

http://www.mondaq.com/unitedstates/x/145170/IRS+HRMC/Investment+In+Alternative+Energy+After+The+End+Of+Cash+Grants&email_access=on

United States: Investment In Alternative Energy After The End Of Cash Grants

19 September 2011

David S. Miller, Partner at Cadwalader Wickersham & Taft's Tax Department and Daniel J. Mulcahy

I. Introduction

The cash grant program for renewable energy expires at the end of this year. When cash grants end, renewable energy projects will once again rely on "tax equity investors" to offer lower-cost financing in exchange for the tax credits and accelerated depreciation that are available to investments in renewable energy.

Will lenders and investors continue to drive growth in the renewable energy sector after the cash grant program expires? Tax equity investing has been the bedrock of renewable power development for a decade. Although the economy continues to face rough times, there are investors with sufficient tax liability to benefit from renewable tax credits and depreciation, without cash grants. While financial institutions have traditionally been the predominant tax equity investors, there also are new, significant investors in the renewable tax equity market that could continue to support renewable projects and infrastructure development in the United States.

In fact, earlier this year, Google Inc. invested in two wind programs in North Dakota, several months ago invested in a wind-power transmission project, and just last month entered into a wind power contract for its data centers.

This memorandum summarizes the two financing structures – "flip" partnerships and sale-leasebacks – that allow tax equity investors to benefit from the tax incentives available to investments in these projects, and then provides a summary of the various tax incentives available for investment in alternative energy.

II. Tax-Related Financing Structures

Two basic types of tax equity financing structures have generally been used: (1) the "flip" partnership and (2) sale-leasebacks. Historically, the flip partnership has been used with respect to production tax credits ("PTC") because these credits are available only to a taxpayer that both owns and operates the facility. A sale-leaseback, which separates tax ownership from operation of the facility, is not available for projects generating production tax credits, such as wind facilities, but is available for investment tax credits ("ITC") based on the capital cost of renewable energy property, such as solar projects.

Legislation enacted in 2009 allows taxpayers to claim investment tax credits instead of production tax credits for wind facilities and certain other renewable energy property. This legislation effectively allows the use of sale-leasebacks structure for these facilities.

A. "Flip" Partnerships

In a "flip" partnership, the developer and the tax equity investor form a partnership or limited liability company taxed as a partnership for U.S. tax purposes to own and operate the facility. Both the developer and the equity investor contribute capital to the partnership, with the equity investor usually investing substantially more. The partnership generally allocates 99% of its taxable income or loss and 99% of the associated PTCs with respect to the facility to the equity investor, with the remaining 1% of income, loss and credits allocated to the developer. Cash distributions, however, are first made to the developer until the developer receives a return of its equity investment and then to the equity investor. After the equity investor has realized a targeted after-tax rate of return (based on both tax benefits and cash distributions), the allocations "flip" with the equity investor being allocated generally 5% of taxable income, losses, credits and cash flow of the partnership and the developers being allocated 95% of the partnership's taxable income, loss, credits and cash flow. The flip usually occurs after the end of year ten when the PTCs are no longer available for the facility. Generally, the developer has an option to purchase the equity investor's interest in the partnership after the "flip" for its then fair market value.

In Revenue Procedure 2007-65,¹ the IRS provided a "safe harbor" for a flip partnership structure with the following principal conditions:

- The developer has a minimum 1% interest in each material item of partnership income, gain, loss, deduction and credit at all times during the existence of the partnership;
- The equity investor has at all times that it owns an interest in the partnership, a minimum interest in each material item of partnership income and gain equal to 5% of the equity investor's percentage interest in partnership income or gain for the taxable year for which the equity investor's percentage interest in income and gain will be largest, as adjusted for sales, redemptions or dilution of interest;
- On or before the later of the date the facility is placed in service or the date the investor acquires its interest in the partnership, the equity investor makes and maintains a minimum unconditional investment in the partnership equal to at least 20% of the sum of the fixed capital contributions plus reasonably anticipated contingent capital contributions required to be made by the equity investor under the partnership agreement. This investment can be reduced by distributions of cash flow from the partnership's operation of the facility or in connection with a sale pursuant to a purchase option described below;
- There is no option to purchase the facility or the equity investor's interest in the partnership at any time for any amount less than the fair market value determined at the time of exercise of that right, and the developer does not have any right to purchase the facility or the equity investor's interest in the partnership earlier than five years after the facility was placed in service;
- The partnership does not have a right to put the facility to any party and the equity investor does not have a right to put its interest in the partnership to any party.

