



# Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009

Renewable Energy

INDUSTRY ALERT

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## **Program Guidance**

The United States Department of the Treasury (Treasury) makes payments to eligible persons who place in service specified energy property and apply for such payments. The purpose of the payment is to reimburse eligible applicants. Non-business energy property described in section 25C of the Internal Revenue Code (IRC) and residential energy efficient property described in section 25D of the IRC do not qualify.

By receiving payments, applicants are electing to forego tax credits under sections 48 and 45 of the IRC. Applicants must agree to the terms and conditions applicable to the Section 1603 program.

### **I. Overview**

Treasury will make payments to qualified applicants in an amount generally equal to 10% or 30% of the basis of the property, depending on the type of property. Applications will be reviewed and payments made within 60 days from the later of the date of the complete application or the date the property is placed in service. The program will temporarily fill the gap created by the diminished investor demand for tax credits.

### **II. Application Procedures**

Applicants may submit an application on-line by going to [www.treasury.gov/recovery](http://www.treasury.gov/recovery). Applications may only be submitted after the property to which the application relates is placed in service, or is under construction. All applications must be received before the statutory deadline of October 1, 2011.

For property placed in service in 2009 or 2010, applications must be submitted after the property has been placed in service and before October 1, 2011. For property not placed in service in 2009 or 2010 but for which construction began in 2009 or 2010, applications must be submitted after construction commences but before October 1, 2011. For property not yet placed in service at the time of the application, Treasury will review such applications and notify the applicant if all eligibility requirements that can be determined prior to the property being placed in service have been met. If so notified, applicants must then submit, within 90 days after the date the property is placed in service, supplemental information sufficient for Treasury to make a final determination.

If an applicant is applying for payments for multiple units of property that are treated as a single, larger unit of property, all such units may be included in a single application.

The application form requests the applicant's Data Universal Numbering System (DUNS) number. Applicants must also register with the Central Contractor Registration (CCR). To register, go to [www.ccr.gov/startregistration.aspx](http://www.ccr.gov/startregistration.aspx). The registration must be completed before a payment can be made.

When an application is approved, it will send a notice to the applicant. Treasury makes payment no later than five days from the date of the notice. Payment will be made by Electronic Funds Transfer based upon the banking information in the CCR.

In cases where an applicant has not submitted sufficient information, the applicant will be so notified and given 21 days from the date of the notice to submit additional information. If additional information is not received, the application will be denied. When Treasury determines that the application does not qualify for payment, the applicant will be so notified. Such notification will include the reasons for the determination and will be considered the final agency action on the application.

### **III. Applicant Eligibility**

Certain persons are not eligible to receive Section 1603 payments. These include:

- any Federal, state or local government, including any political subdivision, agency or instrumentality thereof
- any organization that is described in section 501(c) of the IRC and is exempt from tax under section 501(a) of the IRC
- any entity referred to in paragraph (4) of section 54(j) of the IRC or
- any partnership or other pass-thru entity, any direct or indirect partner (or other holder of an equity or profits interest) of which is an organization or entity described above unless this person only owns an indirect interest in the applicant through a taxable C corporation.

Having as a direct or indirect partner, shareholder, or similar interest holder a taxable C corporation any of whose shareholders are not eligible to receive payments does not affect the eligibility of the partnership or pass-thru entity. Neither a Real Estate Investment Trust, nor a cooperative organization is a pass-thru entity for this purpose.

For an applicant to be eligible it must be the owner or lessee of the property and must have originally placed the property in service.

A foreign person or entity may be eligible if the person or entity qualifies for the exception in section 168(h)(2)(B) of the IRC.

Eligibility will be determined as of the time the application is received.

### **IV. Property and Payment Eligibility**

#### **A. Placed in Service**

Qualified property includes expansions of an existing property that is qualified property.

Placed in service means that the property is ready and available for its specific use.

