The Florida Senate

Issue Brief 2012-204 *September 2011*

Budget Subcommittee on Finance and Tax

REVIEW OF THE CAPITAL INVESTMENT TAX CREDIT

Statement of the Issue

Florida created the Capital Investment Tax Credit in 1998 as a tool to encourage high-impact sector businesses to build or expand facilities within Florida. It provides a tax credit that qualifying businesses can use to reduce corporate income or insurance premium taxes.

The credit has been in place for 14 years, and substantial amounts of tax credits have been awarded. Although the full amount of potential tax credits has not been used, the accumulated amount of approved tax credits has been growing in recent years. This issue brief will detail the history, amendments, and use of the credit, including the amount of potential tax credits that could be used in future years.

Discussion

Creation of the Capital Investment Tax Credit

In 1998, the Legislature created the Capital Investment Tax Credit (CITC) [1] for high-impact sector businesses that locate within Florida. Qualifying businesses that make a significant capital investment in Florida by building or expanding physical facilities can reduce their tax liability for a significant period of time after beginning operations at the new or expanded facility by using the CITC.

The CITC has been amended several times since it was initially enacted. However, the basic framework of the CITC remains the same. The following information explains the portion of the CITC that was part of the initial legislation. Unless otherwise indicated, these requirements still exist.

As it was initially enacted, the CITC had the following requirements to qualify:

(1) The business had to be a high-impact sector business;
(2) The business had to build or expand a facility within Florida;
(3) The business had to incur construction or expansion costs of at least $25 million;[2] and
(4) The business had to create and maintain at least 100 new jobs within Florida.

A qualifying business would receive an annual corporate income tax credit for the 20-year period immediately following the date it commenced operations at the new or expanded facility.

High-Impact Sectors.[3] Every three years, Enterprise Florida, Inc. (Enterprise Florida) researches and recommends the business sectors that should be designated as high-impact.[4]

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[1] Chapter 98-61, Laws of Florida; s. 220.191, Florida Statutes.
[2] In s. 220.191, Florida Statutes, these costs are referred to as "eligible capital costs" or "cumulative capital investment."
[3] By the time the CITC was developed, Florida already had a different incentive in place for high-impact sector businesses – a performance grant system. In creating the CITC, the high-impact sector requirements of that performance grant system were used. See s. 288.108, Florida Statutes.
[4] At the time when the CITC was created, there was not a set three-year schedule for reviewing high-impact designations. The three-year schedule was established by s. 20, ch. 2010-147, Laws of Florida (CS/SB 1752), now in s. 288.108(6)(a), Florida Statutes.

The Department of Economic Opportunity[5] makes the final decision on designations. High-impact sectors have evolved over time. Currently, they are comprised of the following business sectors:[6]

1. Transportation Equipment (Aviation/Aerospace) (1997),
2. Information Technology (1999),
3. Life Sciences (2002),
4. Financial Services (2004),
5. Corporate Headquarters (2006), and
6. Clean Energy (2008).

Eligible Capital Costs and Cumulative Capital Investment. The CITC uses the term "eligible capital costs" to refer to the types of expenses that count toward meeting the minimum $25 million capital investment requirement. "Eligible capital costs" are defined broadly. They generally include all costs related to the acquisition and construction of a facility. Although not limited to specific costs, the statute lists several illustrative examples that qualify: (1) construction costs, including all obligations incurred for labor and obligations to contractors; (2) costs of acquiring land or rights to land, including recording fees; (3) costs for architectural or engineering services; and (4) costs associated with the acquisition and installation of fixtures and equipment.

The amount of "eligible capital costs" (sometimes referred to as "cumulative capital investment") determines the amount of annual credit for a qualifying business. The annual credit amount is essentially the total amount of eligible capital costs equally divided over 20 years.[7] For instance, a business with $40 million in eligible capital costs would have an annual credit limit of $2 million, while a company with the minimum $25 million in costs would have an annual credit limit of $1.25 million.

The CITC was designed as a three-tier program, and the level of eligible capital costs determined the tier that applied to a project. In order to qualify for the lowest tier, eligible capital costs must equal at least $25 million; the middle tier requires eligible capital costs of $50 million, while the highest tier requires eligible capital costs of $100 million. These tiers then determine what percentage of its tax liability, a project could offset. This limitation is discussed below.

