



## Summary of Treasury Grant Program Guidance and Solar-Related Guidance

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On July 9, 2009, the U.S. Treasury Department (“Treasury”) released guidance related to the Treasury Grant program enacted under Section 1603 of the American Recovery and Reinvestment Tax Act of 2009. Generally, Section 1603 provides a 30% cash grant in lieu of investment tax credits for solar facilities that are (a) placed in service in 2009 or 2010 (regardless of when construction began), or (b) placed in service after 2010 but before January 1, 2017, but only if the construction of such property began during 2009 or 2010. The Treasury Grant is only available for property that is used in a trade or business or held for the production of income. Accordingly, non-business energy property and residential energy efficient property eligible for tax credits under Section 25C and 25D of the Internal Revenue Code (the “Code”) do not qualify for a Treasury Grant.

This document is only a summary of certain aspects of the Treasury Grant program guidance. Complete details regarding the application process and the program guidance is available at: <http://www.seia.org/galleries/pdf/Grant%20program%20guidance%2007%2009%2009.pdf>.

**For more information on the grant program beyond the scope of this document, SEIA will be hosting a webinar on the Treasury Grant Program on July 13, 2009 at 1:00 pm ET. Participants will be Laura Jones (Hunton & Williams), David Lowman (Hunton & Williams), Keith Martin (Chadbourne & Parke), and Stacy Short of the IRS Chief Counsel's Office.**

### Application

**It is critical that the application is complete and includes all information identified in the guidance document. Incomplete applications will be rejected and the 60 day approval/ payment period will not begin until a complete application is submitted.**

In addition to the program guidance, Treasury also released a sample application. However, Treasury is not accepting applications for the Treasury Grant program at this time. It is expected that Treasury will begin to accept applications on or about August 1, 2009. Applications must be submitted on-line at [www.treasury.gov/recovery](http://www.treasury.gov/recovery) when the application window opens. For property placed in service in 2009 or 2010, an application cannot be submitted for a project until after the project is placed in service, and must be submitted before October 1, 2011. For projects that are under construction in 2009 or 2010, but not placed in service until after 2010, applications must be submitted after construction has begun, but before October 1, 2011.

Payment of the cash grant will be made within 60 days from the later of (a) the date of the complete application or (2) the date the property is placed in service. For projects that are not

placed in service when the application is submitted, the application process may include two stages (an initial application and supplemental information).

Certain documentation must be submitted with the application to demonstrate that the property is eligible property that has been placed in service, or if placed in service after 2010, that construction began in 2009 or 2010. The types of documentation that must be submitted depends on the type of and other facts relating to the facility.

### **Eligible Applicants**

Certain entities are not eligible for Treasury Grants, including (a) Federal, state or local governments (or any political subdivision, agency or instrumentality thereof), (b) any organization described in Section 501 of the Code and exempt from tax under Section 501(a) of the Code, (c) any entity described in Section 54(j)(4) of the Code, or (d) any partnership or other pass-thru entity which has any of the entities described in (a) through (c) above as a direct or indirect partner, unless such ineligible entity owns an indirect interest in the applicant through a taxable C corporation. The guidance clarifies that a foreign person or entity is eligible for a cash payment if at least 50 percent of the income of the person or entity (or shareholder) is subject to US income tax (the exception provided under Section 168(h)(2)(B) of the Code).

### **Beginning of Construction**

When construction begins is important for projects on which construction begins in 2009 or 2010 but the project is not placed in service until after 2010. The guidance provides that construction begins when physical work of a significant nature begins and provides a safe harbor rule. In the case of self-constructed property (the applicant manufactures, constructs or produces property for its own use in a trade or business or for the production of income), construction begins when physical work of a significant nature begins. Physical work does not include preliminary activities (planning, designing, securing financing, exploring, researching, clearing site, test drilling, etc.) The guidance provides, for example, that construction begins when work begins on the excavation for a foundation, the setting of anchor bolts into the ground, or the pouring of concrete foundations. If the energy property is assembled from modular units off-site, construction begins when physical work of a significant nature commences at the off-site location.

In the case of property that is manufactured, constructed or produced for the applicant by another person under a written binding contract, construction begins when physical work of a significant nature begins under the contract. A contract is a binding contract if it is enforceable under State law against the applicant, does not limit damages to an amount less than 5 percent of the total contract amount, and various other requirements.

In the case of either self-constructed property or property constructed under a written binding contract, an applicant may treat physical work of a significant nature to have begun if (a) an accrual basis applicant incurs under Section 461(h) of the Code or (b) a cash basis applicant pays, more than 5 percent of the total cost of the property (excluding preliminary activities).

