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# Treasury Opens "Cash Grant Window" for Funding of Renewable Energy Projects

by Hugh M. Dougan and C. Brian Wainwright

*The U.S. Treasury Department has announced that it will now accept applications for cash grants for renewable energy projects under Internal Revenue Code section 48(d) and section 1603 of the American Recovery and Reinvestment Tax Act of 2009 (Division B of P.L. 111-5, the Stimulus Act). This news has been eagerly awaited. Certain conditions, however, may somewhat delay the receipt of grant moneys by taxpayers.*

On balance, starting from a virtual "blank page" on this novel subject, the volume and thoughtfulness of the guidance provided by the Treasury and the Internal Revenue Service ("IRS") is extraordinary. It reflects a substantial effort to avoid making the approval process discretionary, while at the same time providing safeguards that assure that the benefits are provided only to qualifying facilities.

## In General

The cash grants are an alternative to either production tax credits under Internal Revenue Code section 45 ("PTCs") or energy investment tax credits under Internal Revenue Code section 48(a) ("ITCs"). For background on PTCs, ITCs and alternative cash grants, see our July 2, 2009 Advisory, *Guidance on Energy Tax Credit Election*.

The Treasury began populating an information website on this topic several weeks ago, has implemented an electronic application, and has established an e-mailbox for questions.

- **Online Application:** *https://treas1603.nrel.gov/*
- **General Guidance:** *http://www.treasury.gov/recovery/1603.shtml*

  Includes the basic Guidance Document, the Terms and Conditions to which applicants must agree in conjunction with the Application, a sample Application Form, an Accountant's Certification for any required certification of qualifying project costs by an accountant, information on assignment of payments to a financial institution, and a Notice of Assignment.

- **Central Contractor Registration (CCR):** *http://www.ccr.gov/startregistration.aspx*

  Applicants must be registered under this system through which the cash grants will actually be paid.

- **E-mail Questions:** *1603Questions@do.treas.gov*

Altogether, the volume of useful information provided on this topic is quite impressive. It is a tribute to the effort and imagination of the Treasury and IRS personnel involved. Interested parties and their advisors should study these materials with care.

At the same time, it appears that some further guidance is needed from the IRS before the grant process can become fully operative. And some limitations built into the Treasury guidance indicate that this financing support for qualifying projects may not be available as quickly as developers may have assumed.

## Cautionary Notes

The PTC facilities that now qualify for cash grants are described in the Internal Revenue Code only with reference to their function (*e.g.*, producing electric energy from wind). The Guidance Document provides helpful further information on the components of certain facilities (such as open-loop biomass, waste and wind facilities) that may qualify for cash grants. We understand, however, that the IRS plans to issue further guidance on the details of qualifying components for all such facilities. Without such guidance it may be difficult for parties or their accountants to provide the certification of qualifying costs that the required Accountant's Certification contemplates.

The sample Application Form instructions provide that, for projects to be placed in service in 2009 or 2010, the Application should not be filed until the project has been placed in service. Thus, while the "window" may now be open, applications apparently are not permitted until the project has been placed in service. This limitation does not appear in the statute. When combined with the requirement of the Accountant's Certification of qualifying costs for projects costing more the $500,000 (which itself seems both reasonable and understandable as a safeguard against false claims), this condition may, as a practical matter, ensure that a cash grant cannot be obtained within 60 days after a project is placed in service, but will more likely be obtainable only within 60 days after filing the completed application. For projects to be placed in service after 2010, the guidance seems to contemplate current applications, but also contemplates supplemental submissions and responses over a somewhat longer period after placement in service. Parties will need to review these timing issues.

## Other Significant Points

The Treasury material available through the website also provides:

- detailed guidance on what will constitute the "commencement of construction" of a project (for example, before 2011),
- a helpful election for taxpayers to treat as a "unit" of property elements that will be operated on a coordinated basis (*e.g.*, a windfarm with multiple turbines) for purposes of the rules relating to the "long-term" construction period of projects eligible for ITCs on a "progress expenditures" basis,
- that applicants need not post a bond and that cash grants will not give rise to liens on project facilities, and

- that, unlike the ITC rules, disposition of a cash grant project within five years will require return of all or a portion of the grant only to the extent that the disposition is to a "disqualified person"—a person who would not initially have qualified for a grant (although the definition of a "disposition" appears stunningly broad and will present difficult issues for project parties as it appears, for example, that a "disposition" could include a transfer of a one percent interest in a partnership that holds a one percent interest in a partnership that owns the project, triggering recapture of the cash grant for the whole project, a result warranting further clarification).

The forms concerning assignment of grant rights to a lender seem intended to implement a pledge of prospective grant rights as collateral for a loan. But while these permitted assignments should facilitate potential construction debt financing in anticipation of a cash grant, it remains to be seen whether lenders will trust the transparency of the grant process sufficiently to provide advance debt funding. The Treasury's effort to accommodate such arrangements, however, is imaginative and constructive, and may prove to be useful.

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