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IRS Issues Guidance on Low-Income Community Bonus Credit

By Michael D. Haun, Kami LaBerge & Lena Son

The Inflation Reduction Act of 2022 (the "**IRA**") added and modified certain renewable energy tax credit provisions of the U.S. Internal Revenue Code of 1986, as amended (the "**Code**"),[1] including the provisions applicable to the investment tax credit under Code Section 48 (the "**ITC**").

Under the IRA, a "qualified solar and wind facility" (*i.e.*, a facility that generates electricity solely from a wind facility, solar energy property, or small wind energy property that has a maximum net output of less than 5MW and that meets certain location requirements) that receives an allocation of environmental justice solar and wind capacity limitation ("**Capacity Limitation**") will be eligible for a 10% or 20% increase in the energy percentage used to calculate the ITC available with respect to that facility (such increase, the "**Low-Income Communities Bonus Credit**"). The IRA required that within 180 days after the IRA's enactment, the Treasury Department establish a program to allocate amounts of Capacity Limitation to qualified solar and wind facilities.

On February 13, 2023, the Internal Revenue Service ("**IRS**") issued Notice 2023-17 ("**Notice 2023-17**") to provide initial guidance on the Low-Income Communities Bonus Credit and to establish the program to allocate amounts of Capacity Limitation.

I. Qualification for the Low-Income Communities Bonus Credit

A "qualified solar and wind facility" is defined in the IRA as any facility (i) that generates electricity solely from a wind facility, solar energy property, or small wind energy property; (ii) that has a maximum net output of less than 5 megawatts (as measured in alternating current); and (iii) that is (A) located in a "low-income community," (B) located on Indian land as defined in Section 2601(2) of the Energy Policy Act of 1992, (C) part of a "qualified low-income residential building project," or (D) part of a "qualified low-income economic benefit project."

A qualified solar and wind facility that receives an allocation of Capacity Limitation will receive a 10% credit increase if it is located in a "low-income community" or on "Indian land" and a 20% increase if it is part of a "qualified low-income residential building project" or a "qualified low-income economic benefit project." The IRA further defined each of those categories:

- ***Category 1: Low-income community***. A "low-income community" is a population census tract that (i) has a poverty rate of at least 20%, or (ii)(A) in the case of a tract not located within a metropolitan area, the median family income for that tract does not exceed 80% of the statewide median family income or (B) in the case of a tract located within a metropolitan area, the median family income for that tract does not exceed 80% of the greater of the statewide median family income or the metropolitan area median family income.

- ***Category 2: Located on Indian land***. Indian land is "Indian land" as defined in Section 2601(2) of the Energy Policy Act of 1992.

- ***Category 3: Qualified low-income residential building project***. A facility will be treated as part of a "qualified low-income residential building project" if it is installed on a residential rental building that participates in an affordable housing program, and the financial benefits[2] of the electricity produced by the facility are allocated equitably among the occupants of the dwelling units of that building. An "affordable housing program" includes (i) a covered housing program under the Violence Against Women Act of 1994, (ii) a housing assistance program administered by the Department of Agriculture under title V of the Housing Act of 1949; (iii) a housing program administered by a tribally designated housing entity; and (iv) other affordable housing programs as the Treasury Secretary may provide.[3]

- ***Category 4: Qualified low-income economic benefit project***. A facility will be treated as part of a "qualified low-income economic benefit" project if at least 50% of the financial benefits of the electricity produced by that facility are provided to households with income of less than 200% of the poverty line applicable to a family of the size involved, or less than 80% of area median gross income).

Notice 2023-17 states that a facility located within a low-income community or on Indian land that is also a part of a qualified low-income residential building project or a qualified low-income economic benefit project will qualify for the 20% adder as a qualified low-income residential building project or a qualified low-income economic benefit project.

Under the IRA, to be eligible for the Low-Income Communities Bonus Credit, a facility must be placed in service[4] within 4 years after the date the applicant was notified of the allocation of Capacity Limitation for that facility. Notice 2023-17 further provides that facilities placed in service before receiving an allocation of Capacity Limitation will not be eligible to receive an allocation.

