



Section 1603 Grants

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The Basics

- ARRA created a program for Department of Treasury to provide a grant to owners of qualified renewable energy property that elect the grant in lieu of Section 48 ITC or the Section 45 PTC
- Grant is either 30% or 10% of the basis of qualified property; the rate depends on the type of technology (most are 30%; geothermal under Section 48 (relevant only after Jan. 1, 2014), micro turbines, combined heat and power, geothermal heat pumps are 10%)
- The qualified property must be placed in service in 2009 or 2010, or construction commenced by the end of 2010 and completed before the applicable credit termination date (1/1/13 for wind; 1/1/14 for biomass and qualified hydro; 1/1/17 for geothermal and solar)

Treasury Guidance

- On July 9, Treasury issued guidance regarding the grant program, terms and conditions to which grant recipients must comply, and a sample form of application for a grant
- Guidance addresses application procedures, applicant eligibility, property eligibility, recapture, assignment and other issues



Applications

- Applications will be accepted via a web based program
- Treasury will begin accepting applications on or about August 1. For projects going in service in 2009 and 2010, the application is to be submitted after the property has been placed in service and before 10/1/11
- For projects commencing construction in 2010 and not completed before 12/31/10, application is to be submitted after construction begins and before 10/1/11

Applications

■ Application is to include:

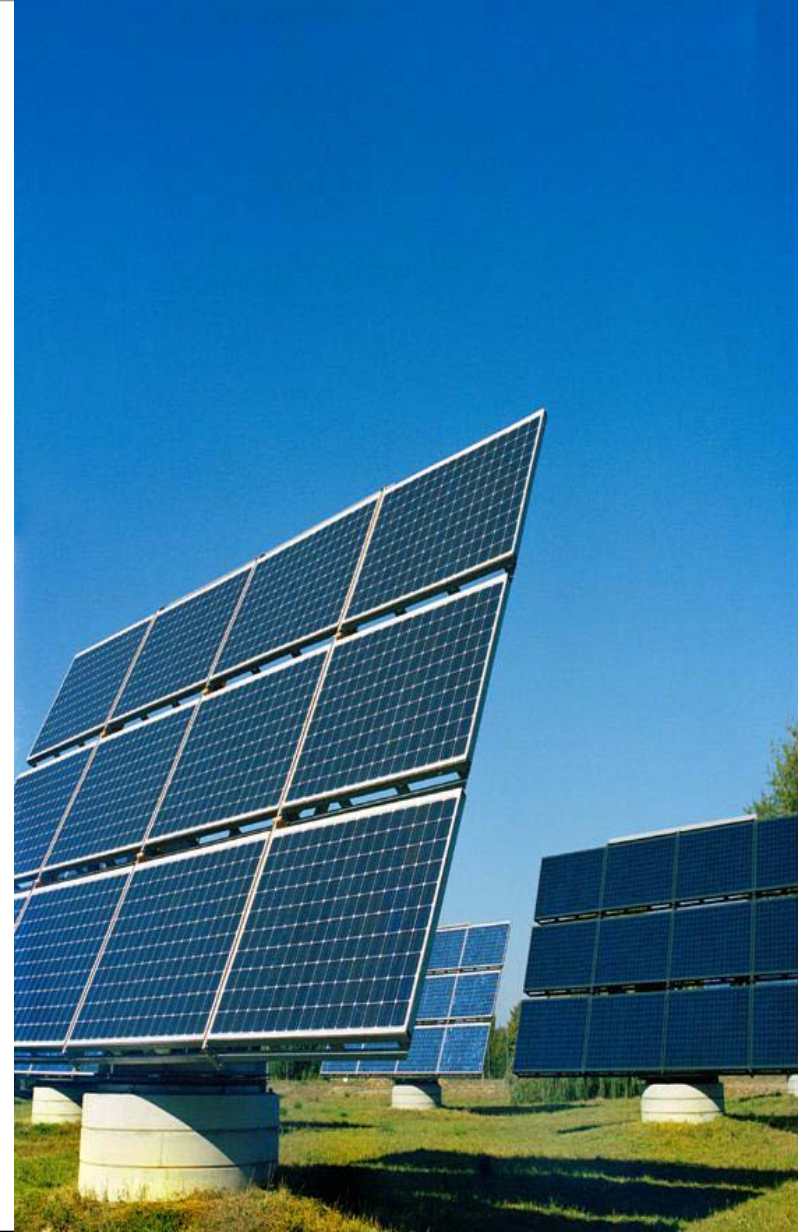
- Signed application form
- Signed Terms and Conditions
- Supporting documentation
- Complete payment information

