

## Part III - Administrative, Procedural, and Miscellaneous

### Clean Renewable Energy Bonds

Notice 2005-98

#### **SECTION 1. PURPOSE**

This Notice solicits applications for allocations of the clean renewable energy bond limitation under section 54(f) of the Internal Revenue Code (the Code). This Notice also provides guidance on: (1) the requirements a project must meet in order to be eligible to obtain an allocation of the limitation; (2) the methodology the Treasury Department will use to allocate the limitation; and (3) the credit rate, maximum term and information reporting requirements applicable to clean renewable energy bonds. In addition, this Notice announces that temporary and proposed regulations will be issued under section 54, and describes certain remedial action provisions and arbitrage restrictions that will be contained in those regulations. Applications for allocations of the clean renewable energy bond limitation must be filed by April 26, 2006, in accordance with this Notice.

#### **SECTION 2. INTRODUCTION**

Section 1303 of the Energy Tax Incentives Act of 2005, Pub. L. No. 109-58 (the Act), added section 54 to the Code. In general, section 54 authorizes up to \$800,000,000 of tax credit bonds to be issued by qualified issuers to finance certain renewable energy projects described in section 45(d) of the Code. Section 54 applies

to bonds issued after December 31, 2005, and before January 1, 2008.

### **SECTION 3. BACKGROUND**

Section 54(a) provides that a taxpayer that holds a “clean renewable energy bond” on one or more credit allowance dates of the bond occurring during any taxable year is allowed as a nonrefundable credit against Federal income tax for the taxable year an amount equal to the sum of the credits determined under section 54(b) with respect to such dates.

Section 54(b)(1) provides that the amount of the credit with respect to any credit allowance date is 25 percent of the annual credit. Section 54(b)(2) provides that the annual credit is the product of (1) the credit rate determined by the Secretary, multiplied by (2) the outstanding face amount of the bond.

Section 54(b)(3) provides that the Secretary shall determine daily a credit rate that shall apply to the first day on which there is a binding, written contract for the sale or exchange of a clean renewable energy bond. The credit rate for any day is the credit rate the Secretary estimates will permit the issuance of clean renewable energy bonds with a specified maturity or redemption date without discount and without interest cost to the issuer.

Section 54(b)(4) provides that the term “credit allowance date” means March 15, June 15, September 15, December 15, and the last day on which the bond is outstanding. Section 54(b)(5) generally provides that if a bond is issued or redeemed, or matures, during the 3-month period ending on a credit allowance date, then the amount of the credit for that credit allowance date is a ratable portion of the credit

otherwise determined for that 3-month period.

Section 54(g) provides that gross income includes the amount of the credit allowed to the taxpayer under section 54 (without regard to section 54(c)) and the amount so included is treated as interest income.

Section 54(d) provides that a “clean renewable energy bond” means any bond issued as part of an issue if: (1) the bond is issued by a qualified issuer pursuant to an allocation by the Secretary to the issuer of a portion of the national clean renewable energy bond limitation under section 54(f)(2); (2) 95 percent or more of the proceeds of the issue are to be used for capital expenditures incurred by qualified borrowers for one or more qualified projects; (3) the qualified issuer designates the bond for purposes of section 54 and the bond is in registered form; and (4) the issue meets certain requirements described in section 54(h) with respect to the expenditure of bond proceeds, including a requirement that the issuer reasonably expects, as of the issue date, that at least 95 percent of the net proceeds will be expended within 5 years.

Section 54(j)(4) defines a “qualified issuer” as: (1) a clean renewable energy bond lender; (2) a cooperative electric company; or (3) a governmental body. Section 54(j)(2) provides that a “clean renewable energy bond lender” is a lender that is: (1) a cooperative that is owned by, or has outstanding loans to, 100 or more cooperative electric companies and was in existence on February 1, 2002; or (2) any affiliated entity controlled by such a lender. Section 54(j)(1) defines the term “cooperative electric company” as a mutual or cooperative electric company described in section 501(c)(12) or section 1381(a)(2)(C), or a not-for-profit electric utility that has received a loan or loan

guarantee under the Rural Electrification Act. Section 54(j)(3) defines the term “governmental body” as any State, territory, possession of the United States, the District of Columbia, Indian tribal government, or any political subdivision thereof.

Section 54(j)(5) provides that a “qualified borrower” is: (1) a mutual or cooperative electric company described in section 501(c)(12) or 1381(a)(2)(C); or (2) a governmental body.

