



## TREASURY ISSUES GUIDELINES ON PAYMENTS FOR SPECIFIED ENERGY PROPERTY IN LIEU OF TAX CREDITS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

On July 9, 2009, the U.S. Department of the Treasury (the “Treasury”) issued the first guidance on how taxpayers can receive a cash grant from the Treasury in lieu of claiming production tax credits or investment tax credits with respect to specified energy property (which includes certain biomass, solar, wind, and other types of renewable energy production facilities). This program is funded through the American Recovery and Reinvestment Act of 2009 (the “Act”).

Section 1603 of the Act authorizes the Treasury to make payments to qualified applicants equal to 10 percent or 30 percent (depending on the specified energy property type) of the specified energy property’s basis. Pursuant to the program, an applicant must agree to forgo the production tax credit and investment tax credit under sections 45 and 48 of the Internal Revenue Code (“IRC”) with respect to the property that is the subject of the application.

The guidance establishes the procedures for applying for payments under section 1603 of the Act as well as clarifies some of the eligibility requirements. The Treasury is not currently accepting applications. However, to facilitate the timely flow of program funds, the Treasury published several key documents in advance, which include the guidance document, Terms and Conditions, and a sample application form. The Treasury has stated that further instructions will be posted when it is ready to begin receiving applications via a web-based application.

### APPLICATION PROCEDURE

When the Treasury begins accepting applications, the applications may be submitted online by going to [www.treasury.gov/recovery](http://www.treasury.gov/recovery). All applications must be received before October 1, 2011. An application may be submitted only after the property to which

the application relates has been placed in service or is under construction (the guidance provides clarification on when construction is deemed to begin as well as a safe harbor). For property placed in service in 2009 or 2010, the applicant should submit its application after the property has been placed in service but before October 1, 2011. For property placed in service after 2010 (but within the applicable credit termination date) and for which construction began in 2009 or 2010, the applicant should submit its application after construction begins but before October 1, 2011 (once the property is placed in service, an updated application, signed Terms and Conditions document, and possibly supplemental information will need to be submitted before the application is complete). The Treasury will make payments to qualified applicants within 60 days of the receipt of the completed application.

**Documentation.** The guidance provides information on documentation that must be submitted with the application, including documentation to demonstrate that the property is of a type eligible for the payment, that the property has been placed in service or is under construction, and the basis of the eligible property. To demonstrate that the property is eligible, all applicants must submit design plans (final engineering design documents, stamped by a licensed professional engineer); other specific types of property have additional documentation requirements. To establish that the property is placed in service, the applicant must submit a commissioning report (a report provided by the project engineer, or the equipment vendor, or an independent third party that certifies that the equipment has been installed, tested, and is ready and capable of being used for its intended purpose). If the property is interconnected with a utility, then a copy of the Interconnection Agreement must also be submitted. Alternately, if the property is under construction, the applicant must submit paid invoices and/or other financial documents demonstrating that physical work of a significant nature has begun (and if the property is being constructed for the applicant by another person, a binding contract for such work must also be submitted). In addition, applicants will need to submit payment documentation with their application to support the cost basis claimed on the property. (For properties having a cost basis in excess of \$500,000, an independent accountant's certification attesting to the accuracy of all costs claimed as part of the basis of the property must also be provided.)

**Reporting and Records.** The applicant must provide periodic reports as required by the Treasury, which must include an annual project performance report for the five years after the property is placed in service. The applicant must also maintain project, financial, and accounting records, and the applicant must give the Treasury physical access to the applicant's facilities and pertinent books and records in order to conduct audits, examinations, and evaluations. Further, the applicant must agree that the information provided in the application to the Treasury (other than bank account information and proprietary information) may be shared with other federal agencies, including the Internal Revenue Service.

