

Client Alert

Energy

DECEMBER 26, 2023

For more information, contact:

John Clay Taylor
+44 20 7551 7553
jtaylor@kslaw.com

Suyoung Moon (Sue)
+44 20 7551 2136
smoon@kslaw.com

Amina S. Dammann
+1 512 457 2002
adamann@kslaw.com

Granta Nakayama
+1 202 626 3733
gnakayama@kslaw.com

Ilana Saltzbar
+1 202 626 3745
isaltzbar@kslaw.com

King & Spalding

London
125 Old Broad Street
London, EC2N 1AR
United Kingdom
Tel. +44 20 7551 7500

Washington
1700 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20006
Tel. +1 202 737 0500

IRS and Treasury Issue Guidance on Section 40B Sustainable Aviation Fuel Credit

Section 40B of the Internal Revenue Code of 1986 (the “Code”) enacted by the Inflation Reduction Act of 2022 (the “IRA”) provides credits for each gallon of sustainable aviation fuel (“SAF”) sold or used by a taxpayer before December 31, 2024 (the “SAF Credit”). In order to qualify for the 40B Credit, the SAF must, among a number of requirements, have a lifecycle greenhouse gas (“GHG”) emissions reduction percentage of at least 50 percent.

On December 15, 2023, the U.S. Department of Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) released Notice 2024-6 (the “Notice”). The Notice follows the initial guidance (Notice 2023-6) which provided rules regarding the lifecycle GHG emissions for certain fuels. The Notice states that the existing Greenhouse Gases, Regulated Emissions, and Energy Use in Technologies (“GREET”) model developed by Argonne National Laboratory does not satisfy the requirements under Section 40B and announces that a modified version of the GREET model that satisfies those requirements will be available in early 2024. The IRA accepts for purposes of the SAF Credit other methods for calculating the lifecycle GHG emission reduction percentage, such as those under the Carbon Offsetting and Reduction Scheme for International Aviation (“CORSIA”) and the Clean Air Act (“CAA”), as implemented through EPA’s Renewable Fuel Standards (“RFS”) program. Importantly, the Notice creates a safe harbor for calculating the lifecycle GHG emissions reduction when relying on EPA’s RFS program and meeting the described certification requirements.

BACKGROUND

Section 40B provides for a SAF Credit equal to \$1.25 per gallon, plus an additional cent per gallon for each percentage point by which the lifecycle GHG emissions reduction percentage of SAF exceeds 50 percent, for a maximum increase of \$0.50.



Among a number of requirements, SAF must be certified to have a lifecycle GHG emissions reduction percentage of at least 50 percent, as compared with petroleum-based jet fuel, calculated either using CORSIA that has been adopted by the International Civil Aviation Organization with the agreement of the United States or “any similar methodology” that satisfies the criteria under § 211(o)(1)(H) of the CAA.

In order to claim the SAF Credit, a producer or importer of SAF must be registered with the Treasury under Section 4101. In addition, the producer or importer must provide certification (in such form and manner as the Treasury and IRS prescribe) from an unrelated party demonstrating compliance with any general requirements, supply chain traceability requirements, and information transmission requirements established under CORSIA (collectively, the “Sustainability Requirements”), or in the case of any similar methodology established by the Treasury and IRS, requirements similar to the Sustainability Requirements.ⁱ

ARGONNE GREET MODEL

The Argonne GREET model was developed by Argonne National Laboratory in 1994 with the Department of Energy support. The GREET model is updated annually and produces a lifecycle GHG value that is comparable to the lifecycle GHG emissions of petroleum-based fuels, including jet fuels. The Notice states that the existing Argonne GREET model does not satisfy the criteria under § 211(o)(1)(H) of the CAA and cannot be used to calculate lifecycle GHG emissions for purpose of Section 40B.ⁱⁱ

The Notice announces that Department of Energy is collaborating with other federal agencies to develop a GREET model that satisfies the requirements of Section 40B (“Section 40B GREET”) which is expected to be available in early 2024. The Treasury and IRS anticipate that after the Section 40B GREET model is released, taxpayers will be able to use it to calculate the emissions reduction percentage for SAF sold or used after December 31, 2022 and prior to January 1, 2025.

The Clean Fuel Production Credit under Section 45Z of the Code (“45Z Credit”) will replace the SAF Credit after December 31, 2024. Importantly, the 45Z Credit contains similar language to that in Section 40B with respect to the emissions model choice for carbon intensity for aviation fuel, referencing the CORSIA model and any similar methodology which satisfies the requirements of the CAA. Merely for non-aviation fuel, the 45Z Credit expressly provides for the use of the Argonne GREET or a “successor model.” Therefore, the interpretive decisions made by the federal agencies with respect to the 40B GREET model could carry over to the administration of the 45Z Credit and potentially play an important role for purposes of the 45Z Credit.

