



RECOVERY ACT

*Assessment of the Internal Revenue
Service's Interpretation of Section 1302 of
the Recovery Act: Qualifying Advanced
Energy Project Credit*

March 21, 2013

Reference Number: 2013-40-029

This report has cleared the Treasury Inspector General for Tax Administration disclosure review process and information determined to be restricted from public release has been redacted from this document.



HIGHLIGHTS



ASSESSMENT OF THE INTERNAL REVENUE SERVICE'S INTERPRETATION OF SECTION 1302 OF THE RECOVERY ACT: QUALIFYING ADVANCED ENERGY PROJECT CREDIT

Highlights

Final Report issued on March 21, 2013

Highlights of Reference Number: 2013-40-029 to the Internal Revenue Service Commissioner for the Large Business and International Division.

IMPACT ON TAXPAYERS

Section 1302 of the American Recovery and Reinvestment Act of 2009 (the Recovery Act) established the Qualifying Advanced Energy Project Credit (Advanced Energy Credit). The Advanced Energy Credit was intended to encourage development of a manufacturing base to support renewable energy industries. The Recovery Act provided for \$2.3 billion in Advanced Energy Credits to be allocated to manufacturers for qualified projects.

WHY TIGTA DID THE AUDIT

This audit was initiated at the request of the Chairman, U.S. House of Representatives, Committee on Science, Space, and Technology, Subcommittee on Investigations and Oversight. The Subcommittee expressed concerns with the IRS's interpretation of Section 1302 of the Recovery Act and its program guidance, which set forth the criteria and process for considering and selecting companies to receive the Advanced Energy Credit.

WHAT TIGTA FOUND

Inconsistencies exist between issued guidance and the law. The inconsistencies between IRS Notice 2009-72 and Internal Revenue Code Section 48C criteria resulted from the IRS's efforts to: 1) simplify program guidance so it would be more easily understood by manufacturers and 2) ensure that the Credits were disbursed equitably among qualified applicants. However, the inconsistencies did not

affect the IRS's compliance with the Code requirements when awarding the Advanced Energy Credit.

In addition, the IRS cites rule-making authority and the general language of the law as its basis to use additional selection criteria. Based on the lack of clarity in the law, the IRS used its authority under Title 5 of the United States Code to interpret the law to mean the IRS must consider all of the criteria contained in the law but could include additional criteria as it deemed appropriate. The IRS, in conjunction with the U.S. Department of Energy, determined that the application of Program Policy Factors was appropriate and set forth the rules in IRS Notice 2009-72.

The U.S. Department of Energy noted that the Program Policy Factors were used to ensure that the \$2.3 billion in allocated Credits was disbursed across a range of project types, sizes, and locations among qualified applicants. The use of the Program Policy Factors affected which qualified projects the Department of Energy recommended to the IRS.

All Advanced Energy Credit awards made by the IRS were consistent with U.S. Department of Energy rankings and recommendations. The IRS's involvement in the ranking and review process was limited to verifying that manufacturers timely filed a complete application for certification with the IRS for each recommended energy project.

WHAT TIGTA RECOMMENDED

TIGTA made no recommendations.



TREASURY INSPECTOR GENERAL
FOR TAX ADMINISTRATION

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

March 21, 2013

MEMORANDUM FOR COMMISSIONER, LARGE BUSINESS AND INTERNATIONAL
DIVISION

FROM: Michael E. McKenney
Acting Deputy Inspector General for Audit

SUBJECT: Final Audit Report – Assessment of the Internal Revenue Service’s
Interpretation of Section 1302 of the Recovery Act: Qualifying
Advanced Energy Project Credit (Audit # 201240139)

This report presents the results of our review of the Internal Revenue Service’s (IRS) interpretation of Section 1302 of the American Recovery and Reinvestment Act of 2009 (Recovery Act)¹ and its program guidance that set forth the criteria and process for considering and selecting manufacturers to receive the Qualifying Advanced Energy Project Credit. This review was requested by the U.S. House of Representatives, Committee on Science, Space, and Technology, Subcommittee on Investigations and Oversight. This report is intended to answer specific questions posed by the Subcommittee. This review is included in the Treasury Inspector General for Tax Administration Fiscal Year 2013 Annual Audit Plan and addresses the major management challenge of Implementation of the Affordable Care Act and Other Tax Law Changes.

The Recovery Act provides separate funding to the Treasury Inspector General for Tax Administration through September 30, 2013, to be used in oversight activities of IRS programs. This audit was conducted using Recovery Act funds.

Although we made no recommendations in this report, IRS officials were provided an opportunity to review the draft report. IRS management did not provide any comments in response to this report.

¹ Pub. L. No. 111-5, 123 Stat. 115 (2009).



