

Part III - Administrative, Procedural, and Miscellaneous

Initial Guidance Establishing Program to Allocate Environmental Justice Solar and Wind Capacity Limitation Under Section 48(e)

Notice 2023-17

SECTION 1. PURPOSE

This notice establishes the program under § 48(e) of the Internal Revenue Code (Code)¹ to allocate amounts of environmental justice solar and wind capacity limitation (Capacity Limitation) to qualified solar and wind facilities eligible for the energy investment credit determined under § 48 (Low-Income Communities Bonus Credit Program). In addition, this notice provides initial guidance regarding the overall program design, the application process, and additional criteria that will be considered in determining which applicants will receive an allocation of Capacity Limitation in calendar year 2023 under the Low-Income Communities Bonus Credit Program. The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) will issue further guidance (forthcoming guidance) outlining the specific application procedures, additional criteria, applicable definitions, and other information necessary to submit an application to request an allocation of Capacity Limitation for calendar year

¹ Unless otherwise specified, all “section” or “§” references are to sections of the Code.

2023 under the Low-Income Communities Bonus Credit Program.

After the 2023 allocation process begins, the Treasury Department and IRS will monitor and assess whether to implement any modifications to the Low-Income Communities Bonus Credit Program for calendar year 2024 allocations of Capacity Limitation.

SECTION 2. BACKGROUND

.01 Overview. The amount of the energy investment credit determined under § 48(a) (§ 48 credit) for a taxable year is generally calculated by multiplying the basis of each energy property placed in service during that taxable year by the energy percentage (as defined in § 48(a)). Section 13103 of Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), amended § 48, in part, to add new § 48(e) to potentially increase the amount of the § 48 credit with respect to eligible property that is part of a qualified solar and wind facility.

.02 Eligible Property. The term eligible property is defined in § 48(e)(3) to mean energy property (including energy storage technology described in § 48(a)(3)(A)(ix) installed in connection with such energy property) that (i) is part of a wind facility described in § 45(d)(1) for which an election to treat the facility as energy property was made under § 48(a)(5) (wind facility), or (ii) is solar energy property described in § 48(a)(3)(A)(i) (solar energy property) or qualified small wind energy property described in § 48(a)(3)(A)(vi) (small wind energy property).

.03 Qualified Solar and Wind Facility. The term qualified solar and wind facility is defined in § 48(e)(2) to mean any facility (i) that generates electricity solely from a wind

facility, solar energy property, or small wind energy property; (ii) that has a maximum net output of less than 5 megawatts (as measured in alternating current); and (iii) that is described in at least one of the following four categories described in § 48(e)(2)(A)(iii):

(1) Category 1: The facility is located in a low-income community described in section 3.01 of this notice.

(2) Category 2: The facility is located on Indian land described in section 3.02 of this notice.

(3) Category 3: The facility is part of a qualified low-income residential building project described in section 3.03 of this notice.

(4) Category 4: The facility is part of a qualified low-income economic benefit project described in section 3.04 of this notice.

.04 Increase in Section 48 Credit. Section 48(e) provides for an increase in the energy percentage used to calculate the amount of the § 48 credit (§ 48(e) Increase) in the case of qualified solar and wind facilities that receive an allocation of Capacity Limitation. Depending on the category of the facility, the § 48(e) Increase is either 10 percentage points or 20 percentage points. Section 48(e)(1)(A)(i) provides for a § 48(e) Increase of 10 percentage points for eligible property that is part of a Category 1 facility or a Category 2 facility that is not also a Category 3 facility or Category 4 facility. See the rules in section 3.01 and section 3.02 in this notice concerning facilities that are described in multiple categories. Section 48(e)(1)(A)(ii) provides for a § 48(e) Increase of 20 percentage points for eligible property that is part of a Category 3 facility or a Category 4 facility. Section 3 of this notice provides additional information regarding the four categories for qualified solar and wind facilities. Section 48(e)(1)(B) provides that

the § 48(e) Increase for any taxable year for all property that is part of a qualified solar and wind facility cannot exceed the amount that bears the same ratio to the amount of the § 48 Increase as the Capacity Limitation allocated to such facility bears to the total megawatt nameplate capacity of such facility, as measured in direct current.

.05 Placed in Service Deadline. To be eligible for the § 48(e) Increase, § 48(e)(4)(E) requires that the property must be placed in service within four years after the date the applicant was notified of the allocation of Capacity Limitation to the facility of which such property is a part. Any Capacity Limitation that is allocated but expires because property is not placed in service within four years is taken into account as an excess, or increase in excess, under the carryover rules in § 48(e)(4)(D). See section 2.07(2) of this notice.