■ Supporting documentation to include:

- Final engineering documents stamped by a licensed professional engineer
- Third party certified commissioning report demonstrating in service (or if in construction and not complete by the deadline then evidence of commencement of construction)
- Interconnection agreement and subsequent interconnection documentation
- Detailed breakdown of costs (with accountant certification for projects over \$500,000; more guidance to be provided regarding this certification)

Applications

- Before payment can be made, applicant must register with Central Contractor (Registration at: www.ccr.gov/startregistration.aspx) and receive a DUNS number from Dun and Bradstreet, 1-866-705-5711
- Payment by electronic funds transfer to be within 60 days after the later of in service or application
- May pay sooner; but may also be delayed based on number of applications



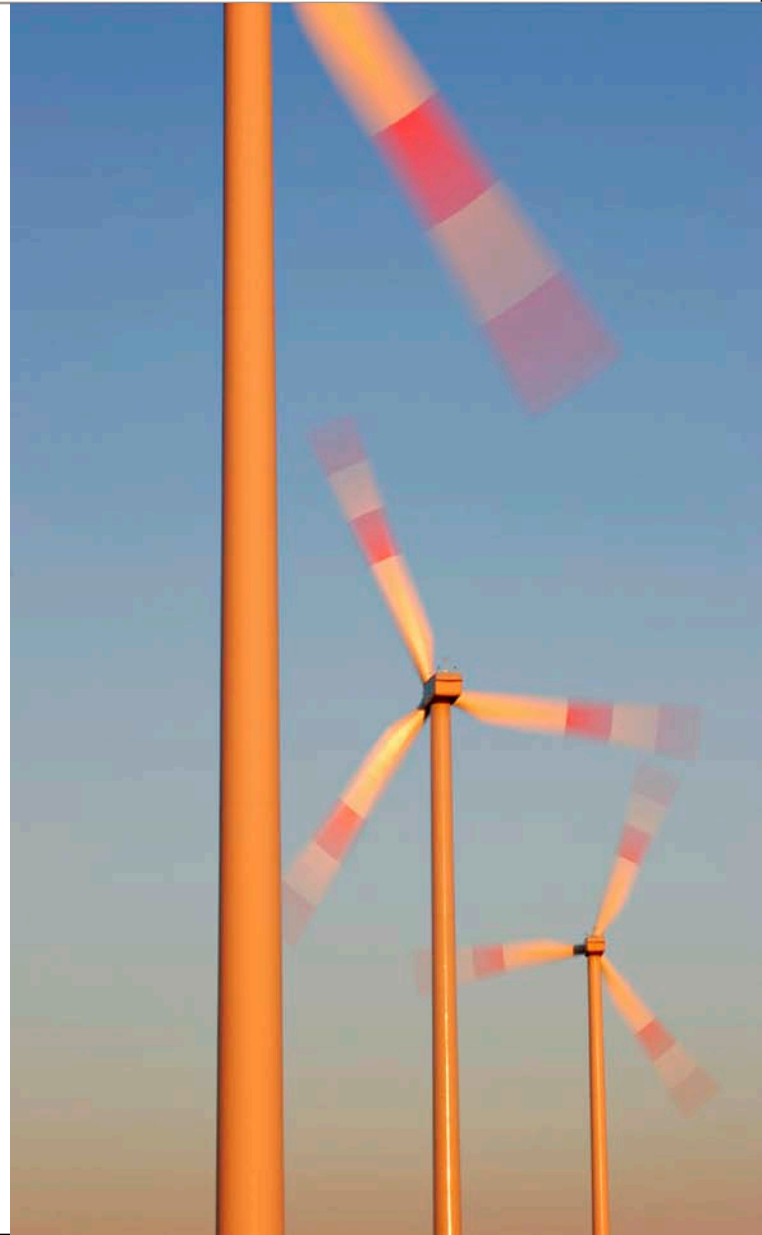
Applicant Eligibility

- Applicant must be owner of the qualified property at the time originally placed in service
- Charitable organizations, government instrumentalities, qualified issuers of clean energy bonds do not qualify; same for partnerships including such entities
- A taxable C corp owned by such a disqualified entity may be partner/member in an owner, and owner will not be disqualified
- Foreign person is eligible for grant only if more than 50% of the gross income for the project is subject to US tax (should be true)
- Qualification is determined at the time application is received; suggesting (i) curing participation by a disqualified person could occur after in service and (ii) could transfer project after the grant is applied for and before it is received – Neither recommended