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Copies of this report are also being sent to the IRS managers affected by the report recommendations. Please contact me if you have questions or Augusta R. Cook, Acting Assistant Inspector General for Audit (Returns Processing and Account Services).



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Assessment of the Internal Revenue Service's
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Abbreviations

I.R.C.	Internal Revenue Code
IRS	Internal Revenue Service
TIGTA	Treasury Inspector General for Tax Administration



Assessment of the Internal Revenue Service's
Interpretation of Section 1302 of the Recovery Act:
Qualifying Advanced Energy Project Credit



Background

This audit was initiated at the request of the Chairman, U.S. House of Representatives, Committee on Science, Space, and Technology, Subcommittee on Investigations and Oversight. The Subcommittee asked questions about the Internal Revenue Service's (IRS) interpretation of Section (§) 1302 of the American Recovery and Reinvestment Act of 2009 (the Recovery Act)¹ and its program guidance, which set forth the criteria and process for considering and selecting manufacturers to receive the Qualifying Advanced Energy Project Credit (Advanced Energy Credit). The Subcommittee asked the Treasury Inspector General for Tax Administration (TIGTA) to address the following:

The Recovery Act provided \$2.3 billion in Advanced Energy Credits for the purpose of encouraging development of a manufacturing base to support renewable energy industries.

- 1) *Inconsistencies between the IRS criteria and the law, especially those related to the lowest levelized cost criterion.*
- 2) *Statutory authority for the addition of Program Policy Factors.*
- 3) *Observations about how any inconsistencies may have affected project rankings.*
- 4) *Whether the IRS made awards consistent with U.S. Department of Energy rankings and recommendations.*

Section 1302 of the Recovery Act established the Advanced Energy Credit by adding Internal Revenue Code (I.R.C.) § 48C.² The Advanced Energy Credit was intended to encourage development of a manufacturing base to support renewable energy industries. Manufacturers can receive Advanced Energy Credits up to 30 percent of the qualified expenditures for a project that establishes, expands, or re-equips a manufacturing facility for the production of certain types of property. These properties include those designed to produce energy from renewable sources such as the sun and wind. The Recovery Act provided for \$2.3 billion in Advanced Energy Credits to be allocated to manufacturers for qualified projects.

¹ Pub. L. 111-5, 123 Stat. 115 (2009).

² Appendix IV provides I.R.C. § 48C.



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Key steps in the Advanced Energy Credit application and awarding process

The IRS, in conjunction with the U.S. Department of Energy (Department of Energy), developed an application process for the Advanced Energy Credit. IRS Notice 2009-72, *Qualifying Advanced Energy Project Credit*, issued in September 2009, provided guidance on the types of projects that qualified to receive the Advanced Energy Credit and how to apply for the Credit.³ Figure 1 provides the timeline for the application and awarding of the Credit.⁴

Figure 1: Timeline for the Application and Awarding of the Advanced Energy Credit

DATE	DESCRIPTION
February 17, 2009	Advanced Energy Credit established as part of the Recovery Act.
August 13, 2009	The IRS posts Notice 2009-72 on IRS.gov. The Notice provides guidance to manufacturers on eligibility requirements and the application process.
August 14, 2009	The IRS and the Department of Energy begin accepting applications from manufacturers for the Advanced Energy Credit.
September 14, 2009	Notice 2009-72 is published in Internal Revenue Bulletin Number 2009-37.
September 16, 2009	The deadline for manufacturers to submit a preliminary project application to the Department of Energy for review of project eligibility and technical merit. The preliminary project application served as a manufacturer's notice of intent to apply for the Credit and allowed the Department of Energy to determine the technological expertise that would be needed to review final applications once received.
October 16, 2009	The deadline for manufacturers to submit the final <i>Application for Department of Energy Recommendation</i> for review of project eligibility and technical merit. This application served as a manufacturer's formal application for the Advanced Energy Credit.
December 16, 2009	The deadline for manufacturers to submit an <i>Application for § 48C Certification</i> to the IRS. The application for certification provided information related to the manufacturer requesting the Advanced Energy Credit along with a point of contact for the IRS. The Department of Energy provides recommendations to the IRS, including the credit amounts for manufacturers to be awarded the Credit. The Department of Energy recommends 184 projects for the Advanced Energy Credit.

³ IRS Notice 2009-72, 2009-37 Internal Revenue Bulletin 325.

⁴ Appendix V details the Advanced Energy Credit application requirements.



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DATE	DESCRIPTION
December 16, 2009	The IRS notifies the Department of Energy that some manufacturers of the 184 recommended projects may not be eligible to receive the Advanced Energy Credit due to not meeting the Notice 2009-72 requirements. ⁵ The IRS requests replacement projects from the Department of Energy.
January 7, 2010	The Department of Energy provides replacement projects to the IRS for awarding of the remaining Credit. The IRS verifies that the manufacturers of the replacement projects met the time period requirement to file an <i>Application for § 48C Certification</i> with the IRS.
January 7, 2010	The IRS notifies selected manufacturers that they have been awarded the Credit and the amount of the Credit received.
January 8, 2010	The President announces the recipients of the \$2.3 billion in Advanced Energy Credits.