B. Sale-Leasebacks

Sale-leasebacks have been used for decades to transfer tax incentives from developers or operators of equipment that generally cannot use the tax incentives efficiently, to banks and other financial institutions that have sufficient tax capacity to use the tax benefits. In return, the operator– lessee shares economically in the tax benefits in the form of reduced rentals. Tax benefits, such as investment tax credits and accelerated depreciation, are based on the owner's capital investment in the renewable energy equipment and therefore sale-leasebacks are particularly useful in transferring these benefits to equity investors. The lessee/developer is typically the operator of the facility and the equity investor's role is purely passive during the term of the lease. Any power purchase agreement or other agreements with respect to sales of power produced by the facility, and any maintenance contracts, are entered into by the lessee/developer (although these contracts may be assigned to the equity investor/lessor as security).

In a typical sale-leaseback transaction, an equity investor, either directly or through a grantor trust or other special purpose vehicle, purchases the energy project from the developer or from a third party at fair market value. In order to be eligible to claim investment tax credits, the equity investor must acquire tax ownership of the facility no later than 90 days after the facility has been originally placed in service. The term of the lease cannot exceed 80% of the economic useful life of the facility, generally as determined by an independent appraiser or engineer. The equity investor finances the purchase of the facility generally with a combination of equity and non-recourse debt. Under IRS guidelines, the equity investment must be at least 20% of the capitalized cost of the facility.

If non-recourse debt is used, a security interest in both the facility and the lease is granted to the lender (along with other associated contracts such as power purchase agreements).

The lessee/developer often is granted an option to purchase the facility at the end of the lease term for either the fair market value of the facility as determined at the time of exercise of the option or at a fixed amount which, based upon independent appraisal, is expected to be greater than the estimated fair market value at the time of exercise. Lessee/developers also often negotiate a fixed price early buyout option which is exercisable at a fixed point in time (usually 3-4 years prior to the scheduled termination of the lease). This option is set at an amount that is in excess of the expected fair market value of the facility at the time that the option may be exercised and also high enough to preserve the equity investor's anticipated after-tax yield from the transaction.

In order for the equity investor to successfully claim the tax benefits related to ownership of the renewable energy facility, the lease must be a "true lease" for federal income tax purposes. This is a facts and circumstances test, although there is an IRS safe harbor in Revenue Procedure 2001-28² which, if all requirements are met, would generally assure true lease treatment. Some of the key requirements of this safe harbor are:

- The equity investor must make and maintain an equity investment of at least 20% of the capitalized cost of the leased facility;

- The term of the lease (including any fixed rate renewals) cannot exceed 80% of the economic useful life of the leased facility;
- At the end of the lease term, the expected value of the facility must be at least equal to 20% of its original capitalized cost (without taking inflation or deflation into account);
- The lessee/developer cannot have a purchase option except at fair market value and equity Investor can not have any right to put the facility to the lessee/developer;
- The facility cannot be "limited use property" (i.e., essentially commercially usable only by the lessee/developer).

Rents under the lease must be structured to comply with rent accounting rules of section 467.³ These rules in some cases can enhance the tax benefits to the Equity Investor.

Any power purchase agreement entered into by the lessee/developer with a tax-exempt entity must qualify as a service contract rather than a lease. Otherwise, the equity investor will not be entitled to the investment tax credit, and depreciation deductions will be substantially deferred. The tax code provides a safe harbor to qualify a power purchase agreement with respect to "alternative energy property" as a service contract rather than as a lease.

