

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[TD 9979]

RIN 1545–BQ81

**Additional Guidance on Low-Income Communities Bonus Credit Program****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Final regulations.

**SUMMARY:** This document contains final regulations concerning the application of the low-income communities bonus credit program for the energy investment credit established pursuant to the Inflation Reduction Act of 2022. Under this program, applicants investing in certain solar or wind-powered electricity generation facilities for which the applicants otherwise would be eligible for an energy investment credit may apply for an allocation of environmental justice solar and wind capacity limitation to increase the amount of the energy investment credit for the taxable year in which the facility is placed in service. This document provides definitions and requirements that are applicable for this program. These final regulations affect applicants seeking allocations of the environmental justice solar and wind capacity limitation to increase the amount of the energy investment credit for which such applicants would otherwise be eligible once the facility is placed in service.

**DATES:** *Effective date:* These regulations are effective on October 16, 2023.

*Applicability date:* For date of applicability, see § 1.48(e)–1(o).

**FOR FURTHER INFORMATION CONTACT:** Concerning the regulations, Whitney Brady, the IRS Office of the Associate Chief Counsel (Passthroughs and Special Industries) at (202) 317–6853 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:****Background**

This document contains amendments to the Income Tax Regulations (26 CFR part 1) relating to new section 48(e) of the Internal Revenue Code (Code). Section 13103 of Public Law 117–169, 136 Stat. 1818, 1921 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), added new section 48(e) to the Code to increase the amount of the energy investment credit determined under section 48(a) (section 48 credit) with respect to eligible property of the taxpayer that is part of

a qualified solar or wind facility if the taxpayer applies for and is awarded an allocation of environmental justice solar and wind capacity limitation (Capacity Limitation) as part of the low-income communities bonus credit program for the section 48 credit (Low-Income Communities Bonus Credit Program or Program).<sup>1</sup> This document contains final definitions and rules applicable to the Program.

The section 48 credit for a taxable year is generally calculated by multiplying the basis of each energy property placed in service by a taxpayer during that taxable year by the energy percentage (as defined in section 48(a)(2)). Section 48(e) increases the taxpayer's section 48 credit by increasing the energy percentage used to calculate the amount of the section 48 credit (section 48(e) Increase) in the case of eligible property that is part of a qualified solar or wind facility that receives an allocation of Capacity Limitation under the Program.

On February 13, 2023, the Department of the Treasury (Treasury Department) and the IRS released Notice 2023–17, 2023–10 I.R.B. 505, to establish the Program. Notice 2023–17 also provided initial Program guidance regarding applicable definitions and Program requirements.

On June 1, 2023, the Treasury Department and the IRS published in the **Federal Register** (88 FR 35791) a notice of proposed rulemaking (REG–110412–23, 2023–26 I.R.B. 1098) under section 48(e) (Proposed Rules) relating to the Program. Numerous commenters responded to the Proposed Rules, and after consideration of all comments received by June 30, 2023, the Proposed Rules are adopted as modified by this Treasury decision. The areas of comment and the revisions to the Proposed Rules are discussed in the following Summary of Comments and Explanation of Revisions section of this preamble. The comments are available for public inspection at <https://www.regulations.gov> or upon request. Other minor, editorial, and clarifying revisions made to the Proposed Rules as adopted in these final regulations are not discussed in the Summary of Comments and Explanation of Revisions section of this preamble.

As announced in Proposed Rules, the Treasury Department and the IRS are also providing procedural and clarifying

guidance applicable to the Program in Revenue Procedure 2023–27, 2023–35 I.R.B. This procedural and clarifying guidance is being issued simultaneously with these final regulations and provides the process for applying to the Program. These procedural rules provide guidance necessary to implement the Program, including, in relevant part, information an applicant must submit, the application review process, and the manner of obtaining an allocation.

**Summary of Comments and Explanation of Revisions***I. Definition of Qualified Solar or Wind Facility*

Section 48(e)(2)(A) and the Proposed Rules define a single qualified solar or wind facility as any facility that (i) generates electricity solely from a wind facility, solar energy property, or small wind energy property; (ii) has a maximum net output of less than 5 megawatts (MW) (as measured in alternating current (AC)); and (iii) is described in at least one of the four facility categories described in section 48(e)(2)(A)(iii) (Category 1, 2, 3, or 4 are described in more detail in part III of this Summary of Comments and Explanation of Revisions section). In addition, for purposes of determining allocations, administering the Program fairly, and avoiding abuse, the Proposed Rules provided that multiple solar or wind energy properties or facilities that are operated as part of a single project would be aggregated and treated as a single facility. Whether multiple facilities or energy properties are operated as part of a single project would depend on the relevant facts and circumstances and would be evaluated based on the factors provided in section 7.01(2)(a) of Notice 2018–59 or section 4.04(2) of Notice 2013–29, as applicable.