#### **B. Credit Termination Date and Applicable Payment Percentage**

Specified Energy Property	Credit Termination Date	Applicable Percentage of Eligible Cost Basis
Large Wind	Jan 1, 2013	30%
Closed-Loop Biomass Facility	Jan 1, 2014	30%
Open-Loop Biomass Facility	Jan 1, 2014	30%
Geothermal under IRC sec. 45	Jan 1, 2014	30%
Landfill Gas Facility	Jan 1, 2014	30%
Trash Facility	Jan 1, 2014	30%
Qualified Hydropower Facility	Jan 1, 2014	30%
Marine & Hydrokinetic	Jan 1, 2014	30%
Solar	Jan 1, 2017	30%
Geothermal under IRC sec. 48	Jan 1, 2017	10%*

Fuel Cells	Jan 1, 2017	30%**
Microturbines	Jan 1, 2017	10%***
Combined Heat & Power	Jan 1, 2017	10%
Small Wind	Jan 1, 2017	30%
Geothermal Heat Pumps	Jan 1, 2017	10%

\*Geothermal Property that meets the definitions of qualified property in both § 45 and § 48 is allowed either the 30% credit or the 10% credit but not both.

\*\* For fuel cell property the maximum amount of the payment may not exceed an amount equal to \$1,500 for each 0.5 kilowatt of capacity.

\*\*\* For microturbine property the maximum amount of the payment may not exceed an amount equal to \$200 for each kilowatt of capacity.

### C. Beginning of Construction

Construction begins when physical work of a significant nature begins.

**Self construction.** If an applicant manufactures, constructs, or produces property for use by the applicant in its trade or business (or for its production of income), construction begins when physical work of a significant nature begins. Physical work does not include preliminary activities. However, if a facility such as a wind turbine and tower unit is to be assembled on-site from modular units manufactured off-site and delivered to the site, construction begins when physical work of a significant nature commences at the off-site location.

**Construction by contract.** For property that is manufactured, constructed, or produced under a written binding contract that is entered into prior to the manufacture, construction, or production of the property construction begins when physical work of a significant nature begins under the contract. A contract is

binding only if it is enforceable under State law against the applicant or a predecessor, and does not limit damages. For this purpose, a contractual provision that limits damages to an amount equal to at least 5 percent of the total contract price will not be treated as limiting damages to a specified amount. If a contract provides for a full refund of the purchase price in lieu of any damages allowable by law in the event of breach or cancellation, the contract is not considered binding.

**Safe Harbor.** An applicant may treat physical work of a significant nature as beginning when the applicant incurs (in the case of an accrual basis applicant) or pays (in the case of a cash basis applicant) more than 5 percent of the total cost of the property (excluding the cost of any land and preliminary activities such as planning or designing, securing financing, exploring, or researching). When property is manufactured, constructed, or produced for the applicant by another person, this test must be met by the applicant, not the other person. The economic performance standards of IRC section 461(h) apply.

#### **D. Units of Property**

For purposes of determining the beginning of construction of property or the date property is placed in service, all the components of a larger property are a single unit of property if the components are functionally interdependent. Components of property that are produced by, or for, the applicant are functionally interdependent if the placing in service of one component is dependent on the placing in service of the other component.

The owner of multiple units of property located at the same site and that will be operated as a larger unit may elect to treat the units as a single unit of property for purposes of determining the beginning of construction and the date the property is placed in service.

#### **E. Specified Energy Property Installed on Other Property**

Only the portion of a facility that is described in section 48 of the IRC is taken into account in computing the Section 1603 payment.

#### **F. Location of Property**

Property used predominantly outside the United States does not qualify.

#### **G. Original Use**

The original use of the property must begin with the applicant. The cost of used parts is not more than 20 percent of the total cost of the facility. If new property is originally placed in service by a person and sold to an applicant and leased back to the person by the applicant within three months, unless the lessor and lessee elect, the applicant-lessor is considered the original user.

## H. Required Documentation

**Eligible Property** – Design plans (required of all applicants). Final engineering design documents, stamped by a licensed professional engineer.

**Placed in Service** - the following documentation must be provided, as applicable, to demonstrate that the property is placed in service:

**Commissioning report.** A report provided by the project engineer, or the equipment vendor, or an independent third party that certifies that the equipment has been installed, tested, and is ready and capable of being used for its intended purpose.