ITC Pass-Through Leases. In the traditional sale-leaseback, the equity investor (as owner/lessor of the facility) is entitled to both the investment tax credit and accelerated depreciation with respect to the facility. The tax code, however, permits the parties instead to elect to "pass through" the ITC to the lessee, so that the lessee/developer, and not the equity investor receives the ITC. In such case the ITC is based on the fair market value of the facility, and not on its cost to the equity investor. In ITC pass through transactions, the equity investor is permitted to claim accelerated depreciation for the entire cost of the facility, rather than to reduce its basis by 50% of the ITC. Instead, the lessee/developer must take 50% of the ITC into income over a 5 year period.

Inverted Lease. Another variant on the sales-leaseback structure is the "inverted lease". In this structure, the developer retains tax ownership of the facility and leases the facility to the equity investor. The ITC is passed through to the equity investor. The equity investor (generally through an operator affiliated with the developer) operates the facility and sells the power to the power purchasers, uses the revenues to pay rent to the developer, and deducts such rent. The developer retains the accelerated depreciation with respect to the facility, which offsets the taxable rents. Importantly, at the end of the lease, the developer simply takes back the facility at no cost. This avoids the necessity under standard sale-leasebacks for the developer to purchase the facility at fair market value if the developer wishes to retain use of the facility and relieves the equity investor of the residual risk of the facility.

C. Comparable Advantages of Flip Partnerships and Sale-Leasebacks

The decision between a flip partnership or a sale-leaseback structure depends upon a number of factors, including the type of credits, the nature of the renewable energy property, the cost of the property, the projected energy production and sales from the facility, the equity investor's expected tax capacity and available debt structures. The following are some specific items that may be relevant:

- PTCs can only be claimed by an owner and operator of the facility; hence the sale-leaseback structure cannot be used for PTCs;
- Sale-leasebacks permit 100% financing of the facility by equity investors; no capital investment in the facility is required by the developer;
- Sale-leasebacks with ITC and accelerated depreciation generate upfront tax benefits to an equity investor and do not directly depend on productivity of the facility or demand for the energy.
- PTCs are realized over a 10-year period, which places pressure on an equity investor's long term projection of its tax capacity. ITCs and accelerated depreciation are front-ended, which reduces risk with respect to equity investor's tax capacity in "out years".
- Flip partnerships provide the developers with 95% of the residual value of the facility after flip at no additional cost.
- Sale-leasebacks require the developer to purchase the facility at fair market value at termination of lease if it wishes to retain use of the facility (early buyout options and inverted leases may partially mitigate this cost).
- Sale-leasebacks permit cash grant in lieu of ITC (but only through the end of the year).
- Flip partnerships benefit from the IRS safe harbor (including implicit approval of treating credits as "cash" for pre-tax economic substance purposes). Sale-leasebacks may need to satisfy pre-tax economic tests of IRS leasing guidelines and treatment of ITC as "cash" is not clear for these purposes.
- In sale-leasebacks, the equity investor's role is purely passive. In flip partnerships, the equity investor typically participates in the operating company.
- Utilization of accelerated depreciation in sale-leaseback structures may be more tax efficient than in flip partnerships.
- Section 467 rent structuring may create added tax benefits in sale-leasebacks that are not available in flip partnerships.

III. Production and Investment Tax Credits, and Other Tax Incentives For Investment in Alternative Energy

This section describes the various tax credits and other tax incentives for investment in alternative energy products.

There are two different types of tax credits available to energy producers – "production" tax credits and "investment" tax credits. Production tax credits are based on the amount of energy produced and investment tax credits are based on the dollar amount invested in energy-producing buildings and equipment.

A. Production Tax Credits

1. Sources of Energy Entitled to the Production Tax Credit. Under section 45, taxpayers are entitled to a production tax credit for energy produced by the following nine sources:

- wind;
- "closed-loop biomass";⁴
- "open-loop biomass";⁵

- geothermal;⁶
- solar;
- "small irrigation";⁷
- "municipal solid waste";⁸
- "qualified hydropower production";⁹ and
- marine and hydrokinetic sources.¹⁰

These sources are referred to as "qualified energy resources." The production tax credit is also available for "refined coal"¹¹ and "Indian coal,"¹² but the production tax credit for these resources was not extended under the Act, and therefore is of limited use.