A few commenters suggested the Treasury Department and the IRS should not impose the single project factors to aggregate multiple facilities or energy properties into a single facility for purposes of these regulations. For example, some commenters said this does not work well for Tribal or some other partially-consolidated “projects” that may share ownership, financing, and other factors for efficiency, yet are different and distinguishable facilities. Some of the commenters suggested that a Tribe must be allowed to apply Capacity Limitation allocations for multiple projects, as separate projects, to allow for phased deployment of projects, and to treat each phase as a different project. Another commenter recommended relaxing restrictions in

<sup>1</sup> This notice of proposed rulemaking uses the terms “taxpayer” and “applicant” interchangeably (as the context may require) to avoid confusion given that persons eligible to apply for an allocation of Capacity Limitation under the Program may be exempt from or otherwise not subject to Federal income taxes imposed by chapter 1 of the Code.

the project definition so long as a reasonable period has elapsed to ensure adequate competitive forces in the market become established or suggested a carve-out from this rule for certain projects. An additional commenter suggested that if certain factors are present, those single factors standing alone should result in energy properties or facilities being regarded as a single project (that is, apart from other properties or facilities with which they might otherwise be grouped) without the need to apply all of the factors provided in section 7.01(2)(a) of Notice 2018–59 or section 4.04(2) of Notice 2013–29, as applicable. Similarly, a commenter noted that co-located sites are typically permitted as a single project, even though the interconnection, ownership, financing, and construction of the facilities are conducted independently. This commenter stated that maintaining the requirement of one project per permit should not disqualify either project from receiving allocation under the Program.

The Treasury Department and the IRS determined that to prevent some applicants from attempting to circumvent the less than 5 MW maximum net output limitation provided in section 48(e)(2)(A)(ii) by artificially dividing larger projects into multiple facilities, it is necessary to incorporate the single project factors tests provided in section 7.01(2)(a) of Notice 2018–59 or section 4.04(2) of Notice 2013–29, as applicable, into the definition of qualified solar or wind facility. Therefore, the final regulations generally adopt the definition of qualified solar or wind facility provided in the Proposed Rules. However, the final regulations clarify that if multiple facilities or energy properties are regarded as a single facility for purposes of this rule, they will be regarded as a single facility for all purposes under the Program. Additionally, to alleviate some commenters' concerns that multiple energy properties or facilities that satisfy any of the listed factors will conclusively result in a single project determination, the final regulations clarify that whether multiple facilities or energy properties are operated as part of a single project and thus treated as a single facility, will depend on the relevant facts and circumstances. Thus, a single factor or factors are not determinative.

A commenter noted that the Proposed Rules specify that a qualified facility refers to a solar energy property with an output of less than 5 MW and recommended aligning the Program with the industry standard by allowing projects that have a capacity of up to 5

MW. This comment is not adopted because section 48(e)(2)(A)(ii) limits the Program to facilities that have a maximum net output of less than 5 MW (as measured in AC).

## *II. Four Categories of Qualified Solar or Wind Facilities*

Depending on the category of the facility, an allocation of Capacity Limitation under the Program may result in a section 48(e) Increase equal to either 10 percentage points or 20 percentage points. Section 48(e)(1)(A)(i) provides for a section 48(e) Increase of 10 percentage points for eligible property that is located in a low-income community (Category 1 facility), or on Indian land (Category 2 facility). Section 48(e)(1)(A)(ii) provides for a section 48(e) Increase of 20 percentage points for eligible property that is part of a qualified low-income residential building project (Category 3 facility) or a qualified low-income economic benefit project (Category 4 facility).

Under section 48(e)(2)(A)(iii)(I), the term low-income community is generally defined under section 45D(e)(1), with certain modifications described elsewhere in section 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 metropolitan area median family income. Section 48(e)(2)(A)(iii)(I) provides that Indian land is defined in section 2601(2) of the Energy Policy Act of 1992 (25 U.S.C. 3501(2)). The final regulations clarify that the poverty rate for a census tract is generally based on the 2011–2015 American Community Survey (ACS) low-income community data for the New Markets Tax Credit (NMTC), however, if updated data is released, a taxpayer can choose to base the poverty rate for any population census tract on either the 2011–2015 ACS low-income community data or the updated ACS low-income community data for a period of 1 year following the date of the release of the updated data. After the 1-year transition period, the updated ACS low-income community data must be used. Applicants who satisfy the definition of low-income community at the time of application are considered to continue to meet the definition of low-income community for the duration of the recapture period,

unless the location of the facility changes.

