

[Alerts and Updates]

DOE and Treasury Announce Availability of \$2.3 Billion in ARRA Tax Credits for Investments in Qualifying Advanced Energy Projects

August 21, 2009

On August 13, 2009, the U.S. Department of Energy ("DOE") and the U.S. Department of the Treasury ("Treasury") announced a new program through which \$2.3 billion in advanced energy project tax credits, authorized by the American Recovery and Reinvestment Act (the "ARRA"), will be awarded to investors in qualifying advanced energy projects. Specifically, the tax credit supports investment in the establishment, expansion or re-equipping of manufacturing facilities producing specific advanced energy property or components thereof. As part of the announcement, Treasury issued [Notice 2009-72](#) (the "Notice"), providing guidance on the process and time lines for applying for the Advanced Energy Manufacturing Tax Credit ("MTC").

The credit is expected to support approximately \$7.7 billion in investments in manufacturing facilities initiating advanced energy projects. Unlike several other credits under the ARRA that are provided to all eligible applicants, the MTC will be awarded through a competitive process in which only selected applicants will receive the credit.

The Credit

The new tax credit was authorized in Section 1302 of the ARRA, codified as Section 48C of the Internal Revenue Code. Section 48C provides for a tax credit equal to 30 percent of the qualified investment with respect to any qualifying advanced energy project of the taxpayer. Qualified investment is defined as the basis of eligible property placed in service by the taxpayer during the taxable year in which the qualifying advanced energy project is placed in service. In order to qualify, the applicant must meet several standards. The project must be an advanced energy project, that is, a project which re-equips, expands or establishes a manufacturing facility for the production of specified advanced energy property. Qualifying property includes:

- Property designed to be used to produce energy from the sun, wind, geothermal deposits or other renewable resources;
- Fuel cells, microturbines or an energy storage system for use with electric or hybrid-electric motor vehicles;
- Electric grids to support the transmission of intermittent sources of renewable energy, including storage of such energy;
- Property designed to capture and sequester carbon dioxide emissions;
- Property designed to refine or blend renewable fuels (but not fossil fuels) or to produce energy conservation technologies (including energy-conserving lighting technologies and smart grid technologies);
- New qualified plug-in electric drive motor vehicles, qualified plug-in electric vehicles or components that are designed specifically for use with such vehicles; or
- Other property designed to reduce greenhouse-gas emissions as determined by the Internal Revenue Service ("IRS").

An applicant must seek and receive a certification from the IRS that approves the applicant to utilize the tax credit.

The Application Process

Unlike many renewable-energy-generation tax credits, a "qualified investment" will not automatically receive the MTC. Instead, the MTC will be allocated in rounds, based on a competitive process conducted by the DOE and the IRS. The first round will be conducted in 2009–2010, with an additional allocation round, if funds remain, to follow in 2010–2011. An applicant must go

through a multistep process in order to receive the MTC. First, an applicant must submit a preliminary application and then a final application for a DOE recommendation in compliance with Appendix B of the Notice. In addition, an applicant must submit a separate application for Section 48C certification to the IRS in compliance with Section 6.03 of the Notice. Failure to provide all information requested may result in an application's not being considered by the DOE or the IRS.

The DOE will review the applications received and rank the projects based on a set of four primary criteria:

- Domestic job creation;
- Avoiding or reducing air pollutants or greenhouse gases;
- Potential for technological innovation and commercial deployment;
- Shortest time frame from certification to completion.

Other factors to be considered include geographic diversity of the projects, technology diversity, project-size diversity and regional economic development.

Once the projects are ranked by the DOE, the IRS will allocate tax credits based on the project ranking. The highest-ranked project will receive the full amount of credit requested. The IRS will then repeat the process for the lower-ranked projects: each project, in order, will be allocated the credit requested for it, until no additional funds for credits remain.

The IRS will inform the applicants by letter of acceptance (and amount of credit allocated to the project) or of rejection. Accepted applicants will need to execute agreements in the form of the agreement provided in Appendix A to the Notice.

Within one year from the date of acceptance, an applicant must submit a documentation package to the IRS showing that it has received all necessary permits and that the project can be placed in service in the next three years.

Timeline

The application timeframe for the 2009–2010 round is very aggressive, as summarized below:

Item	Due Date
Preliminary Applications to DOE	September 16, 2009
Final Applications to DOE	October 16, 2009
Applications to IRS for § 48C Certification	December 16, 2009
DOE Recommendations to IRS	December 16, 2009
IRS Accepts or Rejects Applications for § 48C Certification	January 15, 2010

Applicant Executes and Returns Agreement to IRS	March 15, 2010
IRS Executes and Returns Agreement to Applicant	April 16, 2010
Applicant Submits Evidence of Compliance	Within one year of acceptance date
Project Placed in Service	Within three years of certification

Interested Applicants

Given the tight timelines set forth by Treasury (and Treasury's position that incomplete applications may not be considered), potential applicants should begin the application process as soon as possible. In preparing the applications, great care should be given to completing the applications as completely and accurately as possible, as it is unclear, given the tight timelines involved, whether DOE or the IRS will contact applicants for clarifications or whether any ambiguities or incomplete data will simply be construed against applicants.

For Further Information

If you have questions about this Alert, please contact [James W. McTarnaghan](#) in our San Francisco office, [Daniel J. Bauer](#) in our New York 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.

As required by United States Treasury Regulations, you should be aware that this communication is not intended by the sender to be used, and it cannot be used, for the purpose of avoiding penalties under United States federal tax laws.