**Interconnection agreement (only for properties that are interconnected).** Applicants must also submit any subsequent documentation to demonstrate that the interconnection agreement has been placed in effect.

**Under Construction but not yet Placed in Service** - Paid invoices and/or other financial documents demonstrating that physical work of a significant nature has begun. These documents must demonstrate that more than 5 percent of the total cost of the property has been incurred or paid by the applicant.

**Binding contract** (for property not yet placed in service that is being manufactured, constructed or produced for the applicant by another person).

**Leased Property** - the following documentation must be provided where the applicant is the lessee of the property to demonstrate that the lessor and lessee have entered into the agreement required by section VI of this guidance.

The written agreement with the lessor described in Section VI of this Guidance.

## V. Eligible Basis

The basis of property is determined in accordance with the general rules for determining the basis of property for federal income tax purposes. Cost, unreduced by any other adjustment to basis, such as that for depreciation, and includes all items properly included in the depreciable basis of the property.

Only the cost basis of property placed in service after 2008 is eligible.

The eligible basis of a qualified facility does not include the portion of the cost of the facility that is attributable to a non qualifying activity.

Applicants must submit with their application documentation to support the cost basis claimed for the property. Supporting documentation includes a detailed breakdown of all costs included in the basis. Other supporting documentation must be retained by the applicant. For properties that have a cost basis

in excess of \$500,000 applicants must submit an independent accountant's certification attesting to the accuracy of all costs claimed as part of the basis of the property.

## **VI. Leased Property**

A lessor may elect to pass-through the payment to a lessee. Such an election will treat the lessee as having acquired the property for an amount equal to the independently assessed fair market value of the property on the date the property is transferred to the lessee and will generally follow the rules in the IRC and Treasury regulations governing elections to allow lessees to receive energy tax credits.

The lessor and lessee must agree that the lessor waives all right to a Section 1603 payment or a production or investment tax credit with respect to the eligible property, before the lessee may apply for a Section 1603 payment with respect to such property. The lessee must agree to include ratably in gross income over the five year recapture period an amount equal to 50 % of the amount of the Section 1603 payment.

Both the lessor and the lessee must be persons eligible to receive a payment. This election may not be made by a lessor that is a mutual savings bank or similar financial organization, a regulated investment company or a real estate investment trust.

The election of a lessor may be made with respect to each property leased by the lessor to the lessee. The lessee's written consent is required. The lessor's election is made by a written agreement with the lessee that contains the following information:

- A waiver of the lessor's right to receive any payment under Section 1603 with respect to the property, as well as a waiver of the lessor's right to claim a production or investment tax credit under sections 45 and 48 of the IRC with respect to the same property for the taxable year of the payment or subsequent years;
- All information necessary to determine the amount of lessee's Section 1603 payment;
- The name, address, and employer identification number of the lessor and the lessee;
- A description of each property with respect to which the election is being made;
  - The date on which possession of the property is transferred to the lessee; and
  - The lessee's consent to the election.
- A copy of this agreement must be included in the lessee's application for the payment. This election is irrevocable.

### Special Rule for Sale-leaseback Transaction

In a sale-leaseback transaction, the lessee, who is not the owner of the property, may claim the payment, if three conditions are satisfied:

First, the lessee must be the person who originally placed the property in service.

Second, the property must be sold and leased back by the lessee, or must be leased to the lessee, within three months after the date the property was originally placed in service.

Third, the lessee and lessor must not make an election to preclude application of the sale-leaseback rules.

### **VII. Recapture**

If the applicant disposes of the property to a disqualified person or the property ceases to qualify as a specified energy property within five years from the date the property is placed in service, the payment must be repaid.

Property is considered disposed of if any interest in the property or in the applicant or in any partnership or pass-thru entity that is a direct or indirect owner of an interest in the applicant is sold to: any Federal, state or local government, including any political subdivision, agency or instrumentality thereof; any organization that is described in section 501(c) of the IRC and is exempt from tax under section 501(a) of the IRC; any entity referred to in paragraph (4) of section 54(j) of the IRC; or any partnership or other pass-thru entity any partner (or other holder of an equity or profits interest) of which is a Federal, state or local government, including any political subdivision, agency or instrumentality thereof; an organization that is described in section 501(c) of the IRC and is exempt from tax under section 501(a) of the IRC; or an entity referred to in paragraph (4) of section 54(j) of the IRC. A taxable corporation some or all of whose shareholders are disqualified persons is not a disqualified person and such a corporation's ownership of an interest in a partnership or other pass-thru entity will not cause the partnership or other entity to be treated as a disqualified person.

