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Internal Revenue Service Releases Manufacturing Investment Tax Credit Program Guidance

On August 13, 2009, the Internal Revenue Service (the “Service”) issued Notice 2009-72 (the “Notice”) establishing the qualifying advanced energy project program under Section 48C of the Internal Revenue Code (the “Code”). The American Recovery and Reinvestment Act of 2009 enacted a 30 percent investment tax credit for certain property used in a “qualified advanced energy project” — a project that re-equips, expands or establishes a manufacturing facility for the production of certain energy-related property.

The tax credit is subject to a certification and allocation process. Thus, a taxpayer must be “awarded” an allocation of tax credits in order to claim the credit. The 73-page Notice describes in detail the application process, which is subject to tight deadlines — a preliminary application for the program is due by September 16, 2009. The Secretary of the Treasury (“Secretary”) is authorized to allocate up to \$2.3 billion in such tax credits (which represents approximately \$7.7 billion of investment in qualified advanced energy projects).

This document is only a summary of certain aspects of the manufacturing investment tax credit program guidance. Complete details regarding the application process and the program guidance

are available at: <http://www.energy.gov/recovery/48C.htm>.

Qualifying Advanced Energy Project and Eligible Property

In order to qualify for the tax credit, the project must re-equip, expand or establish a “manufacturing facility” for the production of “specified advanced energy property” or property that, after further manufacture, will become specified advanced energy property. A manufacturing facility is a facility that makes or processes raw materials into finished products (or accomplishes any intermediate stage in that process). Accordingly, the tax credit is for facilities that manufacture certain equipment (e.g., equipment that manufactures solar panels), and not for projects that use the equipment that is manufactured (e.g., a solar system that incorporates such solar panels). In addition, manufacturing facilities for the production of certain components of specified advanced energy property are also qualified for the credit. For example, a project that manufactures wind turbine blades for a wind turbine is a qualifying project. Specified advanced energy property is:

- Property designed for the 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 and 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 as defined in Section 30D of the Code, qualified plug-in electric vehicles as defined in Section 30(d) 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 Secretary in published guidance or in the letter notifying the taxpayer that the Service has accepted the taxpayer's application for Section 48C certification.

Eligible property for purposes of the tax credit is property (other than a building or its structural components) that is necessary for the production of specified advanced energy property listed above.

The property also must be tangible personal property or other tangible property (not including a building or its structural components) that is used as an integral part of the qualifying advanced energy project. Finally, depreciation or amortization must be allowable with respect to the property.

Application Process

In order to compete for an allocation of tax credits, a taxpayer must submit (1) a preliminary application and a final application for recommendation by the Department of Energy ("DOE") and (2) an application for certification by the Service. Separate applications must be submitted for each separate qualifying advanced energy project. If an application for DOE recommendation does not contain all the information required by the Notice, DOE may decline to consider the application. The information required to be contained in each submission is set forth in detail in the Notice and Appendix B to the Notice. Note that the Project Information Memorandum for the final application for recommendation to DOE may not exceed 30 pages (excluding appendices). Accordingly, it is critical that such applications be clear, concise and complete. If an application for Service certification does not contain all the information required by the Notice, the Service will not consider the application. The chart below contains a table of deadlines for various submissions and requirements to qualify for the tax credit.

Eligibility and Evaluation Criteria

The Service will consider a project under the program only if the DOE provides a recommendation and ranking for the project. In turn, the DOE will recommend a project only if the DOE determines that the project is an advanced energy

project that has a reasonable expectation of commercial viability and merits a recommendation based on the evaluation criteria set forth below. The criteria are equally weighted:

- Greatest job creation (both direct and indirect) during the credit period (February 17, 2009 through February 17, 2013).
- Greatest net impact in avoiding or reducing air pollutants or anthropogenic emissions of greenhouse gases.
- 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.
- Shortest time from certification to completion.

The DOE will also take into account four program policy factors: (1) geographic diversity, (2) technology diversity, (3) project size diversity and (4) regional economic development.

The DOE will rank only the recommended projects in descending order and the #1 ranked project will receive its full allocation of tax credits. The #2 ranked project will then receive an allocation of tax credits and so on until the \$2.3 billion in tax credits is exhausted. If the \$2.3 billion is not completely allocated in the first allocation round, another allocation round will be held the following year. (However, it is expected that all of the tax credits will be allocated in the first round.) The Service will determine the amount of the tax credits

to be allocated to a project at the time the Service accepts the application for certification (the "Acceptance Date"). Accordingly, if the Service accepts the taxpayer's application for certification, the acceptance letter will state the amount of the tax credits allocated to the project.

Other Requirements

If a taxpayer receives an allocation of Section 48C tax credits, it must meet certain other requirements in order

to maintain its ability to claim the tax credits. First, it must enter into an agreement (similar to a closing agreement) with the Service regarding the tax credits. Second, within one year of the Acceptance Date, the taxpayer has to provide to the Service documents that establish that the taxpayer has (1) received all federal, state and local permits necessary to begin construction of the project and (2) 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 within three years of the issuance of certification. Finally, the project must be placed in service within three years of the issuance of certification.

All submissions to the DOE and the Service must be signed and dated by the taxpayer. The person signing for the taxpayer must sign under penalties of perjury and have personal knowledge of the facts contained in the document.

Deadlines and Timelines

Event	Deadline
Taxpayer Preliminary Application for DOE Recommendation Due	Sept. 16, 2009
Taxpayer Final Application for DOE Recommendation Due	Oct. 16, 2009
Taxpayer Application for Certification Due to the Service	Dec. 16, 2009
DOE Recommendations Provided to Service	Dec. 16, 2009
Service Accepts or Rejects the Taxpayer's Application for Certification (Acceptance Date)	Jan. 15, 2010
Taxpayer Executes and Returns Agreement	Mar. 15, 2010
Service Executes and Returns Agreement	Apr. 16, 2010
Taxpayer Provides Evidence that Requirements of Certification are met	One Year from Acceptance Date
Service Makes a Decision regarding Certification of the Project (Issuance of Certification)	One Year from Acceptance Date
Project must be Placed in Service	Three Years from Issuance of Certification

Forfeiture of Tax Credits

Numerous actions or inactions can result in the forfeiture or recapture of the Section 48C tax credits, including, but not limited to:

- Not placing the qualifying advanced energy project in service within three years of the date of issuance of the certification. Note that the Service does not have the discretion to extend this period.
- Failure to receive certification for the project as required in the Notice.
- Changes to project plans, which affect relevancy to the DOE in recommending or ranking the

project or the Service in accepting the project application.

Tax credits that are returned or forfeited may be reallocated in an additional allocation program in the future.

Miscellaneous

Section 48C provides an investment tax credit for certain types of property. Accordingly, the Notice provides that the investment tax credit-related rules such as the at-risk rules of Section 49 and the recapture and other special rules in

Section 50 also apply to the Section 48C tax credit. The Notice also explains the application of the rules for claiming the Section 48C tax credits on qualified progress expenditures. Although these rules have a limited role in the actual application process, applicants should consider them as part of their long-term planning, especially in the context of the structure of their investments and the use of the tax credits.

There is no conference or appeals process available with respect to

decisions made by the DOE and the Service under the program. If a taxpayer does receive an allocation of tax credits, the Service will disclose the name of the taxpayer and the amount of the tax credit allocated to the project.

Please contact us if you have any questions regarding qualification for the Section 48C manufacturing investment tax credit, if you require assistance in connection with the application process, or need information regarding the investment tax credit rules.

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