2. Qualified Facilities. The production tax credit is available for energy that is produced in the United States from any of the following eleven types of "qualified facilities" and sold to an unrelated person:

- a wind facility;¹³
- a closed-loop biomass facility;¹⁴
- an open-loop biomass facility;¹⁵
- a geothermal or solar energy facility;¹⁶
- a small irrigation power facility;¹⁷
- a landfill gas facility;¹⁸
- a trash facility;¹⁹
- a refined coal production facility;²⁰
- a qualified hydropower facility;²¹
- an Indian coal production facility;²² and
- a marine and hydrokinetic renewable energy facility.²³

3. Amount of Production Tax Credits. For wind, closed-loop biomass, geothermal energy, and solar energy qualified energy resources, the credit is based on a formula that uses reference prices published annually by the IRS.²⁴

| Summary of Credit for Electricity Produced from Certain Renewable Resources | | |
|--|--|--------------------------|
| Eligible electricity production activity | Credit amount for 2010 ²⁵ (cents per kilowatt-hour) | Expiration ²⁶ |
| Wind | 2.2 | December 31, 2012 |
| Closed-loop biomass | 2.2 | December 31, 2013 |
| Open-loop biomass (including agricultural livestock waste nutrient) | 1.1 | December 31, 2013 |

| | | |
|---|-----|-------------------|
| facilities) | | |
| Geothermal | 2.2 | December 31, 2013 |
| Solar (pre-2006 facilities only) | 2.2 | December 31, 2005 |
| Small irrigation power | 1.1 | December 31, 2013 |
| Municipal solid waste (including landfill gas facilities and trash combustion facilities) | 1.1 | December 31, 2013 |
| Qualified hydropower | 1.1 | December 31, 2013 |
| Marine and hydrokinetic | 1.1 | December 31, 2013 |

For refined coal and Indian coal and steel industry fuel, the credits are based on formulas that use reference prices published annually by the IRS.

The production tax credit is available only to offset taxable income.

4. Election to Receive Investment Tax Credit Instead of Production Tax Credit. Taxpayers may irrevocably elect a 30% investment tax credit instead of the production tax credit for wind facilities placed in service between 2009 and 2012, or closed-loop biomass, open-loop biomass, geothermal or solar energy, landfill gas, trash, qualified hydropower, or marine and hydrokinetic renewable energy facilities placed into service between 2009 and 2013. (The investment tax credit election is not available for small irrigation, refined coal or Indian coal production facilities.) The election is available only if no production tax credit has been claimed.²⁷

5. Election To Receive a Grant For Certain Renewable Energy Resources In Lieu of Investment or Production Tax Credits. Alternatively, if a project otherwise qualifies for the energy investment tax credit, the taxpayer may claim a tax-free grant in lieu of either tax credit. For wind facilities, closed-and open-loop biomass facilities, solar energy facilities, qualified hydropower facilities, marine and hydrokinetic renewable energy facilities, municipal solid waste fuel cell, solar and qualified small wind projects, the grant is 30% of the investment. For geothermal, microturbines, combined heat and power systems, and geothermal heat pumps, the grant is 10% of the investment. However, the grant is available only if the property is placed in service in calendar years 2009, 2010 or 2011, or its construction begun during that period and completed prior to 2013 (in the case of wind facility property), 2014 (in the case of other renewable power facility property eligible for credit under section 45), or 2017 (for specified energy property described in section 48).