## OTHER NOTABLE ITEMS UNDER THE GUIDANCE

The guidance is helpful in various respects, including the following:

**Tax Credits.** An applicant must agree to forgo the production tax credit and investment tax credit under sections 45 and 48 of the IRC with respect to the property. The guidance, in many respects, mirrors the current rules and regulations governing application of the investment tax credit under section 48 of the IRC.

**Projects Not Completed in 2010.** The Act allows for cash grants in lieu of credits not only for projects placed in service in 2009 and 2010, but also for projects "for which construction began" in 2009 or 2010, as long as the projects are completed before the expiration of the relevant credits (in 2013 or 2014). The Act provided no guidance on what it means for construction to have begun in 2010. The new guidance provides a 5 percent safe harbor (*i.e.*, the applicant may treat construction as having begun if more than 5 percent of the total cost of the property has been incurred by the end of 2010 (excluding the cost of any land and preliminary activities such as planning or designing, securing financing, exploring, or researching)) and provides more general guidance about when construction begins.

**Units of Property.** Where a project consists of multiple pieces of property, it was not clear whether a cash grant could be obtained when part of the project was complete. The new guidance states that all functionally interdependent

components are treated as a single property, and that components are functionally interdependent if one cannot be placed in service without the others. For example, in a wind farm, each wind turbine (together with its tower and supporting pad) are a separate property, and a control system to optimize operation of the farm is a separate property. Owners may elect, however, to combine units into a single property for placed-in-service purposes, which may be important where a larger project will not be fully placed in service before the end of 2010.

**Leases.** If both the lessor and lessee are persons eligible to receive a section 1603 payment, the lessor may elect to pass through such payment to the lessee. (The election may not be made by a lessor that is a mutual savings bank or similar financial organization, a regulated investment company, or a real estate investment trust.) In addition, special rules apply for sale-leaseback transactions. Treasury seems to be anticipating the use of lease and sale/leaseback arrangements to permit monetization of tax benefits other than credits (e.g., accelerated and bonus depreciation).

**Partnerships.** In general, a partnership is eligible to apply for and receive a section 1603 payment, provided that each direct and indirect partner in the partnership is eligible to receive section 1603 payments. (Note that if a partner is a C corporation, then shareholders of the C corporation do not affect the eligibility of the partnership.)

**Recapture.** The applicant must certify to the Treasury on an annual basis for a period of five years that the property has not been disposed of to a disqualified person and that the property continues to qualify as specified energy property. If the property fails to satisfy either of these requirements within five years of the date the property is placed in service, the applicant must repay a percentage of the section 1603 funds to the Treasury (depending on the date of the disqualifying event). These recapture rules are similar to those governing the recapture of the investment tax credit under section 48 of the IRC. The guidance emphasizes that liability for recapture is not treated as a tax liability but as an amount owed to the Treasury, and may be collected by all available means.

**Assignment.** If certain conditions are satisfied, the applicant may assign its section 1603 payment to a third party.

**National Environmental Protection Act (“NEPA”) and Davis-Bacon.** A section 1603 payment with respect to specified energy property does not make the property subject to the requirements of NEPA (and similar laws) or the Davis-Bacon Act.

**Taxable Income.** In general, a section 1603 payment is not includable in the gross income of the applicant.

**Normalization Rules.** Payments under section 1603 must be normalized.

## FURTHER INFORMATION

*Treasury Press Release:*

<http://www.treasury.gov/press/releases/tg202.htm>

*Guidance Document:*

<http://www.treas.gov/recovery/docs/guidance.pdf>

*Terms and Conditions:*

<http://www.treas.gov/recovery/docs/energy-terms-and-conditions.pdf>

*Sample Application:*

<http://www.treas.gov/recovery/docs/Application.pdf>

## LAWYER CONTACTS

For more information or assistance with the application process, please contact your principal Jones Day representative or any of the lawyers listed below. General email messages may be sent using our “Contact Us” form, which can be found at [www.jonesday.com](http://www.jonesday.com).

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