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E-ALERT | Clean Energy and Climate

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RECENT IRS GUIDANCE CONCERNING SECTION 48C MANUFACTURING CREDIT REMINDS THAT STANDARD FOR A "SIGNIFICANT CHANGE" IS LOW, BUT INDICATES WILLINGNESS TO CONSULT WITH DOE ON WHETHER CHANGES ARE SIGNIFICANT

As part of the American Recovery and Reinvestment Act of 2009, Congress enacted section 48C, which authorized Treasury to award $2.3 billion in tax credits for the development of new, expanded, or reequipped domestic manufacturing facilities for the production of certain renewable energy components. In order to receive the credit, taxpayers were required to be certified by the Internal Revenue Service ("IRS") and receive Department of Energy ("DOE") recommendation and ranking for their project. The $2.3 billion pool was completely allocated among projects by January 2010, meaning that the credit has effectively expired. Awards were made for the development of 183 manufacturing facilities in 43 states for the production of, among other things, solar and wind energy components, smart grid development, and plug-in electric vehicles. President Obama's fiscal year 2011 proposed budget proposed to provide an additional $5 billion in credits, which would effectively extend the Section 48C credit program, however, the measure was not passed by Congress.

Because the credit pool was limited, it was allocated to applicants on a competitive basis. Applications were assessed on certain criteria including: commercial viability, domestic job creation, technological innovation, speed to project completion, and positive environmental effects.

Application guidance provided by the IRS in Notice 2009-72 states that taxpayers must notify the IRS of any significant change to their project, and that such a significant change after the project was certified for the credit would render the project ineligible. A significant change is defined as any change that a reasonable person would conclude might have influenced the DOE in recommending or ranking the project or the Service in accepting the project. Because most projects were in the planning stages when applications for the credit were submitted and accepted, many eligible taxpayers may be concerned that changes to their projects risk making the project ineligible.

On December 30, 2010, the IRS issued a chief counsel advice ("CCA")[1], which addresses concerns regarding the effect of two types of changes on the taxpayer's eligibility for the credit: (1) sale-leaseback transactions and (2) relocations of the project. In general, the CCA reaffirms that the standard for what constitutes a significant change for purposes of receiving the credit is very low, and states that it is unlikely that the IRS will publish any general descriptions of changes that are not significant.

Specifically, the CCA indicates that sale-leaseback transactions should not impact the taxpayer's eligibility for the credit because such transactions are properly treated as transfers to a successor in interest, which were specifically permitted in Notice 2009-72. In such a case, the transferee should enter into a new credit agreement with the IRS.

[1] CCA 201052005

In contrast, relocations of the project may result in ineligibility for the credit if the DOE concludes that the change would have influenced its recommendation or ranking of the project. In addressing the relocation issue, the CCA indicates a willingness on the part of IRS Chief Counsel and the DOE to review any proposed changes on an expedited basis to determine whether such changes would, or would not, have influenced the DOE's recommendation or ranking of the project. While not stated, presumably such discussions may occur on a preliminary basis prior to any implementation by the taxpayer, and such discussions may extend to other proposed changes not specifically addressed in the CCA.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our clean energy and climate practice group:

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