

Green Building Diligence, Risks and Incentives Panel: An Overview of the Availability of Cash Grants In Lieu Of Tax Credits For Energy Property

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Agenda

- Overview and Analysis of Treasury Guidance

- Overview of Environmental Issues in Renewable Energy Transactions

- Questions

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Program Guidance

- Treasury released the guidance on July 9 2009.
- What was released?
 - Section 1603 Guidance
 - Application
 - Terms and Conditions

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Overview

- Treasury will make payments to qualified applicants in an amount equal to 10% or 30% of the basis of the eligible Property ("Property"), depending on the type of Property.
- These payments are not includible in gross income.
- The basis of the Property is reduced by 50%.
- Applications will be reviewed and payments made within 60 days from the date the completed application is received by Treasury or placed in service.

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13

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Application Procedures

- Treasury began accepting applications on July 31st
- On-line submission process
 - www.treasury.gov/recovery
- Payments will be made within 60 days from the later of the date of completed application OR the placed in service (PIS) date.

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14

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Application Procedures

- For Property PIS in 2009 or 2010, applications must be submitted after the Property is PIS.
- For Property not PIS in 2009 or 2010 but for which construction began in 2009 or 2010, applications must be submitted after construction commences.
- In either case, ALL applications must be received before October 1, 2011.

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15

Application Procedures

- If an applicant is applying for payments for multiple units of Property that are treated as a single, larger unit of Property, all such units may be included in a single application.
- Application form requests Data Universal Numbering System (DUNS) number.
 - Can be obtained by calling (866) 705-5711
- Must also register with the Central Contractor Registration (CCR).
 - www.ccr.gov/startregistration.aspx

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Application Procedures

- If application is approved, a notice will be sent to applicant.
- Treasury is expected to make payment no later than 5 days from the notice date.
- Payment will be made via Electronic Funds Transfer.

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Application Procedures

- If applicant has not submitted sufficient information, applicant will be notified and has 21 days from the notice date to submit additional information.
- If additional information is not received within the 21 day period, application will be denied.

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Application Procedures

- If determined that the application does not qualify for payment, the applicant will be notified.

- Notification will include the reasons for the determination and will be considered the final agency action on the application.

Applicant Eligibility

- Ineligible applicants include:
 - any Federal, state or local government, including any political subdivision, agency or instrumentality thereof
 - any organization that is described in Section 501(c) of the IRC and is exempt from tax under Section 501(a) of the IRC
 - Clean renewable energy bond lenders, cooperative electrical companies, governmental bodies, OR
 - any partnership or other pass-thru entity, any direct or indirect partner (or other holder of an equity or profits interest) of which is an organization or entity described above unless this person only owns an indirect interest in the applicant through a taxable C corporation.

Applicant Eligibility

- "Blocker" corporations may be used to avoid this issue.

- Neither a Real Estate Investment Trust (REIT), nor a cooperative organization is a pass-thru entity for this purpose.

51

Applicant Eligibility

- **To be eligible:**
 - Applicant must be the owner or lessee of the Property, and
 - Must have originally placed the Property in service.

- **Foreign persons or entities may be eligible if more than 50% of the person or entity's income is subject to U.S. income tax.**

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51

Applicant Eligibility

- **Eligibility will be determined as of the time the application is received.**

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51

Placed In Service

- **Qualified Property includes expansions of an existing Property that is qualified Property.**

- **"Placed in service" means that the Property is ready and available for its specific use.**
 - Five factor test

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GT 151

Placed In Service

- Only for Property placed in service in 2009 or 2010,

OR

- Began construction in either 2009 or 2010,

AND...

- Must be completed prior to:
 - 2013 for wind
 - 2014 for certain other Section 45 qualified facilities
 - 2017 for Section 48 Property

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GT 152

Beginning of Construction

- Construction begins when "physical work of a significant nature begins."

- **Self Construction** - applicant manufactures, constructs, or produces Property for use by the applicant in its trade or business
 - same rule as above

- **Construction by Contract** - Property that is manufactured, constructed, or produced under a written binding contract that is entered into prior to the manufacture, construction, or production of the Property
 - same rule as above

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GT 153


Beginning of Construction

- **Safe Harbor**
 - Applicant may treat "physical work of a significant nature" as beginning when applicant incurs more than 5% of the total cost of the Property.
 - Costs for planning, designing, securing financing, exploring, or researching the project site are excluded.
 - Economic performance standards of IRC Section 461(h) apply.