Section 48(e)(2)(B) provides that a facility will be treated as part of a qualified low-income residential building project if (i) such facility is installed on a residential rental building that participates in a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12491(a)(3)) (VAWA), a housing assistance program administered by the Department of Agriculture (USDA) under title V of the Housing Act of 1949, a housing program administered by a Tribally designated housing entity (as defined in section 4(22) of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4103(22)), or such other affordable housing programs as the Secretary may provide, and (ii) the financial benefits of the electricity produced by such facility are allocated equitably among the occupants of the dwelling units of such building.

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 section 36B(d)(3)(A) of the Code) applicable to a family of the size involved, or less than 80 percent of area median gross income (as determined under section 142(d)(2)(B) of the Code).

One commenter stated that the statute does not provide for “facility categories” and that what section 48(e)(2)(A)(iii) describes is not four distinct facility categories, but four ways of meeting geographic or benefits-based qualifying criteria. The Treasury Department and the IRS determined that a change in the final regulations is not necessary because the use of facility categories as a means of differentiating the four distinct geographic or benefits-based qualifying criteria is consistent with the statute and serves as an administratively convenient mechanism to distinguish among them and describe requirements and definitions applicable to each. Accordingly, as discussed in part II of this Summary of Comments and Explanation of Revisions section, the final regulations, consistent with the Proposed Rules, require a qualified solar or wind facility to be described in one of the four categories described in section 48(e)(2)(A)(iii) (Category 1, 2, 3, or 4).

Another commenter asked for clarification on whether a project must just be located in a low-income

community or whether benefits must also go to a low-income community to qualify for each category. The Treasury Department and the IRS considered the comment but did not make a change because the Proposed Rules and now the final regulations clearly describe the categories that have applicable benefits sharing requirements consistent with statutory requirements, so no change is necessary. For Category 1 and Category 2, section 48(e)(2)(A)(iii)(I) requires a facility to be located in a low-income community (as defined in section 45D(e)) or on Indian land (as defined in section 2601(2) of the Energy Policy Act of 1992 (25 U.S.C. 3501(2))), but the statute, and accordingly the final regulations, do not impose any requirements to share financial benefits with low-income subscribers or households. Conversely, for Category 3 and Category 4, section 48(e)(2)(B) and (C) does impose benefits sharing requirements, and those rules were included in the Proposed Rules and are provided in these final regulations as modified. See part V of this Summary of Comments and Explanation of Revisions section for more discussion regarding those requirements.

Specific to Category 2, another commenter noted that the definition of located on Indian land should include simple fee and trust lands located off-reservation owned by Tribes. Trust lands located off-reservation are covered under the statutory definition of Indian land referenced in section 48(e)(2)(A)(I). Fee lands, however, would only be covered if they are included within the boundaries of a reservation or in the census categories included within the Indian land definition. Therefore, the final regulations did not adopt the commenter's suggestion and define "Indian land" by reference to section 2601(2) of the Energy Policy Act of 1992 (25 U.S.C. 3501(2)) without additional clarification.

Specific to Category 3, a commenter asked for clarification that the installation of a facility on a "residential rental building" extends to the curtilage of the building, including carports, sheds, and open space on the same property. Another commenter asked for similar clarification stating that the guidance currently defines a facility as eligible if it is a facility installed on an eligible building. This commenter stated that this is an overly narrow statement that would not include adjacent carport or ground-mount solar on the same parcel. The commenter encouraged the Treasury Department and the IRS to include these other solar installation locations, as rural and suburban section 42 low-income housing credit

(commonly referred to as LIHTC) properties often have excess land or large parking areas due to zoning requirements that could host solar installations. The final regulations adopt this comment by clarifying that a facility is treated as installed on a residential rental building that participates in a covered housing program or other affordable housing program (Qualified Residential Property) even if that facility is not on the Qualified Residential Property if the facility is installed on the same or adjacent parcel of land as the Qualified Residential Property, and the other requirements to be a Category 3 facility are satisfied.

