

September 16, 2009 Deadline for Advanced Energy Project Credit Applications

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On August 13, 2009, the Internal Revenue Service (“IRS”) released Notice 2009-72 that, among other things, sets forth the application process and deadlines for the new advanced energy project credit of Internal Revenue Code section 48C, enacted by section 1302 of the American Recovery and Reinvestment Tax Act of 2009 (Division B of P.L. 111-5, the Stimulus Act), for new, expanded or re-equipped manufacturing facilities for the production of specified advanced energy property. The Notice requires preliminary applications for Department of Energy (“DOE”) recommendations to be filed by September 16, 2009, final applications for DOE recommendations to be filed by October 16, 2009, and applications for IRS certification of the credit to be filed by December 16, 2009. Although preliminary applications need contain only limited information, the final applications require extensive project information.

Background

Section 48C provides a credit equal to 30 percent of the qualified investment by a taxpayer in certain property (other than buildings and their structural components) placed in service (or treated as placed in service under progress expenditure rules) during a taxable year that is part of a qualifying advanced energy project. A qualifying advanced energy project re-equips, expands or establishes a manufacturing facility for the production of

- property to produce energy from sun, wind, geothermal deposits or other renewable sources,
- fuel cells, microturbines or energy storage systems for use with electric vehicles,
- electric grids supporting the transmission of intermittent renewable energy,
- CO₂ capture and sequestration property,
- renewable fuel (not fossil fuels) refining or blending property or property producing energy conservation technologies (e.g., energy-conserving lighting and smart grids),
- new plug-in electric drive motor vehicles, plug-in electric vehicles and their components, and
- other advanced energy property designed to reduce greenhouse gas emissions.

The section 48C credit is not self-executing; taxpayers must apply for DOE recommendations in a competitive process and for IRS certification of the credit and must be awarded a specific credit amount. The total amount of credits that can be awarded under section 48C is limited to \$2.3 billion, which translates into a peculiar maximum amount of qualified investment of \$7²/₃ billion. Although Notice 2009-72 contemplates an additional allocation round in 2010-2011 if the \$2.3 billion is not fully allocated in the 2009-2010 allocation round, it is certainly possible that the \$2.3 billion will be fully allocated in the 2009-2010 round.

Credit Applications and Certifications

Under section 48C and Notice 2009-72, the IRS will consider a project for an award of tax credits only if the DOE first provides a recommendation and ranking for the project. The DOE evaluation process is to take into consideration only those projects where there is a reasonable expectation of commercial viability and those projects that will

- provide the greatest domestic job creation (both direct and indirect) during the credit period,
- provide 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,
- have the lowest levelized cost of generated or stored energy, or of measured reduction in energy consumption or greenhouse gas emission (based on costs of the full supply chain), and
- have the shortest project time from certification to completion.

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Preliminary applications for DOE recommendation and ranking are due September 16, 2009. The form of preliminary application is included in Notice 2009-72. Fortunately, these preliminary applications need include only basic identifying information, a 300-word-or-less project description and a simple qualification checklist. See Notice 2009-72, pp. 60-61. The 300-word description is to include a summary of the project, a description of the type of energy property the manufacturing facility will produce, the project's current status, and the project's anticipated schedule for completion.

Final DOE applications are due October 16, 2009. Final DOE applications must contain extensive project information in prescribed formats. See Notice 2009-72, Appendix B, pp. 26, et seq. DOE will complete its merit review of final applications by December 16, 2009.

Credit applicants must also submit an application for certification to the IRS by December 16, 2009. These applications are to contain basic identifying and contact information and a CD containing the applicant's completed application for DOE recommendation. The IRS will notify applicants by January 15, 2010 whether their projects have been accepted or rejected and, if accepted, the amount of the credit allocated to the project. Successful applicants will be required to enter into an agreement with the IRS in the form of Exhibit A to Notice 2009-72 by March 15, 2010. As required by the statute, the IRS will publish the name and credit amounts of successful applicants.

Credit applicants should carefully review all of Notice 2009-72, including the detailed specifications for preliminary and final DOE applications set forth in Appendix B.

Available Material

The following administrative and legislative material is available with the indicated file sizes:

- Notice 2009-72 [362K],
- American Recovery and Reinvestment Tax Act of 2009, Division B of P.L. 111-5, § 1302, adding I.R.C. § 48C [41K] and
- H.Rpt 111-16, pp. 644-646, the Conference Committee's explanation of new section 48C [79K]

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