.06 Placed in Service.

(1) In general. Eligible property is considered placed in service in the earlier of the following taxable years:

(A) The taxable year in which, under the taxpayer's depreciation practice, the period for depreciation with respect to such eligible property begins; or

(B) The taxable year in which the eligible property is placed in a condition or state of readiness and availability for a specifically assigned function, whether in a trade or business or in the production of income.

(2) Eligible property subject to § 1.48-4 election to treat lessee as purchaser.

Eligible property with respect to which an election is made under § 1.48-4 of the Income Tax Regulations (26 C.F.R. part 1) to treat the lessee as having purchased such energy property is considered placed in service by the lessor in the taxable year in which

possession is transferred to such lessee.

.07 Establishment of Allocation Program.

(1) In general. Section 48(e)(4) directs the Secretary of the Treasury or her delegate (Secretary) to establish a program, within 180 days of enactment of the IRA, to allocate amounts of Capacity Limitation to qualified solar and wind facilities.

(2) Annual Capacity Limitation. Under § 48(e)(4)(C), the total annual Capacity Limitation is 1.8 gigawatts of direct current capacity for each of the calendar years 2023 and 2024. Under § 48(e)(4)(D), if the annual Capacity Limitation for any calendar year exceeds the aggregate amount allocated for such year, the excess is carried forward to the next year, but not beyond calendar year 2024. Any excess from calendar year 2024 may be carried forward and applied to the Capacity Limitation for calendar year 2025 under new § 48E(h)(4)(D)(ii).²

SECTION 3. FACILITY CATEGORIES

.01 Category 1: Located in a Low-Income Community. Under § 48(e)(2)(A)(iii)(I), the term low-income community is generally defined under § 45D(e)(1), with certain modifications described elsewhere in § 45D(e), as any population census tract if the poverty rate for such tract is at least 20 percent, or, in the case of a tract not located within a metropolitan area, the median family income for such tract does not exceed 80 percent 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 percent of the greater of statewide median family income or the

² Section 13702(a) of the IRA also enacted § 48E(h), which generally provides for a program similar to the Low-Income Communities Bonus Credit Program for calendar years after 2024. Section 48E(i) directs the Secretary to issue guidance regarding the implementation of § 48E not later than January 1, 2025.

metropolitan area median family income. A qualified solar and wind facility that is described in this section 3.01 and also in section 3.03 or 3.04 of this notice is considered a Category 3 facility or Category 4 facility (as applicable).

.02 Category 2: Located on Indian Land. Section 48(e)(2)(A)(iii)(I) provides that Indian land is defined in § 2601(2) of the Energy Policy Act of 1992 (25 U.S.C. 3501(2)). A qualified solar and wind facility that is described in this section 3.02 and also in section 3.03 or 3.04 of this notice is considered a Category 3 facility or Category 4 facility (as applicable).

.03 Category 3: Qualified Low-Income Residential Building Project.

(1) Section 48(e)(2)(B) provides that a facility will be treated as part of a qualified low-income residential building project if such facility is installed on a residential rental building which participates in an affordable housing program, and the financial benefits of the electricity produced by such facility are allocated equitably among the occupants of the dwelling units of such building.

(2) An affordable housing program includes any of the following:

(A) A covered housing program (as defined in § 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12491(a)(3)).

(B) A housing assistance program administered by the Department of Agriculture under title V of the Housing Act of 1949.

(C) A housing program administered by a tribally designated housing entity (as defined in § 4(22) of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4103(22)).

(D) Such other affordable housing programs as the Secretary may provide.

(3) For a qualified low-income residential building project, § 48(e)(2)(D) provides that electricity acquired at a below-market rate will be considered a financial benefit.

The forthcoming guidance will further clarify the parameters of financial benefit.

.04 Category 4: Qualified Low-Income Economic Benefit Project.

(1) Section 48(e)(2)(C) provides that a facility will be treated as part of a qualified low-income economic benefit project if at least 50 percent of the financial benefits of the electricity produced by such facility are provided to households with income of less than 200 percent of the poverty line (as defined in § 36B(d)(3)(A)) applicable to a family of the size involved, or less than 80 percent of area median gross income (as determined under § 142(d)(2)(B)).

(2) For a qualified low-income economic benefit project, § 48(e)(2)(D) provides that electricity acquired at a below-market rate will be considered a financial benefit.

