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IRS Issues Interim Section 48 Guidance for Fuel Cell and Microturbine Projects

On August 25, 2008, the Internal Revenue Service issued Notice 2008-68 which provides interim guidance under Section 48 for fuel cells and microturbines (the "Notice"). [A copy of the Notice is attached.](#)

Generally, the Notice recites the statutory requirements under Section 48 applicable to fuel cells and microturbines, but the Notice also provides additional guidance regarding certain of these requirements, as described below. In addition, while the Notice provides guidance relating to fuel cell and microturbines, certain of the guidance discussed below may also be applicable to other Section 48 projects, including solar and geothermal projects.

The Notice is effective for property placed in service after August 25, 2008, but taxpayers may apply the provisions of the Notice to property placed in service after December 31, 2005 and before January 1, 2009.

Background

Section 48 provides a 30 percent investment tax credit for "qualified fuel cell property," which is a fuel cell power plant that (a) has a nameplate capacity of at least 0.5 kilowatt of electricity using an electrochemical process, (b) has an electricity-only generation efficiency greater than 30 percent, and (c) is within the credit period (after December 31, 2005

and before January 1, 2009). Section 48 also provides a 10 percent investment tax credit for "qualified microturbine property," which is a stationary microturbine power plant that (a) has a nameplate capacity of less than 2,000 kilowatts, (b) has an electricity-only generation efficiency of not less than 26 percent at International Standard Organization (ISO) conditions, and (c) is within the credit period (after December 31, 2005 and before January 1, 2009).

Additional Guidance

The Notice provides the following additional guidance:

- Determination of Nameplate Capacity — The nameplate capacity of a fuel cell power plant is the maximum electrical output of a generator as rated by the manufacturer at the normal operating conditions designated by the manufacturer. The nameplate capacity of a stationary microturbine power plant is the maximum electrical output of a generator as rated by the manufacturer and determined at ISO conditions.
- Certain Treasury Regulations Made Applicable — The Notice provides that certain Treasury Regulations apply for purposes of determining whether the original use of the property begins with

- the taxpayer (Treas. Reg. § 1.48-2), whether depreciation (or amortization) is allowable to the taxpayer with respect to the property (Treas. Reg. § 1.48-1(b), when property is placed in service (Treas. Reg. § 1.46-3(d), and the basis of property (Treas. Reg. § 1.46-3(a) and (c)).
- Subsidized Energy Financing — The Notice clarifies that for purposes of Section 48(a)(4), “subsidized energy financing” does not include “a grant includible in gross income under § 61, a nontaxable government grant, or a credit against state or local taxes.”
 - Leased Facilities — The Notice states that the fuel cell or microturbine credit is allowed to the lessor of such a project if depreciation (or amortiza-
- tion) with respect to such project is allowable to the lessor.
- Mobile Fuel Cell Plants — The fuel cell tax credit is allowed with respect to a mobile fuel cell power plant if the plant otherwise meets the requirements under certain sections of the Notice.
 - Generation Efficiency of a Fuel Cell Power Plant — The electricity-only generation efficiency of a fuel cell power plant may be determined in accordance with the ANSI/ASME PTC 50-2002 Fuel Cell Power Systems Performance standards or equivalent testing procedures under normal operating conditions using the lower heating value of the primary fuel.
 - Generation Efficiency of a Stationary Microturbine Power Plant — The
- electricity-only generation efficiency of a stationary microturbine power plant may be determined in accordance with the ASME PTC 22-2005 Gas Turbines standards or equivalent testing procedures under ISO conditions using the lower heating value of the primary fuel.
- ISO Conditions — ISO conditions for purposes of determining both the nameplate capacity and generation efficiency of a stationary microturbine power plant are 59 degrees Fahrenheit, 60 percent relative humidity, and 14.696 psia.
- For additional information, contact any of the attorneys listed on this alert, or visit our [Energy Tax Credits Practice](http://www.hunton.com) at www.hunton.com.

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