Limitations on Annual Credit Amounts. Even though the annual credits potentially can be as high as 5 percent of the total eligible capital costs, two other limitations apply.[8] First, the credit can only be used against the tax liability arising out of the new or expanded facility ("qualifying project"). Second, only a set percentage of the project's tax liability can be offset.

The first limitation – related to the tax liability arising out of the qualifying project – limits the use of the credit in years when the qualifying project has little or no tax liability, even if the business as a whole does owe tax. As an example, assume that the qualifying business builds a new facility in Florida. The facility incurs a total of $40 million in eligible capital costs, and the business establishes the new facility as a division within the corporation.

Assume that in the first year of operations, the new facility has no tax liability, but the overall business is very profitable and owes Florida tax. In this instance, the business would have a potential annual credit of $2 million (5 percent of its $40 million in eligible capital costs). However, it cannot use any of the $2 million credit because that credit can only be used to offset the tax liability that arose out of the new facility, and the new facility did not

[5] The Department of Economic Opportunity was created recently by ch. 2011-142, Laws of Florida (SB 2156). Before the creation of the Department of Economic Opportunity, the Governor's Office of Tourism, Trade and Economic Development was assigned this authority, as well as numerous other responsibilities in administering the CITC. For consistency, references throughout this document will be made to the Department of Economic Opportunity, even when discussing the program at a time when the Governor's Office of Tourism, Trade, and Economic Development existed.
[6] Dates in parentheses are the year in which the sector was designated as high-impact.
[7] Section 220.191(2)(a), Florida Statutes, accomplishes this equation by limiting a taxpayer to 5 percent of its eligible capital costs per year for 20 years.
[8] *See* s. 220.191(2)(a), Florida Statutes.

have any tax liability. Under the original program, the $2 million credit potentially available for year 1 would expire and never be available for future use.

The second limitation – the percentage limit – limits the percentage of the project's tax liability that can be offset with the credits and is determined by the amount of eligible capital costs. If the taxpayer incurs eligible capital costs between $25 million and $50 million, the business can offset a maximum of 50 percent of the project's tax liability; for eligible capital costs between $50 million and $100 million, the business can offset 75 percent; and for projects with eligible capital costs equal to or exceeding $100 million, the business can offset 100 percent of the project's tax liability.

While the CITC has been amended, it still allows businesses to qualify for credit as high-impact sector businesses, with certain changes. The significant amendments to the CITC allow businesses outside of the high-impact sectors to qualify for the CITC.

Significant Amendments to the Credit

The following information outlines significant amendments to the CITC.

A. Insurance Premium Tax.[9] In 1999, the statute was amended to allow qualifying businesses to take the credit against the insurance premium tax.

B. Financial Services Sector Expansion.[10] In 2003, the CITC was expanded temporarily to allow financial services businesses to qualify for the CITC through June 30, 2004. Although now repealed, a financial services facility could have been a qualifying project if it created 2,000 new jobs paying an average wage of $50,000 and it incurred eligible capital costs of at least $30 million.

C. Target Industry Business Sector.[11] In 2005, the CITC was expanded to allow target industry businesses to qualify. Like high-impact sectors, target industries are determined by the Department of Economic Opportunity in consultation with Enterprise Florida. Target industry business sectors are determined through consideration of specified criteria, such as industry growth potential, industry stability, average industry wages, etc.[12] Currently, target industries are a slightly larger group than the high-impact sectors; target industries include all high-impact sectors, as well as businesses working in homeland security and defense activities.

There are certain types of businesses that are statutorily prohibited from participating as target industry businesses, such as retail industry businesses, electric utility companies, and certain mining activities. As with high-impact sectors, target industry designations are reviewed every 3 years.[13]

A target industry business facility can be a qualifying project if it creates or retains at least 1,000 jobs, 100 of which must be new jobs, and the jobs must pay an average wage of at least 130 percent of the average private sector wage in the area. The project also must incur eligible capital costs of $100 million.