The forthcoming guidance will further clarify the parameters of financial benefit.

SECTION 4. DESIGN AND IMPLEMENTATION OF LOW-INCOME COMMUNITIES BONUS CREDIT PROGRAM

.01 In general. Consistent with the statutory references in § 48(e) to low-income communities and environmental justice as well as the statute's four categories, the allocation program's broad goals are to increase adoption of and access to renewable energy facilities in low-income and other communities with environmental justice concerns; encourage new market participants; and provide social and economic benefits to individuals and communities that have been historically overburdened with pollution, adverse human health or environmental effects, and marginalized from economic opportunities.

.02 Facility Category Allocations. For calendar year 2023, the total annual Capacity Limitation of 1.8 gigawatts of direct current capacity will be divided among the four categories described in section 3. The allocation of Capacity Limitation reserved for each facility category for calendar year 2023 is 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 |

See section 4.04 of this notice (relating to allocations of excess Capacity Limitation reserved for categories). As described in section 2.07(2) of this notice, if the annual Capacity Limitation for calendar year 2023 exceeds the aggregate amount allocated for calendar year 2023, the excess will be carried forward to calendar year 2024 pursuant to § 48(e)(4)(D).

.03 Additional Criteria. To further the overall program goals, the program will incorporate additional criteria in determining how to allocate the Capacity Limitation reserved for each facility category among eligible applicants. These criteria may include a focus on facilities that are (i) 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 forthcoming guidance will fully describe these additional criteria.

.04 Allocation Process. If selected applications for facilities with a collective total megawatt nameplate capacity exceed the Capacity Limitation reserved for each category, then a lottery or other processes may be used to allocate the Capacity

Limitation to applicants. In the event a facility category has excess Capacity Limitation, such excess may be reallocated between the categories to maximize 2023 calendar year allocations.

.05 Placed in Service Prior to Allocation Award. Facilities placed in service prior to being awarded an allocation of Capacity Limitation are not eligible to receive an allocation.

.06 Eligible Applicant. Only the owner of a facility may apply for an allocation of Capacity Limitation. For each facility owned by an applicant, the applicant may apply for an allocation of Capacity Limitation in only one category for calendar year 2023. Applicants that do not receive an allocation of Capacity Limitation will be permitted to apply for future allocations after calendar year 2023. There will be no waitlist created from calendar year 2023 applications that did not receive an allocation of Capacity Limitation.

.07 Phased Approach. Applications will be accepted in a phased approach for calendar year 2023, during 60-day application windows. First, the Treasury Department and IRS anticipate that applications will be accepted for Category 3 facilities, as defined in section 3.03 of this notice, and Category 4 facilities, as defined in section 3.04 of this notice, in the third calendar quarter of 2023. Next, the Treasury Department and IRS anticipate that applications will be accepted for Category 1 facilities, as defined in section 3.01 of this notice, and Category 2 facilities, as defined in section 3.02 of this notice, thereafter. Forthcoming guidance on the application process and facility eligibility for all categories will be provided.

.08 Program Administration. The Department of Energy (DOE) will provide

administration services for the Low-Income Communities Bonus Credit Program. DOE will review the applications for statutory eligibility and additional criteria as will be set out in forthcoming guidance and will provide recommendations to the IRS regarding the selection of applications for an allocation of Capacity Limitation. DOE will also perform the lottery or other process for allocation, described in section 4.04 of this notice, as needed. Based on DOE's recommendation and the process for allocation, described in section 4.04 of this notice, the IRS will accept or reject the applicant's request for an allocation of Capacity Limitation and notify the applicant of its decision. An acceptance notification will state the amount of Capacity Limitation allocated to the applicant. The amount of Capacity Limitation allocated will not exceed the nameplate capacity of the facility (as measured in direct current) and will not be prorated. As required by § 48(e)(4)(E), applicants have four years from the date of the acceptance notification to place the property in service.

.09 Effect of an Allocation. The allocation of an amount of Capacity Limitation by the IRS under the Low-Income Communities Bonus Credit Program is not a determination that the facility will qualify for the § 48(e) Increase or the § 48 credit generally. This notice does not alter the rules regarding the determination and eligibility to claim a § 48 credit, including any § 48(e) Increase in energy percentage attributable to the Low-Income Communities Bonus Credit Program.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is the Office of Associate Chief Counsel (Passthroughs & Special Industries). However, other personnel from the Treasury Department and the IRS participated in its development. For further information

regarding this notice, call the energy security guidance contact number at (202) 317-5254 (not a toll-free call).