

Treasury Department Issues Guidance on Section 1603 Grants

On July 9, 2009, The U.S. Treasury Department, in a press release published jointly with the Department of Energy, issued its heavily anticipated guidance on the “grant in lieu of tax credits” provision of Section 1603 of the American Recovery and Reinvestment Act of 2009.

This update is intended to provide a high-level overview of the current status of the program and to highlight significant information in the guidance.

Overview

Section 1603 is intended to accelerate the development of eligible renewable energy projects, by eliminating the need for a “tax equity” investor to utilize tax credits attributable to a renewable energy project. Obtaining equity financing from a tax equity investor is sometimes a complicated and expensive undertaking, especially for smaller projects and especially in times such as these, when there are comparatively fewer investors with significant taxable income to offset. Instead, an eligible person can simply apply to the Treasury Department for a cash payment in the specified amount (see “Payment Amounts and Eligible Projects” below).

The Section 1603 grant program, as currently constituted, applies to projects as to which construction is begun before the end of 2010.

Documents Published and Available

The Treasury Department published three documents along with the July 9 release – a “[guidance](#)” document, a set of “[terms and conditions](#)” and a [sample on-line application](#). Click on the above links to review the documents on the Treasury Department’s web site.

When to Apply

Hopeful grantees may be disappointed to learn that at this time, Treasury has not begun accepting applications for Section 1603 grants. The guidance states that its purpose is to “establish [] procedures” and “clarify the eligibility requirements.” Treasury expects to begin accepting applications around August 1, 2009. So, prospective grantees now know some more about how to access the cash payments, but must continue to wait for the go-ahead to apply. That said, the guidelines also specify that, at least for projects “placed into service” in 2009 or 2010, the application may be submitted only after the property

is placed in service. It remains to be seen how renewable project developers will be able to leverage expected 1603 payments to fund their development and construction costs.

Payment Amounts and Eligible Projects

The release accompanying the guidance was titled “Treasury, Energy Announce More than \$3 Billion in Recovery Act Funds for Renewable Energy Projects.” Also, the Treasury Department previously published an estimate of \$1.1 billion for this program, in its ARRA “agency plan.” However, ARRA does not impose any limit on this program and it is not competitive, i.e., all eligible projects for which applications are accepted should receive grants. The \$3 billion figure should not be interpreted as a limitation on the aggregate amount available.

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Individual grants will be in the amount of either 10% or 30% to eligible persons who construct or place into service assets constituting “qualified renewable energy facilities,” including wind, solar, biomass, and a range of other types of renewable energy generation projects (see the [guidance](#) for a more detailed explanation of the payment credits and eligible projects).

Who Can Apply

The guidance specifies categories of persons not eligible, most notably:

- federal, state or local government institutions
- tax-exempt organizations,
- clean renewable energy bond lenders
- cooperative electric companies
- any partnership or other pass-thru entity in which any direct or indirect equity owner is one of the above disqualified persons

The guidance does provide for an otherwise disqualified person to own its interest indirectly through a taxable C corporation, and provides that REITs and subchapter T cooperatives are not pass-thru entities for this purpose.

The applicant must be the owner of the project (or the lessee, if the lessor and lessee agree and subject to certain conditions specified in the Guidance).

Reporting and Recapture

The application will require significant documentation, copies of project documents, etc. Notably,

for example, projects with a cost basis of greater than \$500,000 will require an independent accountant’s certification of costs.

Grant recipients will also be required to report to the Treasury Department, including providing, for a five-year period, an annual project performance report and a certification that the project remains qualified. If the property or the person ceases to qualify within the five-year from the date it is placed in service, then the recipient must repay a prorated amount of the Section 1603 payment.

What to Do Now

Hopeful grant applicants should review the [guidance](#) carefully. If you have placed a renewable project into service in 2009, or are about to, consult with your advisors on the extent to which it will qualify under the guidance. If you are planning to develop a renewable project, then you should consider the impact of the 1603 guidance on:

- Financing – how to maximize the utility of the grant
- Ownership and structure of the project – identify eligible persons
- How much of the project will qualify as “specified energy property”
- Lessor/lessee issues– effect on deal structure and depreciation
- How to establish the “beginning of construction” within the timelines provided.
- Meeting reporting requirements, certifications and other future eligibility criteria

Additional guidance or instructions will likely be available along with the eventual announcement that applications can be submitted.

For more information, please contact Jerry O’Connor at goconnor@mbbp.com.

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