Source: IRS Offices of Associate Chief Counsel (Passthroughs and Special Industries) and Large Business and International Division.

This review was performed in the IRS's Large Business and International Division Headquarters and the Office of the Chief Counsel in Washington, D.C., and the Large Business and International Division, Natural Resources and Construction Industry function in Houston, Texas. We also obtained information from the Department of Energy Headquarters in Washington, D.C. This review was performed during the period July to December 2012.

The scope of this review was to respond to the questions posed by the Chairman of the Subcommittee on Investigations and Oversight pertaining to the IRS's interpretation of § 1302 of the Recovery Act. We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. There was a scope limitation with respect to the data on project rankings. The Department of Energy was unable to provide us with the individual technical expert review scores or the numeric rankings of projects after the Program Policy Factors had been applied. Without this information, we were unable to determine which projects may have been recommended to the IRS had the Department of Energy compared all qualified projects based only on the projects' technical expert scores. Notwithstanding this limitation, we believe that the evidence we were able to obtain provides a reasonable basis for our findings and conclusions based on our audit objective.

Detailed information on our audit objective, scope, and methodology is presented in Appendix I. Major contributors to the report are listed in Appendix II.

⁵ Per Notice 2009-72, manufacturers must submit an *Application for § 48C Certification* to the IRS by December 16, 2009, to be eligible for the Advanced Energy Credit. See Appendix V.



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Results of Review

Inconsistencies Exist Between Issued Guidance and the Law

The inconsistencies between IRS Notice 2009-72 and I.R.C. § 48C criteria resulted from the IRS's efforts to: 1) simplify program guidance so it would be more easily understood by manufacturers and 2) ensure that the Credits were disbursed equitably among qualified applicants. However, the inconsistencies did not affect the IRS's compliance with the Code requirements when awarding the Advanced Energy Credit.

The inconsistencies are detailed below.

- The I.R.C. § 48C criterion for levelized cost⁶ is worded differently from IRS Notice 2009-72. I.R.C. § 48C(d)(3)(B)(iv) states that in determining which qualifying advanced energy projects to certify, the IRS shall take into consideration which projects have

. . . the lowest levelized cost of generated or stored energy, or of measured reduction in energy consumption or greenhouse gas emission (based on costs of the full supply chain) . . .

However, the wording in IRS Notice 2009-72 states the IRS shall take into consideration which projects have

. . . the greatest potential for technological innovation and commercial deployment, as indicated by (i) the production of new or significantly improved technologies, (ii) improvements in levelized costs and performance . . .

IRS management stated that Notice 2009-72 contains further instructions requiring applicants to include a computation of levelized cost of the project with their application. The Notice also indicates that levelized cost will be evaluated as one of the factors when selecting projects to receive the Advanced Energy Credit. In addition, documentation provided by the Department of Energy indicates that the Department evaluated the lowest levelized cost as described in I.R.C. § 48C when reviewing and recommending projects to the IRS for awarding of the Advanced Energy Credit.

⁶ The levelized cost of energy is the constant price per unit of energy that if assigned to every unit of energy produced (or saved) by the system over a period of time would result in the system's breakeven point where costs and benefits are equal.



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- IRS Notice 2009-72 includes additional selection criteria to be considered when selecting manufacturers that are not included in I.R.C. § 48C. Specifically, Notice 2009-72 provides Program Policy Factors that were to be considered when selecting manufacturers to receive the Advanced Energy Credit. The Department of Energy explained that these four factors were selected for use in recommending recipients of the Advanced Energy Credit to ensure that the \$2.3 billion in allocated Credits was disbursed across a range of project types, sizes, and locations among qualified applicants. Figure 2 provides a description of each of the four Program Policy Factors applied to select manufacturers to receive the Advanced Energy Credit.

Figure 2: Program Policy Factors Applied to Select Manufacturers

Program Policy Factor	Description
Geographic Diversity	Applied in an effort to ensure that the Advanced Energy Credit was awarded to manufacturers who were geographically dispersed throughout the United States.
Technology Diversity	Applied in an effort to ensure that the Advanced Energy Credit was awarded to projects that represented a diverse technology base.
Project Size Diversity	Applied in an effort to ensure that Advanced Energy Credits awarded were dispersed among large, medium, and small projects.
Regional Economic Development	Applied in an effort to ensure that the Advanced Energy Credit was awarded to those projects that would have a positive impact on the economic development within the region where the manufacturing would occur.

