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U.S. DEPARTMENTS OF TREASURY AND ENERGY JOINTLY ANNOUNCE PROGRAM TO AWARD \$2.3 BILLION IN TAX CREDITS TO MANUFACTURERS OF ADVANCED ENERGY EQUIPMENT

ENERGY ALERT

Introduction

On August 13, 2009, the U.S. Departments of Treasury and Energy jointly announced (<http://www.treas.gov/press/releases/tg262.htm>; <http://www.energy.gov/recovery/48C.htm>) a program to award \$2.3 billion of tax credits to manufacturers of advanced energy equipment. The Treasury Department issued Notice 2009-72 (the "Notice"), a 73-page guidance document (http://www.energy.gov/recovery/documents/Federal_Notice_48C.pdf) implementing the "qualifying advanced energy project program" (the "Program"). The Notice provides procedures for applying for rights to claim a 30 percent "qualified advanced energy project credit" under section 48C of the Internal Revenue Code. Section 48C was added to the Code by the American Reinvestment and Recovery Act of 2009 ("ARRA"). Taxpayers seeking allocations for the 2009-2010 round must submit a preliminary application by **September 16, 2009**.

The qualified advanced energy project credit (the "Advanced Energy Credit") differs from most current investment tax credits because, instead of being available for all projects meeting statutory requirements, the credit is awarded to taxpayers on a competitive basis subject to a statutory limitation on the total dollar volume of credits that can be claimed. The Advanced Energy Credit is also more generous than most current and prior investment credits because it equals 30 percent, rather than 10 percent or 20 percent, of qualified investment. In effect, the federal government will pay 30 percent of the cost of an investment for which the Advanced Energy Credit can be claimed.

The Advanced Energy Credit is one of a number of tax provisions in ARRA that were intended to increase investment in renewable energy sources and reduce greenhouse gas emissions. But unlike other credits which are available to the producers of energy or the purchasers or users of assets that conserve energy, this credit is targeted at manufacturers that produce innovative products that can be used to reduce the consumption of energy from sources that generate greenhouse emissions.

Credit Eligibility and Requirements

The Advanced Energy Credit is an investment tax credit equal to 30 percent of the qualified investment with respect to the taxpayer's qualifying advanced energy project. A "qualifying advanced energy project" is a project that: (1) re-equips, expands or establishes a manufacturing facility for the production of "specified advanced energy property" or property that, after further manufacture, will become specified advanced energy property; (2) the IRS has certified that part or all of the qualified investment in the project is eligible for the Advanced Energy Credit under Code section 48C; and (3) does not produce any property which is used in the refining or blending of any transportation fuel (other than renewable fuels).

The Notice defines "manufacturing facilities" as "facilities that make, or process raw materials into, finished products (or accomplish any intermediate stage in that process)."

"Specified advanced energy property" means any of the following:

1. property designed for use in the production of energy from the sun, wind, geothermal deposits or other renewable resources;
2. fuel cells, microturbines or an energy storage system for use with electric or hybrid-electric motor vehicles;

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3. electric grids to support the transmission of intermittent sources of renewable energy, including property for the storage of such energy;
4. property designed to capture and sequester carbon dioxide and sequester carbon dioxide emissions;
5. 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);
6. new plug-in electric drive motor vehicles, qualified plug-in electric vehicles or components that are designed specifically for use with such vehicles, including electric motors, generators and power control units; or
7. other property designed to reduce greenhouse gas emissions as may be determined by the IRS.

The Notice does not provide any useful guidance on the potentially broad category of property designed to reduce greenhouse gas emissions. The Notice states that the Secretary of the Treasury or his delegate “may determine that a property is designed to reduce greenhouse gas emissions in published guidance or in the letter notifying a taxpayer that the [IRS] has accepted the taxpayer’s application.”

The amount of “qualified investment” by a taxpayer is equal to the taxpayer’s basis of eligible property which is part of a qualifying advanced energy project. For this purpose, “eligible property” is any property (other than a building or its structural components) that: (1) is necessary for the production of specified advanced energy property; (2) is either (a) tangible personal property or (b) other tangible property (not including a building or its structural components) that is used as an integral part of the qualifying advanced energy project; and (3) depreciation or amortization is allowable with respect to the property.

Program Requirements

The IRS will consider a project under the Program only if the U.S. Department of Energy (“DOE”) provides a recommendation and ranking for the project. DOE will provide a recommendation and ranking only if it determines that the project has a reasonable expectation of commercial viability and merits a recommendation based on the criteria contained in Code section 48C(d)(3)(B), which includes criteria such as: (1) the amount of domestic job creation by the project; (2) the net impact on reducing air pollutants; (3) the levelized cost of generated or stored energy; and (4) the projected time from certification to completion. Taxpayers seeking the Advanced Energy Credit must submit: (1) a preliminary application and final application for recommendation by DOE and (2) an application for certification under Code section 48C(d)(2) by the IRS.

The Notice states that the IRS intends to allocate the Advanced Energy Credits to qualifying projects in annual allocation rounds with priority of projects based on the DOE recommendations and rankings of the qualifying projects. DOE will rank projects in descending order. A project receiving a higher ranking will be allocated the full amount of the credit requested before any credit is allocated to a lower-ranked project.

Taxpayers seeking allocations for the 2009-2010 allocation round must submit: (1) a preliminary application for DOE recommendation by September 16, 2009 and a final application for DOE recommendation by October 16, 2009; and (2) an application for Code section 48C certification to the IRS after August 13, 2009 and before December 17, 2009. The Notice sets forth in a 48-page Appendix the information needed to be included in applications for DOE recommendations.

For the first allocation round, the IRS will notify taxpayers by letter of the acceptance or rejection of applications by January 15, 2010. Acceptance letters will contain the amount of the Advanced Energy Credit that has been awarded to the taxpayer. Accepted taxpayers will be required to execute and return a tax credit agreement to the IRS by March 15, 2010, in the form contained in Appendix A of the Notice. If all \$2.3 billion of the authorized Advanced Energy Credits for the Program are not subscribed in this first allocation round, the IRS will conduct an additional allocation round in 2010-2011 pursuant to further guidance to be issued by the IRS.

A taxpayer will have one year from the date of acceptance in which to provide evidence that the requirements for the certification have been met. The Notice describes the documentation that the taxpayer must submit to the IRS to obtain certification. After receiving the documentation, the IRS will decide whether to certify the project. If the IRS issues a letter certifying the project, the taxpayer has three years from the date of the certification to place the property in service. The Notice states that the IRS has no authority to extend the three-year period.

A certification applies only to the taxpayer who signed the tax credit agreement. A successor-in-interest must sign a new agreement with the IRS. If a new agreement is not signed, the credit allocated to a project will be forfeited if the interest is acquired before the property is placed in service or recaptured in whole or part if the interest is acquired within five years of the date the property is placed in service.

An acceptance, allocation or certification will not constitute a determination that a project is eligible for the Advanced Energy Credit. The IRS may upon examination determine that a project does not qualify.

The Notice establishes procedures for reallocating credits that are forfeited or reduced.

Upon making a certification, the IRS will publicly disclose the identity of the applicant and the amount of the credit certified with respect to the applicant. However, the application and any other documentation submitted by the taxpayer is treated as confidential tax return information.

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