



Congress Provides Tax Credits For Agricultural Chemicals Security

Introduction

Congress recently enacted the *Heartland, Habitat, Harvest, and Horticulture Act of 2008* (PL No. 110-246, 122 Stat. 1624 (formerly H.R. 6124)), which provides for the Agricultural Chemicals Security Credit (“Chemicals Credit”). The Chemicals Credit, which is codified in I.R.C. § 45O, permits an eligible agricultural business (“Eligible Business”) to use annually as much as \$6 million of its qualified chemical security expenditures (“Qualified Expenditures”) towards a potential \$2 million non-refundable credit against its federal income tax liability. The Chemicals Credit applies to Qualified Expenditures made during the period May 22, 2008 through December 31, 2012 (the “Expenditure Period”).

- A taxpayer may be entitled to a one-year carry back of any unused Chemicals Credit. This aspect may be particularly beneficial to a taxpayer that does not expect to have income in 2009, but was profitable in 2008.
- While the Chemicals Credit may be limited to Qualified Expenditures made during the rather short Expenditure Period, any unused Chemicals Credit may be carried forward for 20 years.
- An Eligible Business includes a taxpayer that manufactures or distributes any of the specified pesticides or fertilizers. Therefore, an Eligible Business may not necessarily be directly engaged in an agricultural related business.

The Chemicals Credit

The Chemicals Credit allows an Eligible Business to use as much as 30% of its Qualified Expenditures incurred during the Expenditure Period as a credit against federal income tax liability.

An Eligible Business for purposes of the Chemicals Credit is a trade or business that: (1) sells agricultural products or a specified agricultural chemical (“Specified Chemical”) at retail predominately to farmers or ranchers; or (2) manufactures, formulates, distributes or aerially applies a Specified Chemical.

A Specified Chemical is: (1) any fertilizer commonly used in agricultural operations that is listed in certain Environmental Protection Agency, Department of Transportation and Department of Homeland Security regulations; or (2) any pesticide that is customarily used on crops grown for food, feed or fiber that is; (i) a nitrogen stabilizer, or (ii) a substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest or used as a plant regulator, defoliant or desiccant.

Qualified Expenditures are expenditures that pertain to the safeguard of a Specified Chemical from theft and use for illegal purposes (*e.g.*, illicit drug manufacturing or acts of terrorism). Qualified Expenditures, for example, include payments for: (1) employee security training and background checks; (2) limitation and prevention of access to controls of specified agricultural chemicals

stored at a facility; (3) implementing a site security plan; and (4) installation of security lighting, cameras, recording equipment and intrusion detection sensors.

The Chemicals Credit is limited to \$300,000 of aggregate Qualified Expenditures made during the Expenditure Period at each facility (*i.e.*, an aggregate \$100,000 per

facility credit limitation). In addition, a taxpayer, which is defined to include a controlled group of corporations, may annually use no more than \$6 million of its Qualified Expenditures for purposes of the Chemicals Credit (*i.e.*, an annual \$2 million credit limitation).

Chemical Security Legislative Update

The Chemical Facility Anti-Terrorism Standards (CFATS) established in 2007 will expire in October of this year, accordingly, Congress is revisiting the issue of chemical facility security. House Homeland Security Committee Chairman Bennie Thompson (D-MS) has begun circulating a discussion draft of legislation intended to extend and recodify the Secretary of Homeland Security's authority to enhance security at chemical facilities. A draft of the bill dated April 3, 2009 contains a number of provisions that will affect the chemical industry, if enacted into law.

First, Thompson's draft bill contains language that would allow any State, or political subdivision thereof, to enforce security standards that are more stringent than the federal standards. Second, the draft legislation also includes provisions covering announced inspections of Tier 1 and 2 facilities and establishing whistleblower protection for chemical facility employees. The bill mandates that Tier 1 and 2 covered chemical facilities undergo unannounced inspections every two and four years respectively. Third, the whistleblower language requires the Secretary of Homeland Security to create a process by which individuals can

report insufficient chemical facility security. The bill obligates the Secretary to keep the identity of anyone filing such a report confidential and to acknowledge receipt of such report. Finally, it prevents employers from taking action against an individual in retaliation for filing a report of insufficient facility security with the Department of Homeland Security.

In brief, Congress has a number of options for managing the expiration of CFATS. These options include but are not limited to: (1) Congress not taking any action and allowing CFATS to expire; and (2) Congress extending the existing CFATS program in the 2010 authorization bill or passing new CFATS legislation. Given that Rep. Thompson chairs the House Homeland Security Committee, he appears to be in a unique position to move his bill through the legislative process. However, his position does not guarantee passage since in the 110th Congress, H.R. 5577, the Chemical Facility Anti-Terrorism Act of 2008, a bill sponsored by Rep. Thompson, fell one vote short of approval by the House Homeland Security Committee.

Blank Rome is dedicated to monitoring and reporting any legal and legislative developments that affect the chemical industry. Should you have any questions regarding the information contained in this Alert, please contact:

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