Addendum: Qualified Energy Conservation Bonds

To: Interested Parties

From: Elizabeth Bellis, Counsel, Energy Programs Consortium

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Re: Requested Guidance: Qualified Energy Conservation Bonds

Under Section 54D of the Internal Revenue Code (the "Code"), Qualified Energy Conservation Bonds ("QECBs") may be issued to finance various projects tending to promote the conservation of energy or the production of energy from renewable sources. QECBs have the potential to be a powerful tool for state, local, territorial and tribal governments to modernize schools and municipal facilities, develop renewable power sources, and encourage local homeowners and businesses to make energy improvements.

However, only a fraction of the $3.2 billion allocated for these bonds has been utilized in the two years since the American Recovery and Reinvestment Act of 2009 ("ARRA").[1] This is due in part to the fact that would-be issuers have struggled to obtain comfort from bond counsel regarding the meaning of certain terms in Sec. 54D. Issuers and bond counsel who have requested guidance from IRS have not been able to secure rulings or other helpful guidance. As a result, bond counsel have on the whole not been able to provide standard bond opinions to QECB issuers and have struggled in advising issuers, resulting in significant delay, confusion, and in at least one case we are aware of, the need to abandon the use of QECBs for intended work.

[1] IRS collects issuance data on Form 8038-TC from all issuers, but has declined our requests for this information. As such, it is not possbile to obtain complete, accurate and official issuance information. Instead, issuance data has been gathered by Energy Programs Consortium from Bloomberg, Munios, EMMA/MSRB, state and local government websites, correspondence and interviews with state and local officials, and various other sources, with input from the National Association of State Energy Officials and the U.S. Department of Energy Lawrence Berkeley National Laboratory. Access to IRS Form 8038-TC issuance data would be very helpful in verifying the data collected and facilitating information sharing among issuers and outreach to issuers who have not yet utilized their allocations.

Guidance in the form of temporary regulations or a revenue procedure providing ruling guidelines would be most helpful.[2] In particular, guidance and safe harbors would be most appreciated with respect to the following questions and concerns:

A. "Green Community Programs"

What is the definition of the term "green community programs"? Specifically, does it encompass any or each of the following?

(1) Any program intended to reduce energy consumption (directly or indirectly) or reduce the environmental impact of energy consumption (directly or indirectly) in the jurisdiction of the issuer;

(2) Any program designated as a "green community program" by ordinance, resolution, legislation or regulation by the issuer or its corresponding jurisdiction (as applicable);

(3) Any program to make energy efficiency improvements to public infrastructure (including streetlights);

(4) Any state program of making loans to large local governments which use the loan proceeds for "eligible conservation purposes" within the meaning of Code Section 54D; and/or

(5) The building of privately-owned renewable generation facilities on publicly-owned properties through an arrangement in which the public entity has an option to purchase system at fair market value.

B. Energy Efficiency

What methods are permissible in calculating 20% reduction in energy consumption for the purposes of Code Section 54D(f)(1)(A)(i)? Specifically:

(1) If an issuance is used to finance improvements to more than one publicly-owned building, is it required that there be a 20% reduction in energy consumption in each building individually or is it sufficient that there be a 20% reduction in energy consumption across the buildings improved with the bond proceeds? Note that some public complexes have multiple buildings on one meter such that requiring building-by-building assessment is extremely difficult.

(2) If an issuance is used to finance improvements to more than one system or component within a publicly-owned building, is it required that there be a 20% reduction in consumption in each system or component or fuel type or is sufficient that there be a 20% reduction across all improved systems?

(3) Is it sufficient for an issuer to compare energy consumption immediately before the issuance to immediately after the issuance in determining the 20% savings, or must the issuer continue to show the reduced consumption over the life of the bonds? Note that building usage may increase, such that

[2] In addition, a Notice of Proposed Rulemaking requesting comments would encourage broader input into any final regulations.

energy consumption increases even after energy efficiency measures are put in place that reduce the amount of energy consumed at a particular level of building usage.

(4) Must energy consumption be tested at the meter or may it be modeled in cases where meter testing is not feasible?

(5) May an issuer rely on the certification of its contractor, energy auditor, or similar organization that energy consumption will be reduced by 20% if the planned improvements are put in place? If the issuer reasonably relies on such a certification, or otherwise reasonably believes that 20% savings will be achieved, and the 20% savings are not achieved, is the issuance nonetheless in compliance?

C. Sub-Allocation Procedure

(1) If the state governor or legislature does not authorize sub-allocations in accordance with the formula by the 3-year anniversary of ARRA, may large local governments obtain access to the sub-allocated funds directly?

D. Rural Development

(1) What is the meaning of “rural”?

(2) What is the meaning of “development”?

(3) Can rural development projects include renewables not covered under section 45(d), such as manufacture of components of solar panels?

E. General

(1) Under what circumstances may QECBs be used to finance new construction?

(2) If the full scope of a project does not qualify as a "green community program," what categories of costs related to the project may still be financed with QECBs?

If you have any questions, please feel free to contact Elizabeth Bellis at ebellis@energyprograms.org, (917) 370-7916; or Colin Bishopp at colin.bishopp@cleaneconomycenter.org, (202) 550-7570.