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**IRS NOTICES RELEVANT TO THE IRA**

**Notice 2022-48 - Provisions related to energy efficiency incentives**.

**IRA Changes**: The IRA has amended the commercial energy efficiency deduction (179D) to allow tribal governments to allocate its deduction to the person primarily responsible for designing the energy efficiency project - typically an architect, engineer, designer or energy services company.

**Treasury Questions**:

* What criteria should Treasury use to determine who is "primarily responsible" for the design of an energy efficiency project for purposes of the tax-exempt entity allocation?

**Potential Responses/Comments**:

* Treasury should define the criteria very broadly to allow tribes (and other tax-exempt organizations) to have multiple options for hiring contractors to perform energy efficiency projects for tribal buildings.

**Notice 2022-49 - Provisions related to energy generation incentives.**

**IRA Changes**: The IRA extended the investment and production tax credits, expanded those tax credits to cover additional technologies (such as interconnection cost), and created bonus credits for meeting certain requirements and/or receiving environmental justice allocations.

**Treasury Questions**:

* Request for general comments regarding guidance and the implementation of these provisions.
* With respect to interconnection costs, what type of documentation should project provide?
* How should taxpayer/project demonstrate eligibility for the tax credit(s)?
* With respect to the environmental justice credit allocations, what should Treasury consider in providing guidance; what factors should Treasury consider in the allocation; how can Treasury make the application for credits accessible?

**Potential Responses/Comments**:

* As a general matter, how will Treasury treat the use of federal grant funding for projects that also qualify for tax credits. Treasury should allow the use, but reduce the cost basis by the amount of the federal grant, unless the federal grant money is treated as non-federal money for project purposes. For example, the ISDEAA and NAHASDA both allow the use of their funding as "non-federal" match. The ARPA Fiscal Recovery Funds also treats certain funding as "non-federal" for purposes of match requirements. These types of funds should not be considered a federal benefit.
* For purposes of documenting the basis of the tax credit for interconnection costs, an executed interconnection agreement should be sufficient. In addition, Treasury should only look to the amount of capacity interconnected, and not necessarily the total capacity size of the project. For example, if a tribe is building a 7.5 MW solar project, but only interconnecting 2.5MW, then the interconnection costs should be eligible for the tax credit.
* The environment justice credit allocations will allow a tribe or its partners to obtain additional tax credits for projects located on tribal lands and/or serving low-income tribal members. Treasury should consider the following:
  + Immediately engage in tribal consultation.
  + Pro rata tribal set aside, based on census tracts. For example, determine the total number of census tracts that are considered low-income, and allocate credits between tribal lands and low-income census tracts.
  + Application information should consider internal capacity limitations for tribes and low-income communities.
  + Priority or emphasis should be on local ownership or development of eligible projects.

**Notice 2022-50 - Provisions related to elective payments of applicable tax credits.**

**IRA Changes**: The IRA created a new provision in the tax code that allows tribal governments to elect to receive payments from the IRS equal to the amount of the tax credits. The provision also requires the Secretary to determine how partnerships or S corporations can make the election because the tax credit is paid to the partnership.

**Treasury Questions**:

* What factors should be taken into consideration to determine the time and manner for filing a claim for tax credit payment?
* What guidance is relevant for partnership election of the tax credit payment?
* What guidance is needed for defining the term "applicable entity", including structures, other issues?
* What information should be required as a condition for submitting a claim for payment?

**Potential Responses/Comments**:

* For governmental entities that do not file tax returns, they should be able to file a claim for payment any time after the project goes into operation.
* Tribes must be able to enter into partnerships, such as LLCs, to develop and own projects. These partnerships should be able to have taxable entities as partners. Tribe recommends that any tax credit, while claimed by the partnership, should be allocated amongst the partners consistent with existing law and regulations.
* Indian tribal governments are included in the definition of "applicable entity," however, the Code reference cited does not exist. Typically, tribal governments are defined as a federally recognized Indian tribe under the List Act. Regardless, Treasury should further define Indian tribal government to include any political or economic subdivision, tribal enterprise, tribal utility, tribal energy development organization, or tribal housing authority of a federally recognized Indian tribe. Furthermore, tribes should be able to structure ownership of these entities under tribal, federal or state law.
* Treasury must also take into consideration that tribes do not file income tax returns and are not generally familiar with the most relevant provisions of the code that are applicable to clean energy projects. Treasury should consider technical assistance or other guidance for tribes to be able to take advantage of this new authority.
* Treasury guidance for submitting claims for a refund should seek to ensure simplicity and timeliness in filing documents. For example, Treasury should seek to mimic Form 3468. No other documentation should be necessary to submit the claim for a refund, but Treasury can instruct applicable entities to maintain sufficient documentation to support the information provided. This would ensure that non-taxable entities, such as tribal governments, are treated similarly to taxable entities who qualify for the same tax credits.

**Notice 2022-51 - Prevailing wage and apprenticeship requirements.**

**IRA Changes**: The base tax credit amount is reduced from 26% to 6% under the IRA. But, if a project meets the prevailing wage based on Davis-Bacon Act, and apprenticeship requirements, based on the National Apprenticeship Act, then the tax credit is increased to 30%. There is also an additional bonus credit of another 10% if the project meets domestic content requirements. For tribal governments that elect to be paid the tax credit through the direct pay provisions, the direct pay amount is reduced for projects that begin construction in 2024. Another bonus credit of 10% is also available for eligible projects located in an energy community.

**Treasury Questions**:

* What guidance should be drafted to clarify the Davis-Bacon prevailing wage requirements; and what documentation should be presented to confirm the project meets the prevailing wage requirement?
* What other factors should be considered to geographically define energy communities?

**Potential Responses/Comments**:

* Treasury should allow tribes to set their own prevailing wage and set their own apprenticeship programs. Other federal agencies, such as Commerce, HUD, Interior and Energy, defer to tribal prevailing wage scales for projects constructed using federal funds. Treasury should follow these agencies.
* Any Indian reservation that has one or more brownfield sites should be classified as an energy community.

For additional information on the IRS Notices relevant to the Inflation Reduction Act's implications for tribal governments, please contact:

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