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Treasury Releases Guidance on Cash Grants for Renewable Energy Projects

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On July 9, the Department of Treasury (the “Treasury”) issued guidance regarding how applications are to be submitted to obtain cash grants in lieu of the investment tax credit for renewable energy projects. The guidance also clarified how the Treasury, in cooperation with the Department of Energy, will interpret various parts of the statute governing these cash grants. The Treasury issued a press release, a 20-page package of guidance, an application template and the terms and conditions to which grant recipients will be required to agree.

The guidance had some very helpful information, but left many open questions. Among other things, the guidance clarified that the Treasury would make payments 60 days from the later of the project's placement in service or when the Treasury received a completed application, and that a completed application cannot be received by Treasury until the project has been placed in service. However, there are lingering questions regarding whether “placement in service” will have the same meaning as under tax law or some new meaning, whether applications can be submitted before placement in service on projects that are anticipated to be completed by December 31, 2010 (if it is possible that they may not meet that deadline), whether payments will be made as each unit of property (e.g., a wind turbine) is placed in service or whether the Treasury will wait for all units of property that are part of a larger group (e.g., a wind farm) to be placed into service, etc.

The guidance also provided a useful safe harbor as to when construction begins. To qualify for the grant, the project must be placed in service before January 1, 2011 or construction must begin before January 1, 2011 (and, in the latter case, the project must be placed in service before various dates that depend on the type of project). The safe harbor requires the applicant to incur or pay, depending on the applicant's method of accounting, 5% of the total costs of the project. While questions remain, this will be a useful target.

For projects that will utilize a leasing structure, the guidance provides helpful rules for establishing these structures to allow either the lessor or lessee to obtain the grant. In particular, the Treasury provided that, if the lessee will be paid the grant, the grant amount will be based on the “independently assessed fair market value” of the project but the lessee will be required to pay tax on 50% of the amount of the payment over the

5-year recapture period.

As to recapture, the guidance provided a rule that is more favorable than what is applicable to the investment tax credit. The investment tax credit is recaptured if, during the first 5 years after placement in service, the property ceases to be investment tax credit property or the property is disposed of or the taxpayer's interest in the property is disposed of (regardless of the identity of the recipient). For the grant, the Treasury stated that recapture would only occur if the property ceases to be eligible for the grant or the property (or an interest in the property) is disposed of to a party that would have been ineligible to receive the grant.

For access to the guidance, go to
<http://www.treas.gov/recovery/1603.shtml>.

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