Section 54(d)(2) defines the term “qualified project” as any of the following qualified facilities (as determined under section 45(d) without regard to any placed in service date) owned by a qualified borrower: (1) a wind facility under section 45(d)(1); (2) a closed-loop biomass facility under section 45(d)(2); (3) an open-loop biomass facility under section 45(d)(3); (4) a geothermal or solar energy facility under section 45(d)(4); (5) a small irrigation power facility under section 45(d)(5); (6) a landfill gas facility under section 45(d)(6); (7) a trash combustion facility under section 45(d)(7); (8) a refined coal production facility under section 45(d)(8); and (9) a qualified hydropower facility under section 45(d)(9).

Section 54(f)(1) provides that the national clean renewable energy bond limitation is \$800,000,000. Section 54(f)(2) provides that the Secretary shall allocate the national clean renewable energy bond limitation among qualified projects in such manner as the Secretary determines appropriate, except that the Secretary may not allocate more than \$500,000,000 of the national clean renewable energy bond limitation to finance qualified projects of qualified borrowers that are governmental bodies.

Section 54(d)(2)(D) provides that, for purposes of the requirement of section

54(d)(1)(B) that at least 95 percent of the proceeds of an issue be used for capital expenditures incurred by a qualified borrower for a qualified project, proceeds of an issue are not treated as used for a qualified project to the extent that a qualified borrower or qualified issuer takes any action within its control that causes such proceeds not to be used for a qualified project. Section 54(d)(2)(D) further provides that the Secretary shall prescribe regulations specifying remedial actions that may be taken (including conditions to taking such remedial actions) to prevent an action described in the preceding sentence from causing a bond to fail to be a clean renewable energy bond.

Section 54(k) generally requires that any borrower of proceeds of a clean renewable energy bond that is a pooled financing bond (within the meaning of section 149(f)(4)(A)) enter into a written loan commitment before the issue date of the bond.

Section 54(l)(6) provides that a bond shall not be treated as a clean renewable energy bond unless it is part of an issue that provides for an equal amount of principal to be paid by the qualified issuer during each calendar year that the issue is outstanding.

Section 54(e)(1) provides that a bond shall not be treated as a clean renewable energy bond if the maturity of the bond exceeds the maximum term determined by the Secretary under section 54(e)(2) with respect to the bond. Section 54(e)(2) provides that, during each calendar month, the Secretary shall determine the maximum term for clean renewable energy bonds issued in the following calendar month. The maximum term is the term the Secretary estimates will result in the present value of the obligation

to repay the principal on the bond being equal to 50 percent of the face amount of the bond. Section 54(e)(2) further provides that such present value shall be determined (1) without regard to the requirement of section 54(l)(6) that the principal of clean renewable energy bonds be amortized ratably each year and (2) using a discount rate equal to the average annual interest rate of tax-exempt obligations having a term of 10 years or more that are issued during the month. If the term as so determined is not a multiple of a whole year, such term shall be rounded to the next highest whole year.

Section 54(i) generally provides that the arbitrage requirements of section 148 applicable to tax-exempt State or local bonds apply to clean renewable energy bonds.

Section 54(l)(7) requires issuers of clean renewable energy bonds to submit reports similar to the reports required under section 149(e) for tax-exempt State or local bonds.

#### **SECTION 4. TEMPORARY REGULATIONS**

The Treasury Department and the Internal Revenue Service intend to issue temporary and proposed regulations (the “Temporary Regulations”) under section 54 to provide guidance to holders and issuers of clean renewable energy bonds. The Temporary Regulations will address, among other matters, remedial actions and arbitrage restrictions applicable to clean renewable energy bonds.

#### **SECTION 5. APPLICATION REQUIREMENTS**

Each application for an allocation of the clean renewable energy bond limitation must be prepared and submitted in accordance with this section. By submitting an application for an allocation of the clean renewable energy bond limitation, pursuant to

section 54(f) and this Notice, the applicant agrees to comply with the requirements of this Notice.

a. Qualified issuer. The application must be submitted by a qualified issuer within the meaning of section 54(j)(4). A “qualified issuer” is: (1) a clean renewable energy bond lender (as defined in section 54(j)(2)); (2) a cooperative electric company (as defined in section 54(j)(1)); or (3) a governmental body (as defined in section 54(j)(3)). Applications must identify the qualified issuer and must demonstrate that the entity constitutes a qualified issuer within the meaning of section 54(j)(4).

b. Signatures. An application must be signed by an authorized employee of the qualified issuer.

c. Addresses. Applications must be submitted in duplicate to the Internal Revenue Service (IRS), Attention CC:TEGE:EOEG:TEB, 1111 Constitution Avenue, NW, Room 4306, Washington, D.C. 20224. Applications may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to the Courier’s Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, D.C., attention CC:TEGE:EOEG:TEB.

d. Due date. Applications must be filed with the IRS on or before April 26, 2006.

e. Project description. Each application must contain the information required by this subsection e.