Applicant Eligibility

■ Leases

- In sale leaseback, lessor may acquire within three months of in service and be treated as original user
- Lessors may elect to pass through the grant to lessee (if lessee is the original user). Lessee treated as acquiring the property for fair market value on the date of transfer
- Documentation for lease applicants includes evidence of qualifying lease and lessor election
- Note both lessor and lessee must be independently eligible for the grant for the pass through (and mutual savings banks, REITS and regulated investment companies may not elect to pass through)



Qualified Property

- Property must be “specified energy property”; Treasury guidance summarizes various types of energy property eligible for the grant (these appear to track definitions in the Code)
- Includes only tangible property that is integral part of the qualified facility and located at its site
 - Does not include a building, but necessary roads are included
 - For biomass and municipal solid waste, on site fuel handling and storage included
 - For geothermal, steam collection system included
- Must be located in the United States (and moving outside of the US after receiving the grant results in recapture)
- Applicant must be the original user of the property but up to 20% may be used property

Eligible Basis

- Eligible basis includes all costs included in basis for purposes of depreciation
- Costs that are deductible in the year paid or incurred are not included
- Eligible basis does not include cost attributable to a non qualifying activity
 - Example: co firing biomass/coal plant would pro rate



Commencement of Construction

- Physical work of a significant nature must commence by 12/31/10
- Self construction: work of a significant nature excludes preliminary activity such as planning and engineering and site preparation but will include excavations for footings and foundations
- Construction by contract: contract for construction must be enforceable under state law, cannot limit damages to less than 5% of the total contract price, and cannot provide for a full refund in lieu of damages in case of breach or cancellation
- Safe harbor: paying more than 5% of the total cost of the project excluding land and preliminary activities

Recapture

- Recapture ratably over five years in the same manner as the ITC if during such period the applicant disposes of the property to a disqualified person or of the property ceases to be specified energy property
- Selling or disposing of property other than to a disqualified person will not result in recapture so long as the property continues to qualify as specified energy property and the purchaser agrees to be jointly liable with the applicant for recapture



Recapture

- Temporary cessation of operation does not lead to recapture. Cessation due to force majeure will not result in recapture
- For co firing biomass projects, annual determination of percentage that is qualified property based on fuel use
- Applicant will be liable for recapture even if the applicant no longer controls—in a sale lease back, a disqualified transfer by the lessor may expose the lessee
- Recapture is a non tax claim, unsecured and junior to secured creditors; special rules as to tax liens will not apply



Partnership accounting

- Treasury guidance does not address partnership accounting issues; Treasury is considering further
- Generally, capital account balances will increase by the amount of the grant and decrease by the reduction in depreciable basis equal to 50% of the grant
- Not clear how allocations of increase in capital account and increase in basis will be allocated to partners



Assignments

- Applicant may submit with the application a notice of assignment under the Federal Assignment of Claims Act
- Certain limitations on assignment do not apply for an assignment to a financial institution of money due or to become due under a contract; Treasury has suggested grant will be such a contract



