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U.S. Treasury and Department of Energy Provide Eagerly Awaited Details on Cash Grants in Lieu of Electing Investment Tax Credit for Specified Energy Property

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When President Obama signed into law the American Recovery and Reinvestment Act of 2009 ("ARRA") in February 2009, substantial incentives were included for the development of renewable energy projects. In Section 1603 of the ARRA, entities eligible for the Investment Tax Credit ("ITC") were provided an option to elect a cash grant in lieu of the ITC. Payments under the Section 1603 program are made to eligible persons who place in service specified energy property, such as qualifying wind, solar, biomass, landfill gas and geothermal projects. Those who receive such payments forego benefits associated with the ITC.

On July 9, 2009, the U.S. Department of the Treasury ("Treasury") and the U.S. Department of Energy ("DOE") released [Program Guidance](#), [Terms and Conditions](#), and an [Application](#) for cash payments under the ARRA Section 1603 program.

With the decline of the traditional tax equity market, the cash grant program provides a government incentive in situations where the tax credit approach is no longer viable. It also proposes a vehicle that is likely to enhance renewable energy project economics with significant cash flow soon after the project is placed in service. Such liquidity is likely to boost lender support for project developers who are able and willing to pledge a large portion of the grant to secure financing. The renewable energy industry has therefore waited with great anticipation for guidance from the federal government on the details and application process to obtain the cash grants.

The Treasury grant program authorized in the ARRA provides grants of up to 30 percent of project costs for ITC-qualifying property. Treasury and DOE officials estimate they will provide \$3 billion to an estimated 5,000 qualifying renewable energy projects under the program, which they estimate will allow \$10 billion to \$14 billion in private capital investment to move forward. These figures, however, were developed only for budgeting purposes—the ARRA places no cap on available funds for qualifying property. Unlike other incentive programs, the Treasury grant program employs objective criteria and does not make applicants compete against one another.

Section 1603 payments are made to qualified applicants in an amount generally equal to 10 percent or 30 percent of the basis in the qualifying property, depending upon the type of technology being employed. Qualifying property must be placed in service in 2009 or 2010, provided that property for which construction began in 2009 or 2010 may still qualify for the grant if it is placed in service by the "Credit Termination Date," and applications are submitted to Treasury after construction commences but before October 1, 2011. The Credit Termination Date ranges from January 1, 2013, to January 1, 2017, for different types of technology, and the grant payments similarly range from 10 percent to 30 percent of the basis in the qualifying property. While developers continue to work on renewable energy projects in order to meet the criteria for the Section 1603 grants, legislation ([H.R. 3136](#)) has been proposed in Congress to extend the Section 1603 grant program beyond the current eligibility periods.

The Treasury/DOE Program Guidance provides certain details interpreting key phrases in Section 1603. For example, the guidance indicates that commencement of construction is deemed to occur upon physical work "of a significant nature" and also states:

- For applicants constructing their own property, construction requires on-site physical activity (excluding planning, designing, financing, exploring, and preliminary work such as clearing a site), but includes off-site manufacturing of modular units.
- For applicants employing a third party to construct qualifying property, construction requires physical, on-site activity pursuant to a formal construction agreement that must meet certain criteria.
- All applicants are permitted to rely on a safe harbor that allows an applicant to treat physical work of a significant nature as beginning when the applicant incurs or pays more than five percent of the total cost of the qualifying property.

The six-page Application is intended to be completed online and submitted to the Treasury portal, which Treasury officials indicated would be operational "on or about" August 1. Applications will be reviewed and payments made within 60 days from the later of the date of the completed application or the date the qualifying property is placed in service. Being "placed in service" means that "the property is ready and available for its specific use." In order to document that the equipment has been placed in service, Treasury will require:

- A commissioning report from the project engineer, equipment vendor or an independent third party certifying that the equipment has been installed, tested, and is ready and capable of being used for its intended purpose; and
- An interconnection agreement (if applicable) establishing the terms and conditions for the interconnection of the applicant's property to the local electric utility system.

Treasury and DOE officials confirmed that they will not substantively review an application until the applicant has submitted the required documentation that the property has been placed in service.

The ARRA also permitted energy sources previously eligible only for a Production Tax Credit ("PTC") to elect an ITC, thus making them eligible for access to the Section 1603 program. In our [June 15, 2009 Alert](#), we reported that the Internal Revenue Service issued a notice explaining the process to elect an ITC in lieu of a PTC. The Treasury and DOE release now establishes the next component of the ARRA program—namely, the conversion of an ITC to a one-time cash payment. The next and final program to be implemented is the expanded DOE loan guarantee program under Section 1705 of the Energy Policy Act of 2005 (added under the ARRA). Matt Rogers, DOE senior advisor on ARRA issues, indicated that DOE would be issuing its rules for this new loan-guarantee program "shortly."

While Treasury and DOE work to implement the ARRA financial incentives for the development of renewable energy resources, on June 26, the U.S. House of Representatives passed the "American Clean Energy and Security Act." The Act, which would regulate greenhouse gas emissions by creating a cap-and-trade system for these emissions, also included a national Renewable Energy Standard ("RES") that would require each state to generate 15 percent of its electric energy from renewable energy resources by 2020, with an incremental requirement that states reduce their electric power consumption by five percent with energy efficiency measures. As noted in our [May 22, 2009 Alert](#), the U.S. Senate is now considering its own bill addressing greenhouse gas emissions and its version of an RES to require the generation and consumption of electric power from renewable energy resources. Various Senate committees have pledged to work on the bill during the summer, with Senate action currently anticipated for later this year.

For Further Information

If you have questions about this Alert, please contact [Benjamin L. Israel](#) in our Washington, D.C. office, [James W. McTarnaghan](#) in our San Francisco office, any other member of the [Renewable Energy and Sustainability Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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