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LEGAL ALERT

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Renewable Energy Treasury Grant Program Extended

On December 17, 2010, Treasury's popular renewable energy grant program was extended with the passage of The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010. This legislation also extends certain tax depreciation benefits available for renewable energy projects.

Treasury Grant Program, Generally

The Treasury grant program provides a cash grant for the development of certain renewable energy projects equal to 30 percent (or 10 percent for certain technologies; see table below) of the eligible costs of the project. Grant payments are made within 60 days after the facility is placed in service and a complete application is filed. The Treasury grant is available in lieu of the Internal Revenue Code (IRC) § 45 production tax credit and the IRC § 48 investment tax credit.[1]

There is no minimum or maximum amount of grant available to a particular project, and there is no cap on the total amount of funds available under this program. To date, Treasury has awarded $5.8 billion of grants in the 16 months since it began accepting applications in August 2009. Those awards ranged from as little as $304 to as much as $218 million.

Extension of Treasury Grant Program

The Treasury grant was originally enacted in February 2009 in the American Recovery and Reinvestment Act of 2009. As originally enacted, the Treasury grant program was available for renewable energy projects that were either: (1) placed in service in 2009 or 2010; or (2) placed in service after 2010 and before the applicable credit termination date (see table below), but only if construction of the renewable energy project began during 2009 or 2010.

As amended, the Treasury grant program has been extended by one year. Consequently, the grant program is now available for renewable energy projects that are either: (1) placed in service in 2009, 2010 or 2011; or (2) placed in service after 2011 and before the applicable credit termination date for the project, but only if construction of the renewable energy project began during 2009, 2010 or 2011. The legislation made no other substantive changes to the grant program.

The immediate impact of this amendment is that renewable energy project developers and investors that have been working to ensure that projects meet the beginning of construction requirement (discussed below) by the end of 2010 should no longer need to take such measures. Rather, they must either:

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[1] For a copy of our earlier Legal Alert that further summarizes certain aspects of the Treasury grant program, please click here.

(1) complete construction by the end of 2011; or (2) ensure that the project satisfies the beginning of construction requirement by the end of 2011 (and is completed by the applicable credit termination date). Applicants should be mindful, however, of how they treat costs incurred during 2010 for tax purposes to ensure that the maximum amount of a grant award is available with respect to a project.

Looking forward to 2011, many projects that would not have been entitled to receive the Treasury grant should now be able to utilize this program by beginning construction during 2011.

Required Placed In Service Date and Available Grant Amounts

The following are the dates before which a renewable energy project must be placed in service to qualify for the Treasury grant and the percent of the eligible costs that are available as a grant from Treasury under this program:

Qualified Energy Resource	Credit Termination Date	Grant Amount
Wind	January 1, 2013	30 percent
Closed-Loop Biomass	January 1, 2014	30 percent
Open-Loop Biomass	January 1, 2014	30 percent
Geothermal (described in IRC § 45)	January 1, 2014	30 percent
Municipal Solid Waste	January 1, 2014	30 percent
Hydropower	January 1, 2014	30 percent
Marine and Hydrokinetic	January 1, 2014	30 percent
Solar	January 1, 2017	30 percent
Fuel Cell	January 1, 2017	30 percent
Small Wind	January 1, 2017	30 percent
Geothermal (described in IRC § 48)	January 1, 2017	10 percent
Microturbine	January 1, 2017	10 percent
Combined Heat and Power System	January 1, 2017	10 percent

Not surprisingly, given the nature and scope of this legislation, it did not extend the credit termination date for renewable energy projects, notwithstanding much discussion regarding the need to provide certainty to the renewable energy industry regarding incentives that may be available for projects at the time they are completed.

Beginning of Construction Requirement

Under the new legislation, to qualify for the Treasury grant, a renewable energy project must be placed in service before the end of 2011 or construction must begin before the end of 2011. Much of the recent discussion in regard to the beginning of construction requirement has focused on: (1) what activities are required to be completed for a project to be treated as having begun construction; and (2) how an applicant must evidence that it has in fact begun construction.

In general, construction begins when "physical work of a significant nature" has been undertaken. A facts-and-circumstances analysis, guided by a thorough understanding of several items of guidance issued by Treasury to date, is required to determine whether this requirement is satisfied. As a safe harbor, the physical work of a significant nature test will be treated as having been satisfied if 5 percent or more of the costs of the project are paid or incurred prior to year-end. It is imperative that potential applicants review and understand guidance provided by Treasury as well as the so-called economic performance rules provided in the IRC to determine whether this safe harbor is satisfied.

Extended Depreciation Benefits

This legislation extends bonus depreciation benefits for two years, thus generally permitting 50 percent of the cost of a renewable energy project to be deducted in the year that the project is placed in service (in addition to the normal accelerated depreciation available for renewable energy projects). Moreover, project owners may be entitled to immediately deduct in full the cost of projects placed in service after September 8, 2010, and before January 1, 2012. It is unclear at this time, however, whether doing so would cause the project to be ineligible for the grant.

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If you have any questions about this Legal Alert, please feel free to contact any of the attorneys listed below or the Sutherland attorney with whom you regularly work.

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