Source: Department of Energy, Office of Energy Efficiency and Renewable Energy.

The Internal Revenue Service Cited Rule-Making Authority and the General Language of the Law as the Basis for Its Decision to Use Additional Selection Criteria

Title 5 of the United States Code (5 U.S.C.) gives Federal agencies the general authority to establish rules to “implement, interpret, or prescribe law or policy.” According to IRS Counsel, Supreme Court rulings have further defined when agencies can make rules. Specifically, agencies can establish interpretive rules when language in the law is ambiguous.

Both the IRS and the Department of Energy agreed that the language in I.R.C. § 48C is not clear as to whether the IRS can or cannot use additional criteria to determine which qualifying advanced energy projects should receive the Advanced Energy Credit. I.R.C. § 48C states the IRS “shall consider **only** those projects where there is a reasonable expectation of commercial viability.” The law further describes other criteria the IRS “shall consider” when awarding the



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Credit. However, the law is unclear as to whether the IRS is to consider only those additional factors or whether it may consider factors in addition to those listed.

Based on the lack of clarity in the law, the IRS used its authority under 5 U.S.C. to interpret the law to mean that the IRS must consider all of the criteria contained in the law but could include additional criteria as it deemed appropriate. The IRS, in conjunction with the Department of Energy, determined that the application of Program Policy Factors was appropriate and set forth the rules in IRS Notice 2009-72.

The Use of Program Policy Factors Affected Project Rankings

I.R.C. § 48C requires the IRS to award the Advanced Energy Credit to qualified projects in rank order until the \$2.3 billion in allocated funds was exhausted. The Department of Energy reviewed the Advanced Energy Credit applications and made recommendations to the IRS as to which projects should be awarded the Credit. However, the use of the Program Policy Factors affected which qualified projects the Department of Energy recommended to the IRS.

The Department of Energy conducted two levels of review when determining which projects to recommend to the IRS. Figure 3 describes the general process the Department of Energy used to formulate its recommendations to the IRS for the Advanced Energy Credit.

Figure 3: Process Used by the Department of Energy to Formulate Recommendations for the Advanced Energy Credit

Step	Action Taken	Description
1	Applications were grouped by like technologies.	Projects that involve similar energy technologies (e.g., wind, solar, or geothermal.) were grouped together for review. The Department of Energy grouped the 594 project applications received into 19 technical groups. ⁷
2	Applications were given an eligibility and technical merit score.	Department of Energy technical experts reviewed the applications within each technology group and assigned a score to each project. The technical expert's score was based on the criteria contained in I.R.C. § 48C. The Department of Energy determined that 418 of the 594 projects qualified to receive the Advanced Energy Credit. Qualified projects were ordered within each technical group based on the technical expert's score.

⁷ See Appendix VI for a listing of the technology groups.



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Step	Action Taken	Description
3	Applications were evaluated using the Program Policy Factors.	A cross-functional team within the Department of Energy conducted analysis of all qualified projects using the Program Policy Factors found in IRS Notice 2009-72. A separate analysis was performed for each Program Policy Factor. These analyses compared projects across technology groups for each of the four Program Policy Factors.
4	Projects were ranked based on the results of the Program Policy Factor analyses.	The Department of Energy compared the results of the Program Policy Factor analyses. Projects that consistently scored high in program policy analysis and technical merit were given the highest rank. The Department of Energy continued to rank projects based on the consistency of its scores within each of the Program Policy Factor and technical merit analyses until the \$2.3 billion in available Credits was allocated. The Department of Energy compiled the remaining projects for future consideration should additional funds become available. ⁸ However, the Department of Energy did not formally rank these projects.
5	Recommendations were made to the IRS.	The Department of Energy recommended qualified projects to the IRS in rank order as determined by the Department of Energy's evaluation of the results of the Program Policy Factor analyses.

Source: The Department of Energy.

Use of the Program Policy Factors influenced which projects were selected to receive the Advanced Energy Credit

Information provided by the Department of Energy shows that use of Program Policy Factors influenced the Department's recommendations to the IRS. However, we are unable to determine how the project selections would have changed had the Program Policy Factors not been used. The Department of Energy was not able to provide us with the individual technical expert score and numeric rankings of each project after the Program Policy Factors had been applied.⁹ Without this information, we are unable to determine which projects may have been recommended to the IRS had the Department of Energy compared all qualified projects based only on the projects' technical expert scores.

⁸ If a company that was awarded the Advanced Energy Credit does not meet all of the requirements to receive the Credit, the funds are to be re-awarded to another qualified applicant.

⁹ When we asked for the information during our audit, Department of Energy management responded that the individuals responsible for compiling the information were no longer with the Department of Energy and, as a result, they were unable to locate the data. After we completed our audit and issued the draft audit report, Department of Energy management stated that they did not provide this information because it would be too confusing to understand.



