2009 RECOVERY ACT—ENERGY Tax Credit Alert
for Real Estate Practitioners
February 17, 2009

AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

Changes to Residential Energy Efficient Property Credit

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On February 17, 2009, President Obama signed into law H.R. 1,[1] the American Recovery and Reinvestment Act of 2009, of which Title 1 Division B is the American Recovery and Reinvestment Tax Act of 2009 (the "2009 Recovery Act"). While generally aimed at creating jobs and providing economic relief to stimulate the economy, the 2009 Recovery Act is a combination of government spending programs and tax cuts. Some of the significant changes affecting real estate include **changes to the residential energy efficient property credit.**

Prior to the 2009 Recovery Act, a 10% tax credit was available for the purchase of qualified energy efficiency improvements to a taxpayer's principal residence.[2] Qualified improvements included

- insulation materials,
- exterior windows and doors,
- certain roofing, as well as
- the purchase of specific energy efficient heating or cooling equipment.

This credit was available for property improvements made after December 31, 2005 and before January 1, 2008, *with a maximum $500 credit allowable* to a taxpayer with respect to the same dwelling for all taxable years. Thus, the credit expired for calendar year 2008.

The 2009 Recovery Act reinstates the non-business energy credit of I.R.C. § 25C for expenditures made and property placed in service during 2009 or 2010.[3] In addition, the 2009 Recovery Act **increased the credit amount to 30% *with a new maximum credit of $1,500***.[4]

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[1] P.L. 111-5.
[2] I.R.C. § 25C.
[3] I.R.C. § 25C(g), as amended by P.L. 111-5, Sec. 302(a).
[4] I.R.C. § 25C(a), (b). The $500 lifetime limit was eliminated.

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Changes to First-Time Homebuyer's Credit

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On February 17, 2009, President Obama signed into law H.R. 1,[1] the American Recovery and Reinvestment Act of 2009, of which Title 1 Division B is the American Recovery and Reinvestment Tax Act of 2009 (the "2009 Recovery Act"). While generally aimed at creating jobs and providing economic relief to stimulate the economy, the 2009 Recovery Act is a combination of government spending programs and tax cuts. The following discusses one of the significant real estate changes – amendments to the first-time homebuyer's credit.

In hopes of spurring the housing industry, the 2009 Recovery Act enhances the first-time homebuyer's credit.[2] A refundable credit for first-time homebuyers equal to the lesser of $7,500 ($3,750 for married individuals filing separately) or 10 percent of the purchase price of a principal residence was added by the Housing Assistance Tax Act of 2008 (the "2008 Act").[3] The 2009 Recovery Act increases the maximum amount of the credit to $8,000 ($4,000 for married individuals filing separately).

This credit originally applied to principal residences purchased on or after April 9, 2008 and before July 1, 2009. The 2009 Recovery Act has extended the credit to apply to principal residences purchased before December 1, 2009. In addition, prior to the 2009 Recovery Act, a taxpayer could elect to treat a residence purchased in 2009 (and before July 1) as if it occurred on December 31, 2008 for purposes of taking the credit on the taxpayer's 2008 return. This election is still available for homes purchased prior to the December 1, 2009 date.

As originally enacted, the homebuyer's credit had to be recaptured ratably, with no interest charge, over 15 years, beginning in the second taxable year after the year in which the home was purchased.[4] Thus, the credit was more like an interest-free loan from the government to the taxpayer. For example, if the taxpayer purchased the home in 2008, and a $7,500 credit was allowable on the 2008 return, annual repayments of $500 per year for 15 years [$7,500 / 15 years, or 6 2/3 percent of the credit] began with the 2010 return. However, to make home buying more attractive, the 2009 Recovery Act waives this recapture rule for home purchases made in 2009 (prior to the December 1, 2009 deadline).[5]

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[1] P.L. 111-5.
[2] P.L. 111-5, Title 1, Division B, Sec. 1006, amending I.R.C. § 36.
[3] P.L. 110-289, Sec. 3011(a), adding I.R.C. § 36.
[4] I.R.C. § 36(f).
[5] I.R.C. § 36(f)(4)(D), as amended by P.L. 111-5. Note that this recapture rule is waived for 2009 purchases, even if the taxpayer elects to take the credit for a 2009 purchase on his or her 2008 return. I.R.C. § 36(g), as amended by P.L. 111-5.

For principal residences purchased in 2008, if the taxpayer sells the home (or ceases to use the property as a principal residence), prior to complete recapture of the credit, any remaining recapture amount is due on the tax return for the year in which the home is sold (or is no longer used as a principal residence).[6] There are exceptions to this recapture payment upon certain events, such as death, certain involuntary conversions, transfers between spouses or incident to divorce, and where gain on sale does not exceed the recapture amount.[7]

The 2009 Recovery Act has liberalized this recapture rule also, and provides that for a principal residence purchased after December 31, 2008 and before December 1, 2009, this recapture rule will apply only if the taxpayer sells the home (or ceases to use the property as a principal residence), during the 36-month period beginning on the date of the purchase of that residence by the taxpayer.[8]

As originally enacted, the I.R.C. § 36 homebuyer's credit did not apply if the taxpayer was entitled to the Washington, D.C. homebuyer's credit. For residences purchased after December 31, 2008 and prior to December 1, 2009, the 2009 Recovery Act allows qualifying taxpayers to take the more generous credit under I.R.C. § 36, but denies them the D.C. credit.[9]

If a purchase of a residence was financed with the proceeds of qualified mortgage revenue bonds, it was originally not eligible for the homebuyer's credit. The 2009 Recovery Act eliminated that restriction, so that the purchase of a home may now be financed with qualified mortgage revenue bonds.[10]

[6] I.R.C. § 36(f)(2).
[7] I.R.C. § 36(f)(3) & (4).
[8] I.R.C. § 36(f)(4)(D)(ii), as amended by P.L. 111-5.
[9] I.R.C. §§ 36(d)(1), 1400C(e)(4), as amended by P.L. 111-5.
[10] I.R.C. § 36(d)(2), as amended by P.L. 111-5.