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Client Alert

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2009 CHANGES TO SECTION 48 INVESTMENT ENERGY CREDITS AND GRANTS FOR RENEWABLE ENERGY PROJECTS

The "Stimulus" legislation enacted by Congress in February, 2009 expanded the use of Investment Energy Credits (the "Credits") under Section 48 of the Internal Revenue Code ("Code"). Before 2009, the Credits were generally available only for solar electric and heating projects and developers of wind, geothermal, biomass and other non-solar energy production facilities needed to claim Production Tax Credits ("PTC's") under Section 45 of the Code. PTC's, unfortunately, are awarded only on the basis of the amount of electricity actually produced by the facility and not in relation to the cost of the investment. Therefore, the expansion of the availability of the Credits (and the potential to monetize them instead of accepting a direct grant from the Treasury) is welcome news for the renewable energy industry. The significant improvements in these incentives are as follows:

- Usage of the Credits is now expanded so that developers of wind, geothermal, biomass and other renewable energy projects may also claim the Credits, in an amount equal to 30 percent of the "eligible cost basis" of the facility. There is no maximum limit on the dollar amount of the Credits and no requirement that any electricity is actually produced.
- The taxpayer claiming the Credits must have made a direct investment in the end use energy facility, rather than merely supplying components or equipment to such a project. solar facilities claiming the Credits must be placed into service by December 31, 2016. Wind farms must be placed into service by December 31, 2012 and biomass, geothermal and other similar projects have a December 31, 2013 deadline.
- The "subsidized financing penalty" provisions under the Code have been removed so that developers claiming the Credits can also obtain local or state bond funding, grants, below-market loans and other "government subsidized financing" that previously reduced the taxpayer's eligible basis in the property under the Code.
- If the project developer itself cannot use the actual tax Credits, it can form a partnership with an equity investor that would finance the facility with capital contributions in exchange for allocation of the Credits. As a partnership with an outside equity investor is often complicated and expensive to structure, however, the legislation also created a temporary alternative for taxpayers who cannot use the actual Credits. Developers of "shovel-ready" projects can now apply for a direct grant ("Grants") from the Department of the Treasury equal to the amount

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of the Credit that otherwise would have applied (generally 30 percent of the eligible cost basis of the investment).

- Projects must begin construction by December 31, 2010 in order to be eligible for the Grants. Projects that are actually placed in service by that date can apply for the Grant and receive payment within 60 days of that date.
- Owners of facilities that have commenced construction but are not yet completed by the end of 2010 must submit a preliminary application before October 1, 2011 and then follow with a subsequent final application within 90 days of the actual placed in service date. Payment of the Grant will not be made until after final application.
- Many states, including Georgia, have adopted similar state credit and/or grant incentives that often can be used in addition to the federal programs.