(i) Qualified borrower. Each application must identify the qualified borrower expected to own the qualified project. A “qualified borrower” is: (1) a mutual or cooperative electric company described in section 501(c)(12) or 1381(a)(2)(C); or (2) a

governmental body (as defined in section 54(j)(3)). The application must demonstrate that the entity constitutes a qualified borrower within the meaning of section 54(j)(5). If any bond is expected to be a pooled financing bond (within the meaning of section 149(f)(4)(A)), the application must demonstrate that the qualified issuer will enter into a written loan commitment with each qualified borrower prior to the issue date of the bond issue.

(ii) Qualified project. Each application must describe in detail the project to be financed with the proceeds of the clean renewable energy bonds. The application must demonstrate that the project will constitute a “qualified project” within the meaning of section 54(d)(2)(A), and must indicate the expected date the project will be placed in service. The application also must contain a certification by an independent, licensed engineer that the project will meet the requirements to be a qualified facility (as determined under section 45(d) without regard to section 45(d)(10) and to any placed in service date) and that the project is technically viable.

(iii) Location of project. The application must indicate the location of the project.

(iv) Regulatory approvals. The application must describe a plan to obtain all necessary Federal, state and local regulatory approvals for the project.

f. Plan of financing. The application must contain a detailed description of the plan of financing for the project, including all private and public sources of financing and the status of the applicants’ efforts to secure all such financing. The application must also describe the anticipated date of bond issuance, the sources of security and repayment for the bonds, the aggregate face amount of bonds expected to be issued for

the project, and the issuer's reasonably expected schedule for spending proceeds of clean renewable energy bonds.

g. Dollar amount of allocation requested. The application must specify the dollar amount of the clean renewable energy bond limitation requested.

## **SECTION 6. ALLOCATION OF CLEAN RENEWABLE ENERGY BOND LIMITATION**

The clean renewable energy bond limitation will be allocated, in accordance with this section, to qualified projects for which applications meeting the requirements of this Notice have been filed with the IRS on or before April 26, 2006. Projects for governmental bodies and mutual or cooperative electric companies described in section 501(c)(12) or 1381(a)(2)(C) will be allocated the full amount of clean renewable energy bond limitation requested beginning with the project(s) for which the smallest dollar amount of clean renewable energy bond limitation has been requested and continuing with the project(s) for which the next-smallest dollar amount of such limitation has been requested until the total amount of clean renewable energy bond limitation has been exhausted. However, in the event that \$500,000,000 has been allocated to qualified projects of qualified borrowers that are governmental bodies, the remaining clean renewable energy bond limitation will be allocated, under the methodology described in the previous sentence, only to qualified projects of qualified borrowers that are not governmental bodies. For purposes of this section, all qualified projects located at the same site and owned by the same qualified borrower are treated as a single project.

## **SECTION 7. REQUIRED DECLARATIONS**

Each application, certification, report or other document submitted under this

Notice must include the following declaration signed by an authorized employee of the qualified issuer who has personal knowledge of the relevant facts and circumstances:

“Under penalties of perjury, I declare that I have examined this document and, to the best of my knowledge and belief, all of the facts contained herein are true, correct, and complete.”

#### **SECTION 8. MAXIMUM TERM**

The maximum term for a clean renewable energy bond is determined under section 54(e)(2) by using a discount rate equal to 110 percent of the long-term adjusted AFR, compounded semi-annually, for the month in which the bond is sold. For purposes of this Notice, a bond is “sold” on the first day on which there is a binding contract in writing for the sale or exchange of the bond. The maximum term for a clean renewable energy bond will be published daily by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: <http://www.publicdebt.treas.gov>.

