

PUBLICATION

Treasury Issues Guidelines On Grants In Lieu Of Energy-Related Tax Credits

July 27, 2009

Developers and owners of qualifying energy projects generally have used the tax credits under Internal Revenue Code (IRC) Sections 45 (Energy Production Credit) and 48 (Energy Investment Credit) generated by a particular project to raise cash by selling the tax credits to investors that could use the credits to offset the investors' federal tax liability. Current economic conditions and accumulating tax losses have greatly diminished investor demand for tax credits. In an effort to stimulate renewable energy projects, the American Recovery and Reinvestment Act of 2009 (the Recovery Act) created a program which will allow taxpayers to receive a grant from the Treasury Department in lieu of claiming a tax credit under IRC Sections 45 and 48. On July 9, 2009, the US Department of Treasury (the Treasury Department) released guidelines and application procedures on the "grant for tax credit program" created under the Recovery Act.

Grants are available to taxpayers that place "specified energy property" into service during 2009 or 2010, or after 2010 and before the credit termination date (discussed below) with respect to such property, but only if the construction of such property began in 2009 or 2010. In addition, grants are only available to taxpayers that submit an application before October 1, 2011. Applications will be submitted online. Importantly, applications can only be submitted after the property to which the application relates is under construction or placed in service.

Under the grant program, the Treasury Department will make grants to qualified applicants in an amount generally equal to either 10% or 30% of the basis of the property, depending on the type of property involved. Applications will be reviewed and payment made within 60 days from the later of the date of the complete application or the date the property is placed in service. If the property has not been placed in service at the time of the filing of the application, the Treasury Department will review the application and notify the applicant if all eligibility requirements (except the placed in service requirement) have been met. If so notified, applicants will be required to submit supplemental information sufficient to the Treasury Department within 90 days after the property was placed in service.

As part of the application procedure, applicants will be required to submit final engineering design documents stamped by a licensed professional engineer and other property specific documentation to demonstrate that the property is eligible for the program. In addition, applicants will be required to submit a commissioning report certifying that the equipment has been installed, tested, and is ready and capable of being used for its intended purpose. For property that is under construction but not yet placed in service at the time of the application, paid invoices and/or other financial documents demonstrating that physical work of a significant nature has begun on the property must be submitted.

Lessees of qualifying property can apply for a grant under the program on the condition that the lessor has agreed, in writing, to the lessee being the recipient of the grant and has waived, in writing, its right to receive any grant payment as well as its right to claim a tax credit under Sections 45 and 48. Lessors of qualifying property can elect to pass-through the right to receive a grant payment to a lessee. The election requires the lessor to waive all rights it may otherwise have to a grant payment or a tax credit with respect to the eligible property.

As noted above, the time allowed to place property in service and the amount of the actual grant differs based on the type of property involved. For property that is part of a qualified wind facility, the credit termination date is January 1, 2013 and the amount of the grant is equal to 30% of the basis of the qualifying property. For property that is part of a qualified closed-loop biomass facility, open-loop biomass facility, geothermal, landfill gas facility, trash facility, hydropower facility, or marine and hydrokinetic renewable energy facility, the credit termination date is January 1, 2014 and the amount of the grant is equal to 30% of the basis of the qualifying property. For qualified fuel cell property, solar energy property and qualified small wind energy property, the credit termination date is January 1, 2017 and the amount of the grant is equal to 30% of the basis of the qualifying property. For geothermal energy property, qualified microturbine property, combined heat and power system property and geothermal heat pump property, the credit termination date is January 1, 2017 and the amount of the grant is equal to 10% of the basis of the qualifying property.

Should you wish to discuss this federal tax development in more detail, please contact any one of the attorneys in the Firm's Tax Department.