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Client Alert

Tax

JUNE 6, 2023

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IRS Publishes Guidance on Section 48C Advanced Energy Project Tax Credit

On May 31, 2023, the IRS released Notice 2023-44 (the "Notice") providing additional guidance on the advanced energy project tax credit (Section 48C), effectively reintroduced by the Inflation Reduction Act of 2022 ("IRA"). The Notice modifies and clarifies initial guidance (Notice 2023-18) issued in February 2023, addressing the contents of applications and the process of applying for certification.

Section 48C provides a tax credit of up to 30% of qualifying investment in certain green energy manufacturing equipment. This credit is very unusual in that: (1) it is effectively awarded as a competitive grant, and (2) the total amount of credits available is $10 billion for all taxpayers with $4 billion set aside for facilities located in certain "energy communities" described below.

The application process is expected to be very competitive. The 2009 version of the credit was capped at $2.3 billion and received more than 500 applications requesting more than $8 billion worth of credit requests.

The application submission portal will be open no later than June 30, 2023. The deadline for submitting the initial application is July 31, 2023.

BACKGROUND

The 48C credit is available for taxpayers seeking to build or expand certain manufacturing or material processing capabilities in the United States. The 48C credit is unusual in that it is effectively awarded as a competitive grant, and the total amount of credits available is $10 billion for all taxpayers with $4 billion set aside for facilities located in certain "energy communities," i.e., certain coal mines and coal-fired power plants. The Notice provides a list of census tracts that are qualifying energy communities for purposes of the 48C credit and a mapping tool.[1]

Qualifying projects include facilities that manufacture qualifying renewable energy components and property as well as facilities that recycle such components and property. The list of qualifying renewable energy components and property has been expanded to include property designed to be used to produce energy from water (along with sun, wind, geothermal deposits, and other renewable resources), equipment 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, and materials for electric or fuel cell vehicles and their associated charging or refueling infrastructure. Section 48C also covers “other advanced energy property designed to reduce greenhouse gas emissions” and “any other industrial technology designed to reduce greenhouse gas emissions.” Therefore, the list of qualifying projects is broader than the statutory list.

The Notice makes clear that taxpayers cannot claim the advanced manufacturing credit under Section 45X for the production of eligible components produced in a facility that includes property taken into account for purposes of the Section 48C tax credit. The Notice clarifies that independently functioning production units may be recognized as separate facilities. Thus, for example, if independent production units are arranged in serial fashion, property comprising an earlier independent production unit can be taken into account for purposes of the Section 48C tax credit, and the eligible components produced by a latter independent production unit can qualify for the advanced manufacturing tax credit under Section 45X.

The Notice also clarifies that a facility “placed in service” prior to being awarded an allocation of the Section 48C credits is not eligible to receive such an allocation. The earliest that the taxpayer may place in service an eligible facility is after receiving the allocation letter from the IRS with respect to that eligible facility.

APPLICATION TIMELINE AND PROCESS

Stage one of the process is preparation of a concept paper for review by the Department of Energy (“DOE”). Concept paper application materials are available for applicants to download from the eXCHANGE portal. Concept paper submissions will be accepted in the eXCHANGE portal beginning no later than June 30, 2023.

Following submission of a concept paper, DOE will encourage or discourage taxpayers from submitting a “Section 48C(e) application,” with the deadline for that second submission to be sometime between Fall 2023-Winter 2023/2024. All taxpayers who submit concept papers are eligible to submit a Section 48C(e) application, regardless of DOE’s response to the concept paper. The date on which DOE will begin accepting Section 48C(e) applications and the deadline by which they must be submitted will be conveyed to applicants through the eXCHANGE portal at a subsequent time.

DOE will review the Section 48C(e) applications for compliance with eligibility and other threshold requirements provided in the Notice so that the agency can provide its recommendation as to whether the IRS should allocate a portion of the available 48C credits to the project. Both concept papers and Section 48C(e) applications will be evaluated against the following four technical review criteria based on the factors listed in Section 48C:

(1) Commercial viability;

(2) Greenhouse gas emissions impact;

(3) Strengthening U.S. supply chains and domestic manufacturing for a net-zero economy; and

(4) Workforce and community engagement.

Additionally, the Notice provides a list of priority areas that DOE will consider when evaluating the strengthening U.S. supply chains and domestic manufacturing for a net-zero economy criterion.

The concept paper and the Section 48C(e) application must be submitted through the eXCHANGE portal, which will open no later than June 30, 2023. Concept papers and Section 48C(e) applications received after the stated deadlines will not be reviewed or considered.

Upon completion of its review of all Section 48C(e) applications, DOE will provide the IRS with a recommendation of acceptance or rejection for each Section 48C(e) application, as well as a ranking of all Section 48C(e) applications. The IRS will make its decision based on DOE's recommendations and rankings. Each applicant will receive a letter from the IRS notifying the applicant whether its Section 48C(e) application was accepted or rejected.

No later than two years after receiving an acceptance letter from the IRS, taxpayers whose projects are accepted must notify DOE through the eXCHANGE portal that certification requirements, such as all permits necessary to commence construction, have been met. The IRS will then send the taxpayer a certification letter. Within two years after receiving the certification letter, the taxpayer must place the facility in service and notify DOE of this fact through the eXCHANGE portal. If the qualifying facility is placed in service within the required period and DOE is properly notified, the taxpayer will claim the 48C credit on its U.S. federal income tax return for the year in which the qualified facility is placed in service.

CONCLUSION

It will be important for applicants to demonstrate the business and financial merits of their projects, and equally the projects' potential direct and indirect environmental benefits. Some of the DOE's evaluation factors reflect priorities identified in the Administration's Justice40 Initiative, which seeks to ensure that economic benefits from government-funded projects flow to minority and underserved communities.

Meaningful involvement of the community is a core aspect of the Administration's environmental justice focus. Having support from the local community where the project will be sited, and from other relevant stakeholders, can help demonstrate concrete and specific connections with the community and to show that the project will further the interests of minority and underserved populations. In addition, the guidance incorporates requirements or preferences related to domestic sourcing or sourcing from certain countries. This would be in line with the Administration's goals of strengthening the domestic supply chain, particularly in the clean and renewable energy sector. This can be an opportunity, providing companies that produce qualifying components with the ability to market to downstream OEMs, and it can also be an obstacle by requiring more costly use of U.S.- or North American-produced content in projects or manufactured goods.

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[1] The list of qualifying "energy communities" is available here.The Notice clarifies that a facility will be treated as being located in a qualifying energy community if 50 percent or more of its total square footage is located in a census tract that is a qualifying energy community. The final determination of whether a qualifying advanced energy project is located in a qualifying energy community will be made when DOE provides its recommendations to the IRS.