# IRS Issues More Guidance on Energy Incentive Tax Credit Provisions

March 7, 2023

On February 13, 2023, the IRS released Notices 2023-17 and 2023-18, which provide guidance on energy incentive tax credit provisions that were amended by the Inflation Reduction Act of 2022 (the "IRA"). Taxpayers and their advisors have been eagerly awaiting guidance on many aspects of the IRA's changes. The guidance in Notices 2023-17 and 2023-18, however, does not cover many of the most pressing issues regarding the new tax credit rules, such as the details of how to obtain a refund of tax credits under the new “direct pay” provision and how to comply with the prevailing wage and apprenticeship requirements. The IRS has stated that it will issue additional guidance on the IRA's changes to existing tax credit provisions in the future.

## Notice 2023-17

The IRA amended the investment tax credit ("ITC") provisions to provide a new 10% or 20% bonus tax credit for certain solar and wind facilities located in low-income communities or incorporated into low-income building projects. In order to qualify for these bonuses, a taxpayer must receive an allocation of "environmental justice solar and wind capacity limitation" ("Capacity Limitation"). The IRA directed the IRS to establish a program to make such allocations by February 13, 2023.

The IRA established four categories of solar and wind facilities which qualify for a bonus ITC based on a connection to a low-income community or building project:

- Category 1: "Located in a Low-Income Community," generally as defined in Section 45D(e). This generally includes any population census tract if (A) the poverty rate for such tract is at least 20%, or (B) in the case of a tract located outside a metropolitan area, the median family income for such tract does not exceed 80% of statewide median family income, or in the case of a tract located within a metropolitan area, the median family income for such tract does not exceed 80% of the greater of statewide median family income or the metropolitan area median family income.

- Category 2: "Located on Indian Land" as defined in Section 2601(2) of the Energy Policy Act of 1992. This includes (A) any land located within the boundaries of an Indian reservation, pueblo, or rancheria; (B) any land not located within the boundaries of an Indian reservation, pueblo, or rancheria, the title to which is held in trust by the United States for the benefit of an Indian tribe or an individual Indian, by an Indian tribe or an individual Indian, subject to restriction against alienation under laws of the United States, or by a dependent Indian community; (C) land that is owned by an Indian tribe and was conveyed by the United States to a Native Corporation pursuant to the Alaska Native Claims Settlement Act (the "ANCSA"), or that was conveyed by the United States to a Native Corporation in exchange for such land; (D) any land located in a census tract in which the majority of residents are Natives (as defined in the ANCSA); and (E) any land located in a census tract in which the majority of residents are persons who are enrolled members of a federally recognized Tribe or village.

- Category 3: "Qualified Low-Income Residential Building Project," meaning a residential rental building which participates in a covered housing program (as defined in Section 41411(a) of the Violence Against Women Act of 1994), a housing assistance program administered by the Department of Agriculture under Title V of the Housing Act of 1949, a housing program administered by a tribally designated housing entity (as defined in Section 4(22) of the Native American Housing Assistance and Self-Determination Act of 1996) or such other affordable housing programs as the Secretary may provide, provided that the financial benefits of the electricity produced by such facility are allocated equitably among the occupants of the dwelling units of such building.

- Category 4: "Qualified Low-Income Economic Benefit Project," which means a facility if at least 50% of the financial benefits of the electricity produced by such facility are provided to households with income of (i) less than 200% of the poverty line applicable to a family of the size involved, or (ii) less than 80% of area median gross income.

Under Notice 2023-17, the total allocation of Capacity Limitation for 2023 and 2024 is 1.8 gigawatts of direct current capacity for each year. The Capacity Limitation is broken down as follows:

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| 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 |

Notice 2023-17 specifies that the Capacity Limitation allocation program may adopt additional criteria in order to focus on facilities that (i) are owned or developed by community-based organizations and mission-driven entities, (ii) have an impact on encouraging new market participants, (iii) provide substantial benefits to low-income communities and individuals marginalized from economic opportunities, and (iv) have a higher degree of commercial readiness. The Notice provides that future guidance will fully describe these additional criteria.