B. Investment Tax Credit

Taxpayers are generally allowed a 10% or 30% investment tax credit for certain property that is used to produce alternative energy.

| Summary of Energy Investment Tax Credit | | | | |
|--|--|-----------------------------------|-----------------------------------|-------------------|
| | | Credit Rate | Maximum Credit | Expiration |
| Energy credit (sec. 48) | Equipment to produce a geothermal deposit | 10% | None | None |
| | Equipment to use ground or ground water for heating or cooling | 10% | None | December 31, 2016 |
| | Microturbine property (<2 Mw electrical generation power plants of >26% efficiency) | 10% | \$200 per Kw of capacity | December 31, 2016 |
| | Combined heat and power property simultaneous production of electrical/mechanical power and useful heat >60% efficiency) | 10% | None | December 31, 2016 |
| | Solar electric or solar hot water property | 30% (10% after December 31, 2016) | None | None |
| | Fuel cell property (generates electricity through electrochemical process) | 30% | \$1,500 for each ½ Kw of capacity | December 31, 2016 |
| | Energy credit (sec. | 30% | None | December |

| | | | | |
|--|---|--|--|----------|
| | 48) Small (100 Kw capacity) wind electrical generation property | | | 31, 2016 |
|--|---|--|--|----------|

The 10% investment tax credit is available for:

- Equipment used to produce, distribute or use energy from a geothermal deposit;²⁸
- Certain equipment that converts fuel into electricity with a gas turbine engine ("qualified microturbine property");²⁹
- Equipment that produces thermal as well as electrical and mechanical shaft power (a "combined head and power system property");³⁰ and
- Equipment that uses the ground or ground water as a thermal energy source to heat a structure or as a thermal energy sink to cool a structure.³¹

The investment tax credit is available only if (i) the taxpayer itself completes the construction, reconstruction or erection of the property or acquires the property and commences its original use (*i.e.*, the investment tax credit is not available to a secondary purchaser of property that is already producing energy),³² and (ii) the property is used in a trade or business and therefore qualifies for depreciation or amortization.³³ If a taxpayer elects the investment tax credit, the tax basis of the property is reduced by 50% of the credit.³⁴ Moreover, all or a portion of the credit is recaptured if the property is disposed of within 5 years.³⁵

C. Bonus and Accelerated Depreciation

Taxpayers may generally elect to deduct "bonus depreciation" (in a single year) 100% of the adjusted basis of certain property placed in service on or before December 31, 2011 and 50% of the adjusted basis of certain property placed in service on or after January 1, 2012 and before January 1, 2013. If the bonus depreciation election is made, the adjusted tax basis of the property is reduced by the depreciation claimed.³⁶ For most alternative energy property, the balance of any tax basis is depreciable over five years for federal income tax purposes.

IV. Other Credits

A number of other energy tax credits for businesses are available.

Alcohol Fuels Credit – A credit of between 33 and 60 cents/gallon is available to taxpayers that produce and sell or use alcohol fuel through December 31, 2011. The amount of credit depends in part on whether the fuel is pure alcohol or mixed with other fuels, and the proof of the fuel. The credit is increased by an additional 10 cents/gallon for certain small ethanol producers. An additional credit of \$1.01/gallon is available for taxpayers that produce and sell cellulosic biofuel through December 31, 2012, reduced by any alcohol credits received if the cellulosic biofuel is alcohol.³⁷

Biodiesel and Renewable Diesel Used as a Fuel Credit – A credit of \$1/gallon is available through December 31, 2009 to taxpayers that produce and sell or use biodiesel or renewable diesel fuel. Certain small agri-biodiesel producers may be entitled to an additional 10 cents/gallon credit for qualified agri-biodiesel fuel produced and sold or used. The credit expires at the end of 2011.³⁸

Increasing Research Activities Credit – A credit of as much as 20% of research expenses above a base amount is available for taxpayers conducting research. Alternatively, a taxpayer may elect a credit of as much as 14% of research expenses that exceed 50% of the average of those expenses for the three prior taxable years. Although this credit is generally available for all taxpayers conducting research, it could be used by a taxpayer developing alternative fuel, including for amounts paid for energy research to a tax-exempt energy research consortium. The credit is set to expire at the end of this year.³⁹

Advanced Nuclear Power Facility Production Credit – A credit of up to 1.8 cents/kilowatt hour of electricity is available for electricity produced by a taxpayer at certain nuclear power facilities that are placed in service prior to January 1, 2021.⁴⁰ The credit is subject to a phaseout.⁴¹

