Explanation of Nuclear Production Tax Credit Proposal

The United States has not constructed a new nuclear facility in several decades. Through the enactment of section 45J in the Energy Policy Act of 2005, Congress sought to change this by creating a tax incentive to develop new nuclear plants in the U.S. The tax credit Congress proposed is not only capped in volume but also is only available to advanced nuclear projects as defined in the law.

While this tax credit has been absolutely essential in attracting interest to new nuclear, it is, in practice, imperfect. By their very nature, nuclear facilities involve massive scale, risk and cost, so much so that the initiation of the first projects has required joint development by both public and private entities. This joint ownership leads to inefficiencies in the way the tax credit is shared between the taxable private partners and the tax-exempt public partners.

Specifically, current law contains certain limitations on non-taxable entities' ability to utilize the section 45J nuclear production tax credit. The proposal would make it easier for tax-exempt owners of advanced nuclear power facilities to allocate the credit to other entities engaged in the development of the new nuclear project who are able to use the credit to offset their federal income tax liability. The proposal, described more fully below, is consistent with other areas of the Internal Revenue Code where rules have been implemented to enable tax-exempt entities to allocate tax benefits to taxpayers who are able to use the benefits.

A proposal similar to that described below was included in a bipartisan Senate Finance Committee Mark released in 2008 but never voted on by the Committee. Joint Tax scored the proposal in 2008 as having no revenue effect.

I. The Proposal

The proposal would create a new subsection to the nuclear production tax credit to specifically address facility owners who are "qualified public entities." A qualified public entity is defined in the proposal as (i) a Federal, State, or local government entity or any political subdivision or agency or instrumentality thereof, (ii) a mutual or cooperative electric company, or (ii) a not-for profit electric utility.

First, the proposal would allow, in the case of facility which is owned by a public-private partnership or co-owned by a qualified public entity and a non-public entity, the qualified public entity to assign its allocation of credit, or a portion thereof, to the non-public entity partner or co-owner. For example, where a project is being co-developed by a state-owned utility and a private utility, this rule would allow the state utility to direct the allocation of its credits to the private utility.

Second the proposal would also allow, in the case of a facility owned by a public-private partnership or co-owned by qualified public entity, the credit, or a portion thereof, to be allocated to (i) persons responsible for designing the facility, or (ii) persons responsible for, or participating in, construction of the facility (including suppliers and subcontractors). The Secretary of the Treasury shall promulgate a regulation to administer the allocation of the credits; however, the intent is that the allocation itself is determined at the discretion of the qualified public entity.

The proposal permits any credit to be allocated only once, so, for example, a credit transferred by the qualified public entity to a non-public entity partner could not also be allocated to a designer.

II. Current Law Precedent

There are several current-law precedents to the proposal, including sections 30B, 30C, 30D and 179D. In each of those recent instances, Congress recognized the need to level the playing field for tax-exempt entities by permitting the transfer of the tax incentive.

For instance, section 179D provides a special deduction available to commercial building owners who install energy efficient property such as efficient lighting, HVAC equipment, etc. This deduction was designed by Congress to reduce the after-tax cost of installing this equipment. Congress recognized that a substantial portion of buildings are owned by entities that pay no tax. This includes federal, state and locally owned government building such as schools, courthouses, government offices, museums and the like. Congress recognized that specific accommodations would need to be made to the non-taxable owners of these buildings to give them a similar incentive to invest in energy efficient property.

To address this, Congress created a special rule for deductions attributable to publicly owned buildings. Specifically, Section 179D(d)(4) provides:

In the case of energy efficient commercial building property installed in or on property owned by a Federal, State or local government or a political subdivision thereof, the Secretary shall promulgate a regulation to allow the allocation of the deduction to the person primarily responsible for designing the property in lieu of the owner of such property. Such person shall be treated as the taxpayer for purposes of this section.

This rule has the effect of allowing the government entity that owns the building to allocate the tax deduction to the architect, engineer or construction firm responsible for the energy improvements.

In the case of section 179D, Treasury did not actually promulgate a regulation to allow for the allocation of the deduction, instead, under the authority provided in section 179D, the IRS issued a guidance document (Notice 2008-40) which includes specific procedures for how to allocate the credit. Notice 2008-40 notes that in a case where more than one designer is responsible for the energy improvements, the owner of the building may determine which designer is primarily responsible and allocate all of the deduction to that person, or the owner may instead use its discretion to allocate the deduction among several designers.

As mentioned, there are other areas in the Internal Revenue Code that provide mechanisms similar to section 179D in their intent to allow tax benefits to be passed from governmental entities to other persons. Examples of these mechanisms are included in the section 30B credit for alternative motor vehicles, the section 30C credit for refueling property and the section 30D credit for plug-in electric vehicles. These credits are generally claimed by the purchaser of the vehicles or equipment, however, in sections 30B(h)(6), 30C(e)(2) and 30D(f)(3), there are rules allowing the seller of the vehicle, rather than the purchaser, to claim the credits when the purchaser is a tax-exempt entity. These rules recognize that these types of vehicles would be purchased by state entities, school districts and city governments.

The allocation mechanism in the proposal is consistent with operation of the allocation of the section 179D deduction. And in general, the overall intent of all of the credit allocation options in proposal, to allow for tax-exempt facility owners to efficiently transfer tax benefits, has clear precedent in the Internal Revenue Code.