Energy and Clean Technology Alert: "Grants in Lieu of Tax Credits" - New Guidance on Eligibility and How To Apply

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The American Recovery and Reinvestment Act of 2009 (ARRA) expanded tax incentives for the renewable energy sector in several ways. One significant change under Section 1603 of the ARRA allows taxpayers to receive a cash grant (a "Section 1603 grant") in lieu of Section 45 production tax credits (PTC) or Section 48 investment tax credits (ITC) for investment in certain renewable energy property. On July 9, 2009, the Treasury Department issued important guidance regarding eligibility and how to apply for Section 1603 grants.

Who is Eligible for a Grant?

Subject to some exceptions, Section 1603 grants are available to any person, whether individual or entity, who is the original user of "specified energy property" (see below). The original user may be the first owner of the property, or under some circumstances, a lessee.

Some persons, however, are not eligible for a Section 1603 grant:

- Federal, state, or local governments
- Tax-exempt organizations
- Clean renewable energy bond lenders, cooperative electric companies, or governmental bodies
- Partnerships or other pass-through entities having an equity owner who is described above, unless the ineligible person owns its interest through a C corporation
- Foreign persons or entities, unless more than 50% of the foreign person or entity's gross income derived from the specified energy property is subject to U.S. federal income tax

Grants for What? How Much? By When?

"Specified energy property" for a Section 1603 grant is energy property otherwise eligible for ITC, including "PTC-type" property that can now elect ITC. The amount of the grant is the same amount otherwise available under ITC, which is 30% of the cost of most projects and 10% of the cost of others (see table below).

Receiving a Section 1603 grant is subject to certain project deadlines. Construction must begin by the end of 2010. If construction began before 2009, the property must be placed in service by the end of 2010. If construction begins in 2009 or 2010, the property must be placed in service by the dates listed in the table below.

"Construction begins" on a property when "physical work of a significant nature" begins, either directly by the owner or on the owner's behalf by a third party under a written binding contract. Preliminary activities, such as planning, designing, or securing financing, do not constitute physical work. Generally speaking, property is "placed in service" when it is ready and available for its intended use, i.e., the project is substantially complete and ready to produce energy.

The table below summarizes the types of property eligible for a Section 1603 grant, the placed-in-service deadline if construction begins in 2009 or 2010, and the amount of the grant as a percentage of cost.

Specified Energy Property	Placed-in-Service Deadline if Construction Begins in 2009 or 2010	Amount of Credit as a Percentage of Cost
"Original" ITC Property		
Solar Energy Property	Dec. 31, 2016	30%
Geothermal Energy Property	Dec. 31, 2016	10%
Qualified Fuel Cell Energy Property	Dec. 31, 2016	30%
Qualified Microturbine Energy Property	Dec. 31, 2016	10%
Combined Heat & Power System Energy Property	Dec. 31, 2016	10%
Qualified Small Wind Energy Property	Dec. 31, 2016	30%
Geothermal Heat Pump Property	Dec. 31, 2016	10%
"PTC-Type" Property Eligible for ITC Election		
Wind Facility	Dec. 31, 2012	30%
Closed-Loop	Dec. 31, 2013	30%

Biomass Facility		
Open-Loop Biomass Facility	Dec. 31, 2013	30%
Geothermal Facility		30%
Landfill Gas Facility	Dec. 31, 2013	30%
Trash Facility	Dec. 31, 2013	30%
Hydropower Facility	Dec. 31, 2013	30%
Marine & Hydrokinetic Facility	Dec. 31, 2013	30%

How To Apply for a Grant and Receive Payment

Taxpayers can apply for a Section 1603 grant online at www.treasury.gov/recovery beginning on or about August 1. For eligible projects placed in service in 2009 or 2010, applications must be submitted after the project has been placed in service, but before October 1, 2011. For eligible projects placed in service after 2010 and by the applicable placed-in-service deadline, applications must be submitted after construction has begun but before October 1, 2011. Treasury will review completed applications and make payments to qualified applicants within 60 days following the later of (i) the date of the completed application, or (ii) the date the eligible project is placed in service.

Completed applications must include the following:

- A signed and completed application form
- Supporting documentation demonstrating that the property has been placed in service (or construction began) within the required time period and that the property meets the applicable requirements for PTC or ITC
- Signed Terms and Conditions
- Detailed payment information to support the cost basis claimed for the property (including an independent accountant's certification for property costing more than $500,000)

Section 1603 grants are subject to similar inclusion and recapture rules applicable to ITC. Accordingly, a Section 1603 grant is not included in the recipient's gross income, but will reduce the property's basis by 50% of the grant amount. If a grant recipient transfers the property to an ineligible person or if the property ceases to qualify for the grant within five years from the date the property is first placed in service, the grant must be repaid in proportion to its length of service (i.e., 80% of the grant must be repaid after one year, 60% after two years, etc.). But, unlike ITC, transferring the property to an eligible person will not trigger recapture, provided the property continues to qualify as specified energy property and the purchaser agrees to be jointly liable with the applicant for any recapture.

Further Tax Guidance Expected Affecting Renewable Energy

Our Energy and Clean Technology group is currently awaiting additional tax-related guidance arising from the ARRA. New Section 48C established a "manufacturing credit" equal to 30% of the cost of personal property and fixtures to outfit a facility that manufactures renewable energy-related products. Unlike the Section 1603 grant, available manufacturing credits are limited to $2.3 billion and taxpayers must apply and be approved for a discretionary allocation. Guidance on the manufacturing credit, including the application process, is expected in August 2009.

Of course, we are monitoring these issues closely and will update our clients and friends as developments arise.

If you have any questions about the new regulations or the regulatory process, please call your Mintz Levin service professional or any of those listed below.

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