Property ceases to qualify as a specified energy property if the use of the property changes so that it no longer qualifies as specified energy property. Permanent cessation of production will result in recapture. Permanent cessation of production due to natural disaster will not result in recapture unless the property is replaced with property for which a Section 1603 payment is allowed.

Selling or otherwise disposing of the property to an entity other than a disqualified person does not result in recapture provided the property continues to qualify as a specified energy property and provided the purchaser of the property agrees to be jointly liable with the applicant for any recapture. Recapture would occur in the event the property is resold to a disqualified person or ceases to qualify as a specified energy property. The applicant remains jointly liable to the Treasury for the recapture amount even if the applicant no longer has control over the property.

Where a lessor elects to pass through the Section 1603 payment to a lessee, if the lessor sells the property to a disqualified person, the lessee is liable to the Treasury for the recapture amount even if the lessee maintains control over the property. If the lease is terminated and possession of the property is transferred by the lessee to the lessor or any other person, the lessee is liable to the Treasury for the recapture amount if the use of the property changes during the recapture period so that it no longer qualifies as specified energy property.

Applicants are not required to post a bond as a condition of receiving payment under the section 1603 program and receipt of payment does not create a lien on the property in favor of the United States. However, funds that must be repaid to the Treasury under these rules are considered debts owed to the United States and if not paid when due, will be collected by all available means against any assets of the applicant, including enforcement by the United States Department of Justice. Debts arising under these rules are not considered tax liabilities.

## **VIII. Miscellaneous Provisions**

### **A. Assignment of Payment**

Applicants may submit, along with their request for payment, a Notice of Assignment, assigning the payment to a third party provided the requirements of the Federal Assignment of Claims Act (31 U.S.C. 3727) are met. The Notice of Assignment will include the DUNS number for the third party. The third party will be required to register in CCR.

### **B. National Environmental Protection Act (NEPA)**

A Section 1603 payment with respect to specified energy property does not make the property subject to the requirements of NEPA and similar laws.

### **C. Davis- Bacon**

A 1603 payment with respect to specified energy property does not make the property subject to the requirements of the Davis-Bacon Act.

### **D. Treatment of Payments as Taxable Income**

Except as described in Section IV of this Guidance with respect to leased property, a Section 1603 payment with respect to specified energy property is not includible in the gross income of the applicant. The basis of the property is reduced by an amount equal to 50% of the payment.

### **E. Real Estate Investment Trusts**

A Real Estate Investment Trust (REIT) will be eligible to receive Section 1603 payments only to the extent allowed by section 50 of the IRC. IRC section 50(d)(1) specifies that rules similar to the rules of former IRC section 46(e) will apply. IRC section 46(e)(1)(B) provides that, in general, in the case of a REIT,

qualified investment is limited to the REIT's ratable share of such qualified investment. The ratable share is a ratio, the numerator of which is its taxable income and the denominator of which is its taxable income computed without regard to the deduction for dividends paid (provided by IRC section 857(b)(2)(B)). For this purpose, the REIT's taxable income is determined without regard to any deduction for capital gains dividends and by excluding any net capital gain.

#### **F. Applicability of Normalization Rules**

Payments received under the Section 1603 program must be normalized. See former IRC Section 46(f).

#### **G. Reporting**

Applicants will be required to provide reports, as required by Treasury, including an annual performance report as set forth in the Terms and Conditions.

**-End of Redacted Summary-**

**Please see official guidance (20 pages) in its entirety before apply or proceeding with an application, or contact your Reznick professional with questions. For additional information on Reznick Group and our services for the renewable energy industry, visit:**  
[www.reznickgroup.com/renewableenergy](http://www.reznickgroup.com/renewableenergy)

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