The tax credit for target industry businesses is calculated differently than the typical 5 percent of eligible capital costs per year. Target industry businesses can only take credit for 5 years; however, these businesses may take a credit equal to one-half of the increase in the tax liability arising out of the project, without regard to the amount of eligible capital costs.

D. Corporate Headquarters Facilities.[14] In 2006, the CITC was expanded to allow any business that located its corporate headquarters in Florida to qualify for the credit, regardless of whether the business was in a high-impact

[9] See s. 64, ch. 99-251, Laws of Florida (CS/SB 1566).
[10] See s. 1, ch. 2003-270 (HB 691).
[11] See s. 5, ch. 2005-282, Laws of Florida (CS/SB 202).
[12] *See* s. 288.106(2)(t), Florida Statutes.
[13] See s. 288.106(2)(t), Florida Statutes (flush language).
[14] See s. 1, ch. 2006-55, Laws of Florida (CS CS SB 2728).

or target industry business sector. A corporate headquarters facility can be a qualifying project if it is located in an enterprise zone and brownfield area, creates at least 1,500 jobs with an average pay at least 200 percent of the statewide average annual private sector wage, and incurs eligible capital costs of at least $250 million.

Like the high-impact sector business projects, the annual tax credit amount for a corporate headquarters project is equal to 5 percent of the eligible capital costs, but limited to $15 million.[15] Tax credits awarded for a corporate headquarters facility may only be taken against corporate income tax liability.

If the full tax credit associated with a corporate headquarters facility is not used in any one year, the taxpayer can carry the unused credit forward to any year within the normal 20-year window. In addition, this type of credit may be used by any corporation within the qualifying business's affiliated group.[16]

E. Transferability of CITC for Solar Panel Manufacturing Companies.[17] Generally speaking, the CITC may not be transferred or sold to other businesses. However, in 2008, the CITC was amended to allow certain qualifying projects to transfer unused tax credits.

In order to qualify to transfer a tax credit, the qualifying project must be a new solar panel manufacturing facility that generated at least 400 jobs within 6 months after commencing operations, and pays an average annual salary for the new jobs of at least $50,000. The qualifying business may transfer its credit to any other business, but the transferred amount cannot exceed the amount of the tax liability of the qualifying business's tax liability (or reduced percentage depending on which high-impact sector tier for which the business qualifies). A taxpayer that receives a credit under this transfer method must use the credit in the year the credit is received.

F. Extended Life for Certain Tax Credits.[18] In 2011, the CITC was amended to allow certain tax credits to be used outside of the normal 20-year period following commencement of operations of the qualifying project. The amendment only applies to high-impact sector projects that qualify for tier 3 – the $100 million eligible capital costs threshold. These companies can use any unused credit amounts beginning in the 21st year after the commencement of operations, but not later than the 30th year after operations commence.

G. Disproportionately Affected County Waiver.[19] In 2011, the CITC was amended to waive the requirement that a qualifying project be in a high-impact business sector for the period from July 1, 2011, through June 30, 2014. The business has to be an "otherwise eligible business from another state which locates all or a portion of its business to a Disproportionately Affected County." "Disproportionally Affected County" is defined to mean Bay, Escambia, Franklin, Gulf, Okaloosa, Santa Rosa, Walton, or Wakulla County.

Summary of the Current Types of Qualifying Projects

As amended, the CITC allows for three types of qualifying projects – high-impact sector businesses (which have 3 different tiers); target industry businesses, and corporate headquarters. The high-impact sector project type is largely the same as it was when the CITC was developed in 1998. The primary changes have been in adding the new types of qualifying projects and permitting special credit treatment in certain instances.

