

Climate Alert

Significant Climate Change-Related News and Updates from the LLB&L Climate Change Practice Team

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Tax Credit Program Application Deadline

September 16, 2009 For Qualified Advanced Energy Manufacturing Projects

The American Recovery and Reinvestment Act of 2009, commonly known as the Stimulus Bill, signed into law on February 17, 2009, contained numerous provisions designed to stimulate investment in and development of renewable energy projects and technologies. One of those provisions is designed to encourage taxpayers to re-equip, expand, or establish manufacturing facilities for the production of energy-related property. This provision is codified in Section 48C of the Internal Revenue Code of 1986, as amended (the "Code") and provides for a 30 percent federal income tax credit for investments in qualified property used in a qualified advanced energy manufacturing project (the "Manufacturing Tax Credit").

Since the enactment of Manufacturing Tax Credit, taxpayers have been anxiously awaiting additional guidance that would establish the guidelines for the application process to obtain the credit. On August 14, 2009, the Internal Revenue Service (the "IRS") provided additional guidance that describes the allocation process as well as the application requirements and procedures. The deadline for submitting a preliminary application is **September 16, 2009**. Additional deadlines are outlined below.

Congress has authorized \$2.3 billion in funding for the Manufacturing Tax Credit program. The total amount of tax credits that may be authorized by the IRS under the Manufacturing Tax Credit program cannot exceed that figure. The available tax credits will be allocated by the IRS based on a competitive application process akin to a grant process. The IRS's allocation of the credits will be based on a project-by-project analysis performed in annual allocation rounds. The initial allocation round will be conducted in 2009-2010. If necessary an additional allocation round will be conducted in 2010-2011.

Application Process and Allocation of the Manufacturing Tax Credit

The IRS will consider a project for the Manufacturing Tax Credit only if the Department of Energy ("DOE") provides a recommendation and ranking for that project. Therefore, any taxpayer seeking to receive a Manufacturing Tax

Credit must submit a two-part application to the DOE. The preliminary DOE application provides the DOE with notice of the technology and other factors that will assist the DOE in determining the necessary staff needed to review all of the final DOE applications. The final DOE applications will be reviewed by the DOE based on certain criteria (noted below) and each applicant will be ranked to determine which applicants should be eligible to receive a Manufacturing Tax Credit. Taxpayers who are ranked the highest by the DOE are likely to receive a Manufacturing Tax Credit, provided that they submit a separate application to the IRS for certification of the project and allocation of the credit. The deadline for preliminary applications is rapidly approaching on September 16, 2009.

DOE Recommendation

After reviewing all final applications, the DOE will provide the IRS with a list of the projects recommended to receive the Manufacturing Tax Credit ranked in descending order. The available tax credits will be allocated in full to the highest ranked project, and then in full to the next ranked project and so forth until the total available credits that may be allocated in the current allocation round have been exhausted. The DOE will only recommend those projects that it determines have a reasonable expectation of commercial viability.

When ranking projects, the DOE will consider which projects will:

- provide the greatest domestic job creation (both direct and indirect) during the credit period (February 17, 2009 through February 17, 2013);
- have the greatest net impact in avoiding or reducing air pollutants or anthropogenic emissions of greenhouse gases;
- have the greatest potential for technological innovation and commercial deployment, as indicated by: (a) the production of new or significantly improved technologies, (b) improvements in leverized costs and performances, and (c) manufacturing significance and value; and
- have the shortest project time from certification to completion.

These four criteria will be weighed equally. Additional factors that the DOE will consider in its ranking of projects will include:

- Technology diversity (e.g., projects based on wind as compared to projects based on other sources such as sun, geothermal, electric grids, etc.);
- Geographic diversity (e.g., whether all the projects are centered around a particular city or around the U.S.);
- Project size diversity (e.g., one project that will consume ½ of the credit available versus 20 projects will consume ½ of the credit available and how do the other factors enter into the analysis (job creation etc.)); and
- Regional economic development (e.g., whether a given project could provide a boost to very economically challenged areas of the U.S.).

IRS Certification and Allocation

In addition to the two DOE applications, a separate application must be made to the IRS for certification of the project and allocation of the credit. While the DOE has responsibility for reviewing the technology, recommending, and then ranking the project for a credit, it is the IRS that implements the tax credit. The IRS must accept the application and agree that the applicant has performed all of the necessary steps for certification. The IRS accepts only those projects that are ranked high enough by the DOE to receive an allocation of the credit.

If accepted, the IRS will send the applicant a letter stating the amount of the credit that will be allocated to the applicant's project, and the taxpayer and the IRS will enter into an agreement. After the agreement is executed, the taxpayer has one year from the date the IRS accepts the application (i.e., the date on the IRS's acceptance letter) to provide the IRS with evidence that the requirements of the certification have been met. The requirements for certification are met if:

- the taxpayer has received all federal, state, and local permits, including environmental authorization or

reviews necessary to commence construction of the project; and

- the taxpayer has completed all steps that must be accomplished during the one-year period beginning on the acceptance date if the project is to be placed in service before the end of the three-year period beginning on the date of issuance of the certification (assuming such certification will be issued on the one-year anniversary of the acceptance date).