Nonconventional Source Production Credit – A credit of as much as \$3/barrel-of-oil equivalent is available for the production and sale of (i) oil produced from shale and tar sands, (ii) gas produced from geopressured brine, Devonian shale, coal seams, or a tight formation, or biomass, and (iii) synthetic fuels produced from coal. The credit is available only for fuel produced from facilities placed in service prior to January 1, 2010 and only for fuel sold prior to January 1, 2014.⁴²

Qualifying Advanced Coal Project Credit – Taxpayers may claim a credit of as much as 15-30% of their investment to construct, reconstruct, erect or acquire certain advanced coal projects facilities. The project must be approved by the Secretary of the Treasury.⁴³

Qualifying Gasification Project Credit – Taxpayers may claim a credit of as much as 20-30% of their investment to construct, reconstruct, erect or acquire certain gasification projects facilities. The project must be approved by the Secretary of the Treasury.⁴⁴

Qualifying Advanced Energy Project Credit – Taxpayers may claim a credit of as much as 30%⁴⁵ of their investment to re-equip, expand or establish (i) a manufacturing facility to produce energy from solar, wind, geothermal or renewable resources, (ii) fuel cells, microturbines, electric and certain other energy storage and transmission systems, (iii) electric grids for intermittent energy sources, (iv) property to capture and sequester CO₂, (v) certain advanced energy property that is designed to reduce greenhouse gas emissions, (vi) certain plug-in electric drive vehicles, and (vii) property to refine or blend renewable fuels or produce energy conservation technology.⁴⁶ The project must be approved by the Secretary of the Treasury.⁴⁷

Footnotes

1 2007-45 IRB 967.

2 2001-1 C.B. 1156.

3 All references to section numbers are to the Internal Revenue Code.

4 Closed-loop biomass is any organic material from a plant that is planted exclusively for use at a facility to produce electricity. Section 45(c)(2).

5 Open-loop biomass includes certain agricultural livestock manure and litter, certain mill and harvesting waste material, and certain other crop by-products or residues. Open-loop biomass does not generally include closed-loop biomass or biomass burned in conjunction with fossil fuel. Section 45(c)(3).

6 Geothermal energy is energy derived from a geothermal deposit. Section 45(c)(4).

7 Small irrigation power is power generated without any dam or impoundment of water through an irrigation system canal or ditch and whose "nameplate capacity rating" is between 150 kilowatts and 5 megawatts. Section 45(c)(5).

8 Municipal solid waste is "solid waste" as defined under section 2(27) of the Solid Waste Disposal Act (23 U.S.C. § 6903). Section 45(c)(6).

9 Qualified hydropower production is generally limited to incremental hydropower production from hydroelectric dams and hydropower production from nonhydroelectric dams placed in service on or before August 8, 2005. Section 45(c)(8).

10 The tax credit is available for marine and hydrokinetic renewable energy derived from waves, tides, and currents in oceans, estuaries, and tidal areas, free flowing water in rivers, lakes, and streams or in an irrigation system, canal, or other man-made channel. Section 45(c)(10). Marine and hydrokinetic renewable energy does not include energy derived from a source that uses a dam, other diversionary structure, or impoundment for electric power production purposes. Section 45(c)(10).

11 Refined coal includes (i) certain coal produced from coal or high carbon fly ash, and (ii) certain "steel industry fuel" (which is a type of coal that is produced from hazardous wastes).

12 Indian coal is coal produced from coal reserves that were owned by (or for the benefit of) an Indian tribe or its members on June 14, 2005. Section 45(c)(9)

13 A wind facility must be placed into service before January 1, 2013. Section 45(d)(1).

14 A closed-loop biomass facility generally must be placed into service before January 1, 2014. Section 45(d)(2).

15 An open-loop biomass facility is a facility that uses open-loop biomass to produce electricity. An open-loop biomass facility generally must be placed into service before January 1, 2014. Section 45(d)(3)

16 A geothermal or solar energy facility is a facility that uses geothermal or solar energy to produce electricity. A geothermal facility must be placed into service before January 1, 2014. A solar energy facility must have been placed into service before January 1, 2006. Section 45(d)(4).