Notice 2023-17 provides some details on the process for administering the program. The program will take a phased approach based on 60-day windows for applications. In quarter 3 of 2023, applications will be accepted for Category 3 and Category 4 facilities, and applications will be accepted for Category 1 and Category 2 facilities thereafter. In 2023, a taxpayer can apply for an allocation of Capacity Limitation in only one category for each facility owned by the taxpayer.

The Notice specifies that once a facility is placed into service, it is no longer eligible to apply for an allocation of Capacity Limitation. Accordingly, a taxpayer that intends to apply for a bonus tax credit should not place the relevant project into service before obtaining an allocation of Capacity Limitation.

The program will be administered by the Department of Energy, which will make recommendations to the Treasury Department regarding how allocations will be made among applicants.

## Notice 2023-18

Section 48C provides a tax credit for an investment in a "qualifying advanced energy project" (a "QAEP"). The IRA amended Section 48C to create a program under which taxpayers must apply for and obtain an allocation of this tax credit. Notice 2023-18 provides guidance on how this allocation program will work.

Under the IRA, a QAEP is generally defined as any project in the following three categories:

1. A project which re-equips, expands, or establishes an industrial or manufacturing facility for the production or recycling of certain types of property, including (i) property designed to produce energy from the sun, water, wind, geothermal deposits, or other renewable resources, (ii) fuel cells, microturbines, or energy storage systems and components, (iii) electric grid modernization equipment or components, (iv) property designed to capture, remove, use, or sequester carbon oxide emissions, (v) equipment designed to refine, electrolyze, or blend any fuel, chemical, or product which is renewable, or low-carbon and low-emission, (vi) property designed to produce energy conservation technologies, (vii) light-, medium-, or heavy-duty electric or fuel cell vehicles, as well as technologies, components, or materials for such vehicles, and associated charging or refueling infrastructure, and (viii) certain hybrid vehicles, as well as technologies, components, or materials for such vehicles.

2. A project which re-equips an industrial or manufacturing facility with equipment designed to reduce greenhouse gas emissions by at least 20% through the installation of (i) low- or zero-carbon process heat systems, (ii) carbon capture, transport, utilization and storage systems, or (iii) energy efficiency and reduction in waste from industrial processes.

3. A project which re-equips, expands, or establishes an industrial facility for the processing, refining, or recycling of critical materials. Critical materials are generally materials that have a high risk of supply chain interruption and are essential for certain energy technologies. The Department of Energy determines which materials are critical materials.[1]

Notice 2023-18 provides that the QAEP allocation program will be administered by the Department of Energy, which will make recommendations to the Treasury Department regarding which applicants should receive an allocation of tax credit. The application process will be conducted through the Department of Energy's eXCHANGE portal.[2]

The Notice specifies that Round 1 of the application process will open on May 31, 2023, and a taxpayer that wishes to apply for a QAEP allocation must submit a concept paper describing the proposed QAEP by July 31, 2023. Notice 2023-18 includes detailed requirements regarding the information that must be included in a QAEP concept paper. After the concept paper is reviewed, the taxpayer must file a full application for the Section 48C tax credit. The IRS will provide the due date for the full application in future guidance.

Notice 2023-18 also provides guidance on matters ancillary to the QAEP application process. For example, the Notice provides procedures to be followed if a taxpayer's plans change after submission of the concept paper and procedures for a taxpayer to request that the IRS transfer the taxpayer's allocation to a successor in interest.

In addition, like the general ITC provision, the IRA amended Section 48C to impose a prevailing wage and apprenticeship requirement for a taxpayer to be eligible for the full 30% of the tax credit for QAEPs. Notice 2023-18 provides that a taxpayer must certify its compliance with the prevailing wage and apprenticeship requirements when it places the relevant QAEP into service.

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## For More Information

If you would like further information concerning the matters discussed in this article, please contact Heath Martin or the Chapman attorney with whom you regularly work:

**Heath Martin**
Partner
212.655.2521
hmartin@chapman.com

1 *See* https://www.energy.gov/critical-minerals-materials.

2 Accessible at https://infrastructure-exchange.energy.gov/.