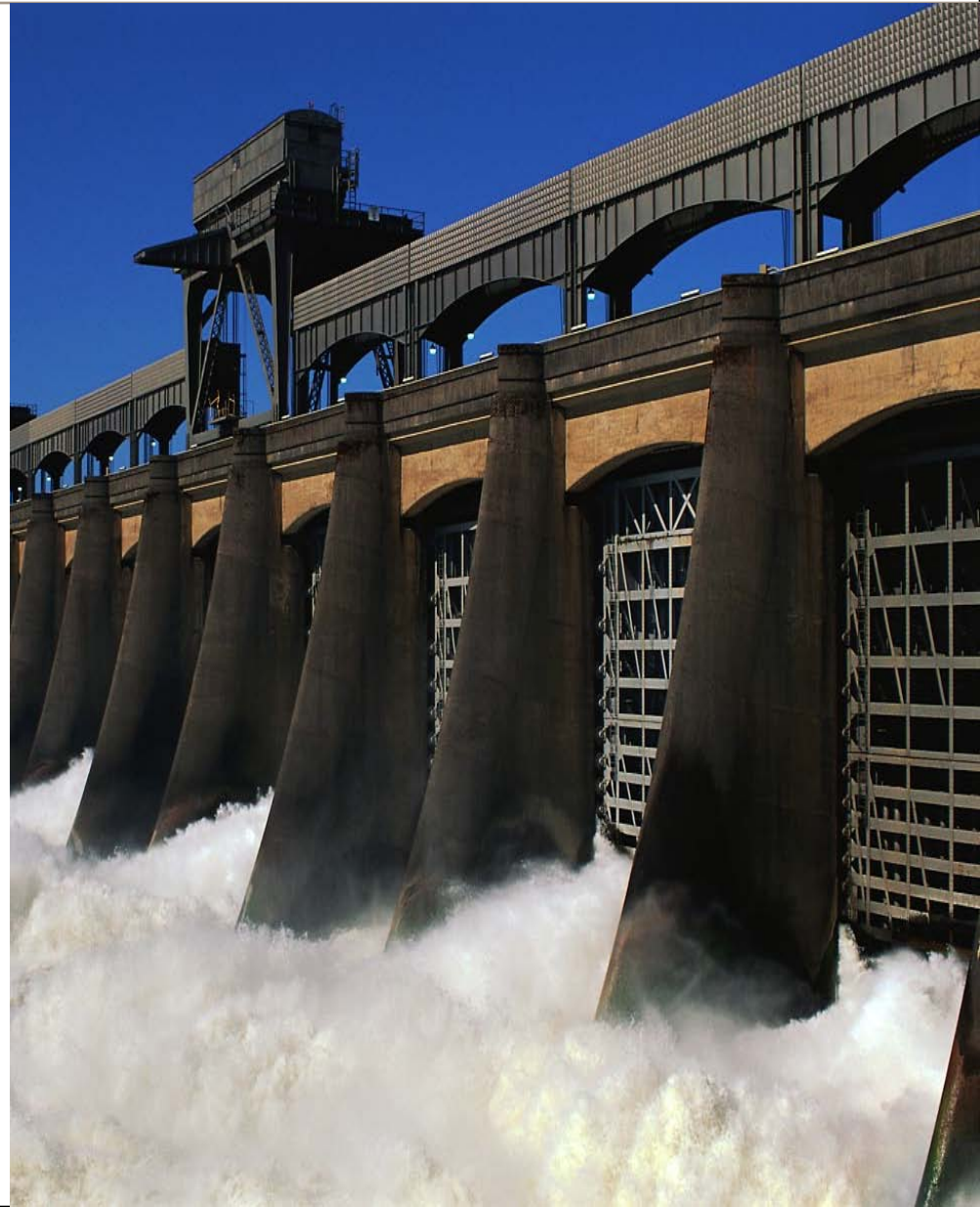
Terms and Conditions

- Applicant agrees under penalty of perjury
- Include representations as to status of applicant and the project
- Applicant to provide annual reporting and certification
- A material failure to comply with any term of the award, the terms and conditions or the guidance may result in Treasury action, including disallowance; statute of limitations applies



Other

- Davis Bacon does not apply
- NEPA does not apply





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Simon Friedman is a tax partner in the Los Angeles office of Milbank, Tweed, Hadley & McCloy LLP. He has extensive experience in all areas of tax law matters with an emphasis on partnerships, mergers and acquisitions, bankruptcy, and alternative energy. He joined Milbank's Los Angeles office in 1997 after serving for 10 years in the Firm's New York headquarters.

During his career at Milbank, Mr. Friedman has had primary tax responsibility for structuring numerous funds, including "mark to market" hedge funds, funds specializing in debt, including high yield and distressed debt, venture capital and technology funds, real estate funds, and funds investing in infrastructure and power projects. He has also advised these funds on acquisitions, sales and debt restructurings.

Mr. Friedman has represented numerous debtors and creditors in numerous bankruptcies, including American Health Care, PSE&G, World Com and Eagle Picher. He assisted in the reorganization of Rockefeller Center. In the field of mergers and acquisitions, he has represented both buyers and sellers of public companies, private corporations, S-corporations, partnerships and limited liability companies in both taxable and tax-free acquisitions, dispositions, and spin-offs. The businesses involved in these transactions have included high tech companies, television and radio stations, chemical companies, broker-dealers, and casinos. Mr. Friedman has represented sponsors, tax equity and debt in connection with the purchase or construction of facilities generating electricity through the use of wind, solar, geothermal and biomass energy.

Prior to moving to Los Angeles, Mr. Friedman was a member of the New York State Bar Association, where he served on a number of Tax Section committees. He also served as a member of the New York City Bar Association. He is a member of the New York and California Bar.

Mr. Friedman received a J.D. from Yale Law School, where he served as an editor of the *Yale Law Journal*. He also has a Ph.D. in English Literature from Yale University and B.A. degrees from King's College, Cambridge and from Columbia College.

THANK
You!