NEW TAX LAW IN PLACE – WHAT IMPACTS ON BROWNFIELD FINANCING?

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President Trump signed the Tax Cuts and Jobs Act (HR 1) into law on December 22 – less than two months after the House and Means Committee released its initial tax reform proposal. As you probably heard at the EPA brownfield conference in December, and read about in other sources, key tax code changes considered during the bill drafting process would have severely curtailed or eliminated critical federal business and real estate development incentives often used as part of the financing package typically assembled to advance brownfield site revitalization. As I stated at the conference, losing these incentives would have undermined years of effort to "level the playing field" between brownfield and greenfield sites, by making it much more difficult – if not impossible – to attract the up-front capital needed to address fundamental property assessment and cleanup needs.

The end result – now that the final law is in place – is that, overall, economic development incentives commonly used by developers and communities to promote brownfield reuse, threatened during the bill drafting process, emerged generally intact. (However, previously lapsed tax incentives to offset brownfield cleanup costs were not restored as part of the reform of business credits). On the other hand, the lower overall corporate tax rate will make many of these incentives less attractive to investors and others who had used these incentives to reduce their tax liabilities – and the ultimate impact of that on brownfield finance remains to be seen. In addition, HR 1 as signed included a new "base erosion and anti-abuse tax" (BEAT) – essentially an international corporate AMT. This may limit the ability of some corporate investors to fully claim credits from the incentives noted below, making them less desirable.

- ***Historic rehabilitation 20% tax credits retained, but with reduced bottom-line value*** – One of the most important brownfield financing tools – especially for smaller projects of less than $1 million in size – has been preserved, although credits will now have to be claimed over 5 years upon project completion, rather than all in the year the restored property is put back into service. For large projects, this could affect the up-front syndication value of these credits; for small projects, it will likely require accommodating a new strategy for managing cash flow that addresses property preparation. In addition, the majority of states have their own historic tax credit programs, many synchronized with the federal tax code; the impact of this change in state credit time frames has yet to be determined.
- ***Non-historic rehabilitation tax credits (10%, for pre-1936 buildings) repealed*** – Not used nearly as often as the historic credits, the 10% credit nevertheless helped finance numerous revitalization projects involving the types of old buildings typical of brownfield properties, often for small economic development projects. Given this change, it may make sense for developers or communities to pursue historic designation for these properties, to take advantage of the revised 20% historic credit.

- ***New Markets Tax Credits (previously authorized 2018 and 2019 rounds) retained*** – Targeted to distressed low-income areas – the typical brownfield location in many communities – retention of NMTCs will channel $7 billion in private investment dollars to these areas nationally over the next few years, mostly for job generating real estate and business development projects. The tax act did not authorize NMTCs beyond 2019.
- ***Private activity bond interest exemption retained*** – A critical result of HR 1 was the continued availability of tax-exempt bonds to developers and state and local jurisdiction; while traditionally more of a tangential tool to brownfield redevelopment, PABs are a vital piece of public-private partnerships that finance manufacturing, infrastructure, hospitals, and other economic and community development investment.
- ***Low-income housing tax credits retained*** – LIHTCs (both the 9% volume cap and the 4% PAB credits) emerged with no substantive changes; they are critical to financing affordable housing development and have been used in numerous brownfield-to-housing projects across the country. (However, the nature of these credits, and who uses them, means that the lower corporate tax rate will make these credits less attractive to investors).
- ***Renewable energy investment tax credits, production tax credits retained*** – These credits, which have been integrated into brownfield repowering projects, will continue as is, with existing phase downs (after 2019 for ITC, after 2016 for PTC) retained.
- ***Investing in "Opportunity Zones" newly authorized*** – HR 1 included a new incentive to invest capital gains in new or existing businesses in state-designated "opportunity zones" in low-income communities, using criteria comparable to those for NMTCs. States will be allowed to designate up to 25% of their low-income census tracts as opportunity zones, for a 10-year period. HR 1 anticipates that "qualified opportunity funds" will be organized for purposes of investing in opportunity zone property. While the implementation specifics have yet to be defined, brownfield reuse advocates might be able to leverage their designation and operation to target distressed properties for revitalization.