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INSIGHTS

Treasury Department and IRS Issue Additional Guidance on the New Low-Income Communities Bonus Credit Program

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The low-income communities bonus credit (the LIC Bonus), which was introduced by the Inflation Reduction Act of 2022 (the IRA), provides an enhanced tax credit for certain wind and solar facilities located in designated low-income communities. On February 13, 2023, the Treasury Department and Internal Revenue Service (IRS) issued ***Notice 2023-17*** (the Prior Notice), which established the program (the Allocation Program) for the allocation of a portion of the annual "environmental justice solar and wind capacity limitation" (the Capacity Limitation) prescribed by newly-enacted Section 48(e) of the Internal Revenue Code of 1986, as amended (the Code), and provided initial guidance with respect to the overall administration of the Allocation Program.[1] On June 1, 2023, the Treasury Department and IRS issued additional guidance regarding the Allocation Program in the form of ***proposed rules*** (the Proposed Rules), which are intended to apply to the 2023 calendar year only.

Key Takeaways

- The Capacity Limitation for the 2023 calendar year statutorily is set at 1.8 gigawatts of direct current capacity, which can be allocated to four (4) categories of qualified wind or solar facilities identified in Section 48(e)(2) of the Code (the Categories). For this purpose, the Proposed Rules reserve an allocation of Capacity Limitation for each such Category in a manner consistent with the Prior Notice, as set forth below.

Category 1: Located in a Low-Income Community	700 megawatts
Category 2: Located on Indian Land	200 megawatts
Category 3: Qualified Low-Income Residential Building Project	200 megawatts
Category 4: Qualified Low-Income Economic Benefit Project	700 megawatts

- Because allocations of Capacity Limitation are permitted only for wind and solar facilities that have a maximum net output of less than five (5) megawatts (as measured in alternating current), the Treasury Department and IRS expressed concern that taxpayers may artificially attempt to divide larger projects into multiple facilities in order to qualify for the LIC Bonus. Accordingly, the Proposed Rules adopt an aggregation rule under which multiple facilities can be treated as a single facility if various factors suggest that the facilities are operated as a single project (e.g., ownership by a single legal entity, adjacent property locations, same regulatory permits, common financing).[2]

- The LIC Bonus is available for investments in "eligible property," as defined in Section 48(e)(3) of the Code, which generally includes energy property that is part of a wind or solar energy facility, and which also includes energy storage technology "installed in connection with" the qualifying energy property. In this regard, the Proposed Rules define "installed in connection with" to mean that (i) the energy storage technology and the other eligible property are considered part of a single qualified wind or solar facility, using certain of the same aggregation factors mentioned above and (ii) the energy storage technology is charged no less than 50 percent by the other eligible property. With respect to the latter requirement, the Proposed Rules provide a safe harbor that would deem the energy storage technology to be charged at least 50 percent by the facility if the power rating of the energy storage technology is less than two (2) times the capacity rating of the connected wind facility (determined in alternating current) or solar facility (determined in direct current).

- For a wind or solar facility falling under Category 3 or 4, relating to low-income residential buildings and low-income communities, respectively, the financial benefits of the electricity produced at such facility generally must inure to the benefit of the residents of the building or community, as the case may be. For this purpose, electricity acquired at a below-market rate may be considered a financial benefit. In this regard, the Proposed Rules include detailed definitions of both "financial benefit" and "electricity acquired at a below market rate."

- The Proposed Rules state that allocations of Capacity Limitation will not be allowed for facilities that are placed in service prior to the award of such allocations.

- The Proposed Rules modify the selection process for the Allocation Program from the process that originally was described in the Prior Notice. Specifically, the Proposed Rules give priority to applicants that meet certain additional criteria relating to the ownership of the facility and/or the geographic location of the facility (the Additional Selection Criteria). Under the Additional Selection Criteria relating to ownership, priority would be given to facilities owned by Indian Tribal governments, Alaskan Native Corporations, governmental entities, tax-exempt organizations, certain renewable energy cooperatives (i.e., either serving low-income households or worker-owned) and "qualified renewable energy companies" that serve low-income communities and promote the adoption of clean energy. For the Additional Selection Criteria relating to geographic location, priority would be given to facilities that are located in a Persistent Poverty County (PPC)[3] or a census tract that is designed as disadvantaged in the Climate and Economic Justice Screening Tool (CEJST).[4]

- The Proposed Rules includes a list of various documents and attestations that must be submitted with an application for an allocation of Capacity Limitation.

- Following the Prior Notice, the Proposed Rules adopt a Nameplate Capacity Test for purposes of determining whether a wind or solar facility is located on Indian land under Category 2 or in a low-income community under Category 4. Under the Nameplate Capacity Test, a facility is treated as so located as long as 50 percent or more of the facility's nameplate capacity falls within the relevant qualifying area. The Nameplate Capacity Test also will be taken into account under the Proposed Rules in evaluating applications for allocations of Capacity Limitation under the Additional Selection Criteria relating to geographic location.

- The Proposed Rules set forth the following circumstances in which an applicant will be required to forfeit an award of Capacity Limitation after it is received: (i) a change in the location of the facility; (ii) an increase in the nameplate capacity of the facility above the five (5) megawatt limit or a decrease in such capacity by the greater of two (2) kilowatts or 25 percent of the Capacity Limitation awarded; (iii) failure to satisfy the financial benefits requirement for Category 3 or 4 facilities; (iv) failure to place the facility in service within four (4) years after the date on which the applicant was notified of the allocation; and (v) a change that materially impacts the Additional Selection Criteria relating to ownership.

- The Proposed Rules require recapture of an already claimed LIC Bonus in the following situations: (i) failure of a Category 3 or 4 facility to provide the requisite financial benefits for five (5) years following the date the facility is placed in service; (ii) failure of a Category 3 or 4 facility to pass along financial benefits to the intended recipients (i.e., occupants of the low-income residential building or households within the low-income community, as applicable); (iii) failure of a Category 3 facility to continue to participate in a qualifying low-income housing program; and (iv) failure of a facility to maintain its output below the five (5) megawatt limit.

The Proposed Rules will become effective when published in final form in the Federal Register. The Proposed Rules included a 30-day comment period, which expired on June 30, 2023. The Treasury Department and IRS requested comments, in particular, on whether the Proposed Rules also should be applied to the LIC Bonus program for the 2024 calendar year, as well as the similar program to be established for calendar year 2025 and beyond under Section 48E(h) of the Code (relating to the LIC Bonus for purposes of the clean electricity investment credit).

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[1] We discussed the Notice in a prior alert, which can be found **here**.

[2] Such single project factors have been used in other contexts. *See* **Notice 2013-29** (Beginning of Construction for Purposes of the Renewable Electricity Production Tax Credit and Energy Investment Tax Credit) and **Notice 2018-59** (Beginning of Construction for the Investment Tax Credit under Section 48).

[3] Information on PPCs can be found ***here***.

[4] The CEJST can be found ***here***.