Notice 2023-17 also states that the allocation of an amount of Capacity Limitation by the IRS is not a determination that the facility will qualify for the Low-Income Communities Bonus Credit or for the ITC generally.

II. Design and Implementation of Low-Income Communities Bonus Credit Program

A. Capacity Allocation

Under the IRA, the amount of the Capacity Limitation that may be allocated pursuant to Code Section 48(e)(4) is limited to 1.8 gigawatts of direct current capacity for each of calendar years 2023 and 2024, and zero thereafter.

Notice 2023-17 provides that the allocation of Capacity Limitation reserved for each facility category for calendar year 2023 is as follows:

Category 1:	Located in a low-income community	700 MW
Category 2:	Located on Indian land	200 MW
Category 3:	Qualified low-income residential building project	200 MW
Category 4:	Qualified low-income economic benefit project	700 MW

If the annual capacity limitation for 2023 exceeds the aggregate amount allocated for 2023, the excess will be carried forward to 2024. Any excess from calendar year 2024 may be carried forward and applied to the capacity limitation for calendar year 2025 under the new Code Section 48E(h) program, which provides for a program similar to the Low-Income Communities Bonus Credit program for calendar years after 2024.[5]

Notice 2023-17 also provides that the allocation program of the capacity limitation for the Low-Income Communities Bonus Credit will focus on the following types of facilities:

- facilities owned or developed by community-based organizations and mission-driven entities,
- facilities that have an impact on encouraging new market participants,
- facilities that provide substantial benefits to low-income communities and individuals marginalized from economic opportunities, and
- facilities that have a higher degree of commercial readiness.

If selected applications have total megawatt nameplate capacity greater than the capacity limitation reserved for each category of facility, then a lottery or other process performed by the Department of Energy may be used to allocate the capacity limitation. In addition, if one facility category has excess capacity limitation, that excess amount may be reallocated among other facility categories to maximize the calendar year allocations.

B. Applicants and Applications

Under Notice 2023-17, only the owner of a facility may apply for an allocation of Capacity Limitation. For each facility, the applicant may apply for an allocation under only one facility category for calendar year 2023.

Notice 2023-17 also provides that applications will be accepted in a phased approach for calendar year 2023, during 60-day application windows. The IRS stated that it anticipates that applications will be accepted for Category 3 and Category 4 facilities beginning in the third quarter of 2023, with applications for Category 1 and Category 2 facilities accepted thereafter.

C. Program Administration

The Low-Income Communities Bonus Credit program will be administered by the Department of Energy, which will review the applications for statutory eligibility and additional criteria and provide recommendations to the IRS regarding selecting applications for an allocation of Capacity Limitation.

III. Additional Future Guidance is Anticipated

Notice 2023-17 states that the Treasury Department and the IRS will issue further guidance outlining the specific application procedures, additional criteria, applicable definitions, and other information necessary for an owner of a facility to submit an application to request an allocation of Capacity Limitation for the 2023 calendar year. After the 2023 allocation process begins, the Treasury Department and IRS will monitor and assess whether to implement any modifications to the program for calendar year 2024 allocations.

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

Michael D. Haun
1.213.683.6119
michaelhaun@paulhastings.com

Kami LaBerge
1.213.683.6159
kamilaberge@paulhastings.com

Lena Son
1.213.683.6115
lenason@paulhastings.com

[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] Notice 2023-17 provides that forthcoming guidance will further clarify the parameters of "financial benefits."

[3] Notice 2023-17 does not set forth any other programs that may qualify.

[4] Notice 2023-17 explains that a facility will be considered placed in service in the earlier of (i) the taxable year in which, under the taxpayer's depreciation practice, the period for depreciation with respect to the facility begins; or (ii) the taxable year in which the facility is placed in a condition or state of readiness and availability for a specifically assigned function, whether in a trade or business or in the production of income.

[5] Further IRS and Treasury guidance on this Section 48E(h) program is anticipated prior to 2025.