The executed agreement between the IRS and the taxpayer applies only to the taxpayer who signed the agreement and cannot directly be assigned. Any successor in interest must execute a new agreement with the IRS no later than the due date (including extensions) of the successor in interest's federal income tax return for the taxable year in which the transfer occurs. If a new agreement is executed, then the credit would appear to apply to the successor in interest without the need to resubmit an application, although the IRS has not provided any guidance regarding this issue. If a new agreement is not timely executed, the credit is either forfeited (if becoming a successor in interest before the project is placed in service) or recaptured at least in part pursuant to Code Section 50 (if becoming a successor in interest after the project is placed in service).

Once the project is certified, a taxpayer has three years from the date of issuance of the certification to place the project in service (i.e., placed in a condition or state of readiness and availability for its intended purpose). If the project is not placed in service by that time period, the certification is no longer valid.

Projects Qualifying for the Manufacturing Tax Credit

A taxpayer's potential Manufacturing Tax Credit for any taxable year is an amount equal to 30 percent of the qualified investment for such taxable year with respect to a qualifying advanced energy project.

Qualified Advanced Energy Project

A qualifying advanced energy project is a project that re-equips, expands, or establishes a facility that makes, or processes raw materials into, finished products (or accomplishes any intermediate stage in that process) for the production of specified advanced energy property, or property that after further manufacture will become specified advanced energy property. The IRS must have certified that part or all of the qualified investment in the project is eligible for the Manufacturing Tax Credit, and the project cannot produce any property which is used in the refining or blending of any transportation fuel other than renewable fuels.

Specified Advanced Energy Property

Specified advanced energy property means any one of the following:

- property designed to be used to produce 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 storage of that energy;
- property designed to capture 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 qualified plug-in electric drive motor vehicles, qualified plug-in electric vehicles, or components which are designed specifically for use with those 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.

Qualified Investment

A qualified investment is the taxpayer's cost basis of eligible property placed in

service during that tax year which is part of a qualifying advanced energy project. Eligible property includes any tangible personal property or other tangible property (excluding buildings or structural components) if that property constitutes an integral part of the qualified advanced energy project. Only property with respect to which depreciation (or amortization in lieu of depreciation) is allowable will be considered eligible property. The taxpayer's basis in the qualified property must be reduced by the amount of the tax credit ultimately received.

To determine the amount of qualified investment made in the case of self-constructed property, amounts paid or incurred are considered a qualified investment at that time, to the extent they are properly includible in computing basis under the taxpayer's method of accounting. To claim the Manufacturing Tax

Credit on any work in progress, the taxpayer must make an election under the rules set forth in Treasury Regulations Section 1.46-5(o). No such election may be made by the taxpayer unless the taxpayer has received an acceptance letter for the project from the IRS.

Limitations on Manufacturing Tax Credit

A Manufacturing Tax Credit will not be allocated to a project with respect to any qualified investment for which an investment tax credit is allowed under Code Section 48 (energy), Code Section 48A (advanced coal), Code Section 48B (gasification), or for which payment is received as a Grant in lieu of the Code Sections 48 or 45 credits.

Summary of Relevant Deadlines for 2009-2010 Allocation Round

The key elements of the application process include the preparation and submission of certain documents by the dates indicated below. Many of these dates are quickly approaching. Accordingly, persons interested in applying for the Manufacturing Tax Credit should commence the process without delay.

Date	DOE	IRS
August 14, 2009 through December 16, 2009		2009-2010 application period for taxpayers to provide the IRS their application for certification
By September 16, 2009	Preliminary application for DOE Recommendation due	
By October 16, 2009	Final application for DOE Recommendation due	
By December 16, 2009	DOE provides the IRS with the DOE Recommendation	DOE provides the IRS with the DOE Recommendation
By January 15, 2010		IRS accepts or rejects the taxpayer's application for IRS certification

Date (cont'd.)	DOE (cont'd.)	IRS (cont'd.)
By March 15, 2010		Taxpayer must execute and return the agreement to the IRS
By April 16, 2010		The IRS will execute and return the agreement to the taxpayer
1 year from the date the IRS accepts the application		Taxpayer must establish that requirements of certification have been satisfied, if so the project is certified
3 years from the certification date		Taxpayer must place the project into service

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Tax Credit Program Application Deadline*September 16, 2009 For Qualified Advanced Energy Manufacturing Projects* (cont'd.)

For further information or assistance with an application for the Manufacturing Tax Credit, please contact any of the persons referred to in the column to the left of this *Client Alert*.

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M. Benjamin Cowan is a partner in the Environmental Section of LLB&L. Mr. Cowan is the leader of the firm's Climate Change Practice Team, with an emphasis on carbon trading programs and the development of emissions credits and offset projects. He has extensive experience in the permitting and development of wind energy projects. His traditional environmental law practice covers regulatory compliance and permitting issues, civil and criminal enforcement defense, and real estate, corporate and energy transactional matters.

Buddy Sanders is a partner at LLB&L. He concentrates on personal and business tax planning, tax litigation, and controversy, climate change and energy tax incentives and corporate law. Drawing on four years of service at the Internal Revenue Service, he represents clients on various tax matters and business transactions, including tax litigation before the U.S. Tax Court.

Ryan Gardner is an associate at LLB&L. He practices tax, nonqualified executive compensation and corporate law in the Houston office of LLB&L. Mr. Gardner has been a Certified Public Accountant since 1992 and a Tax Attorney since 2001. His practice encompasses all areas of federal income taxation, as well as state, local, and international taxation. Mr. Gardner is a member of the Firm's Climate Change Practice Team with a focus on tax strategy in the structuring of renewable energy ventures.

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