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IRS Provides Initial Guidance on Code Section 48C Qualifying Advanced Energy Project Credit

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The Inflation Reduction Act of 2022 (the "IRA") added and modified certain energy tax credit provisions of the U.S. Internal Revenue Code of 1986, as amended (the "Code").¹ The modifications included the extension of the credit for "qualifying advanced energy projects" under Code Section 48C (the "Section 48C Credit"), which was originally enacted as part of the American Recovery and Reinvestment Act of 2009. Unlike the Code Section 48 investment tax credit, the Section 48C Credit requires a federal allocation for which taxpayers must apply. The IRA provides for an additional credit allocation of \$10 billion.

As modified by the IRA, Code Section 48C allows a taxpayer to claim the Section 48C Credit for any taxable year in an amount equal to a base rate of 6% of the taxpayer's "qualified investment" for that taxable year with respect to any "qualifying advanced energy project" owned by the taxpayer. The base rate is increased to 30% if the taxpayer satisfies certain prevailing wage and apprenticeship requirements with respect to the project.²

The Internal Revenue Service ("IRS") issued limited guidance on Code Section 48C in [Notice 2023-18](#) ("Notice 2023-18"), which provides initial procedures for applications and allocations of the Section 48C Credit (the "Section 48C(e) Program").

Qualifying Advanced Energy Projects

"Qualifying advanced energy projects" under the Code and Notice 2023-18 are defined to mean projects that fit into one of three general categories:

Category 1: Clean Energy Manufacturing and Recycling Projects

The first category of qualifying advanced energy projects is projects that re-equip, expand or establish an industrial facility³ or a manufacturing facility⁴ for the production or recycling of specified advanced energy property. "Specified advanced energy property" is defined to mean:

- property designed for use in the production of energy from the sun, water, wind, geothermal deposits (within the meaning of Code Section 613(e)(2)), or other renewable resources;
- fuel cells, microturbines, or energy storage systems and components;

- electric grid modernization equipment or components;
- property designed to capture, remove, use, or sequester carbon oxide emissions;
- equipment designed to refine, electrolyze, or blend any fuel, chemical, or product which is renewable, or low-carbon and low-emission;
- property designed to produce energy conservation technologies (including residential, commercial, and industrial applications);
- light-, medium-, or heavy-duty electric or fuel cell vehicles, as well as technologies, components, or materials for such vehicles, and associated charging or refueling infrastructure;
- hybrid vehicles with a gross vehicle weight rating of not less than 14,000 pounds as well as technologies, components, or materials for such vehicles; and
- other advanced energy property designed to reduce greenhouse gas emissions as may be determined by the Treasury Secretary.

Appendix A of Notice 2023-18 provides specific examples of qualifying projects under this first category. In particular, these examples provide that specialized components and equipment for nuclear power reactors or their fuels qualify as other advanced energy property designed to reduce greenhouse gas emissions.

Category 2: Greenhouse Gas Emission Reduction Projects

The second category of qualifying advanced energy projects is projects that re-equip any industrial facility or manufacturing facility, with equipment designed to reduce greenhouse gas emissions by at least 20% through the installation of:

- low- or zero-carbon process heat systems;
- carbon capture, transport, utilization and storage systems;
- energy efficiency and reduction in waste from industrial processes; or
- any other industrial technology designed to reduce greenhouse gas emissions, as determined by the Treasury Secretary.

Appendix A of Notice 2023-18 provides specific examples of qualifying projects under this second category.

Category 3: Critical Materials Projects

The final category of qualifying advanced energy projects is projects that re-equip, expand or establish an industrial facility for the processing, refining or recycling of critical materials. Appendix A of Notice 2023-18 explains that “critical materials” include (1) critical minerals as determined by the U.S. Geological Survey and (2) any additional critical materials as determined by the Secretary of Energy by July 31, 2023.

A qualifying advanced energy project fitting into any of the three categories above may not include any portion of a project for the production of any property that is used in the refining or blending of any transportation fuels (other than renewable fuels).

Qualified Investments, Eligible Property, and Placement in Service

Under Code Section 48C(b), the taxpayer's "qualified investment" is the basis of "eligible property" placed in service by the taxpayer that is part of a qualifying advanced energy project.

"Eligible property" is generally defined by the Code to mean any property that meets the following requirements:

1. The property is necessary for (a) the production or recycling of specified advanced energy property, (b) re-equipping a greenhouse gas emission reduction project, or (c) re-equipping, expanding, or establishing a critical minerals project;
2. The property is (a) tangible personal property or (b) other tangible property (excluding buildings and their structural components) that is used as an integral part of the qualifying advanced energy project; and
3. Depreciation (or amortization in lieu of depreciation) is allowable with respect to the property.

Notice 2023-18 provides that eligible property is placed in service in the earlier of (a) the taxable year in which, under the taxpayer's depreciation practice, the period for depreciation with respect to that eligible property begins, or (b) the taxable year in which the eligible property is placed in a condition or state of readiness or availability for a specifically assigned function, whether in a trade or business or in the production of income.

Energy Communities

Of the \$10 billion credit allocation, at least \$4 billion will be allocated to projects located in census tracts that (1) did not have a project receive a certification and allocation of credits under the Code Section 48C(e) allocation program before August 16, 2022, and (2) are one of the following: (a) a census tract in which a coal mine has closed after 1999, (b) a census tract in which a coal-fired electric generating unit has been retired after 2009, or (c) census tract directly adjoining a census tract described in (a) or (b) (the "Section 48C Energy Communities Census Tracts").⁵

The determination of whether a project is located in a Section 48C(e) Energy Communities Census Tract will be made at the time that the Department of Energy provides recommendations to the IRS (as described below) and will not be re-determined.

