

July 21st Deadline for Therapeutic Discovery Grant or Tax Credit Applications

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On May 21, the Internal Revenue Service issued Notice 2010-45 (“IRS Notice”) providing details on applying for the Qualifying Therapeutic Discovery Project Program (“QTDP Program”) established by the Patient Protection and Affordable Care Act of 2010, including the application deadline of July 21, 2010. The \$1 billion QTDP Program established both a tax credit (“QTDP Credit”) and a grant (“QTDP Grant”) for investments in 2009 and 2010 by small and mid-size companies developing therapeutic medical projects.

Background

Who Qualifies

The QTDP program is limited to companies with no more than 250 employees at the time of the application. Commonly controlled and affiliated employers will be aggregated together and treated as a single employer for purposes of applying the 250-employee limitation. A company will not qualify for a QTDP Grant if it is (a) a federal, state or local governmental entity, (b) a tax-exempt organization, or (c) a partnership or other pass-through entity which has one or more owners which are either governmental entities or tax-exempt organizations.

Qualifying Therapeutic Discovery Project

A qualifying therapeutic discovery project includes any project which is designed to:

- treat or prevent diseases or conditions by conducting pre-clinical activities, clinical trials and clinical studies, or carrying out research protocols,
- diagnose diseases or conditions or to determine molecular factors related to disease or conditions by developing molecular diagnostics to guide therapeutic decisions, or
- develop a product, process or technology to further the delivery or administration of therapeutics.

Qualified Investments

Qualified investments include expenses incurred in 2009 and 2010 that were necessary for, and directly related to, the conduct of a qualifying therapeutic discovery project. Certain expenses are specifically excluded, including (1) salaries of certain highly compensated employees, (2) interest expenses, (3) facility maintenance expenses, (4) certain indirect costs, and (5) other expenses to be identified by the Secretary of the Treasury (“Secretary”).

Amount of QTDP Credit and QTDP Grant

The QTDP Credit will equal 50 percent of the “qualified investment” in any tax year with respect to a “qualifying therapeutic discovery project.”

The QTDP Grant will equal 50 percent of the “qualified investment” in any tax year with respect to a “qualifying therapeutic discovery project.” A QTDP Grant will not be includable in a company’s taxable income.

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A variety of rules will limit the ability of a company that receives either the QTDP Credit or the QTDP Grant to receive a “double benefit.” First, a company that receives the QTDP Grant will not be eligible for the QTDP Credit. Further, a company that receives either the QTDP Credit or the QTDP Grant will not be eligible to claim bonus depreciation, research credits and other tax benefits for the same expenditures. Finally, the tax basis of the property must be reduced by the amount of the QTDP Credit or QTDP Grant.

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Notice 2010-45

Application Deadlines

The application timeframe under the QTDP Program is very limited—applications will be accepted from **June 21, 2010 through July 21, 2010**. The IRS Notice states that the complete application (including the Project Information Memorandum described below) must be postmarked on or before July 21, 2010 to be eligible. Applications postmarked after that date will be rejected.

Form of Application

Applications for the QTDP Program are to be made on Form 8942. The IRS released **Form 8942 and its instructions on June 18, 2010**. A separate Form 8942 must be filed with the IRS for each qualifying therapeutic discovery project for which a QTDP Grant or QTDP Credit is sought. Completion of the Project Information Memorandum will require significant information about each project.

Limit

No taxpayer will be entitled to receive more than a combined allocation of \$5 million for both of QTDP Credits and QTDP Grants for 2009 and 2010.

Form of Project Information Memorandum

Each Form 8942 application must be accompanied by a Project Information Memorandum. The IRS Notice sets forth the required format and content of the memorandum, which includes both specific yes/no questions as well as provision for short narrative answers that support each yes answer and limited citations to scientific literature supporting the project claims. The rules for completion of the Project Information Memorandum include detailed requirements with respect to the format, including word limitations and font and margin size. An application that fails to satisfy these requirements may be rejected or portions of the application may not be considered.

Other Requirements

Applicants for a QDTP Grant must satisfy certain additional requirements. First, the applicant must have a Data Universal Number System (DUNS) number from Dun and Bradstreet. Applicants who do not yet have this number may request one at no cost. Second, the application must register with the Central Contractor Registration, which can be done online.

Preliminary Review Deadline

The IRS Notice provides that a preliminary review of each application will be completed on September 30, 2010.

Award Deadline

The IRS will approve or deny applications for certification no later than October 29, 2010; successful applicants will be notified by mail of the amount of the qualified investment that is certified as eligible for the QTDP Credit or QTDP Grant.

Selection Criteria

Each application will undergo review by the Department of Health and Human Services (“HHS”) to determine if it meets the QDTP award criteria. In its review, HHS will determine whether the application is for a project that is a qualifying therapeutic discovery project. If the project meets this hurdle, HHS will determine whether the project shows reasonable potential to (a) result in new therapies (i) to treat areas of unmet medical need, or (ii) to prevent, detect, or treat chronic or acute diseases and conditions, (b) to reduce long-term health care costs in the United States, or (c) to significantly advance the goal of curing cancer within the next 30 years. In approving applications for certification, the IRS will consider the results of the HHS review together with the potential of the project to create and sustain high-quality, high-paying jobs, and to advance U.S. competitiveness in the fields of life, biological, and medical sciences.

Action Needed

Completing the Form 8942 application and the Project Information Memorandum will require significant time and effort. Given the absolute deadline of July 21, anyone interested in the QTDP Program should immediately note the requirements set forth in the IRS Notice and begin putting together the application.