In the case of multiple units of property that are located at the same site and will be operated as part of a larger unit (such as series of solar panels that are able to be operated independently, but will be placed in service in a series as part of a single project), the owner may elect to treat all the units (except units placed in service prior to January 1, 2009) as a single unit of property for purposes of determining when construction commences and the date the property is placed in service. If an applicant makes this election, the total cost of the project is taken into account for purposes of the safe harbor described above, and the failure to place the entire project into service will not preclude the receipt of a cash payment. However, only the units that are placed in service prior to the deadline (January 1, 2017 in the case of solar facilities) will be eligible for a cash payment.

### **Original Use - Leases**

The guidance provides that the original use of the property must begin with the applicant. However, the sale-leaseback rules are applicable and if property is placed in service by a person, sold to an applicant and then leased back by the applicant to the person that placed the property in service within 3 months of the placed-in-service date, the original use begins with the applicant/lessor and the property is considered to be placed in service when it is first used under the leaseback.

In a sale-leaseback, the lessee may receive the cash payment if the following three conditions are satisfied: (1) the lessee must be the person who originally placed the property in service; (2) the property must be sold by and leased back to the lessee within three months of the placed in service date; and (3) the lessee and lessor must not make an election out of the sale-leaseback rules.

The guidance also permits a lessor (who is eligible to receive a Treasury grant) to pass through the cash payment to a lessee (who is also eligible to receive a Treasury grant). In order to make the election, the property must be eligible to receive a Treasury grant if such property were owned by the lessee. If an election is made, the lessee will be treated 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. The election will generally follow the rules in the Code and the Treasury regulations governing lessee pass-through elections. The guidance provides additional rules and requirements regarding the election.

### **Grant-Eligible Property**

Only tangible property (not including a building) that is an “integral” part” of the facility and for which depreciation (or amortization) is allowable is eligible property for purposes of determining the cash grant. The tangible property is tangible personal property and other tangible property as defined in Sections 1.48-1(c) and (d) of the Treasury Regulations. The guidance provides, for example, in the case of a building with solar property on its roof, only the cost of the solar property (including the cost of installing or mounting the solar property on the roof) qualifies for the Treasury Grant. However the cost of the building does not qualify.

Similarly, if solar property is mounted on a truck, the cost of the solar property (including the mounting cost) may qualify for the Treasury Grant, but the cost of the truck does not.

The basis of the eligible property is determined in accordance with the general tax rules for determining the basis of property and includes all properly capitalized costs. Only the basis of property placed in service after 2008 is eligible for a cash grant. Thus, if property is placed in service in a qualified facility that was placed in service in an earlier year, only the basis of property placed in service in 2009 is eligible for a cash grant. Applicants must submit a detailed breakdown of the costs included in the basis of the property. For properties with a cost basis in excess of \$500,000, an applicant must also submit an independent accountant's certification regarding the accuracy of the claimed cost basis.

### **Recapture**

The Treasury Grant will vest ratably over a five-period in the same manner as the investment tax credit. The following events will trigger recapture: (1) disposition of the property to a disqualified person; (2) the property ceases to qualify as specified energy property (i.e., use of the property predominantly outside of the United States; permanent cessation of production, etc.); and (3) various other events not applicable to solar facilities. A property may be sold to an entity other than a disqualified person without triggering recapture provided that (a) the property continues to be specified energy property, and (b) the purchaser of the property agrees to be jointly liable with the applicant for any recapture.

### **Required Documentation**

Applicants must submit documentation that the property is eligible property and has been placed in service, including (i) final engineering design documents stamped by a professional engineer, (ii) a commissioning report from the project engineer, equipment vendor, or an independent third party that the equipment has been installed, tested, and is ready and capable of its intended use, and (iii) an interconnection agreement for properties that are connected to a utility.

### **Miscellaneous**

- Applicants may request that the payment be assigned to a third party provided that certain requirements are met.
- The requirements of the National Environmental Protection Act (NEPA) and the Davis-Bacon Act do not apply to property for which a Treasury grant is sought.
- Treasury Grant payments must be normalized under the rules of former Code section 46(f).
- A Treasury Grant payment is not includible in the income of the applicant, but the basis of the property is reduced by 50 percent of the amount of the Treasury Grant (unless the property is the subject of a lessee pass-through election).

- The applicant is required to provide certain reports (including a project performance report) and certifications to Treasury and must maintain certain records as set forth in a Terms and Conditions document that the applicant must agree to and sign.

For more information, please see <http://www.seia.org>.