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MEMORANDUM

September 24, 2024

TO: TRIBAL HOUSING CLIENTS

FROM: ED C. GOODMAN & TELLY J. MEIER
HOBBS, STRAUS, DEAN & WALKER, LLP

RE: ***Notice of Proposed Rulemaking To Implement 26 U.S.C. § 48E(h)***

On September 3, 2024, the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") published a notice of proposed rulemaking[1] ("NPRM") on the Clean Electricity Low-Income Communities Bonus Credit program, enacted by the Inflation Reduction Act and codified at 26 U.S.C. § 48E(h). The program is the successor to the Low-Income Communities Bonus Credit program, codified at 26 U.S.C. § 48(e). This report provides an overview of the program and highlights from the NPRM.

Overview of the Clean Electricity Low-Income Communities Bonus Credit Program

Like the Low-Income Communities Bonus Credit program, the Clean Electricity Low-Income Communities Bonus Credit program provides a 10% or 20% increase to the clean electricity investment tax credit codified at 26 U.S.C. § 48E. Taxpayers seeking to claim the bonus credit must first apply for and receive a Capacity Limitation allocation from the Departments of Energy and Treasury. There will be 1.8 gigawatts of Capacity Limitation available every year starting January 1, 2025 and ending in the later of 2032 or the year in which annual greenhouse gas emissions from U.S. electricity production are 25% or less of such greenhouse gas emissions produced in 2022. 26 U.S.C. § 48E(h)(4)(C).

Eligible facilities must (1) be placed in service after December 31, 2024; (2) be non-combustion and gasification; (3) have an anticipated greenhouse gas emissions rate of zero or less; (4) have a maximum output of less than 5 megawatts (as measured in alternating current); and (5) fall under one of four statutory categories. *See id.* §§ 48E(b)(3), (h)(2)(A). The four categories are:

- Category 1: Located in a low-income community (10% bonus)
- Category 2: Located on Indian land (10% bonus)

[1] Guidance on Clean Electricity Low-Income Communities Bonus Credit Amount Program, 89 Fed. Reg. 71,193 (Sept. 3, 2024).

- Category 3: Qualified low-income residential building project (20% bonus)
- Category 4: Qualified low-income economic benefit project (20% bonus)

As the definition suggests, the Clean Electricity Low-Income Communities Bonus Credit program opens eligibility to clean energy technologies beyond wind and solar.

Notice of Proposed Rulemaking

Treasury and the IRS propose to clarify eligibility criteria, program requirements, the application and selection process, and post-allocation requirements.

1. Eligibility Criteria

Category 1 and 2 facilities are well-defined in statute, with Category 1 using the same definition of "low-income community" as the New Markets Tax Credit program and Category 2 using the same definition of "Indian land" as the Energy Policy Act. *Id.* § 48E(h)(2)(A)(iii)(I). Category 3 and 4 facilities are also defined in statute, *id.* §§ 48E(h)(2)(B), (C), but the NPRM proposes additional clarification. For example, the statute requires Category 3 facilities to be residential rental buildings that participate in affordable housing programs. *Id.* § 48E(h)(2)(B)(i). The NPRM provides a list of federal housing programs that meet the statutory requirements and seeks comment on additional affordable housing programs to add to the list, as well as whether state programs should be added to the list under certain conditions. 89 Fed. Reg. at 71,196. Housing programs listed in the NPRM include those authorized by the Native American Housing Assistance and Self-Determination Act, but these are the only programs specifically targeted at Native Americans on the list. If your Tribe administers a housing program that is not included on this list, such as the Tribal HUD-VA Supportive Housing program, we encourage you to submit comments advocating for the inclusion of additional Tribal programs.

The NPRM also proposes to clarify how Category 3 and 4 facilities must meet the statutory financial benefits requirement. The statute provides that Category 3 facilities must equitably allocate the financial benefits of the electricity produced by the facility amongst building occupants. 26 U.S.C. § 48E(h)(2)(B)(ii). In turn, the NPRM proposes that for Category 3 facilities, different rules would apply depending on if financial value is distributed to building occupants via utility bill savings or other means, such as lowered operational costs of electricity consumption for common areas. 89 Fed. Reg. at 71,198. The NPRM also provides that tenants' annual income for rent calculations or other purposes should not be negatively impacted by the distribution of financial value. *Id.*

The statute requires Category 4 facilities to provide at least 50% of the financial benefits of the electricity produced by the facility to households with an income of less than 200% of the poverty line applicable to a family of the size involved, or less than 80% of area median gross income. *Id.* § 48E(h)(2)(C). The NPRM proposes that to satisfy this financial benefits requirement,

> (i) The facility must serve multiple qualifying low-income households under section 48E(e)(2)(C)(i);
> (ii) At least 50 percent of the facility's total output in kilowatts (kW) must be assigned to Qualifying Households; and
> (iii) Each Qualifying Household must be provided a bill credit discount rate (as defined in proposed §1.48E(h)-1(f)(2)) of at least 30 percent.