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Figure 4 provides an example of how the use of the Program Policy Factors affected the Department of Energy's recommendation of projects within one of the 19 technology groups it used. For example, Company 2 was not recommended for the Advanced Energy Credit although the company's project had a technical expert score of 875, significantly higher than the technical expert score for Company 15, which was recommended to receive the Credit. The IRS awarded the Advanced Energy Credit consistent with the Department of Energy's recommendations.

Figure 4: Example of the Effect of the Use of Program Policy Factors on the Department of Energy's Recommendations to the IRS

Company	Technical Expert Score ¹⁰	Recommended to IRS?
Company 1	905	Yes
Company 2	875	No
Company 3	850	Yes
Company 4	805	Yes
Company 5	805	Yes
Company 6	750	Yes
Company 7	750	Yes
Company 8	680	Yes
Company 9	650	Yes
Company 10	585	Yes
Company 11	500	Yes
Company 12	500	No
Company 13	450	No
Company 14	450	No
Company 15	400	Yes

Source: TIGTA analysis of Department of Energy recommendations for the Advanced Energy Credit.

We cannot determine whether the Department of Energy would have recommended all 15 of the companies in Figure 4 to the IRS if it had ranked projects only on their technical expert score. Without the exact technical expert score for each qualified project, we cannot determine how

¹⁰ The technical expert score is the approximate score each company received. The approximate score was determined from information provided to TIGTA by the Department of Energy. The Department of Energy did not provide TIGTA with the actual technical expert score for each qualified project.



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these 15 projects would have ranked among all 418 qualified projects. In addition, the IRS could only award the Advanced Energy Credit to companies until the \$2.3 billion in available funds was exhausted.

Advanced Energy Credit Awards Were Consistent With Department of Energy Rankings and Recommendations

All Advanced Energy Credit awards made by the IRS were consistent with Department of Energy rankings and recommendations. The Department of Energy received 594 applications for the Advanced Energy Credit. The Department of Energy, based upon a review of eligibility and merit, determined that 418 of the 594 applicants qualified for the Advanced Energy Credit. On December 16, 2009, the Department of Energy recommended to the IRS 184 projects for the Advanced Energy Credit associated with 135 manufacturers.¹¹

The IRS's involvement in the ranking and review process was limited to verifying that manufacturers timely filed a complete *Application for § 48C Certification* with the IRS for each recommended energy project. Of the 135 manufacturers the Department of Energy recommended, the IRS identified four manufacturers that did not timely file a complete *Application for § 48C Certification*. These projects were denied the Advanced Energy Credit. The IRS notified the Department of Energy that four of the recommended manufacturers did not satisfy the requirement of timely filing an *Application for § 48C Certification* and requested recommendations for replacement projects. The Department of Energy provided replacement projects that the IRS used to award the remaining Advanced Energy Credits.

¹¹ The number of manufacturers and projects receiving the Advanced Energy Credit is based upon information provided to us by the IRS. TIGTA did not verify the accuracy of the information provided.



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Appendix I

Detailed Objective, Scope, and Methodology

The overall objective of this review was to assess the IRS's interpretation of Section (§) 1302 of the American Recovery and Reinvestment Act of 2009 (Recovery Act)¹ and its program guidance that set forth the criteria and process for considering and selecting manufacturers to receive the Qualifying Advanced Energy Project Credit (Advanced Energy Credit). This review was requested by the U.S. House of Representatives, Committee on Science, Space, and Technology, Subcommittee on Investigations and Oversight. This audit was limited to obtaining the answers to the specific questions posed by the Subcommittee on Investigations and Oversight.

Our analysis was limited to the IRS's role in the development of the Advanced Energy Project program guidance and awarding of the Advanced Energy Credit. We did not evaluate Department of Energy actions other than to determine the role the Department of Energy played in formulating program guidance and recommending qualified energy projects for receipt of the Credit. To accomplish our objective, we:

- I. Determined why there are inconsistencies between the IRS criteria and I.R.C. § 48C statutory criteria, particularly those associated with the lowest levelized cost criterion.
 - A. Reviewed the Recovery Act, I.R.C. § 48C, and IRS Notice 2009-72, *Qualifying Advanced Energy Project Credit*,² to determine the differences between I.R.C. § 48C and Notice 2009-72. We interviewed IRS personnel, including those in the IRS Office of Chief Counsel, and obtained documentation related to the process used to produce IRS Notice 2009-72.
 - B. Interviewed Department of Energy personnel, including the Department's Chief Counsel, as to why the lowest levelized cost evaluation factor differed from I.R.C. § 48C. We obtained any supplemental documentation to the extent allowable related to the process used to produce IRS Notice 2009-72.
- II. Determined the statutory authority for the addition of Program Policy Factors.
 - A. Interviewed IRS personnel, including those in the IRS Office of Chief Counsel, to determine the statutory authority for the addition of the Program Policy Factors and reviewed documentation obtained from the IRS Office of Chief Counsel in Step I.A.