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Units of Property

- For purposes of determining the beginning of construction of Property or the PIS date, all the components of a larger Property are a single unit of Property if components are functionally interdependent (placing in service of one component is dependent on the placing in service of the other component).
- The owner of multiple units of Property located at the same site and that will be operated as a larger unit may elect to treat the units as a single unit of Property for purposes of determining the beginning of construction and the date the Property is placed in service.

 117


Specified Energy Property

- Only the portion of a facility that is described in Section 48 taken into account in computing the Section 1603 payment.

 118

Location of Property

- If the Property is located outside the U.S. during more than 50% of the year, the Property is considered to be used predominantly outside the U.S. during that year.

 119

Original Use

- The original use of the Property must begin with the applicant.

- The cost of used parts cannot be more than 20% of the total cost of the Property.

- If new Property is originally PIS by a person and sold to applicant and leased back to the person by the applicant within three months, unless the lessor and lessee elect, lessor is considered the original user and would be the applicant for the grant.

Required Documentation

- Eligible Property
 - Design plans
 - Final engineering design documents stamped by a licensed professional engineer
 - Documents establishing nameplate capacity

- Placed In Service
 - Commissioning report
 - Interconnection agreement (only for properties interconnected with a utility)


Required Documentation

- Under Construction (not PIS)
 - Paid invoices for work actually performed
 - Other financial documents demonstrating that "physical work of a significant nature" has begun
 - Binding contract (meeting the requirements of the guidance)

- Leased Property
 - Written agreement between the lessor and lessee meeting the requirements of the guidance


Eligible Basis

- The basis of Property is determined in accordance with the general rules for determining the basis of Property for federal income tax purposes.
- Only the cost basis of Property PIS after 2008 is eligible.
- Eligible basis of a qualified facility does not include the portion of the cost of the facility that is attributable to a non qualifying activity.

 121

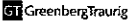
Eligible Basis

- Applicants must submit documentation to support the cost basis claimed for the Property (detailed breakdown of all costs included in basis).
- For properties with a cost basis in excess of \$500,000, applicants must submit an independent accountant's certification attesting to the accuracy of all costs claimed as part of the basis of the Property.

 122

Leased Property

- A lessor may irrevocably elect to pass-through the payment to a lessee.
- The lessor and lessee must agree in writing, that the lessor waives all right to a Section 1603 payment or a PTC or ITC with respect to the Property, BEFORE the lessee may apply for a Section 1603 payment with respect to such Property.

 123

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Leased Property

- The lessee must agree to include 50% of the payment ratably in gross income over the five year recapture period.

- Both the lessor and the lessee must be persons eligible to receive a payment.

- This 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.

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Leased Property

- The lessor's election is made by a written agreement and contains the following:
 - Waiver of the lessor's right to receive any Section 1603 payment or claim a PTC or ITC
 - All information necessary to determine the amount of lessee's Section 1603 payment
 - The name, address, and EIN of the lessor and lessee
 - A description of each Property with respect to which the election is being made
 - The date on which possession of the Property is transferred to lessee
 - Lessee's consent to the election

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Sale Leaseback Transactions

- The lessee may claim the payment if:
 - The lessee must be the person who originally placed the Property in service.
 - The Property must be sold and leased back by the lessee, or must be leased to the lessee, within three months after the date the Property was originally placed in service.
 - The lessee and lessor must not make an election to preclude application of the sale-leaseback rules.

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Recapture

- If the applicant disposes of the Property to a disqualified person or the Property ceases to qualify as a specified energy Property within 5 years from the PIS date, a certain percentage of the payment must be repaid to Treasury.
- Property is considered disposed if any interest in the Property is sold to a disqualified person.
- Temporary cessation will not result in recapture if the owner "intends to resume production."

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Recapture

- Property ceases to qualify if the use of the Property changes so that it no longer qualifies as specified energy Property.
- Permanent cessation will result in recapture (unless permanent cessation is due to natural disaster).

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Final Thoughts

- Make sure to meet the "physical work of a significant nature" requirement if not placing in service by year-end
 - If using safe harbor, better to exceed the 5% threshold in case of cost overruns
- Stay apprised of legislative updates

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