Id. at 71,199. The NPRM requests comment on whether a minimum 30% bill credit discount rate is feasible and the impact such a rate might have. *Id.* The NPRM also requests comment on alternative methods for delivering financial benefits in cases where bill credit discounts are not available or are infeasible for certain technologies. *Id.* Finally, the NPRM proposes to require verification of benefiting households' qualifying low-income status. *Id.* The NPRM proposes that self-attestation would not be a permissible method of verification, but would allow for categorical eligibility through participation in a needs-based utility program with income limits at or below the qualifying income levels listed in the statute (such as Medicaid, the Low-Income Home Energy Assistance Program, etc.). *Id.* Notably, the NPRM would allow state agencies to provide verification for households that participate in state solar programs with required income limits, but the NPRM does not extend this same ability to Tribes. *Id.* at 71,199−71,200. We encourage Tribes to submit comments urging Treasury and the IRS to affirm Tribal sovereignty by extending the ability for Tribes to verify household eligibility.

2. <u>Proposed Program Requirements and Structure</u>

The NPRM clarifies how the 1.8 Gigawatt capacity limitation would be allocated amongst applicants and facility categories. Similar to the Low-Income Communities Bonus Credit program, the NPRM proposes to reserve at least 50% of allocations for facilities that meet additional selection criteria based on ownership or geography. *Id.* at 71,200. A facility would meet the ownership criteria if it is owned by:

- A Tribal enterprise, defined as an entity that is (1) owned at least 51% directly by an Indian Tribal government, a corporation wholly-owned by an Indian Tribal government, or a Section 17 corporation; and (2) subject to Tribal government rules, regulations, and/or codes that regulate the operations of the entity.
- An Alaska Native corporation
- A Native Hawaiian organization

- A renewable energy cooperative
- A qualified tax-exempt entity (includes Tribal governments)
- A partnership in which one of the above entities owns at least a 1% interest and is a managing member or general partner at all times during the existence of the partnership.

Id. at 71,200−71,201. The NPRM requests comments on other appropriate ownership criteria and the supporting documentation that could be provided as part of the application to verify an applicant meets such criteria. *Id.* at 71,200.

To meet the proposed geographic criteria, a facility would need to be located in a "Persistent Poverty County,"[2] defined as a county in which 20% or more residents have experienced high rates of poverty over the past 30 years, or in certain census tracts identified on the Climate and Economic Justice Screening Tool.[3] *Id.* at 71,201.

Finally, the NPRM would create an additional sub-reservation within Category 1 for residential, behind-the-meter facilities, including rooftop solar. 89 Fed. Reg. at 71,202. The Treasury Department and the IRS anticipate that Category 1 will receive the largest number of applications, and that within Category 1, many applications will involve residential solar facilities that are smaller in scale and have relatively short construction completion timelines. *Id.* The sub-reservation is intended to ensure that allocations are primarily awarded to facilities serving residences and consumers, rather than facilities serving businesses. *Id.*

3. Application, Selection, and Placed-in-Service Requirements

The NPRM outlines how Treasury and the IRS would process applications to maximize program impact with a finite Capacity Limitation. Similar to the Low-Income Communities Bonus Credit program, the NPRM would implement an initial application window in which all applications received during that window would be evaluated together, followed by a rolling application process if Capacity Limitation remains after the initial application window. *Id.* The NPRM also proposes to "deprioritize" applications for facilities that, together with other facilities, (1) share a point of interconnection; (2) produce electricity using the same technology; (3) are owned by the same taxpayer, and (4) have an aggregate total maximum net output of five megawatts (alternating current) or greater. *Id.* The NPRM states that such deprioritization would avoid concentrating allocations in a few communities.

[2] *Poverty Area Measures*, U.S. Dep't of Agric. Econ. Rsch. Serv. (Dec. 8, 2023), https://www.ers.usda.gov/data-products/poverty-area-measures.
[3] *Methodology*, Climate & Econ. Just. Screening Tool, https://screeningtool.geoplatform.gov/en/methodology (last visited Sept. 17, 2024).

The NPRM also states that applicants will be required to submit documentation and attestations at the initial application stage and at the placed-in-service stage. *Id.* at 71,203. Such documentation must demonstrate applicant eligibility and project viability at the application stage and final eligibility information at the placed-in-service stage. *Id.* The NPRM does not provide specific details of what the required documentation will be, but instead states that Treasury and the IRS will periodically assess the program and publish guidance in the Internal Revenue Bulletin. *Id.* The NPRM seeks comments on the application process and requirements, as well as how facilities can demonstrate project viability. *Id.*

We encourage Tribes and Tribally Designated Housing Entities (TDHEs) to submit comments urging Treasury and the IRS to implement the principles of Executive Order (EO) 14112 by streamlining the application process for Tribes and TDHEs specifically, such as by reducing the volume of documentation required. A critical purpose of the Clean Electricity Low-Income Communities Bonus Credit is to increase equitable access to clean energy options and target the most disadvantaged communities. The many references to Tribes and Tribal lands throughout the NPRM clearly demonstrate Treasury and the IRS's understanding that Tribes fall squarely within the target population for this program. Thus, it is critical that Treasury and the IRS implement the program in a way that facilitates access, caters to Tribal needs, and respects Tribal sovereignty.

Conclusion

Comments on the NPRM are due on October 3, 2024. If you have any questions or would like assistance in preparing comments, please contact Ed Goodman (egoodman@hobbsstraus.com or 503-242-1745), Telly Meier (tmeier@hobbsstraus.com or 202-822-8282), or Claire Newfeld (cnewfeld@hobbsstraus.com or 202-822-8282).