Overlap between Qualifying Project Types. Due to the changes in the high-impact business sectors, some overlap now exists between the types of qualifying projects. For example, the current statute has two different project types for headquarters facilities: a corporate headquarters facility could qualify as a high-impact sector project, or the facility could qualify under the specific headquarters facility project type. The investment requirements of these two project types differ significantly. The requirements for qualifying under the specific corporate

[15] This $15 million annual limit effectively caps credit for this type of project to $300 million in eligible capital costs. Any costs above $300 million will not generate additional CITC.
[16] "Affiliated group" is a reference to a feature of the federal income tax system wherein related corporations are grouped together for certain tax purposes. See Title 26 Internal Revenue Code s. 1504.
[17] See s. 10, ch. 2008-227, Laws of Florida (HB 7135).
[18] See s. 1, ch. 2011-223, Laws of Florida (CS/HB 879).
[19] See s. 95, ch. 2011-142, Laws of Florida (SB 2156).

headquarters project type are more onerous and require significantly more investment. The difference in the required investment makes it unclear whether any corporate headquarters project would attempt to qualify under the specific headquarters facility project type. This overlap between project types has not yet raised any administrative problems, but retaining the unused headquarters project type under these circumstances may not be useful.

The situation is similar for financial services businesses. The specific financial services facilities project type was repealed in 2004, but that year, financial services businesses were classified as a high-impact sector business. Thus, despite the statutory repeal, financial services businesses still potentially qualify for CITC. As with the specific project type for headquarters facilities, the financial services project type had job requirements far exceeding those required to qualify as a high-impact sector business.

Table 1 summarizes the various types of business operations that qualify for credit and the specific credit provisions related to each type.

TABLE 1

CAPITAL INVESTMENT TAX CREDIT QUALIFYING PROJECT TYPES					
	High-Impact Tier 1	**High-Impact Tier 2**	**High-Impact Tier 3**	**Target Industry**	**Headquarters**
Investment Required	$25 Million	$50 Million	$100 Million	$100 Million	$250 Million
Taxes that the Credit can be Applied Against	Corporate Income Tax or Insurance Premium	Corporate Income Tax or Insurance Premium	Corporate Income Tax or Insurance Premium	Corporate Income Tax or Insurance Premium	Corporate Income Tax
Jobs Requirement	100 New Jobs	100 New Jobs	100 New Jobs	100 New, 900 New or Retained	1,500 New
Annual Credit Amount	5% of Eligible Costs	5% of Eligible Costs	5% of Eligible Costs	50% of increased tax liability arising out of the project	Lesser of $15 million or 5% of Eligible Costs
Annual Credit Limit	50% of tax arising out of project	75% of tax arising out of project	100% of tax arising out of project	50% of increased tax liability arising out of project	$15 million per year
Credit Period	20 years	20 Years	20 Years	5 years	20 years
Credit Carryover	None	None	Amounts not used within the 20-yr period can be taken between years 21 and 30	None	Annual unused amounts can be carried forward within the 20-yr period
Disproportionately Affected County Waiver	Between 7/1/11 and 6/30/14, the high impact sector requirement is waived for any business that relocates all or a portion of its out-of-state business to Bay, Escambia, Franklin, Gulf, Okaloosa, Santa Rosa, Walton or Wakulla County.			N/A	N/A
Taxpayer Permitted to Transfer Credit?	Generally not. However, if a project establishes a new solar panel manufacturing facility and generates at least 400 jobs within 6 months of commencing operations and pays those jobs at least $50,000 average annual salary, it may transfer its permissible credit to another business.				

The Process for Obtaining Tax Credits

Three agencies are involved in the administration of the CITC. A business interested in the CITC initially applies to Enterprise Florida, where a review is done to ensure that the business's planned project will meet the requirements for a qualifying project. After review, Enterprise Florida recommends eligible businesses to the Department of Economic Opportunity.

The Department of Economic Opportunity reviews the business's plan and makes a final determination on whether to enter into an agreement with the business. If so, the written agreement outlines the specifics of the project, including the planned date that operations will commence and the total amount of credit that the company can expect if the project proceeds as planned. At this point, the applicant is considered "certified" and the total amount of credit listed in the agreement is considered a "certified credit."

The agreement is drafted so that the qualifying business's annual credit amount begins on the date of commencement of operations, and the 20-year credit period begins at that time. If for some reason operations do not commence on time, the 20-year credit window is not adjusted. So, every year that the commencement of operations is delayed, a year of credit is lost.

Once construction is complete, the business is not permitted to take credit until it requests that the Department of Economic Opportunity audit its eligible capital costs. Once audited, the Department of Economic Opportunity makes any necessary adjustments to the initial certified credit amount.

