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IRS Guidance Issued on Energy Community Bonus Credit

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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 The IRA additions included a new energy community bonus credit under Code Sections 45, 45Y, 48, and 48E (the “**Energy Community Bonus Credit**”). Under these new rules, an increased credit amount or rate is available to (i) qualified facilities eligible for the Code Section 45 production tax credit (the “**PTC**”) and Code Section 45Y clean energy production credit (the “**CE PTC**”) that is located in an “energy community,” (ii) energy projects eligible for the Code Section 48 investment tax credit (the “**ITC**”) that are placed in service within an “energy community,” and (iii) qualified investments with respect to qualified facilities or energy storage technology eligible for the Code Section 48E clean energy investment credit (the “**CE ITC**”) that are placed in service within an “energy community.” In this Client Alert, we will refer to projects and facilities described in clauses (i)-(iii) of the previous sentence as “**EC Projects**.”

The IRA defines an “energy community” to include three location-based categories:

1. a brownfield site (as defined in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (“**CERCLA**”)) (the “**Brownfield Category**”);
2. a metropolitan statistical area (“**MSA**”) or non-metropolitan statistical area (“**non-MSA**”) that (i) has (or had at any time after 2009) 0.17% or greater direct employment or 25% or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas, and (ii) has an unemployment rate at or above the national average unemployment rate for the previous year (the “**Statistical Area Category**”); and
3. a census tract (or a census tract directly adjoining such census tract) in which (i) after 1999, a coal mine has closed, or (ii) after 2009, a coal-fired electric generating unit has been retired (the “**Coal Closure Category**”).²

On April 4, 2023, the Internal Revenue Service (“**IRS**”) issued [Notice 2023-29](#) (“Notice 2023-29”) to provide initial guidance on the Energy Community Bonus Credit rules.

The Brownfield Category

A “brownfield site” for purposes of the Brownfield Category is defined in CERCLA as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence

of a hazardous substance, pollutant, or contaminant” and certain mine-scarred land.³ The exclusions to the definition of “brownfield site” in CERCLA also apply to the Brownfield Category.⁴

Notice 2023-29 also provides a safe harbor under which the IRS will accept that a site meets the definition of a “brownfield site” under CERCLA if it satisfies at least one of the following conditions:

- it was previously assessed through federal, state, territory, or federally recognized Indian tribal brownfield resources as meeting the definition of a “brownfield site” under CERCLA;
- an ASTM E1527 Phase II Environmental Site Assessment has been completed with respect to the site in accordance with current standard practices and that assessment confirmed the presence of a hazardous substance (as defined in 42 U.S.C. § 9601(14)) or a pollutant or contaminant (as defined in 42 U.S.C. § 9601(33)); or
- for projects with a nameplate capacity of 5MW (AC) or less, an ASTM E1527 Phase I Environmental Site Assessment has been completed with respect to the site in accordance with current standard practices.

The Statistical Area Category

Under the IRA, the second category of locations that qualify as “energy communities” are MSAs and non-MSAs that (i) have (or had at any time after 2009) 0.17% or greater direct employment (“Fossil Fuel Employment”) or 25% or greater local tax revenues (“Fossil Fuel Tax Revenues”) related to the extraction, processing, transport, or storage of coal, oil, or natural gas, and (ii) have an unemployment rate at or above the national average unemployment rate for the previous year. Although Notice 2023-29 provides some clarity on these rules, it does leave some open questions, particularly with respect to the determination of Fossil Fuel Tax Revenues.

Determination of MSAs and Non-MSAs

MSAs are groups of counties or county-equivalents that are grouped according to standards determined by the Office of Management and Budget in Bulletin No. 18-03 (April 18, 2018). Non-MSAs are nonmetropolitan areas as identified in the May 2021 Metropolitan and Nonmetropolitan Area Definitions published by the Occupational Employment and Wages Statistics division of the U.S. Bureau of Labor Statistics (“BLS”).

[Appendix A of Notice 2023-29](#) contains a list of MSAs and non-MSAs that are used for purposes of the Energy Community Bonus Credit.

Fossil Fuel Employment

To determine whether an MSA or non-MSA has 0.17% or greater direct employment related to the extraction, processing, transport, or storage of coal, oil, or natural gas, the employment rate is calculated by dividing (i) the number of people employed in the industries identified by certain North American Industry Classification System (NAICS) industry codes⁵ and as listed in the annual County Files of the County Business Patterns published by the U.S. Census Bureau, by (ii) the total number of people employed in the applicable MSA or non-MSA. [Appendix B of Notice 2023-29](#) contains a list of MSAs and non-MSAs that meet this Fossil Fuel Employment threshold.

Fossil Fuel Tax Revenue

Due to the difficulty in collecting data on local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas, the Department of the Treasury and the IRS have declined to clarify this rule in Notice 2023-29 and have instead invited public comments addressing the possible data sources, revenue categories and procedures for determining whether a MSA or non-MSA qualifies under the Statistical Area Category based on Fossil Fuel Tax Revenue.

Unemployment Rate

To determine whether an MSA or non-MSA has an unemployment rate at or above the national average unemployment rate for the previous year, the unemployment rate for the applicable MSA or non-MSA for the applicable year (determined using the Local Area Unemployment Statistics annual data for counties from the BLS) must be compared against the national average unemployment rate for the previous calendar year.