17 A small irrigation power facility is a facility that uses small irrigation power to produce electricity. A small irrigation power facility must have been placed into service before October 3, 2008. Section 45(d)(5).

18 A landfill gas facility is a facility that produces electricity from gas derived from the biodegradation of municipal solid waste. A landfill gas facility must be placed into service before January 1, 2014. Section 45(d)(6)

19 A trash facility is a facility (other than a landfill gas facility) that uses municipal solid waste to produce electricity. A trash facility must be placed into service before January 1, 2014. Section 45(d)(7).

20 A refined coal production facility is a facility that produces refined coal. A refined coal production facility must be placed into service before December 31, 2011. Section 45(d)(8).

21 A qualified hydropower facility is a facility that produces qualified hydropower production. A qualified hydropower facility must be placed into service before January 1, 2014. Section 45(d)(9).

22 An Indian coal production facility is a facility that produces Indian coal. It must have been placed into service before January 1, 2009. Section 45(d)(10).

23 A marine and hydrokinetic renewable energy facility is a facility that produces electricity from marine and hydrokinetic renewable energy. A marine and hydrokinetic renewable energy facility must be placed into service before January 1, 2014 and have a nameplate capacity rating of at least 150 kilowatts. Section 45(d)(11).

24 The formula is equal to 1.5 cents/kilowatt multiplied by an inflation adjustment factor published by the IRS. Section 45(a) and (b). If the taxpayer has received grants, tax-exempt financing or other subsidized energy financing, the credit is generally reduced to the lesser of 50% and the percentage of the cost that is financed with grants, proceeds from tax-exempt bonds, subsidized energy financings, and other allowable credits. Section 45(b)(3).

25 In general, the credit is available for electricity produced during the first 10 years after a facility has been placed in service.

26 Expires for property placed in service after this date.

27 The election is available only for tangible property that is used as an integral part of the facility for which depreciation or amortization is allowable. The election is not available for a building or its structural components. Section 48(a)(5).

28 The investment tax credit for geothermal power is available only until the electrical transmission stage and expires in 2016. Section 48(a)(3)(A)(iii).

29 Qualified microturbine property is an integrated system consisting of a gas turbine engine, a combustor, a recuperator or regenerator, a generator or alternator, converts a fuel into electricity and thermal energy, has a nameplate capacity of less than 2,000 kilowatts, and has an electricity-only generation efficiency of 26% at International Standard Organization conditions. Section 48(c)(2).

30 Section 48(c)(3).

31 Section 48(a)(3)(A)(vii).

32 Section 48(a)(3)(B).

33 Section 48(a)(3)(C). Certain other limitations apply. In addition, the Treasury Department may impose performance and quality standards. These standards are conditions for the investment tax credit only if they are in effect at the time the property is acquired. Section 48(a)(3)(D).

34 Section 50(c).

35 Section 50(a)(1).

36 Section 168(k)(1)(B).

37 Cellulosic biofuel is a liquid fuel that is produced from plant matter that is available on a renewable or recurring basis and meets the registration requirements for fuels and fuel additives established by the Environmental Protection Agency under section 211 of the Clean Air Act (42 U.S.C. 7545).

38 Section 40A.

39 Section 41.

40 Section 45J.

41 Section 45J(c)(2).

42 Section 45K. Gas produced from a tight formation is gas produced under such conditions as the Commission determined to present extraordinary risks or costs. TAM 200252029 (December 26, 2002). Special rules apply to qualifying coke gas. Section 45K(g).

43 Section 48A.

44 Section 48B.

45 Section 48C(a).

46 Section 48C(c)(1)(A)(i)(I) to (VII).

47 Section 48C(d)(2).

www.cadwalader.com

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

[Mondaq 1994-2011.](#)

All Rights Reserved