Every year, the Department of Economic Opportunity reviews the status of all qualifying projects to ensure that the jobs requirements and any other requirements outlined in the agreement are still satisfied. For projects that still meet all requirements and for which the department has completed an audit, the department issues an annual credit letter that outlines how much credit the qualifying business could potentially take for that year.

The CITC also requires that the qualifying business agree with the Department of Revenue on a method to calculate the income from the qualifying project. As discussed above, the qualifying business may only apply its credit to a percentage of the income "arising out of the qualifying project." In some instances, the income from the qualifying project is difficult to separate from the other income of the qualifying business. Section 220.191(5), Florida Statutes, requires that the qualifying business and the Department of Revenue agree on the calculation. The Department of Revenue enters into these agreements by issuing a Technical Assistance Advisement – a binding opinion from the Department of Revenue.[20]

After an annual credit letter is received and the taxpayer has agreed with the Department of Revenue as to the calculation of the income arising out of the qualifying project, the taxpayer may claim the appropriate credit amount on its annual tax return.

Current CITC Statistics

The following information is current as of August 8, 2011.

Applicants and Certifications. Table 2 lists applicant data by project type. The table lists the number of applicants that applied to Enterprise Florida for participation in the program, the number of those applicants that Enterprise Florida (EFI) recommended that the Department of Economic Opportunity consider for participation, and the number of the applicants that the Department of Economic Opportunity (DEO) certified for participation in the program.

[20] Rule 12C-1.0191(1)(a), Florida Administrative Code.

TABLE 2

APPLICANTS AND CERTIFICATIONS BY PROJECT TYPE						
Qualifying Project Type	**High-Impact Sector $25 Million**	**High-Impact Sector $50 Million**	**High-Impact Sector $100 Million**	**Targeted Industries**	**Headquarters**	**Total**
Number of Applicants to EFI	21	6	14	1	0	**42**
Number of EFI Recommendations to DEO	11	3	10	0	0	**24**
Number of Applicants Certified by DEO	10	3	10	0	0	**23**

Summary Credit Information. Table 3 summarizes credit data by project type. Only high-impact sectors are included because no applicants have been certified under either the target industry or headquarters project types.

The table lists the amount of certified credit awarded under each high-impact sector tier, the amount of that credit that has been audited by the Department of Economic Opportunity, and the amount of the audited credit that has been claimed on tax returns. As discussed below, not all projects have requested audits or claimed credit. Thus, for reference, the number of projects involved has been included in parentheses below each dollar amount in the table.

TABLE 3

SUMMARY CREDIT DATA				
	High-Impact Sector $25 Million	**High-Impact Sector $50 Million**	**High-Impact Sector $100 Million**	**Total**
Initial Certified Credit Awarded	$189.3 million (10 projects)	$149.7 million (3 projects)	$2.3 billion (10 projects)	$2.6 billion (23 projects)
Amount of Certified Credit Audited	$37.3 million (2 projects)	$62.1 million (1 project)	$506.1 million (2 projects)	$605.5 million (5 projects)
Amount of Credit Claimed	$54.5 Million[21]			$54.5 million (5 projects)

The total amount of certified credit for all projects is $2.6 billion. This amount is the total amount of credit that potentially could have been taken between the first year that the first qualifying project planned to begin operations (2000) and the last year of the most recently certified project's 20-year window (2031).

As discussed above, before any qualifying business can take credit on its tax return, the Department of Economic Opportunity must complete an audit of the project's eligible capital costs. Table 3 illustrates that only 5 of 23 projects have requested this audit. Thus, the bulk of qualifying businesses have not taken the final steps to be able to take credit on their return.

[21] This amount represents the total credit for all three high-impact sector tiers. Section 213.053, Florida Statutes, prohibits the Department of Revenue from releasing specific taxpayer information. Due to this restraint, the Department of Revenue cannot provide the credit information relating to the individual high-impact sector tiers since there are so few taxpayers involved that release would potentially divulge specific taxpayer information.

