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### Investment Tax Credit or Cash Grant in Lieu of Investment Tax Credit for Qualifying Therapeutic Discovery Projects

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As part of the new health reform law, consisting of H.R. 3590, the Patient Protection and Affordable Care Act (P.L. 111-148), and H.R. 4872, the Health Care and Education Reconciliation Act of 2010 (P.L. 111-152), there is a new nonrefundable investment tax credit for certain taxpayers with “qualified investment” in a “qualified therapeutic discovery project” (a “QTDP”). A taxpayer also may request a cash grant in lieu of the investment tax credit, likely very similar to the cash grant in lieu of tax credit procedure that currently is in place for certain specified energy property. The new nonrefundable investment tax credit (the “QTDP tax credit”) and cash grant in lieu of the QTDP tax credit are included in the new Section 48D of the Internal Revenue Code of 1986, as amended (the “Code”). *Because qualified investment includes certain costs paid or incurred in a tax year beginning in 2009 or 2010 and the total amount of QTDP tax credits and cash grants that can be allocated by the Treasury Department cannot exceed \$1 billion for the two-year period beginning with 2009, it is anticipated that the application process will be time-sensitive and highly competitive.*

#### Qualified Investment in a QTDP

The QTDP tax credit or cash grant may be claimed for up to 50% of qualified investment in a QTDP. Qualified investment includes costs paid or incurred in a tax year beginning in 2009 or 2010 for expenses necessary for and directly related to the conduct of a QTDP. The amount treated as qualified investment for all tax years cannot exceed the amount certified by the Treasury as eligible for the QTDP tax credit.

A “qualifying therapeutic discovery project” is a project which is designed:

- to treat or prevent diseases or conditions by conducting pre-clinical activities, clinical trials, and clinical studies, or carrying out research protocols, for the purpose of securing approval of a product by the Food & Drug Administration or Public Health Service;
- to diagnose diseases or conditions or to determine molecular factors related to diseases or conditions by developing molecular diagnostics, molecular drugs and companion drugs and diagnostics to guide therapeutic decisions; or
- to develop a product, process, or technology to further the delivery or administration of therapeutics.

Qualified investment does not include the following costs:

- remuneration for certain executives;
- interest expense;
- facility maintenance expenses, including mortgage or rent payments, insurance payments, utility and maintenance costs and costs of employment of maintenance personnel;
- certain indirect costs (e.g., general and administrative costs) identified as costs attributable to service departments, such as personnel, accounting, etc.;
- any other expense that is determined by the Treasury to be appropriate to carry out the purposes of Code Sec. 48D; and
- expenses that are financed by certain types of nonrecourse financing.

Additionally, qualified investment does not include costs used in claiming certain other tax incentives such as bonus depreciation, the research and development tax credit and the “orphan drug” tax credit. In other words, a taxpayer generally cannot use such costs for a double income tax benefit.

#### Eligible Applicants

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An eligible applicant for the QTDP tax credit or cash grant is a taxpayer that employs no more than 250 employees in all businesses of the taxpayer at the time of the submission of the application under the QTDP certification program. Certain related persons are treated as a single employer for this purpose. Also, a cash grant cannot be awarded to:

- any federal, state or local government (or any political subdivision, agency or instrumentality);
- any tax-exempt organization described in Code Section 501(c);
- any clean renewable energy bond lender, cooperative electric company or governmental body; or
- any partnership or other pass-through entity any holder of an equity or profits interest of which is described in the three preceding bullet points.

### **QTDP Certification Program**

Not later than May 21, 2010, the Treasury, in consultation with the Secretary of Health and Human Services, must establish a QTDP certification program to consider and award certifications for qualified investments eligible for the QTDP tax credit. Each applicant must submit an application containing the information as the Treasury may require during the period beginning on the date that the Treasury establishes the QTDP certification program. The application can include a request for an allocation of QTDP tax credits for both 2009 and 2010. The Treasury must take action to approve or deny any application within 30 days of submission of the application.

In certifying QTDPs, the Treasury is required to take into consideration only those projects that show reasonable potential (i) to result in certain new therapies associated with unmet medical need or chronic or acute diseases and conditions, (ii) to reduce long-term health care costs in the United States, or (iii) to significantly advance the goal of curing cancer within the 30-year period beginning on the date the Treasury establishes the QTDP certification program. Additionally, the Treasury is required to take into consideration which projects have the greatest potential (i) to create and sustain high quality, high-paying jobs in the United States, and (ii) to advance U.S. competitiveness in the fields of life, biological and medical sciences. Upon making a certification, the Treasury must publicly disclose the identity of the applicant and the amount of QTDP tax credit or cash grant for the applicant.

### **Certain Federal Income Tax Aspects Associated with the QTDP Tax Credit or Cash Grant**

The QTDP tax credit or cash grant is not taxable as income. If a QTDP tax credit or cash grant is allowed for an expense related to depreciable property (such as a patent), the basis of the property must be reduced by the amount of the QTDP tax credit or cash grant. No QTDP tax credit is allowed for the tax year in which a cash grant is made or any subsequent tax year.

The QTDP tax credit and cash grant are subject to the complex restrictions imposed upon the investment tax credit. One such restriction is recapture of the QTDP tax credits and cash grants if a patent or other resulting property from the QTDP is disposed of or ceases to meet QTDP tax credit requirements within five years after it is placed in service.

### **More Information**

[Click here for the full text of P.L. 111-148 \(PDF\).](#)

[Click here for the full text of P.L. 111-152 \(PDF\).](#)

If you have any questions, please contact Will Becker, Thomas Ford, Robert McNamara or Thomas Popplewell

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