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IRS and Treasury Issue Notice 2024-41 Providing Additional Guidance on "Domestic Content" for ITC- and PTC-Eligible Projects

Client Alert | May 20, 2024

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The Notice provides a new elective safe harbor that should reduce the practical difficulties that taxpayers face in seeking to demonstrate that their clean energy projects are eligible for the Domestic Content Bonus Credit by reducing the circumstances when taxpayers will be forced to engage in cumbersome or impractical substantiation of third-party costs.

On May 16, 2024, the IRS and Treasury issued Notice 2024-41 (the "Notice") (here), which modifies and expands Notice 2023-38, issued last year as initial guidance for developers and investors seeking to qualify projects for the domestic content bonus credit available under sections 45, 45Y, 48, and 48E (the "Domestic Content Bonus Credit").[1] (For a full discussion of Notice 2023-38 and the Domestic Content Bonus Credit, see our earlier client alert here.)

The Notice is a highly welcome piece of guidance. Most importantly, it provides a new elective safe harbor that should reduce the practical difficulties that taxpayers face in seeking to demonstrate that their clean energy projects are eligible for the Domestic Content Bonus Credit by reducing the circumstances when taxpayers will be forced to engage in cumbersome or impractical substantiation of third-party costs. The Notice also expands and modifies a helpful list in Notice 2023-38 categorizing components as Applicable Project Components and Manufactured Product Components for purposes of further applying the applicable requirements for the Domestic Content Bonus Credit.[2]

Background

A taxpayer is eligible to claim a Domestic Content Bonus Credit, which is an increased tax credit amount in respect of projects that meet certain requirements under sections 45 and 45Y (the "PTC") and sections 48 and 48E (the "ITC"), if the taxpayer timely certifies to the IRS that the applicable requirements have been satisfied.[3]

The Domestic Content Bonus Credit requirements vary based on the type of Applicable Project Component. Applicable Project Components that are made primarily of steel or iron, and are structural in function, meet the Domestic Content Bonus Credit requirements if all manufacturing processes with respect to the Applicable Project Component (except metallurgical processes involving refinement of steel additives) take place in the United States (the "Steel or Iron Requirement").[4] All other Applicable Project Components that result from a manufacturing process meet the Domestic Content Bonus Credit requirements if a certain statutory percentage (ranging from 20 percent to 55 percent) of the total of certain costs of Applicable Project Components are attributable to (i) Applicable Project Components for which all of the manufacturing processes take place in the United

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States and all Manufactured Product Components are of U.S. origin and (ii) "U.S. Components" (*i.e.*, Manufactured Product Components that are mined, produced, or manufactured in the United States) of other Applicable Project Components not described in clause (i) (the "Manufactured Products Requirement").[5]

Expansion and Modification of Existing Categorization Safe Harbor

Notice 2023-38 identified certain Applicable Project Components in utility-scale solar, wind, and energy storage projects and categorized them as subject to either the Steel or Iron Requirement or the Manufactured Products Requirement. This was a welcome development, providing highly practical guidance for taxpayers that reduced uncertainty in the threshold identification and categorization of components.

The Notice expands the guidance in Notice 2023-38 on how to identify and categorize Applicable Project Components and Manufactured Product Components of hydropower and pumped hydropower storage facilities and extends the guidance applicable to utility-scale solar to apply to ground-mount and rooftop PV systems.

The Notice also identifies additional Manufactured Product Components of inverters, solar trackers and battery containers. The Notice both states that taxpayers may treat the Applicable Project Components or Manufactured Product Components described in the Notice as having been included in the initial guidance in Notice 2023-38 and that where there are inconsistencies between the two notices regarding classifications of Applicable Project Components or Manufactured Product Components, the Notice will control.

Addition of New Elective Safe Harbor

Notice 2023-38 provided that, for purposes of satisfying the Manufactured Products Requirement, only direct material and labor costs were taken into account in the numerator and denominator when computing the applicable statutory percentage, which necessitated collecting sensitive commercial information (in documented form) from third-party suppliers or other counterparties (and then sharing that sensitive information with insurers, project buyers, lenders, tax equity investors and credit buyers). This exercise proved challenging, if not practically impossible.

The Notice eases the taxpayer's compliance burden by providing a new safe harbor that allows taxpayers to elect to use Department of Energy-provided cost percentages (in lieu of actual costs) to determine if the Manufactured Products Requirement is met.