The fact that relatively few companies have completed all steps to take credit is likely due to a lack of tax liability. Most businesses in Florida are not subject to the corporate income tax or insurance premium tax. Moreover, many of the businesses that are subject to tax have small tax liability. Thus, although it is difficult to know for certain, many of these companies may not have sufficient tax liability to warrant completing the final steps. If this is the case, the credits would not become valuable to these companies until the qualifying business becomes subject to tax or is able to sell the credit to other businesses.

Year-by-Year Credit Amounts. The figures above in Table 3 provide the total amount of credits that have been awarded and audited. Although they help measure the level of activity within the program, they span such a long time period that they are not useful for any type of revenue analysis.

To help illustrate how this credit could affect revenue in a given year, Table 4 lists credit data for 4 specific years. The year 2009 is the most recent year for which tax reporting data is available, thus it has been included. The years 2012 and 2019 are currently the highest years for which credit has been allocated. The final year that a participating business that has been audited can take credit is year 2027, thus it has been included.

TABLE 4

SPECIFIC YEARS' ANNUAL CREDIT DATA				
	2009	**2012**	**2019**	**2027**
Annual Certified Credit	$113.7 million	$130.6 million	$130.6 million	$48.1 million
Annual Audited Credit	$30.3 million (5 projects)	$30.3 million (5 projects)	$30.3 million (5 projects)	$7.5 million (1 project)
Credit Claimed on Tax Returns	$14.4 million (5 Projects)			

As discussed above, the audited credit amount is the amount of credit that a qualifying business is approved to claim on a return without any further action on behalf of a government agency. The amount of certified credit is the full potential credit available for qualifying taxpayers; however, most taxpayers would need to have their audits completed before they could claim their credit amounts on a tax return.

Unused Credits

As originally designed, the program discarded unused credits after the year in which they could have been claimed. For instance, Table 4 illustrates that in 2009 there was a potential $113.7 million of certified credit that had been awarded; however, only $14.4 million was claimed on tax returns. Under the original program, the difference of $99.3 million would have expired and would never become available for use on a future tax return.

In 2011, legislation changed the treatment of unused credits in certain circumstances. The program was amended to allow a high-impact sector business that qualified for tier 3 – the $100 million investment threshold – that was unable to fully use its available credit between years 1 and 20, to begin using that credit in years 21 through 30 following the commencement of operations. Thus, at least some credits that would have expired by year 20 may ultimately be available for use, which makes it difficult to project how much credit will ultimately be taken.

There are unresolved issues with the legislation that permits the use of credits between years 21 and 30. First, the new language provides that when the tax liability of the qualifying business is insufficient to permit full use of the credit, then the credits can be used in years 21 through 30.[22] This language seems to be concerned with offsetting the income of the qualifying business; however, until this legislative change, the statute only used the income of the qualifying project to determine the amount of credit.[23]

[22] See s. 220.191(2)(d), Florida Statutes.
[23] See s. 220.191(2)(a), Florida Statutes.

Under the language as written, the extension of the unused credits will apply in situations where the qualifying project had substantial tax liability to use the credit, but the credit was not used because the project's tax liability was offset by losses from the other ventures of the business. The extension will not apply if the credit cannot be used because the qualifying project did not generate an income tax liability.

Second, at the time the legislation was passed in 2011, almost $1 billion of the $2.61 billion of certified credit had already expired due to the fact that the credit was available, but went unused. The 2011 legislation does not specifically provide whether it was intended to apply to this already expired credit amount. If administrative agencies interpret the legislation to apply to this already expired credit, some of this credit will again become available in future years.

Lastly, as written, it is possible that qualifying companies could take multiple years' credit in a single year. The language provides that any unused credit may be taken in years 21 through 30. It is unclear whether the intent was to require companies to spread unused credits over years 21 through 30. Administrative agencies may administer this provision to allow companies to fully take all available credit in year 21.

Summary

As currently structured, there are no statutory limits on how much credit can be awarded or taken in any given year. To date, relatively small amounts of credit have been used. However, this is the result of actions outside the Legislature's control. While unlikely, the possibility exists that the annual amount of credit taken in each year could exceed $130 million instead of the less than $14 million taken in 2009.

The Legislature may want to explore adding some statutory controls or limitations that will limit the amount of the annual credit than can be taken to an acceptable level.