¹ Pub. L. No. 111-5, 123 Stat. 115 (2009).

² I.R.S. Notice 2009-72, 2009-37 Internal Revenue Bulletin 325.



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- to determine the support for the IRS's opinion that the inclusion of the Program Policy factors was allowable under I.R.C. § 48C.
- B. Interviewed Department of Energy personnel responsible for the content in IRS Notice 2009-72 to determine the statutory authority for the addition of the Program Policy Factors. We also reviewed documentation obtained from the Department of Energy in Step I.B. to determine the reason the Program Policy Factors were used and the support for the Department's opinion that the inclusion of the Program Policy Factors was allowable under I.R.C. § 48C.
- III. Made observations about how inconsistencies between IRS Notice 2009-72 and I.R.C. § 48C may have affected project rankings.
- A. Determined the Department of Energy's purpose for using the Program Policy Factors in ranking projects and determined if the use of the Program Policy Factors would have had a material impact on the Department of Energy's recommendations for the Advanced Energy Credit.
- B. Determined how the Department of Energy applied the Program Policy Factors when evaluating and ranking projects. We also obtained a list of projects from the Department of Energy as they were ranked before the Program Policy Factors were applied and a list of projects as they were ranked after the Factors were applied. We compared the lists to determine how the projects that were recommended to the IRS would have changed if the Program Policy Factors had not been used.
- IV. Determined if the IRS made awards consistent with the Department of Energy's rankings.
- A. Identified the process used by the IRS to determine which projects recommended by the Department of Energy should be awarded the Advanced Energy Credit and obtained documentation on the process used.
- B. Determined if the IRS awarded the Advanced Energy Credit to any project that was not recommended by the Department of Energy and, if so, why. We obtained documentation from the IRS for any project the Department of Energy recommended and the IRS rejected to determine the reason for the rejection. We also determined how the IRS, in working with the Department of Energy, replaced rejected projects when awarding the Advanced Energy Credit.

Internal controls methodology

Internal controls relate to management's plans, methods, and procedures used to meet their mission, goals, and objectives. Internal controls include the processes and procedures for planning, organizing, directing, and controlling program operations. They include the systems for measuring, reporting, and monitoring program performance. We determined the following internal controls were relevant to our audit objective: the controls in place to ensure that IRS program guidance accurately reflects the legislation on which the guidance is developed. We



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evaluated the controls by reviewing the process the IRS used to develop Notice 2009-72 and award the Advanced Energy Credit.



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Appendix II

Major Contributors to This Report

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Brett C. Thornock, Audit Evaluator



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Appendix III

Report Distribution List

Commissioner C
Office of the Commissioner – Attn: Chief of Staff C
Deputy Commissioner for Services and Enforcement SE
Deputy Commissioner (Domestic), Large Business and International Division SE:LB
Director, Natural Resources and Construction Industry, Large Business and International
Division SE:LB:NRC
Director, Shared Support, Large Business and International Division SE:LB:SS
Chief of Counsel CC
National Taxpayer Advocate TA
Director, Office of Legislative Affairs CL:LA
Director, Office of Program Evaluation and Risk Analysis RAS:O
Office of Internal Control OS:CFO:CPIC:IC
Audit Liaison: Program Manager, Division Planning, Oversight Reporting and Liaison, Shared
Support, Large Business and International Division SE:LB:SS:DPORL



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Appendix IV

*Internal Revenue Code Section 48C,
Qualifying Advanced Energy Project Credit*

(a) In general

For purposes of section 46, the qualifying advanced energy project credit for any taxable year is an amount equal to 30 percent of the qualified investment for such taxable year with respect to any qualifying advanced energy project of the taxpayer.

(b) Qualified investment

(1) In general

For purposes of subsection (a), the qualified investment for any taxable year is the basis of eligible property placed in service by the taxpayer during such taxable year which is part of a qualifying advanced energy project.

(2) Certain qualified progress expenditures rules made applicable

Rules similar to the rules of subsections (c)(4) and (d) of section 46 (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990) shall apply for purposes of this section.

(3) Limitation

The amount which is treated for all taxable years with respect to any qualifying advanced energy project shall not exceed the amount designated by the Secretary as eligible for the credit under this section.