RENEWABLE FUEL STANDARD SAFE HARBOR

The Notice creates a “safe harbor” for the SAF blending component for a jet fuel that qualifies as renewable fuel and that generates renewable identification numbers (“RINs”) under the RFS program developed by the EPA. The Notice provides that lifecycle GHG emissions analysis performed under the RFS program can qualify as a “similar methodology” under certain circumstances. It explains that the EPA’s methodology under the RFS program was specifically designed to satisfy the statutory definition of “lifecycle greenhouse gas emissions” in § 211(o)(1)(H) of the CAA and similar to the CORSIA methodology.

Specifically, SAF blending component that has generated biomass-based diesel (D-code 4) or advanced biofuel (D-code 5) RINs under the RFS program that have been validated under a quality assurance plan (“QAP”) will be assigned a 50-percent emissions reduction percentage. A SAF synthetic blending component that has generated valid cellulosic biofuel (D-code 3) or cellulosic diesel (D-code 7) RINs under the RFS program that have been validated under a QAP



will be assigned a 60-percent emissions reduction percentage. The Treasury and IRS will accept only these 50-percent and 60-percent emissions reductions as part of the RFS safe harbor and will not accept other specific lifecycle analysis ranges and estimates released by the EPA for certain fuel pathways.

However, the EPA has completed several facility-specific fuel pathway assessments for renewable jet fuel under the RFS programⁱⁱⁱ, and the Treasury and IRS will accept the emissions reduction percentage determined pursuant to those approved facility-specific pathways.

CERTIFICATION REQUIREMENT

With respect to the RFS safe harbor, the Notice provides that the Treasury and IRS will consider a SAF producer to have met the certification of the Sustainability Requirements if the SAF synthetic blending component has been generated as Q-RIN with a D-code 3, 4, 5, or 7 RIN and verified under a QAP. Under a QAP, independent third-parties audit and verify that RINs have been properly generated and are valid for compliance purposes. If so, these RINs are designated as Q-RINs. Significantly, participating in a QAP is voluntary and does not layer additional sustainability requirements on fuel producers; a QAP only assures rigorous compliance with the existing RFS framework. To demonstrate compliance with the QAP verification requirement, the registered producer must record a valid Q-RIN or Q-RINs on the certificate for the SAF synthetic blending component for a particular volume of fuel to which the certificate relates. Appendix A of the Notice provides a model certificate.

King & Spalding has significant expertise counseling clients on all facets of EPA's RFS program, including representing clients in regulatory counseling and transactional interfaces related to sustainable aviation fuel, as well as in enforcement investigations initiated by EPA, defending clients in enforcement actions before EPA and the Department of Justice, and representing clients in litigation on challenges to EPA's RFS program. King & Spalding also has one of the deepest energy teams among the AmLaw top tier firms, and that team is directly focused on green and low-carbon hydrogen and their derivatives and carriers. Our energy team is fully integrated across jurisdictions, with our tax lawyers regularly providing advice on "first of its kind", cutting-edge transactions throughout the emerging new energy value chain.

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,300 lawyers in 23 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered "Attorney Advertising." View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
ATLANTA	CHICAGO	GENEVA	MIAMI	RIYADH	TOKYO
AUSTIN	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
BRUSSELS	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	



ⁱ Notice 2023-6 provides guidance regarding the registration requirements under Section 4101 and unrelated party certification of the sustainability requirements under CORSIA. Note that the model certificate in Appendix A of the Notice supersedes the model certificate in Appendix B of Notice 2023-6 beginning after December 15, 2023.

ⁱⁱ The Notice provides that the Treasury and IRS consulted with the Environmental Protection Agency ("EPA") and cites a letter from EPA Acting Assistant Administrator Joe Goffman to the Treasury. The letter, however, provides little explanation to support the conclusion that Argonne GREET by itself is insufficient to calculate lifecycle GHG emissions.

ⁱⁱⁱ EPA has issued several facility-specific renewable fuel pathway assessments for jet fuel derived from sugarcane ethanol, soybean oil, Brassica carinata oil, renewable diesel, distillers sorghum oil, distillers corn oil, energy cane and napier grass, and Camelina sativa oil. The completed pathway assessments are accessible at: <https://www.epa.gov/renewable-fuel-standard-program/approved-pathways-renewable-fuel>.