



ARTICLE

THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 Grants in Lieu of Tax Credits for Renewable Energy

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A. Introduction

The American Recovery and Reinvestment Act of 2009 (the “Act”) contains several provisions intended to provide incentives to developers and producers of renewable energy. Perhaps the most attractive renewable energy incentive in the Act is Section 1603, which allows taxpayers to elect to receive a grant, rather than a tax credit, when “specified energy property” is placed in service (the “Grant Program”).

Prior to the Act, the primary tax incentives offered to developers and producers of renewable energy consisted of tax credits based on renewable energy production or investment (the “Credits”). Because the value of the Credits is dependent upon having sufficient tax liability to offset, the current economic climate has made the Credits much less attractive to many investors.

The Grant Program provides recipients with cash regardless of their tax liability. However, the lack of specific guidelines regarding the Grant Program has caused a temporary freeze in the renewable energy market that will remain until at least June 30, 2009 – the expected date that the Treasury Department (“Treasury”) will release the application for the Grant Program (the “Application”).

B. The Grant Program

The Grant Program offers developers and investors a cash grant equal to the applicable percentage (“Applicable Percentage”) of the specified energy property’s basis. The specified energy property must (1) be placed in service in 2009 or 2010, or (2) be placed in service by the “credit termination date” if construction on the project began in 2009 or 2010.

The credit termination date depends on the type of specified energy property and varies from January 1, 2013 to January 1, 2017. To the extent the precise definition of “specified energy property” impacts (1) the Applicable Percentage or (2) the length of the period during which a developer or investor can qualify under the Grant Program (i.e., “solar energy facility” vs. solar “energy property”), special attention must be given to whether the specified energy property fits within the particular definition providing a greater benefit to such developer or investor.

Grants will be paid during the sixty-day period beginning on the later of (1) the date of the Application or (2) the date the specified energy property is placed in service. Generally, “placed in service” occurs when the property is placed in a condition or state of readiness and availability for a specifically designed function. However, decades of case law and Internal Revenue Service guidance have interpreted the meaning of “placed in service” in various contexts, so the facts of the transaction need to be considered when determining whether all or a portion of the facility has been “placed in service.” A percentage of the grant will be “recaptured” by the Internal Revenue Service if the specified energy property is disposed of or otherwise ceases to be specified energy property within five years.

C. Uncertainties Surrounding the Grant Program

While the Grant Program offers attractive incentives to developers and producers of renewable energy, uncertainty exists regarding the Application and Treasury’s oversight of grant recipients.

1. Application Contents

Treasury released a notice (the “Notice”) stating that the Application will be available no later than June 30, 2009, but Treasury did not provide any clues as to the Application contents.¹ Treasury’s silence regarding the Application contents leaves uncertainty regarding (1) the exact criteria that will be used to evaluate the Applications, and (2) the amount of information that must be disclosed to receive grants.

2. Treasury Oversight

The Notice also established that Treasury will monitor and review projects receiving grants under the Grant Program. Without additional explanation, Treasury announced plans to monitor “percent on-time

performance for project activities; obligations and outlays; acquisition competition and contract types; performance measure actual values versus targets; and accountability metrics monthly,” and that “corrective and/or preventative actions that are established as a result of the reviews will be tracked for implementation.”

These concepts are not defined and no examples of their application currently exist. Therefore, it is unclear how and to what extent Treasury’s monitoring will impact energy projects. Further adding to the uncertainty, Treasury conceded that it “has little experience in administering energy related programs . . . [and] it will need to rely on the expertise of the Energy Department to assist in administering the program.”²

D. Conclusion

For several reasons, applicants to the Grant Program can expect delays and uncertainty regarding their right to receive grants. The result is that the renewable energy market has frozen. Perhaps the biggest cause for the freeze is the market’s uncertainty regarding Treasury’s admitted lack of expertise administering energy-related programs.³ While some clarity is expected to arrive on June 30, 2009 with the issuance of the Application, it is not certain that this will be enough to unfreeze the market.

Because of the uncertainties regarding the contents of the Application and the extent and methods of Treasury’s oversight, it is impossible to predict with certainty how the Grant Program will operate, and until such time that clarity arrives to the market, participants can expect that the freeze may continue.

¹ <http://www.treas.gov/recovery/> (follow “ARRA Program Plan – Cash Assistance for Specified Energy Property in Lieu of Tax Credits” hyperlink).

² Id.

³ Id.

ALERT

Specified Energy Property	As Defined in I.R.C.* Section	Applicable Percentage***	Credit Termination Date****
Biomass Facility (Closed-Loop and Open-Loop)	§45(d)(2)-(3)	30%	1/1/2014
Solar Energy Facility	§45(d)(4)	30%	1/1/2014
Geothermal Energy Facility	§45(d)(4)	30%	1/1/2014
Landfill Gas or Trash Facility	§45(d)(6)-(7)	30%	1/1/2014
Qualified Hydropower Facility	§45(d)(9)	30%	1/1/2014
Marine and Hydrokinetic Renewable Energy Facility	§45(d)(11)	30%	1/1/2014
Wind Facility	§45(d)(1)	30%	1/1/2013
Qualified Small Wind Energy Property	§48(c)(4)	30%	1/1/2017
Qualified Fuel Cell Property**	§48(c)(1)	30%	1/1/2017
Solar Property	§48(a)(3)(A)(i)-(ii)	30%	1/1/2017
Qualified Microturbine Property **	§48(c)(2)	10%	1/1/2017
Combined Heat and Power System Property**	§48(c)(3)	10%	1/1/2017
Geothermal and Geothermal Heat Pump Property	§48(a)(3)(A)(iii), (vii)	10%	1/1/2017

* All references to “I.R.C.” “Section” and “§” are to the Internal Revenue Code of 1986, as amended, and the Treasury regulations promulgated thereunder.

**The Grant Program imposes the same dollar limitation as §48 imposes on credits for the specified property.

***To the extent the definitions of “geothermal” and “solar” are similar under §§45 and 48, the precise definition is important in determining (1) the Applicable Percentage and (2) the credit termination date. For example, if solar specified energy property qualifies for a credit termination date in 2014 and 2017, the credit termination date will be 1/1/2017.

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