THREE PART WEBINAR SERIES

THE STIMULUS BILL:
Structured Tax Incentives

STOEL RIVES LLP

ATTORNEYS AT LAW

Wednesday, November 4, 2009 • 10 a.m. Pacific; 1 p.m. Eastern

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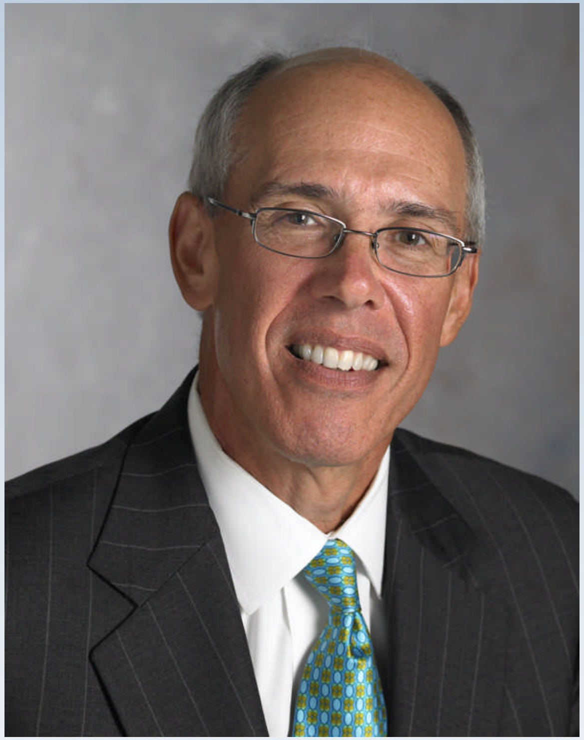

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Background of Grant Program

- Investment-based ITC existed prior to ARRA – applied to more limited types of facilities
- ARRA made ITC available for additional types of facilities that previously qualified only for production-based PTC
- ARRA added grant program, which is intended to function similarly to a refundable ITC

Overview of Grant Program

- Grant functions essentially the same as the ITC
  - Generally 30% of tax basis of qualifying assets
  - Subject to recapture in certain circumstances
  - Not included in recipient's taxable income
  - Basis reduced by 50% of the amount of the grant
- Treasury Department guidance

Eligible Applicants

- Generally, anyone owning a qualified project is eligible to receive the grant
- The following types of entities are *not* eligible:
  - Federal, state and local government entities
  - Tax-exempt organizations
  - Organizations described in Code Section 54(j)
  - Flow-through entities with owners described above
- Blocker corporations

Eligible Facilities

- Grant applies to the following types of facilities:
  - Wind
  - Biomass (open- and closed-loop)
  - Geothermal
  - Landfill gas
  - Solar
  - Marine and hydrokinetic
  - Others (trash, qualified hydropower, etc.)

“Placed in Service” Requirement

- Generally, project must be placed in service in calendar year 2009 or 2010
- If construction begins in 2009 or 2010, must be placed in service before credit termination date
  - January 1, 2013 in the case of wind
  - January 1, 2014 in the case of biomass, geothermal, landfill gas, trash, marine and hydrokinetic
  - January 1, 2017 in the case of solar, small wind, and others (geothermal qualifying for 10% grant)

“Placed in Service” Issues

- “Placed in service” generally means placed in a state of readiness for assigned function
  - Factual issues may arise
  - Generally must be ready to operate
  - 5-factor test from Revenue Rulings
- “Units” of property
  - Wind turbine ruling
  - Treasury guidance allows owner to select units

Beginning Construction

- Must begin physical work of a significant nature
- Self-construction – must begin physical work; preliminary work not sufficient
- Construction by contract
  - Must have binding contract; liquidated damages must be at least 5% of contract price
  - Physical work must commence under the contract
- Safe harbor – must incur 5% of total cost

Other Issues Relating to Facility

- Location of property – must be used predominately in the U.S.
- Original use – 80/20 test
- Cost segregation for property installed on other property
- No double-dipping. Grant not available with respect to property for which PTC or ITC is claimed.

Specified Energy Property

- Grant applies only to "specified energy property" that is part of a qualified facility
- Specified energy property must be eligible for depreciation or amortization *and* must be
  - Tangible personal property; or
  - Other tangible property (not including a building or its structural components) that is used as an integral part of the facility

Leased Property

- Pass-through election
  - Lessee treated as having acquired for an amount equal to fair market value on date of lease
  - Lessor must waive right to grant payment
  - No basis reduction for owner of property
  - Lessee must include half the grant in gross income ratably over 5-year recapture period
- Sale-leaseback transactions

Grant Percentage

- 30% of tax basis of specified energy property for:
  - Property for which the PTC otherwise is allowed;
  - Qualified fuel cell property;
  - Solar property;
  - Qualified small wind energy property
- 10% of tax basis of other types of specified energy property

Tax Treatment of Grant

- General Rules:
  - The amount of the grant is *not* included in recipient’s gross income for tax purposes
  - Tax basis of specified energy property reduced by one-half of the amount of the grant
- Special rule for lease pass-through election:
  - Lessee required to include one-half of the amount of the grant in gross income
  - No basis reduction for owner of property

Application Procedures

- Application must be received by Treasury Department:
  - After project is placed in service or construction has begun; and
  - Before October 1, 2011
- Treasury Department will review and make payment within 60 days of the date the application is submitted for projects that are in service

Supporting Documentation

- Application must include detailed summary of all costs included in basis
- Taxpayer must retain and provide upon request copies of contracts, invoices, and proof of payment
- For property with cost basis of more than $500,000, application must include independent accountant's certification of costs

Recapture

- Grant is subject to recapture if property is disposed of or ceases to be used as specified energy property within 5 years (100% in year one, 80% in year 2, 60% in year 3, etc.)
- Property is considered to be disposed of only if it is transferred to a person who would not have been eligible for the grant in the first instance (different from ITC recapture)

…Recapture (cont.)

