

TREASURY BEGINS ACCEPTING APPLICATIONS FOR GRANTS FOR CERTAIN RENEWABLE ENERGY AND INNOVATIVE ENERGY TECHNOLOGY PROJECTS

On July 31, 2009, the Treasury Department announced that it is now accepting applications (<http://www.treas.gov/recovery/1603.shtml>) for cash grants (the "Grants") which will essentially monetize tax credits that would otherwise be available to certain renewable energy and innovative energy technology projects. Generally, properties eligible for the Grants are depreciable properties that are, among others, part of an electricity production facility using wind, biomass, geothermal or solar energy, or certain power plants using fuel cells or microturbines. Earlier, on July 9, 2009, the Treasury Department had issued the much anticipated guidance titled "Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009." This guidance sets forth in detail the procedures and requirements of applying for the Grants.

The Grant will be in an amount equal to 10% or 30% of the tax basis of the eligible property, depending on the types of property. It is available only to an eligible property (1) that is placed in service in 2009 or 2010, in which case the application must be submitted before October 1, 2011; or (2) the construction for which began in 2009 or 2010 and is placed in service before the end of the applicable tax credit period, in which case the application must be submitted after the construction commences but before October 1, 2011. The applicant must be the owner (or the lessee if certain conditions are met) of the property and must have originally placed the property in service. Tax-exempt organizations, governmental bodies and certain cooperative lenders or electric companies, as well as pass-through entities that have any such person as a direct or indirect partner (collectively, the "Disqualified Persons"), are not eligible for the Grants. However, a taxable corporation would be eligible even if it is owned by one or more Disqualified Persons. Disqualified Persons can also own indirect interest in a pass-through entity through such taxable corporations ("Blocker Corporations").

Under the guidance, some or all of a Grant would generally have to be repaid to the Treasury Department if the property is disposed of (or deemed to be disposed of when a direct or indirect interest in the applicant is sold), or ceases to be eligible property, within five years from the date the property is placed in service. Importantly, however, the trigger of the recapture provided in the guidance is narrower than the rules applicable to investment tax credits. With respect to a Grant, a property can be sold to any entity that is not a Disqualified Person without triggering the recapture, provided that the buyer agrees to be jointly liable with the applicant for any recapture. Therefore, a sale to any Blocker Corporation, or to any pass-through entity in which Disqualified Persons only have indirect interest through Blocker Corporations, could avoid the recapture.

The guidance issued by the Treasury Department is extensive and addresses many other procedural as well as substantive issues. For example, under the guidance, generally a Grant payment would not constitute income to the applicant, but a lessee who receives the Grant must include ratably in gross income over the five-year recapture period an amount equal to 50% of the Grant. Taxpayers who are interested in the program should carefully consider all benefits and consequences with respect to their particular circumstances.

To ensure compliance with requirements imposed by the IRS, we inform you that, unless explicitly provided otherwise, any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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