Client Alert

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CURRENT ISSUES RELEVANT TO OUR CLIENTS July 18, 2012

Qualified Energy Conservation Bonds

The Internal Revenue Service (the *"IRS"*) recently released Notice 2012-44 (the "*Notice*"), which provides guidance concerning qualified energy conservation bonds (*"QECBs"*). QECBs are taxable bonds that can be issued by State or local governments to finance certain energy conservation projects, including: (i) reducing energy consumption in publicly-owned buildings by at least 20 percent; and (ii) implementing green community programs (described below). QECBs may also be issued to finance certain electricity-producing facilities, such as wind facilities and solar facilities.

QECBs may be issued to (i) provide the holders of QECBs with a federal tax credit instead of a portion of the interest payable on the bonds or (ii) provide the issuer with a direct federal cash subsidy from the U.S. Treasury representing a portion of the interest paid by the issuer to holders of QECBs. Congress authorized $3.2 billion in nationwide volume cap for QECBs in 2009 and approximately $2 billion of such nationwide volume cap is still unused. Volume cap was first allocated to a State and then allocated to large local governments within the State. Large local governments are any municipality or county having a population of 100,000 or more. Accordingly, municipalities and counties with a population of 100,000 or more were allocated volume cap that authorizes the issuance of QECBs in certain amounts.

Energy Reduction in Publicly-Owned Buildings

QECBs can be issued to reduce energy consumption in publicly-owned buildings by at least 20 percent. The Notice provides guidance on how to measure such energy reduction. The Notice permits the issuer to measure the reduction in energy consumption in: (i) a single publicly-owned building; (ii) multiple publicly-owned buildings; (iii) one or more building system components of one or more publicly-owned buildings, or (iv) a combination of (i), (ii) and (iii). A building system includes a system that serves one of the following functions: heating, ventilation, and air conditioning; hot water system; lighting; building envelope (*e.g.,* windows, roof, walls, insulation); or electricity "plug load" (*e.g.,* items plugged into electric outlets, such as computers and refrigerators).

The Notice provides a reasonable expectations standard as of the issue date of the bonds for purposes of determining reductions in energy consumption. Issuers must use reasonable and consistently applied methods to measure energy savings. The Notice also provides the reduction of energy consumption may be measured over measurement time periods of not less than one year and provides examples of measurement periods.

Issuers may rely on an independent experts to establish reasonably expectations, if, no earlier than sixty days before the issue date of the issue, an independent, licensed professional engineer or other independent expert certifies under penalty of perjury that the capital expenditures to be incurred with respect to the measurement unit are reasonably expected to result in at least a 20 percent reduction of energy consumption during the measurement time periods. An issuer may rely on this certification only if the actual capital expenditures from the QECB proceeds are substantially the same as the expected capital expenditures of such proceeds on which the certification was based. The Notice provides an example of an engineer's certification.

Green Community Programs

QECBs may be issued to finance certain green community programs. In general, the Notice states that the term “green community program” means a program that meets the following two requirements:

(i) *Program Purpose.* The purpose of a green community program is to promote one or more of the purposes of energy conservation, energy efficiency, or environmental conservation initiatives relating to energy consumption, broadly construed. Eligible program purposes include, among others, promotion of energy savings through retrofitting initiatives for heating, cooling, lighting, water-saving, storm-water reducing, or other efficiency measures; distributed generation initiatives; or transportation initiatives that conserve energy and/or support alternative fuel infrastructure (which may include, for example, improvements to public bicycle paths or mass transit systems).

(ii) *General Public Use or Broad Public Availability.* A green community program must: (1) involve property that is available for general public use (using standards similar to standards for distinguishing general public use from private business use under the treasury regulations); or (2) involve a loan (or other repayment mechanism) or grant program that is broadly available to members of the general public, including individuals or businesses. A green community program need not affect the entire geographical area or all the residents and businesses within the jurisdiction of the State or local governmental unit that implements the program, provided that the program broadly benefits the general public, residents, or businesses in the affected area of the State or local governmental unit. Examples of programs that are available for general public use include programs to make improvements to public infrastructure that enhances proximity and connectivity between community assets and public transit in order to reduce motor vehicle use and promote energy conservation. An example of a loan or grant program that is broadly available to the general public would be a program for residential housing or private building energy efficiency initiatives that provides grants or loans that are broadly available for homeowners or businesses.

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