(c) Definitions

(1) Qualifying advanced energy project

(A) In general

The term “qualifying advanced energy project” means a project—

(i) which re-equips, expands, or establishes a manufacturing facility for the production of—

(I) property designed to be used to produce energy from the sun, wind, geothermal deposits (within the meaning of section 613(e)(2)), or other renewable resources,



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- (II) fuel cells, microturbines, or an energy storage system for use with electric or hybrid-electric motor vehicles,
 - (III) electric grids to support the transmission of intermittent sources of renewable energy, including storage of such energy,
 - (IV) property designed to capture and sequester carbon dioxide emissions,
 - (V) property designed to refine or blend renewable fuels or to produce energy conservation technologies (including energy-conserving lighting technologies and smart grid technologies),
 - (VI) new qualified plug-in electric drive motor vehicles (as defined by section 30D), qualified plug-in electric vehicles (as defined by section 30(d)), or components which are designed specifically for use with such vehicles, including electric motors, generators, and power control units, or
 - (VII) other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Secretary, and
- (ii) any portion of the qualified investment of which is certified by the Secretary under subsection (d) as eligible for a credit under this section.

(B) Exception

Such term shall not include any portion of a project for the production of any property which is used in the refining or blending of any transportation fuel (other than renewable fuels).

(2) Eligible property

The term “eligible property” means any property—

- (A) which is necessary for the production of property described in paragraph (1)(A)(i),
- (B) which is—
 - (i) tangible personal property, or
 - (ii) other tangible property (not including a building or its structural components), but only if such property is used as an integral part of the qualified investment credit facility, and
- (C) with respect to which depreciation (or amortization in lieu of depreciation) is allowable.



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(d) Qualifying advanced energy project program

(1) Establishment

(A) In general

Not later than 180 days after the date of enactment of this section, the Secretary, in consultation with the Secretary of Energy, shall establish a qualifying advanced energy project program to consider and award certifications for qualified investments eligible for credits under this section to qualifying advanced energy project sponsors.

(B) Limitation

The total amount of credits that may be allocated under the program shall not exceed \$2,300,000,000.

(2) Certification

(A) Application period

Each applicant for certification under this paragraph shall submit an application containing such information as the Secretary may require during the two-year period beginning on the date the Secretary establishes the program under paragraph (1).

(B) Time to meet criteria for certification

Each applicant for certification shall have one year from the date of acceptance by the Secretary of the application during which to provide to the Secretary evidence that the requirements of the certification have been met.

(C) Period of issuance

An applicant which receives a certification shall have three years from the date of issuance of the certification in order to place the project in service and if such project is not placed in service by that time period, then the certification shall no longer be valid.

(3) Selection criteria

In determining which qualifying advanced energy projects to certify under this section, the Secretary—

(A) shall take into consideration only those projects where there is a reasonable expectation of commercial viability, and

(B) shall take into consideration which projects—

(i) will provide the greatest domestic job creation (both direct and indirect) during the credit period,



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- (ii) will provide the greatest net impact in avoiding or reducing air pollutants or anthropogenic emissions of greenhouse gases,
- (iii) have the greatest potential for technological innovation and commercial deployment,
- (iv) have the lowest levelized cost of generated or stored energy, or of measured reduction in energy consumption or greenhouse gas emission (based on costs of the full supply chain), and
- (v) have the shortest project time from certification to completion.

(4) Review and redistribution

(A) Review

Not later than four years after the date of enactment of this section, the Secretary shall review the credits allocated under this section as of such date.

(B) Redistribution

The Secretary may reallocate credits awarded under this section if the Secretary determines that—

- (i) there is an insufficient quantity of qualifying applications for certification pending at the time of the review, or
- (ii) any certification made pursuant to paragraph (2) has been revoked pursuant to paragraph (2)(B) because the project subject to the certification has been delayed as a result of third-party opposition or litigation to the proposed project.

(C) Reallocation

If the Secretary determines that credits under this section are available for reallocation pursuant to the requirements set forth in paragraph (2), the Secretary is authorized to conduct an additional program for applications for certification.

(5) Disclosure of allocations

The Secretary shall, upon making a certification under this subsection, publicly disclose the identity of the applicant and the amount of the credit with respect to such applicant.

(e) Denial of double benefit

A credit shall not be allowed under this section for any qualified investment for which a credit is allowed under section 48, 48A, or 48B.

Source

(Added Pub. L. 111-5, div. B, title I, § 1302(b), Feb. 17, 2009, 123 Stat. 345.)



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References in Text

Subsections (c)(4) and (d) of section 46 (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990), referred to in subsec. (b)(2), means section 46(c)(4) and (d) as in effect before enactment of Pub. L. 101-508, which amended section 46 generally.

The date of enactment of this section, referred to in subsec. (d)(1)(A), (4)(A), is the date of enactment of Pub. L. 111-5, which was approved Feb. 17, 2009.

Effective Date

Section applicable to periods after Feb. 17, 2009, under rules similar to the rules of section 48(m) of this title as in effect on the day before Nov. 5, 1990, see section 1302(d) of Pub. L. 111-5, set out as an Effective Date of 2009 Amendment note under section 46 of this title.



