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IRS Announces September 16 Deadline for Initial Allocation of Credits for Clean Energy Property Manufacturing Facilities

On August 13, 2009, the IRS set a very aggressive September 16, 2009 deadline for the new thirty percent investment tax credit for projects that re-equip, expand or establish a manufacturing facility for the production of clean energy property. This program is part of the 2009 economic stimulus legislation and offers a credit to support the production of property that either reduces or contributes to the reduction of greenhouse gases. The potential range of qualifying projects is quite broad, and would include (but not be limited to) property built to manufacture renewable energy generating property, a facility to produce energy conservation property, or a factory designed to build parts used in hybrid or plug-in vehicles.

In conjunction with the deadline, IRS also established the rules for applying for these new Section 48C credits.

While an applicant needs to be aware of all of the typical considerations and limitations associated with taking an investment tax credit, there are two other critical aspects to this new credit. First, the credit qualification process will be competitive, and the IRS's certification of the project will be based on a recommendation and ranking from the Department of Energy ("DOE"). Second, the total pool of available credit dollars is limited to $2.3 billion, which will support slightly more than $7.5 billion in qualifying investment. This pool of credits will be allocated by the IRS during credit allocation rounds. Once the credits are fully allocated there will be no additional allocation rounds.

Even with the tight application deadline, we think there is a likelihood that the credit will be significantly oversubscribed, making the qualification process extremely competitive. The likelihood of oversubscription also increases the possibility that this will be the only meaningful round for applications. In addition, credit requests will be paid in full on the basis of the final DOE ranking, making positioning your project absolutely critical.

First Steps

If your company is making, or is planning to make, an investment in manufacturing capacity for clean energy property, it is critical to act swiftly. You should be considering the following steps.

- Determine whether the property qualifies as "specified energy property" eligible for the credit (discussed in more detail below); if not, how strong a case can be made that it is designed to reduce greenhouse gas emissions? You may want to file a preliminary application while you are evaluating your project's qualification and whether you will file a final application.
- Consider how well the project meets the criteria for ranking applications, and how to best document and frame the criteria for ranking purposes.
- Establish a plan for application preparation to ensure that the initial application deadline can be met. **If a preliminary application is not filed by September 16, you will not be eligible for this round of credit allocation.**
- Review the information required for each phase of the application process to ensure that you have, or will have in advance of each deadline, the necessary information to meet the application requirements.
- Establish a plan for diligence and review of the application. If either the IRS or DOE determines that the application is missing required information, the application will be declined. **There is no appeal process.**

The full application and review process will likely be fairly time consuming and somewhat costly. So, while filing protective applications to meet the initial deadline may be the best course of action for most potential applicants, it is worth realistically assessing whether there is any chance of qualifying for the credit. A potential applicant should also consider whether the credit's impact would lower the future effective tax rate for manufacturing activities enough to actually make a U.S. site more attractive than foreign options, especially for those companies with limited budgets.

Program Details

In order to be allocated a credit, the taxpayer's project must be certified by both the DOE and the Department of Treasury. The IRS Notice requires that the taxpayer submit for each project (1) an application for recommendation to DOE and (2) an application for credit certification to the IRS.

Application Deadlines

For the initial allocation round, the first deadline of September 16, 2009 is for the submission of a preliminary application for DOE recommendation. A final application for DOE recommendation must be submitted by October 16, 2009. Applications for credit certification may be submitted to the IRS any time between August 14, 2009 and December 16, 2009. The IRS will make its certification determinations and credit allocation decisions by January 15, 2010. The taxpayer will have three years from the date the certification is issued to place the qualifying advanced energy project in service or else the credit certification expires, and any qualifying progress credits will be recaptured.

Qualifying Projects

The credit is allowed for up to 30% of the taxpayer's basis in certain property (not including a building, its structural components or certain other non-manufacturing property) that is placed in service by the taxpayer during the year that is part of a Qualifying Advanced Energy Project ("Qualifying Project"). A Qualifying Project is a manufacturing facility that will produce Specified Advanced Energy Property or property that, after further manufacture, will become Specified Advanced Energy Property. The following property is considered Specified Advanced Energy Property:

- Property designed for use in the production of energy from the sun, wind, geothermal deposits, or other renewable resources;
- Fuel cells, microturbines, or an energy storage system for use with electric or hybrid-electric motor vehicles;
- Electric grids to support the transmission of intermittent sources of renewable energy, including property for the storage of such energy;
- Property designed to capture and sequester carbon dioxide and sequester carbon dioxide emissions;
- Property designed to refine or blend renewable fuels (but not fossil fuels), or to produce energy conservation technologies (including energy-conserving lighting technologies and smart grid technologies);
- New plug-in electric drive motor vehicles, qualified plug-in electric vehicles, or components that are designed specifically for use with such vehicles, including electric motors, generators, and power control units; or
- Other property designed to reduce greenhouse gas emissions as may be determined by the IRS, either through published guidance, or in the letter notifying a taxpayer that it has received a credit allocation.

IRS and DOE Credit Criteria

A project must have a reasonable expectation of commercial viability in order to be considered for review. In addition, the DOE and IRS will take the following factors into consideration in determining which projects are allocated credits:

- Which projects provide the greatest domestic job creation (both direct and indirect) during the credit period;
- Which projects provide the greatest net impact in avoiding or reducing air pollutants or anthropogenic emissions of greenhouse gases;
- Which projects have the greatest potential for technological innovation and commercial deployment, as indicated by (i) the production of new or significantly improved technologies, (ii) improvements in levelized costs and performance, and (iii) manufacturing significance and value; and
- How quickly following certification a project will be completed.

In making its recommendation, DOE will also consider: (1) Geographic Diversity; (2) Technology Diversity; (3) Project Size Diversity; and (4) Regional Economic Development.

The application provides quantitative guidelines for some of these criteria, but it will still be crucial to make sure to make the best possible case by carefully considering how to use input data and positioning submissions to clearly fulfill these criteria.

Additional Considerations

In addition, applicants should consider the impact of the general rules associated with investment tax credits, including the rules under Internal Revenue Code Section 50, which establish restrictions for certain non-taxable or tax advantaged entities, and lay out recapture rules (which are modified for this credit by allowing a transfer of interest in the Qualifying Project provided the transferee is an eligible entity and meets additional reporting requirements).

Finally, a potential applicant should consider whether it will have adequate tax liability to fully utilize the credit, and if not, what the implications of bringing in a tax equity investor through direct ownership, an equity-flip partnership, or leasing structure would be on its business objectives and financing options.

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