. *Id.*

298. *Id.*

299. Energy Tax Incentives Act of 2005 § 1329(a); I.R.C. § 167 (West 2007).

300. § 167(h).

301. § 167(h)(4).

302. *Id.*

303. § 167(h)(5)(A); Tax Increase Prevention and Reconciliation Act of 2005, Pub. L. No. 109-222, 120 Stat. 345 (codified as amended in scattered sections of 26 U.S.C.A.).

304. I.R.C. § 167(h)(5)(B) (West 2007).

305. §§ 167(h)(5)(B)(iii), 613A(d)(4).

306. *See* Energy Tax Incentives Act of 2005 § 1328(a).

307. §§ 167(h)(5)(B)(iii), 613A(d)(4).

during the taxable year, the refinery runs of the taxpayer and the related person exceeded 50,000 barrels.<sup>308</sup>

### *E. Depreciation*

The Energy Tax Incentives Act of 2005 changed the class life for the purpose of regular depreciation of natural gas gathering lines to 7 years.<sup>309</sup> In order to qualify for this change, the taxpayer's original use of the natural gas gathering line must begin after April 11, 2005.<sup>310</sup> The alternative depreciation system class life for this property is 14 years.<sup>311</sup> This property is not subject to a depreciation adjustment for alternative minimum tax purposes.<sup>312</sup>

The Energy Tax Incentives Act of 2005 changed the class life for the purpose of regular depreciation of natural gas distribution lines to 15 years.<sup>313</sup> In order to qualify for this change, the taxpayer's original use of the natural gas gathering line must begin after April 11, 2005 and the natural gas distribution line must be placed in service prior to January 1, 2011.<sup>314</sup> The alternative depreciation system class life for this property is 30 years.<sup>315</sup>

The Energy Tax Incentives Act of 2005 changed the class life for the purpose of regular depreciation of section 1245 property (generally personal property) used in the transmission at 69 or more kilovolts of electricity for sale to 15 years.<sup>316</sup> In order to qualify for this change, the original use of the section 1245 property must begin with the taxpayer after April 11, 2005.<sup>317</sup> The alternative depreciation system class life for this property is 30 years.<sup>318</sup>

### *F. Amortization of Pollution Control Facilities*

The Energy Tax Incentives Act of 2005 allows 7 year amortization of certain atmospheric pollution control facilities under I.R.C. § 169.<sup>319</sup> The atmospheric pollution control facility must be placed in service after April 11, 2005 and used in connection with an electric generation plant or

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308. § 613A(d)(4).

309. Energy Tax Incentives Act of 2005 § 1326(a); I.R.C. § 168(e)(3)(C)(iv) (West 2007).

310. § 168(e)(3)(C)(iv).

311. § 168(g)(3)(B).

312. I.R.C. § 56(a)(1)(B) (West 2007).

313. Energy Tax Incentives Act of 2005 § 1325(a); I.R.C. § 168(e)(3)(E)(viii) (West 2007).

314. § 168(e)(3)(E)(viii).

315. § 168(g)(3)(B).

316. Energy Tax Incentives Act of 2005 § 1308(a); § 168(g)(3)(B).

317. § 168(e)(3)(E)(vii).

318. I.R.C. § 168(g)(3)(B).

319. Energy Tax Incentives Act of 2005 § 1309(a); I.R.C. § 169(d)(5) (West 2007).

other property which is primarily coal fired.<sup>320</sup> In order to qualify for the credit, the construction, reconstruction or erection of the atmospheric pollution control facility must be completed by the taxpayer after April 11, 2005 or the atmospheric pollution control facility must be acquired by the taxpayer after April 11, 2005 and the original use of the atmospheric pollution control facility must begin with the taxpayer after April 11, 2005.<sup>321</sup>

### *G. Net Operating Loss Deduction*

During a taxable year ending after December 31, 2005 and before January 1, 2009 (year of the election), a taxpayer may elect to carryback a net operating loss from a taxable year ending after December 31, 2002 and before January 1, 2006 (year of the loss) to the five year period preceding the year of the loss.<sup>322</sup> The amount of loss that may be carried back is limited to 20% of the taxpayer's electric transmission property capital expenditures and pollution control facility capital expenditures for the year preceding the year of the election.<sup>323</sup> Electric transmission property capital expenditures are expenditures chargeable to a capital account which is attributable to electric transmission property used by the taxpayer in the transmission at 69 or more kilovolts of electricity for sale.<sup>324</sup> Pollution control facility capital expenditures are expenditures chargeable to a capital account made by an electric utility company which is attributable to a facility which will qualify as a certified pollution control facility.<sup>325</sup>

### *H. Deductions for Payments to a Nuclear Decommissioning Reserve Fund*

The Energy Tax Incentives Act of 2005 changed the limitation on the amount that may be paid into a Nuclear Decommissioning Reserve Fund to the ruling amount applicable for the taxable year.<sup>326</sup> The Act also requires that the taxpayer request a schedule of ruling amounts upon each renewal of the operating license of the nuclear power plant.<sup>327</sup> The ruling amount is the amount which the Secretary of the Treasury determines to be necessary to both fund the total nuclear decommissioning costs, with respect to the power plant, over the estimated useful life of the power plant and prevent any excessive

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320. § 169(d)(5).

321. § 169(d)(4).

322. I.R.C. § 172(b)(1)(I)(i) (West 2007).

323. *Id.*

324. § 172(b)(1)(I)(v)(I).

325. § 172(b)(1)(I)(v)(II).

326. Energy Tax Incentives Act of 2005 § 1310(a); I.R.C. § 468A(b) (West 2007).

327. Energy Tax Incentives Act of 2005 § 1310(c); § 468A(d)(1).

funding or funding at a rate more rapid than level funding, taking into account an appropriate discount rate.<sup>328</sup>

#### VI. CONCLUSION

As this article demonstrates, the Energy Tax Incentives Act of 2005 affected many provisions of the Internal Revenue Code. Some provisions that were discussed in this article were simplified. Please consult a tax practitioner before taking any action based on the information contained in this article.

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328. 26 U.S.C.A. §468A(d)(2); I.R.C. § 468A(d)(2) (West 2007).