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Tax Update

IRS, Department of Treasury Release Energy Community Bonus Credit Notice

Earlier this month, the Department of Treasury and the Internal Revenue Service ("IRS"), as contemplated by the Inflation Reduction Act of 2022 ("IRA"), announced certain rules associated with "increased credit amounts or rates if certain requirements pertaining to energy communities are satisfied… for certain qualified facilities, energy projects, or energy storage technologies that satisfy similar requirements" as permitted by the IRA.[1]

The Notice released provides background and interim guidance for taxpayers who wish to take advantage of energy community bonus credit rates and amounts offered under the IRA. Ultimately, while forthcoming proposed regulations will be issued by the IRS and Treasury Department, the rules set forth in the notice are intended to apply to all taxable years following the notice's April 4, 2023 issuance.[2]

Under the rules, certain qualified facilities, energy projects or energy storage technologies are defined as an "EC Project" for which taxpayers who satisfy the requirements

[1] Notice 2023-29, § 1 (https://www.irs.gov/pub/irs-drop/n-23-29.pdf).
[2] *Id*.

may receive increased tax credit amounts or rates.[3] These special rules are further outlined under Sections 45, 45Y, 48, and 48E discussing the specific amount of credit increase due based on whether an EC Project meets requirements for qualified facilities, energy storage technologies or other services located within the community.[4] This may include, as the notice itself recognizes, brownfield sites, statistical areas (whether metropolitan or non-metropolitan (MSA and non-MSA each respectively)) and census tracts that include coal mine closures.[5] For any qualifying EC Project, depending on the situation and exact requirements satisfied, taxpayers may, for example, expect bonus tax credit amounts increased by ten (10) percent or have their energy percentage used to determine tax credits increased by two (2) percentage points.[6]

An initial Notice was issued from the IRS and Treasury Department requesting inquiries related to energy community requirements under the IRA.[7] The subsequent Notice recently issued aims to clarify several comments received following that initial Notice requesting clarification with respect to the requirement that a facility be "located in" an energy community.

Under the rules provided in this Notice, Section 45 and 45Y require qualified facilities "located in" an energy community to be determined "separately for each taxable year of the qualified facility's 10-year credit period."[8] Under Section 48 and 48E for obtaining energy credits associated with those provisions, whether an energy project, qualified facility or energy storage technology is placed in service within an energy community "is determined as of the

[3] *Id.* § 2(1)-(3).
[4] 26 U.S.C. § 45(b)(11); 26 U.S.C. § 45Y(g)(7); 26 U.S.C. § 48(a)(14); 26 U.S.C. § 48E(a)(3)(A).
[5] Notice 2023-29, § 3.01(1)-(3).
[6] *Id.* at p3.
[7] See Notice 2022-51, (https://www.irs.gov/pub/irs-drop/n-22-51.pdf).
[8] Notice 2023-29, § 4.01(1).

placed-in-service date (the date the credit is determined)."[9] A special rule was also announced related to projects that begin construction on a date in a location that contains an energy community, determining "the location will continue to be considered an energy community for the duration of the credit period for §§ 45 and 45Y or on the placed-in-service date for §§48 and 48E."[10]

An EC Project must also satisfy either a "nameplate capacity test" or a "square footage test" to be treated as "located in" an energy community.[11] The Nameplate Capacity Test requires 50 percent or more of the Project's nameplate capacity to be in an area that qualifies as an energy community, which can be computed "dividing the nameplate capacity of the EC Project's energy-generating units that are located in an energy community by the total nameplate capacity of all the energy-generating units of the EC Project."[12] Under the Footprint Test, an EC Project will be located in an energy community if 50 percent or more of the square footage is in an area that qualifies as an energy community, which can be computed "dividing the square footage of the EC Project that is located in an energy community by the total square footage of the EC Project."[13]

The Notice further provides a safe harbor for brownfield sites,[14] specifying that sites previously assessed and recognized as brownfield sites, as well as sites which have undergone

[9] *Id.*
[10] *Id.* § 4.01(2).
[11] *Id.* § 4.02.
[12] *Id.* § 4.02(1).
[13] *Id.* § 4.02(2).
[14] Brownfield sites are defined in the Notice by 42 U.S.C. § 9601(39)(A).

ASTM Phase I or II Environmental Site Assessments, may be considered as sites which meet the definition of a "brownfield site" under the rules provided by the IRS.[15]

Taxpayers who wish to take advantage of the energy community credits available must, as with other opportunities to use tax credits, follow general recordkeeping requirements to substantiate the location of an EC Project in service in an energy community.[16]

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[15] Notice 2023-29, §5.01-02.
[16] *Id.*, § 6.