Available Material

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

- [Patient Protection and Affordable Care Act of 2010 \(H.R. 3590, P.L. 111-148\), § 9023](#), enacting I.R.C. § 48D [56.4K]
- [IRS Notice 2010-45](#) [80.5K]
- [Form 8942](#) [112K]
- [Form 8942 Instructions](#) [146K]

Recent IRS Rulings Clarify Tax Treatment of Registered Domestic Partners

Alexis M. Petas

On May 28, 2010, the Internal Revenue Service released Private Letter Ruling 201021048 (the “Ruling”) addressing several issues related to the federal income and gift taxation of registered domestic partners in California. Under the Ruling, income of registered domestic partners is treated consistently with California state law, and thus is treated as community property for federal income tax purposes.

Effective January 1, 2007, California conformed its personal income tax rules to its community property regime for registered domestic partners. Thus, for taxable years beginning after December 31, 2006, a California registered domestic partner must report one-half of the community income on his or her California personal income tax return. This rule applies to all community income, both that received as compensation for personal services and that received as income from property. As a result of this change, registered domestic partners are required to file either as “married/RDP filing jointly” or “married/RDP filing separately” for California personal income tax purposes. Under federal law, as interpreted by the IRS, registered domestic partners are not permitted to file joint federal income tax returns.

In the Ruling, the IRS states that a registered domestic partner is entitled to one-half of the credits for income tax withholding from the wages of each of the domestic partners, as that taxpayer is also the recipient of one-half of the community property income. The Ruling also addresses whether such treatment causes community property to be treated as a transfer for federal gift tax purposes under Internal Revenue Code section 2501. The IRS ruled that although a California taxpayer’s earnings are treated as community property, and thus vested in the other member of the community, such treatment will not cause the vested property to be treated as a transfer for federal gift tax purposes.

Additionally, on May 28, 2010, the IRS released Chief Counsel Advice 201021050 (the “Memorandum”) regarding the reporting of income of registered domestic partners in California. Under the Memorandum, and consistent with the Ruling, the Chief Counsel’s Office states that for federal income tax purposes, it intends to treat income of California registered domestic partners in the same manner as California’s treatment of community property income. This holding also

applies to all community income, both that received as compensation for personal services and income from property. The Memorandum also provides that registered domestic partners may, but are not required to, amend their returns to report income according to the above discussed guidelines for taxable years beginning after December 31, 2006, and before January 1, 2010.

Addressing another aspect of community property of registered domestic partners in California, the IRS released Chief Counsel Advice 201021049 on May 28, 2010, stating that the IRS can consider assets of a taxpayer’s registered domestic partner in California when determining the reasonable collection potential of that taxpayer’s Offer in Compromise under Internal Revenue Code section 7122. Previously, the IRS recognized that the assets of both owners of community property in community property states should be considered in determining the reasonable collection potential of a taxpayer’s Offer in Compromise. Thus, the IRS concluded that because California community property law applies to registered domestic partners, such community property should similarly be considered in evaluating an Offer in Compromise.

Private letter rulings, technical advice memoranda, Chief Counsel advice and similar documents published by the IRS have no value as precedent and are generally treated in litigation with the IRS as entitled to no more weight than a position advanced by the Commissioner on brief. See, e.g., *Laglia v. Commissioner*, 88 T.C. 894, 897 (1987). Moreover, Internal Revenue Code section 6110(k)(3) provides that a “written determination” may not be “used or cited as precedent.” Internal Revenue Code section 6110(b)(1) defines the term “written determination” as a “ruling, determination letter, technical advice memorandum, or Chief Counsel advice.” However, private letter rulings are often helpful in understanding the position of the IRS with respect to the issues addressed. For example, in *Rowan Cos. v. United States*, 452 U.S. 247 (1981), footnote 17 at 261,

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the United States Supreme Court examined a series of private letter rulings in discussing the history of the IRS' interpretation of a provision of the Internal Revenue Code, but noted the lack of precedential value of those rulings. Additionally, Chief Counsel advice does have weight within the IRS; it is viewed as written advice or instruction prepared by the National Office which conveys an interpretation of a revenue provision or IRS position, and is recognized by the IRS as providing correct and impartial interpretations of the internal revenue laws. See IRM 33.1.3.1.1 (Definition of Chief Counsel Advice); IRM 4.46.1 (Overview of LMSB Guide for Quality Examinations).

On a related matter at the state level, on May 12, 2010, the State of New York Commissioner of Taxation and Finance issued New York Advisory Opinion No. TSB-A-10(2)I, May 12, 2010 (the "Opinion"), regarding whether marriage to a same-sex partner will be recognized for New York State personal income tax purposes. Under New York State law, an individual's marital filing status is the same as that individual's federal filing status. As previously noted, under the IRS' interpretation of federal law, same-sex married couples are not permitted to file joint federal income tax returns. Therefore, the Opinion concludes that marriage to a same-sex partner will not be recognized for purposes of New York State personal income tax.

Important Notice to Readers

This material is not intended to constitute a complete analysis of all tax considerations. Internal Revenue Service regulations generally provide that, for the purpose of avoiding United States federal tax penalties, a taxpayer may rely only on formal written opinions meeting specific regulatory requirements. This material does not meet those requirements. Accordingly, this material was not intended or written to be used, and a taxpayer cannot use it, for the purpose of avoiding United States federal or other tax penalties or of promoting, marketing or recommending to another party any tax-related matters.