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Appendix V

*Application Requirements for the
Advanced Energy Credit*

Manufacturers were required to submit three applications for each project for which they were requesting the Advanced Energy Credit – Preliminary Application, *Application for Department of Energy Recommendation*, and *Application for § 48C Certification*.

- The Preliminary Application provided the Department of Energy a preview of the types of projects that would be applying for the Credit. This allowed the Department to adequately plan for the technical expertise that would be needed to review the *Applications for Department of Energy Recommendation* once submitted.
- The *Application for Department of Energy Recommendation* served as a project's official application for the Advanced Energy Credit.
- The *Application for § 48C Certification* provided detailed information about the entity requesting the Credit as well as contact information. The IRS used this information to verify that applications were being submitted by individuals within the requesting entity who had the authority to do so. Figure 1 provides the information manufacturers were required to submit with each application.

Figure 1: Application Requirements for the Advanced Energy Credit

Application	Requirements
Preliminary Application	Manufacturers were to provide a brief description of the project, including: <ul style="list-style-type: none">• A summary of the project.• The specified advanced energy property the re-equipped, expanded, or new manufacturing facility will produce.• Current project status and progress to date.• Project schedule and milestones through the placed-in-service date.



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Application	Requirements
Application for Department of Energy Recommendation	<p>Manufacturers were to provide:</p> <ul style="list-style-type: none">• A copy of the project's Preliminary Application.• A description of the project including:<ul style="list-style-type: none">○ A description of the project, including incremental manufacturing capacity.○ Location of the project.○ The specified advanced energy property the re-equipped, expanded, or new manufacturing facility will produce.○ The amount of tax credit requested and the estimated amount that will be treated as a qualified investment.○ Current project status and schedule, with milestones, through the placed-in-service date.○ Summary of the main parties to the project, including owners, investors, and technical partners.○ Summary of the financial strength of owners, investors, and technical partners and the technical capabilities and experience of the technical partners providing key components to the project.○ Overview of the intellectual property arrangements with respect to the property produced.○ Confirmed or potential customers who will purchase, lease, or use the property produced.• The project's business plan.• The project's financial plan.• Information on job creation.• Total emissions reduced.• A discussion of greenhouse gas emissions and air pollutants generated, along the full supply chain, for the manufacture, installation, operation, and decommissioning of the specified advanced energy property to which the project will contribute.• A discussion of whether the project will produce a new or significantly improved technology.• Calculations of incremental cost improvements for the specified advanced energy property attributable to the facility.• A description of other technological improvements for the specified advanced energy property attributable to the facility.• A calculation of the Attributable Annual Manufacturing Capacity.¹

¹ *Attributable Annual Manufacturing Capacity measures the total impact over the lifetime of deployed property which is attributable to one year of manufacturing.*



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Application	Requirements
Application for § 48 Certification	Manufacturers were to provide: <ul style="list-style-type: none">• The name, address, and Taxpayer Identification Number² of the taxpayer. If the taxpayer is a member of an affiliated group filing consolidated returns, the taxpayer must also provide the name, address, and Taxpayer Identification Number of the common parent of the group.• The name, telephone number, e-mail address, and fax number of a contact person.• A properly executed power of attorney, preferably on Form 2848, <i>Power of Attorney and Declaration of Representative</i>, for the contact person.• One electronic version of the completed <i>Application for Department of Energy Recommendation</i> submitted with respect to the project.

Source: IRS Notice 2009-72, *Qualifying Advanced Energy Project Credit*, issued September 14, 2009.³

² A nine-digit number assigned to taxpayers for identification purposes. Depending upon the nature of the taxpayer, the Taxpayer Identification Number is an Employer Identification Number, a Social Security Number, or an Individual Taxpayer Identification Number.

³ IRS Notice 2009-72, 2009-37 Internal Revenue Bulletin 325.



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Appendix VI

Department of Energy Technology Groups

The Department of Energy grouped the 594 applications it received for the Advanced Energy Credit into 19 technology groups. Department of Energy technical experts reviewed the applications within each technology group and computed a technical expert score for each project. A project's score was based on the eligibility and evaluation criteria contained in Appendix B of IRS Notice 2007-92, *Qualifying Advanced Energy Project Credit*.¹

- Batteries
- Biomass
- Building Efficiency
- Carbon Capture and Storage
- Fuel Cell
- Geothermal
- Hydro
- Industrial
- Nuclear
- Smart Grid
- Solar, Components and Materials
- Solar, Crystalline Silicon
- Solar, Concentrating Solar Power
- Solar, Hot Water
- Solar, Photo Voltaic
- Vehicles
- Wind, Blades
- Wind, Towers
- Wind, Turbines

¹ I.R.S. Notice 2009-72, 2009-37 Internal Revenue Bulletin 325.