The IRS also stated in Notice 2023-29 that the Department of the Treasury and the IRS intend to issue a list identifying the MSAs and non-MSAs that qualify under the Statistical Area Category based on Fossil Fuel Employment after the unemployment data for 2022 becomes available and that this list is expected to be updated annually in May for the 12-month period starting in May through April of the following year.

The Coal Closure Category

The third category of locations that qualify as “energy communities” under the IRA are census tracts (or census tracts directly adjoining such census tracts) in which (i) after 1999, a coal mine has closed, or (ii) after 2009, a coal-fired electric generating unit has been retired. Notice 2023-29 explains that for these purposes, a “census tract” is as defined and delineated by the U.S. Census Bureau for the 2020 Decennial Census. Notice 2023-29 also defines the terms “closed coal mine” and “retired coal-fired electric generating unit.”

The term “closed coal mine” means a coal mine classified as a surface or underground mine that has ever had at any time after 1999 a mine status of abandoned or abandoned and sealed by the U.S. Department of Labor’s Mine Safety and Health Administration (“**MSHA**”) in the Mine Data Retrieval System (“**MDRS**”). Taxpayers seeking to qualify for the Energy Community Bonus Credit based on a closed coal mine that is not listed in the MSHA MDRS due to irregular location information may provide evidence to the MSHA to correct the information.

The term “retired coal-fired electric generating unit” means an electric generating unit classified as retired at any time after 2009 by the U.S. Energy Information Administration (“**EIA**”) of the U.S. Department of Energy in the Preliminary Monthly Electric Generator Inventory (EIA Form 860M) or the Electric Generator Inventory (EIA Form 860).

Notice 2023-29 provides clarity on when a census tract is “directly adjoining” another census tract. Census tracts are considered directly adjoining if their boundaries touch at any single point. Thus, any census tract that shares a single point of contact with a census tract containing a closed coal mine or a retired coal-fired electric generating unit will fit within the Coal Closure Category.

[Appendix C of Notice 2023-29](#) contains a list of census tracts in the Coal Closure Category.

Applicable Rules for Determining Whether the Location Requirement is Satisfied

Code Sections 45 and 45Y provide that for purposes of the PTC and CE PTC, an EC Project must be “located in” an energy community, and Code Sections 48 and 48E provide that for purposes of the ITC and CE ITC, an EC Project must be “placed in service within” an energy community. It was unclear from the plain language of the applicable statutes when the “energy community” requirements need to be met with respect to an EC Project and whether EC Projects that are located partially within and partially outside an energy community would qualify. Notice 2023-29 provides taxpayer-friendly clarity on those open questions.

Timing Rules in Notice 2023-29

For purposes of the PTC and CE PTC, whether a qualified facility is “located in” an energy community must be determined separately for each taxable year of the qualified facility’s 10-year credit period. A qualified facility is treated as located in an energy community during a taxable year if it is located in an energy community during any part of that taxable year.

For purposes of the ITC and CE ITC, whether an energy project, qualified facility, or qualified energy storage technology is “placed in service within” an energy community is determined as of the placed-in-service date.

As an exception to the general rules above, if a taxpayer begins construction on an EC Project in a location that is an energy community as of the beginning-of-construction date of that EC Project, then that location will continue to be considered an energy community for the duration of the credit period for the PTC and CE PTC or on the placed-in-service date for the ITC and CE ITC.

Location Rules in Notice 2023-29

If an EC Project has a nameplate capacity, it will be treated as “located in” or “placed in service within” an energy community if it satisfies the “nameplate capacity test.” Under the nameplate capacity test, 50% or more of the EC Project’s nameplate capacity must be in an area that qualifies as an energy community. Notice 2023-29 provides additional guidance on how the nameplate capacity is determined and how an EC Project’s nameplate capacity is attributed to the equipment that comprises that EC Project.

If an EC Project has no nameplate capacity, it will be treated as “located in” or “placed in service within” an energy community if it satisfies the “footprint test.” The footprint test requires that 50% or more of the EC Project’s square footage be in an area that qualifies as an energy community.

Proposed Treasury Regulations Are Forthcoming

The Department of the Treasury and the IRS intend to propose regulations addressing the rules applicable to the Energy Credit Bonus Credit, which will include the rules described in Notice 2023-29 as described above. These regulations are expected to apply to taxable years ending after April 4, 2023. In the meantime, taxpayers may rely on the rules described in Notice 2023-29 until those proposed regulations are issued.

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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 Code Section 45(b)(11)(B).

³ 42 U.S.C. § 9601(39)(A).

⁴ The exclusions are set forth in 42 U.S.C. § 9601(39)(B).

⁵ The applicable NAICS codes are as follows:

- 211 (Oil and Gas Extraction);
- 2121 (Coal Mining);
- 213111 (Drilling Oil and Gas Wells);
- 213112 (Support Activities for Oil and Gas Operations);
- 213113 (Support Activities for Coal Mining);
- 32411 (Petroleum Refineries);
- 4861 (Pipeline Transportation of Crude Oil); and
- 4862 (Pipeline Transportation of Natural Gas).

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