

\$1 Billion Allocated to Investment Credit or Grants for Qualifying Therapeutic Discovery Projects - Act Quickly

by William M. Joseph

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The health care legislation passed Sunday night includes a new subsidy for biotechnology businesses. The provision (creates) a 50% nonrefundable investment tax credit for "qualified investments" in "qualifying therapeutic discovery projects." (Only companies with 250 or fewer employees can take advantage of this credit).

Because many biotechnology companies are early stage and do not have taxable income to fully utilize the credit, the new legislation permits companies to elect to receive cash grants in lieu of the tax credit.

The provision allocates \$1 billion to this program for qualifying investments made in 2009 and 2010. Companies must apply to the Department of Treasury to obtain certification for qualifying investments. Treasury will consider only those projects that show potential to (1) result in new therapies to treat areas of unmet medical need or to prevent, detect, or treat chronic or acute disease and conditions, (2) reduce long-term health care costs in the United States, or (3) significantly advance the goal of curing cancer within a 30-year period. Additionally, Treasury will take into consideration which projects would have the greatest potential to: (1) create and sustain (directly or indirectly) high quality, high paying jobs in the United States, and (2) advance the United States' competitiveness in the fields of life, biological, and medical sciences. Presumably, the application for certification will require documentation of these factors to be considered by Treasury.

Treasury must approve or deny an application for certification of the credit within 30 days of the submission of the application. Grants must be paid (within 30 days of the date of the application or the date on which the qualifying investment is made, whichever date is later). There is no limit on the amount of the credit that may be awarded to each applicant so it appears that the credit will be awarded on a first-come first-served basis until the \$1 billion allocation runs out.

Qualifying therapeutic discovery projects are defined as projects designed to develop a product, process, or therapy to diagnose, treat, or prevent diseases and afflictions by: (1) conducting pre-clinical activities, clinical trials, clinical studies, and research protocols, or (2) by developing technology or products designed to diagnose diseases and conditions, including molecular and companion drugs and diagnostics, or to further the delivery or administration of therapeutics.

A qualified investment is the aggregate amount paid or incurred during the taxable year for expenses necessary for and directly related to the conduct of a qualifying therapeutic discovery project. It is important to note that a qualified investment excludes certain expenses, including remuneration for the CEO and certain executive personnel, interest expense, facility maintenance expenses, and service cost identified in uniform capitalization regulations.

Project expenditures for which the credit or grant is allowed will not also qualify for the research credit, orphan drug credit, or bonus depreciation, and if the new credit is allowed for an expenditure related to property subject to depreciation, the basis of the property is reduced by the amount of the credit. Expenditures taken into account in determining the credit are nondeductible to the extent of the credit claimed that is attributable to such expenditures. However, the 50% credit or grant should be more valuable than these disallowed credits and depreciation or other deductions.

The Department of Treasury is directed to establish the certification application procedure in consultation with the Department of Health and Human Services within 60 days after the enactment of the statute.

Clients that would be able to take advantage of the credit (or receive a grant) should be prepared to act quickly once the certification application procedure is made available.

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