- No bond requirement
- No lien on property for potential recapture
- No personal guarantees required
- Recapture liability is considered debt owed to the U.S. and is enforced by the DOJ
- Recapture liability is not considered a tax liability for enforcement purposes

Miscellaneous Issues

- Assignment of grant payments
- Annual performance reporting requirement
- Grant does not trigger NEPA compliance
- Grant does not trigger Davis-Bacon compliance
- CCR registration requirement
- Normalization accounting required for regulated utilities receiving grants

Grant vs. ITC

- Grant may mitigate need for tax investor, although losses are still very valuable
- Timing of benefit realization may differ slightly
- Recapture operates differently and is collected differently
- ITC may allow for more aggressive positions in gray areas

ITC/Grant vs. PTC

- PTC is spread over 10 years, whereas ITC/grant is available in the first year a project is in service
- PTC is not subject to recapture
- Difference in value depends on cost and expected output and efficiency of facility
- ITC not subject to reduction for government financing; PTC is subject to reduction

Monetization Structures

- Bringing in tax-motivated investor may be helpful to maximize the value of tax credits and tax losses
- Primary monetization structures:
  - Partnership “flip”
  - Lease with pass-through election
  - Sale-leaseback

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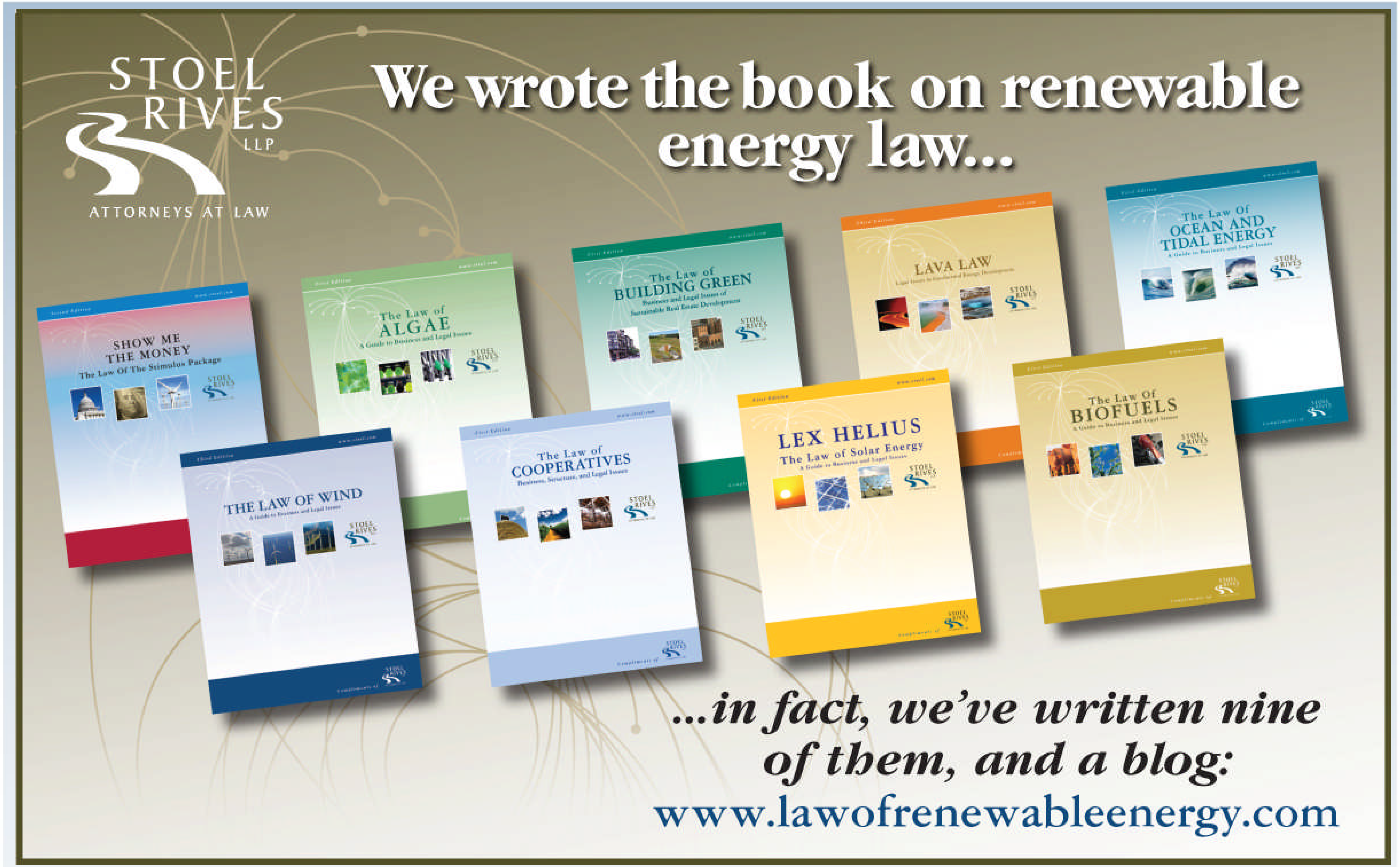
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