Allocation Procedures

Notice 2023-18 states that the Treasury Department and the IRS anticipate providing at least two allocation rounds under the Section 48C(e) Program. The first allocation round will begin on May 31, 2023, for \$4 billion of Section 48C Credits, approximately \$1.6 billion of which will be allocated to projects located in Section 48C Energy Communities Census Tracts. The IRS will make allocations under the Section 48C(e) Program to successive projects according to DOE recommendations and rankings (as described below) until the amount available for allocations is exhausted.

Notice 2023-18 outlines the following general process and procedures that must be followed for a project to receive an allocation of the Section 48C Credit:

1. A taxpayer submits concept papers to the Department of Energy ("DOE"). To be considered for the first round of allocation, taxpayers must submit concept papers by July 31, 2023.
2. DOE sends a letter to the taxpayer either encouraging or discouraging the taxpayer from submitting a joint application for DOE recommendation and for IRS certification. Regardless of DOE's response, the taxpayer may submit an application in accordance with step 3, below; however, Notice 2023-18 states that if a taxpayer receives a discouragement from DOE, the taxpayer's project is unlikely to ultimately receive a recommendation by DOE.
3. The taxpayer submits an application. An applicant who intends to apply for and receive an allocation of Section 48C Credits calculated at the 30% rate because it will satisfy the prevailing wage and apprenticeship requirements must confirm in the application that it intends to do so.
4. DOE reviews the applications for compliance with eligibility and other threshold requirements. If the taxpayer's application complies with all eligibility and threshold requirements, DOE will conduct a technical review of the application to form and provide a recommendation to the IRS regarding the acceptance or rejection of each application and a ranking of the applications. DOE will provide a positive recommendation to the IRS only if DOE determines that the project has a reasonable expectation of commercial viability and merits a recommendation based on the criteria that will be provided in forthcoming additional Section 48C(e) Program guidance. DOE will also determine which projects are located in Section 48C Energy Communities Census Tracts, which may impact DOE's recommendation with respect to a project.
5. The IRS makes a decision regarding the acceptance or rejection of each application based on DOE's recommendation and ranking and notifies the applicant of the outcome.
6. Within two years from the date of acceptance by DOE of the applicant's Section 48C Credit application, the applicant must provide to DOE evidence that all requirements for the certification have been met.
7. DOE notifies the taxpayer and the IRS that it has received the taxpayer's notification that the certification requirements have been met.
8. The IRS certifies the project by sending a certification letter (the "Allocation Letter").
9. The taxpayer has two years from the date of issuance of the Allocation Letter to place the project in service and to notify DOE that the applicable project has been placed in service. A taxpayer may claim Section 48C Credits in the year in which the eligible property is placed in service.

The certification will not be valid if the project is not placed in service within the two-year period or if the project has been placed in service at a location that is materially different than the location specified in the taxpayer's application. In addition, a taxpayer must inform DOE and the IRS if the plans for a qualifying project change in any significant respect from the plans set forth in the concept paper and the application. The at-risk rules of Code Section 49, the credit recapture and other special rules provided in Code Section 50, and rules regarding qualified progress expenditures (similar to the rules of Code Section 46(c)(4) and (d)) will apply for purposes of the Section 48C Credits.

The Allocation Letter applies only to the taxpayer who requested it. Nevertheless, if an applicant transfers its interest in a project that received a Section 48C Credit allocation, the successor-in-interest

may request that the IRS transfer the credit allocation for the project to the successor-in-interest. This request must be made at least 30 days before the due date (including extensions) of the successor-in-interest's U.S. federal income tax return for the taxable year in which the transfer occurs.

Additional Future Guidance is Anticipated

The Treasury and the IRS intend to issue a supplemental notice and appendices regarding the Section 48C(e) Program by May 31, 2023. After the first allocation round of the Section 48C(e) Program, the IRS will conduct one or more additional allocation rounds and intends to prescribe the procedures applicable to future allocation rounds in subsequent guidance. In the meantime, Notice 2023-18 provides project developers and sponsors with guidance to allow them to meaningfully consider whether to submit an application for the Section 48C Credit for the first round of allocation, particularly with respect to projects that may be ineligible for other energy tax credits.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Los Angeles lawyers:

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¹ For a general discussion on the additions and modifications introduced in the Inflation Reduction Act, see our prior Client Alert, [U.S. Senate Passes Inflation Reduction Act](#).

² For a discussion on recent IRS guidance on the prevailing wage and apprenticeship requirements, see our prior Client Alert, [IRS Publishes Initial Tax Credit Guidance on Prevailing Wage and Apprenticeship Requirements](#).

³ The term "industrial facility" means a facility that produces, processes, or refines materials or products from raw or manufactured inputs. Notice 2023-18, § 3.05.

⁴ The term "manufacturing facility" means a facility that makes or processes raw materials into finished products (or accomplishes any intermediate stage in that process). Notice 2023-18, § 3.06.

⁵ For a discussion on recent IRS guidance on certain energy community requirements applicable to Code Section 48, see our prior Client Alert, [IRS Guidance Issued on Energy Community Bonus Credit](#).

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