

Bond Case Briefs

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IRS to Allocate Nearly \$1.4 Billion in New CREBs Volume Cap: McGuireWoods

With close to \$1.4 billion in volume cap for New Clean Renewable Energy Bonds (New CREBs) remaining, Notice 2015-12 (the 2015 Notice) announces the March 5 opening of the rolling volume-cap application window for governmental bodies (governments) and cooperative electric companies (co-ops), as well as a closed-end application period for public power providers.¹ This Client Alert summarizes the volume-cap application process under the 2015 Notice, including certain new monitoring and filing requirements that require vigilance. For [information on New CREBs](#), including pertinent pronouncements of the Internal Revenue Service (IRS), please see our prior [Client Alerts](#).

Allocation Summary

The amounts, methods and limits of volume cap, as well as application periods and reallocation procedures, for each category are as follows:

	Governmental Bodies	Cooperative Electric Companies	Public Power Providers
Qualified Owners			
Volume Cap Available	\$597,134,963.60	\$280,778,469.00	\$516,565,691.35
Allocation Method	First-come, first-served	First-come, first-served	Pro rata if oversubscribed
Allocation Limit (per applicant) to be updated periodically	Greater of: (i) 20% of available volume cap, or (ii) \$40 million	Greater of: (i) 20% of available volume cap, or (ii) \$40 million	Amount requested in application, subject to ratable allocation if oversubscribed
Application Period	Accepting on and after March 5, 2015	Accepting on and after March 5, 2015	Filed by June 3, 2015
Awarded and Forfeited Allocation	Reallocable under the 2015 Notice	Reallocable under the 2015 Notice	Not reallocable under the 2015 Notice; will be subject to future guidance

Application Requirements; Optional Disclosure

Applicants must be qualified issuers and use a form of application substantially similar to the form included in the 2015 Notice as Appendix A. Among other requirements, the application must:

1. be signed by an authorized official of the applicant;
2. designate a person with knowledge of the project and with whom the IRS may communicate;
3. describe the project in reasonable detail, including applicable acquisition, commencement and completion dates, as well as location, expected costs and amount of requested allocation;
4. certify that the project is a qualified facility;²
5. include an engineer's certification of the facility's qualification under applicable provisions of the Internal Revenue Code and expectation of electricity production upon project completion;
6. specify the project owner and certify that such owner is a qualified owner, although (a) for

governmentally or co-op owned projects, the application must state that the owner is not a public power provider, (b) if the project may satisfy more than one qualified owner category, the application must identify only one such category, and (c) projects owned by public power providers are ineligible for governmental or co-op volume cap;

7. certify that none of the costs were the subject of a prior application, and if they were, (a) the IRS has been notified that the application has been withdrawn or (b) applicable awarded allocation has reverted to the IRS, plus address any situations of awarded and either expired or forfeited allocation under the 2015 Notice;
8. state that all necessary federal, state and local regulatory and issuance approvals have been received, identify any approvals that have not been received, including the plan and timeframe for securing such approvals and certify that the applicant expects to receive such outstanding approvals to permit the issuance;
9. provide a plan of financing that details use of the proceeds of the New CREBs, other sources of financing, and marketability of the New CREBs prior to the allocation expiration date; and
10. certify reasonably expected compliance with applicable requirements of the Internal Revenue Code and engagement of bond counsel to opine to such compliance.

As with prior awards, the IRS desires to disclose information about the awards, such as the project owner, type, location and amount of awarded volume cap, and it needs the applicant's consent for such disclosure. Such consent is optional and not a condition to receiving volume cap. The form of that disclosure consent is provided in Appendix B of the 2015 Notice.

Application Process; "Accept or Decline" Feature; Allocation Options

Beginning March 5, 2015, the IRS will accept applications for volume cap to governments and co-ops on a first-come, first-served basis, and any applications received before that date will be treated as received on that date. If any government or co-op submits an application requesting an amount exceeding the volume cap available on a particular date, each applicant will be offered a ratable portion of the available volume cap. Each applicant will have 30 days to (i) accept the reduced amount (using Appendix C to the 2015 Notice), or (ii) delay allocation for up to 90 days from its application date in the event additional volume cap becomes available (using Appendix D to the 2015 Notice). If no additional volume cap becomes available, the IRS will notify the applicant, who will have 30 days to accept the reduced allocation or to withdraw its application.

For public power providers, the IRS will accept their applications up to and including June 3, 2015, and in the event of oversubscription, will then offer allocations of volume cap on a pro rata basis relative to the amount of allocation available and the amounts requested. The IRS will notify each applicant of the reduced amount available, and each applicant will have 30 days to accept or decline the reduced amount.

An application will be treated as received either on the date of its receipt or upon the receipt of any supplemental information the IRS requests.

Substantial Deviations

Similar to the prior New CREBs Notice 2009-33, the 2015 Notice contains the "insubstantial deviation" concept; however, unlike the prior notice, an allocation of volume cap under the 2015 Notice will become invalid if, prior to the issuance of the New CREBs, there is a change to, among other things, the New CREB project that substantially deviates from the New CREB project noted in the allocation application. If there is such a change, the 2015 Notice allows the applicant to forfeit its allocation and to submit a new application correcting the deviation.

Additionally, if there is a substantial deviation after the issuance of the New CREBs, the allocation will remain valid if, and only if, the deviation does not change the category of qualified owner and the applicant submits a supplemental notice of issuance to the IRS. The supplemental notice requires the applicant to certify that it reasonably expected, at the time of issuance of the New CREBs, that the use of New CREB proceeds would not substantially deviate from the proposed New CREB project. The supplemental notice further requires a certification that the applicant has obtained an opinion of bond counsel that the change will not cause the New CREBs to fail to meet the applicable requirements of the Internal Revenue Code.

180-Day Expiration Date; Notice of Issuance

Under the 2015 Notice, New CREBs must be issued within 180 days of the allocation date. After 180 days, any unissued allocation will revert to the IRS and be available for reallocation.

Moreover, upon issuance the issuer must file IRS Form 8038-TC as well as a notice of issuance. Such notice must be filed no later than 15 days after the issuance. Such notice shall provide, among other things, the issue price and the issue date of the New CREBs and a project description. If an applicant fails to file such notice within 15 days of the expiration of the 180-day period, the IRS will request such applicant either to submit such notice or to confirm that the allocation has been forfeited. If the applicant fails either to submit the notice within 15 days of the IRS request or to confirm that the allocation was forfeited, the IRS, in its discretion, may treat the allocation as forfeited and as having reverted back to the IRS and available for reallocation.

Footnotes

1, 2. New CREBs may be used for capital expenditures incurred by governments, public power providers or co-ops for one or more qualified renewable energy facilities. Such facilities include certain wind, closed- and open-loop biomass, geothermal or solar energy, small irrigation power, landfill gas, trash, qualified hydropower and marine and hydrokinetic renewable energy facilities.

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Article by Douglas E. Lamb, Michael Dow, John J. Semeniak and James E. Gross

McGuireWoods LLP

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.