#### **SECTION 9. CREDIT RATE**

For each issue of clean renewable energy bonds, a separate credit rate will apply to each of the level annual repayments of principal of the issue (each, a “principal maturity”). The credit rate for a principal maturity of an issue of clean renewable energy bonds is the applicable clean renewable energy bond credit rate published each business day by the Bureau of Public Debt on its Internet site for State and Local Government Series securities at: <http://www.publicdebt.treas.gov>. The applicable clean renewable energy bond credit rate shall be applied to a principal maturity of an issue of

clean renewable energy bonds on the day the issue is sold. The credit rates will be determined by the Treasury Department based on its estimate of the yield on outstanding AA rated corporate bonds of a similar maturity for the business day immediately prior to the date on which the issue is sold.

## **SECTION 10. INFORMATION REPORTING**

Section 54(l)(7) requires issuers of clean renewable energy bonds to submit reports similar to the reports required under section 149(e) for tax-exempt State or local bonds. To satisfy this requirement, an issuer of clean renewable energy bonds must submit for each issue, at the same time and in the same manner as required under section 149(e), Form 8038-G, *Information Return for Tax-Exempt Governmental Obligations*. Issuers of clean renewable energy bonds should complete Part II of Form 8038-G by checking the box on Line 18 (Other), writing “clean renewable energy bonds” in the space provided for the bond description, and entering the amount of the bonds in the Issue Price column. For purposes of this Notice, an “issue” means one or more bonds that are sold on the same day by the same qualified issuer with respect to the same qualified borrower.

## **SECTION 11. REMEDIAL ACTIONS**

It is anticipated that the Temporary Regulations will provide that, for purposes of the requirement of section 54(d)(1)(B) that at least 95 percent of the proceeds of an issue be used for capital expenditures incurred by a qualified borrower for a qualified project, proceeds of an issue will not be treated as used for a qualified project to the extent that a qualified issuer or qualified borrower takes a deliberate action that causes

such proceeds not to be used for a qualified project. For this purpose, the term “deliberate action” will have the same meaning as in § 1.141-2(d)(3) of the Income Tax Regulations, except that “section 54” will be substituted for “section 141” in § 1.141-2(d)(3)(i). It is further anticipated that the Temporary Regulations will provide that an action that causes an issue to fail to meet the requirements of section 54(d)(1)(B) is not treated as a deliberate action if (1) the issuer takes a remedial action described in the Temporary Regulations and (2) certain other requirements specified in the Temporary Regulations are met. Finally, it is anticipated that the Temporary Regulations will contain a “redemption or defeasance” remedial action and an “alternative use of disposition proceeds” remedial action similar but not identical to the remedial actions contained in § 1.141-12(d) and § 1.141-12(e).

## **SECTION 12. ARBITRAGE REQUIREMENTS**

Section 54(i) generally provides that a bond shall not be treated as a clean renewable energy bond unless, with respect to the issue of which the bond is a part, the qualified issuer satisfies the arbitrage requirements of section 148 with respect to proceeds of the issue. It is anticipated that the Temporary Regulations will provide that, for purposes of applying the arbitrage requirements of section 148 to bonds issued under section 54--

(1) If an issue meets the requirements of section 54(h)(1) (including the requirement that the issuer reasonably expects, as of the issue date, that at least 95 percent of the net proceeds will be expended within 5 years), then the proceeds of the issue qualify for a temporary period of 5 years beginning on the date of issuance of the

issue, and any unspent proceeds after the end of such 5-year period are eligible for yield reduction payments under the principles of § 1.148-5(c);

(2) The credit allowed under section 54(a) shall be disregarded for purposes of computing the yield on the issue under § 1.148-4;

(3) Section 148(b)(3) (relating to exception to the definition of “investment property” for certain tax-exempt bonds) shall not apply;

(4) The bonds shall not be treated as private activity bonds for purposes of section 148(f)(4)(A) (relating to rebate exception for amounts in a bona fide debt service fund);

(5) Section 148(f)(4)(C) (relating to exception from rebate for certain proceeds to be used to finance construction expenditures) shall apply to the available construction proceeds of an issue; and

(6) Section 148(f)(4)(D) (relating to exception from rebate for certain small issuers) shall not apply.

### **SECTION 13. DRAFTING INFORMATION**

The principal authors of this Notice are Timothy L. Jones and Aviva M. Roth of the Office of Associate Chief Counsel (Tax Exempt & Government Entities). However, other personnel from the IRS and the Treasury Department participated in its development. For further information regarding this Notice contact Timothy L. Jones or Aviva M. Roth at (202) 622-3980 (not a toll-free call).