

Contact Attorney Regarding
This Matter:

William H. Kitchens
404.873.8644 - direct
404.873.8645 - fax
william.kitchens@agg.com

Arnall Golden Gregory LLP
Attorneys at Law
171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031
404.873.8500
www.agg.com

Department of Treasury Releases Implementing Details for \$1 Billion Tax Credit Program for Qualifying Therapeutic Discovery Projects

On Friday, May 21, 2010, the Department of Treasury released [IRS Notice 2010-45](#)¹ and a [Fact Sheet](#),² which explains how the qualifying therapeutic discovery project program for the 50 percent investment tax credit that was mandated by Section 9023 of the Patient Protection and Affordable Care Act (the Affordable Care Act or Act) will be administered. The Notice provides information regarding the application process for the \$1 billion of tax credits/grants under the program and the criteria to be considered.

As described in an earlier [AGG Client Alert](#),³ under the therapeutic discovery project program, firms with 250 employees or fewer will be eligible to apply for a tax credit (or alternatively, a grant) equal to 50 percent of the direct and necessary costs incurred during 2009 and 2010 for a qualifying therapeutic discovery project. Eligible firms can opt to receive an equivalent cash grant instead of a tax credit, so start-up companies that are not yet profitable can benefit as well.

The IRS Notice provides that to receive the credit/grant, a project must be “qualified” by the Department of Health and Human Services (HHS) and “certified” by the IRS. First, HHS must qualify the project based on whether it:

1. results in new therapies to treat an unmet medical need or prevent, detect or treat a chronic or acute disease or condition;
2. reduces long-term health costs; or
3. significantly advances the goal of curing cancer within 30 years.

Only projects that show a reasonable potential to meet one or more of these goals will be certified as eligible for the credit. Next, the IRS will certify qualified projects that have the greatest potential to:

1. create and sustain high-quality, high-paying jobs in the U.S.; and
2. advance U.S. competitiveness in the life, biological and medical sciences.

The IRS Notice answers an “open question” presented by the Affordable Care Act itself by specifying that no company may receive more than \$5 million in

1 [http://www.agg.com/media/interior/publications/Kitchens-DoTReleasesImplementingDetailsFor\\$1BillionTaxCredit-Link1.pdf](http://www.agg.com/media/interior/publications/Kitchens-DoTReleasesImplementingDetailsFor$1BillionTaxCredit-Link1.pdf)

2 [http://www.agg.com/media/interior/publications/Kitchens-DoTReleasesImplementingDetailsFor\\$1BillionTaxCredit-Link2.pdf](http://www.agg.com/media/interior/publications/Kitchens-DoTReleasesImplementingDetailsFor$1BillionTaxCredit-Link2.pdf)

3 http://www.agg.com/media/interior/publications/Kitchens-HC_Reform_Bill_Presents_Opps_for_LS_Companies.pdf

tax credits or grants for 2009 and 2010 combined. The Affordable Care Act caps the total amount of credits/grants that may be allocated among certified projects at \$1 billion for the two-year period, but the Act was silent as to the amount of the credit/grant that would be certified per taxpayer.

The IRS Notice describes the process by which firms can apply to have their research projects certified as eligible for the tax credit/grant. A separate application must be submitted for each project, and all applications must be submitted during a narrow window that begins on the day the application form (Form 8942) is released on www.irs.gov, which will be no later than June 21, 2010, and ends on July 21, 2010. Each application will be subject to a preliminary review, which will enable the IRS to determine whether the applicant is an eligible taxpayer and whether the application is otherwise complete. Preliminary review of timely-filed applications will end on September 30, 2010. All eligible and completed applications will be treated as submitted on October 1, 2010, when the IRS will begin the formal 30-day review process for all applications specified in the Affordable Care Act.

The IRS Notice describes the information that Form 8942 will require in each application. Of particular note is the requirement that the applicant must disclose whether, as of the date on which the application is submitted, the therapeutic discovery project is active, terminated or suspended. The Notice further provides that those projects that have been terminated or suspended because the project failed a clinical trial, failed a pre-clinical research milestone or failed to secure Food and Drug Administration licensure will be determined to have insufficient potential to advance U.S. competitiveness in the fields of life, biological or medical sciences, and a result will be determined to be ineligible for certification.

The application process will include the completion of a project information memorandum that is geared toward the demonstration that the project meets the definition of "qualifying therapeutic discovery project" and whether the applicant has demonstrated that its project shows "reasonable potential" to meet one or more of the goals specified in the Act. In certain sections of the application word limitations will be imposed (e.g., the description of the product, process, or technology under development may not exceed 250 words). Moreover, brochures or other presentations will not be permitted as part of the application and will not be considered.

Arnall Golden Gregory LLP serves the business needs of growing public and private companies, helping clients turn legal challenges into business opportunities. We don't just tell you if something is possible, we show you how to make it happen. Please visit our website for more information, www.agg.com.

This alert provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice.