

WSGR ALERT

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TREASURY DEPARTMENT ISSUES FURTHER GUIDANCE ON SECTION 1603 GRANT PROGRAM

Yesterday, the Department of Treasury released guidance in the form of frequently asked questions (FAQs) on the cash-grant program enacted in Section 1603 of the American Recovery and Reinvestment Act of 2009, P.L. 111-5. The FAQs address the so-called “5 percent safe harbor” used to determine whether construction of the energy property will be considered to have begun before the end of 2011, which is one of the requirements to be eligible to receive the cash grant. Please visit <http://www.treasury.gov/initiatives/recovery/Pages/1603.aspx> to access the Treasury Department’s FAQs.

Background

The cash-grant program allows owners and certain lessees of specific types of renewable energy property to receive a cash grant of, generally, 30 percent of the cost of the property in lieu of claiming certain tax credits with respect to the property. Grants are available for property placed in service in 2009, 2010, or 2011, and for property placed in service after 2011 (and before the expiration date of the credit available for the property) so long as construction of the property began in 2009, 2010, or 2011. Previously, the Department of Treasury released guidance on various aspects of the cash-grant program, including a set of FAQs on how to meet the requirement that construction of the energy property begin in 2009, 2010, or 2011. Earlier guidance generally provides that the “commencement-of-construction” requirement can be satisfied either by (i) beginning “physical work of a significant nature” in 2009, 2010, or 2011, or (ii) paying or incurring at least 5 percent of the total cost of the specified energy property

before the end of 2011 (the “5 percent safe harbor”). In March 2010, the Treasury Department revised its published guidance to clarify a number of issues regarding the commencement-of-construction requirement and later issued guidance in question-and-answer form. Please visit <http://www.treasury.gov/initiatives/recovery/Pages/1603.aspx> to access the earlier guidance.

Yesterday’s Guidance

The FAQs released yesterday further clarify several issues with respect to the 5 percent safe harbor for satisfying the commencement-of-construction requirement. In particular, the FAQs provide the following:

- If an owner of property transfers the property to a “related person” (generally an entity with 20 percent common ownership) and the transferee uses the property in a qualifying energy project, then for the purposes of determining whether the transferee qualifies for the 5 percent safe harbor, the transferee is treated as if it paid or incurred—at the same time as the transferor—the costs that the transferor paid or incurred to acquire the property. The same rule applies to transfers to unrelated persons only in the case of certain sale/leaseback transactions.
- If a purchaser such as a tax equity investor acquires an interest in an entity after December 31, 2011, but before the property is placed in service, and the entity previously had met the 5 percent safe harbor, eligibility for the cash grant is not affected so long as (i) the

purchaser is an otherwise eligible cash-grant applicant, and (ii) the entity being sold had commenced development of a project as evidenced by activity such as acquiring land, obtaining permits and licenses, entering into a power purchase agreement, entering into an interconnection agreement, or contracting with an engineering, procurement, and construction contractor.

Initial Observation

The FAQs address post-2011 transactions involving entities that previously qualified for the 5 percent safe harbor, and in so doing distinguish between developers that transfer assets directly and developers that sell ownership interests in entities holding the relevant assets to investors. Transferring assets directly appears to provide less flexibility, since the developer and transferee generally must have 20 percent common ownership. A developer that sells ownership interests, on the other hand, can sell as large of an ownership interest as it wants to an unrelated investor without affecting cash-grant eligibility, so long as the entity satisfying the 5 percent safe harbor has undertaken certain of the development activities described above.

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Continued on page 2...

Treasury Department Issues Further Guidance . . .

Continued from page 1...

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