

RENEWABLE ENERGY PROJECTS: TREASURY ISSUES GUIDANCE FOR THE CASH GRANTS

July 15, 2009

To Our Clients and Friends:

On July 9, 2009, Treasury released the eagerly awaited Guidance needed to apply for the cash grants made available to qualified renewable energy projects under the recently enacted Stimulus Legislation. Treasury expects that it will make approximately \$3 billion in payments under this program in the form of a cash grant generally equal to 30% of the project cost (10% for certain property) in support of approximately 5,000 new renewable energy projects. This alert highlights a few of the more significant aspects of the Guidance issued by Treasury, which is available at www.treas.gov/recovery/1603.shtml.

APPLICATION WINDOW NOT YET OPEN

The Guidance incorporates a two-part application package (to be submitted on-line) that includes a form application and a set of Terms and Conditions. Treasury is not currently accepting applications, but plans to begin accepting them some time around August 1, 2009. Treasury will make payment to qualified applicants by electronic funds transfer within 60 days from the date the completed application is received by Treasury.

BLOCKER CORPORATIONS PERMITTED

If a project is partially owned by certain “disqualified persons,” including governmental entities, tax-exempt entities, university endowments, pension funds and any partnership or other pass-through entity any partner of which is such an entity, the project is not eligible for the cash grant. However, if such a disqualified person holds its interest in the project through a taxable corporation, often referred to as a “blocker corporation,” the Guidance provides that the cash grant will be allowed. This is a more lenient rule than under the current investment tax credit regime and a significant benefit to private equity funds and hedge funds looking to invest in clean energy projects.

CERTAIN DISPOSITIONS PERMITTED

The Guidance contains a taxpayer-favorable rule that permits any disposition of the property for which a cash grant has been made if the purchaser is not a disqualified person and the purchaser agrees to be jointly liable with the applicant for any potential recapture in the future (*e.g.*, upon change in use or a subsequent disposition of the property to a disqualified person). This is also more favorable than the ITC rules, which provide for recapture upon *any* disposition of the property (including a partner’s disposition of more than one-third of

its interest in a partnership that owns the property) before the fifth anniversary of the date on which the property was placed in service.

The cash grant program is expected to be a significant component in the financing of renewable energy projects. This rule will enhance the value of the collateral to a lender as foreclosure will not automatically trigger recapture. Additionally, the relaxation of the recapture rules will make clean energy projects more attractive in situations where the investment horizon is less than five years.

SPECIAL ELECTION FOR MULTI-UNIT PROJECTS

In order to qualify for a cash grant, the property must either be placed in service during 2009 or 2010 or construction must begin before the end of 2010, and the property must be placed in service before the applicable credit termination date (which ranges from January 1, 2013 – January 1, 2017 depending on the type of property).

The Guidance provides a favorable rule for determining when construction began on multi-unit projects. It provides that the owner of multiple units that are located at the same site and that will be operated as a larger unit may elect to treat such units as a single unit for purposes of determining the date construction began. This is significant because certain components of a project on which construction has not started by the end of 2010 can still qualify for the cash grant if such components are placed in service prior to the credit termination date for the property.

The special election for multi-unit projects is of particular significance to large wind farms. Absent the election, turbines whose construction had not begun before the end of 2010 would not qualify. The election permits the applicant to look back to the date that physical work of a significant nature began on the overall project and treat that date as the date construction began on each component of the wind farm. The Guidance includes a safe harbor to determine when physical work of a significant nature has begun – generally, once the applicant has paid at least 5% of the total cost of the property.

Please contact us if you have any questions.

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