If a taxpayer elects to use the new safe harbor, it must apply the assigned cost percentages in the Notice to all relevant Applicable Project Components and Manufactured Product Components of the Applicable Project. If relevant Applicable Project Components and Manufactured Product Components are not enumerated in the Notice, then those components are disregarded; if the Applicable Project does not use certain Appliable Project Components and Manufactured Product Components listed in the Notice, then those components take a zero value. The safe harbor includes special provisions to facilitate its application in circumstances where a project incorporates Manufactured Products or Manufactured Product Components of the same type (*e.g.*, a wind turbine) from both foreign and domestic sources, along with a special rule authorizing taxpayers claiming the ITC to apply the safe harbor on a project-wide basis where the project is comprised of both an energy generation and an energy storage facility.

Reliance and Certification

Taxpayers are permitted to rely on Notice 2023-38, as modified by the Notice, for purposes of claiming the Domestic Content Bonus Credit for a project on which construction begins before the date that is 90 days after publication of forthcoming proposed regulations on the domestic content requirements. Taxpayers are permitted to rely on the new safe harbor for purposes of claiming the Domestic Content Bonus Credit

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for a project on which construction begins before the date that is 90 days after any modification, update, or withdrawal of this new safe harbor. To rely on this new safe harbor, a taxpayer must specify on its domestic content certification statement (as described in Notice 2023-38) that the taxpayer is relying on the new safe harbor for purposes of claiming the Domestic Content Bonus Credit in respect of a project.

Observations

- In our prior alert summarizing Notice 2023-38, we anticipated the commercial issues that are addressed by the Notice. We are optimistic that this Notice will allow taxpayers to take advantage of this important incentive more readily, although the all-or-nothing nature of the new safe harbor may compel some taxpayers that have good cost information with respect to some, but not all, of the Applicable Project Components to carefully weigh the pros and cons of applying the safe harbor.
- Application of the new safe harbor still requires a taxpayer to identify (and document) relevant Applicable Project Components and Manufactured Product Components as having been mined, produced or manufactured in the United States, which will continue to require taxpayers to obtain information from third parties.

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[1] Unless indicated otherwise, all section references are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treas. Reg. §" references are to the Treasury Regulations promulgated under the Code.

For a discussion of the other energy community bonus credit, please see here. For our other recent updates on guidance related to energy credits, please see the following: (1) our alerts on guidance related to transferring and receiving direct payments with respect to tax credits (available here, here, and here), (2) our alert describing proposed investment tax credit regulations (available here), (3) our alert describing proposed regulations providing guidance on the prevailing wage and apprenticeship rules (available here), (4) our alert describing tax benefits for the carbon capture industry (available here).

[2] As described in our prior client alert, applicable projects are types of energy generation or storage facilities or properties, *e.g.*, a utility-scale photovoltaic property or land-based wind facility (an "Applicable Project"). An applicable project component is the building block of an Applicable Project (an "Applicable Project Component"). For example, Applicable Project Components of for a land-based wind facility include the tower and wind turbine. Finally, a manufactured product component is an item that is directly incorporated into an Applicable Project Component that is produced as a result of the manufacturing process (a "Manufactured Product Component").

[3] For PTC projects, if the Domestic Content Bonus Credit is available, the section 45 or 45Y credit is increased by a maximum of 10 percent, and for ITC projects, the section 48 or 48E credit percentage is increased by a maximum of 10 percentage points. In the case of projects subject to prevailing wage and apprenticeship requirements (discussed in our prior alert here), failure to satisfy those requirements reduces the bonus credit amounts to 2 percent (for PTC projects) or 2 percentage points (for ITC projects).

[4] For purposes of this Notice, the United States includes the States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, and the Commonwealth of Northern Mariana Islands.

[5] The Steel or Iron Requirement applies in a manner consistent with Section 661.5(b) and (c) of title 49 of the Code of Federal Regulations (the "CFR"). 49 CFR §§ 661.1 through 661.21 (also known as the "Buy America" requirements). The Manufactured

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Products Requirement applies in a manner consistent with 49 CFR § 661.5(d).

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Gibson Dunn lawyers are available to assist in addressing any questions you may have about these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Tax, Cleantech, or Power and Renewables practice groups, or the following authors:

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