Several commenters requested that the Treasury Department and the IRS categorically include any LIHTC project as a Category 3 project. Section 48(e)(2)(B)(i) provides that a covered housing program is defined in VAWA. The statutory cross-reference is comprehensive and includes numerous types of housing programs and policies across Federal agencies, including the low-income housing credit under section 42 of title 26. Accordingly, a solar or wind facility that is installed on a "qualified low-income building" under section 42 is eligible for Category 3. In response to commenters' general inquiries on covered housing programs, the Treasury Department and the IRS, in consultation with other Federal agencies, developed an illustrative list of Federal housing programs and policies that meet the requirements in section 48(e)(2)(B)(i). This list will be made available on the Program web page and is also listed here:

Covered housing programs and policies (as defined in VAWA) with active affordability covenants tied to the following:

- Department of Housing and Urban Development's (HUD) Section 202 Supportive Housing for the Elderly, including the direct loan program under Section 202;
- HUD's Section 811 Supportive Housing for Persons with Disabilities;
- HUD's Housing Opportunities for Persons With AIDS (HOPWA) program;
- HUD's homeless programs under title IV of the McKinney-Vento Homeless Assistance Act, including the Emergency Solutions Grants program, the Continuum of Care program, and the Rural Housing Stability Assistance program;
- HUD's HOME Investment Partnerships (HOME) program;
- Federal Housing Administration (FHA) mortgage insurance under Section 221(d)(3) subsidized with a below-market interest rate (BMIR)

prescribed in the proviso of Section 221(d)(5) of the National Housing Act;

- HUD's Section 236 interest rate reduction payments;
- HUD Public Housing assisted under section 9 of the United States Housing Act of 1937;
- HUD tenant-based and project-based rental assistance under section 8 of the United States Housing Act of 1937;
- HUD Section 8 Moderate Rehabilitation Program;
- HUD Section 8 Moderate Rehabilitation Single Room Occupancy Program for Homeless Individuals;
- USDA Section 515 Rural Rental Housing;
- USDA Section 514/516 Farm Labor Housing;
- USDA Section 538 Guaranteed Rural Rental Housing;
- USDA Section 533 Housing Preservation Grant Program;
- Treasury/IRS Low-Income Housing Credit under section 42 of the Code;
- HUD's National Housing Trust Fund;
- Veterans Administration's (VA) Comprehensive Service Programs for Homeless Veterans;
- VA's grant program for homeless veterans with special needs;
- VA's financial assistance for supportive services for very low-income veteran families in permanent housing; and/or
- Department of Justice transitional housing assistance grants for victims of domestic violence, dating violence, sexual assault, or stalking.

Section 48(e)(2)(B)(i) also includes the following Federal housing programs:

- Housing assistance programs administered by the USDA under title V of the Housing Act of 1949; and/or
- Housing programs administered by an Indian Tribe or a Tribally designated housing entity (as defined in section 4(22) of the Native American Housing Assistance and Self-Determination Act of 1996 (25 U.S.C. 4103(22))).

One commenter also requested that Federal Weatherization Assistance Program (WAP) affordable housing categorically qualify as Category 3 covered housing. The WAP is not a housing program. The WAP is a program of the DOE that provides weatherization services and support for qualifying housing but does not provide or administer the actual housing. Therefore, the WAP program is not included as a Category 3 housing program.

Several commenters also requested that Category 3 include as an eligible residential rental building housing that is enrolled under a State-specific low-

income housing program that is not enrolled, or may not qualify, under the statutorily listed Federal housing programs. Similarly, several commenters requested that housing authorities under State programs be able to appeal for qualification under the Program. One commenter provided that housing authorities should be able to prove they meet certain minimum criteria and thresholds beyond enrollment in specified Federal programs.

State specific housing programs do not categorically qualify as Qualified Residential Properties nor do the facilities installed on such buildings categorically meet the requirements of section 48(e)(2)(B). The statute specifically lists only Federal housing programs and provides that the Secretary may include other affordable housing programs. The Treasury Department and the IRS decline to include additional housing programs in the final regulations at this time so that the Program will focus on the statutorily-prescribed housing programs. However, the Treasury Department and the IRS may include additional housing programs in future Program guidance.

The final regulations also do not provide a special review process for housing authorities to be considered as qualifying under State specific programs for the same reasons as provided earlier regarding State program eligibility. Moreover, a housing authority is not the same thing as a housing program. It is the solar or wind facility that is being reviewed, upon application, to determine whether the facility qualifies for an allocation, and not a specific housing authority or building that the facility will serve. The building on which the facility is built must already be a part of a Qualified Residential Property, otherwise the facility is not eligible under the requirements for Category 3.

One commenter also requested greater protection for the tenants of a Qualified Residential Property when a facility applies for or receives an allocation under Category 3. The commenter requested rent protection for the life of the solar or wind facility to ensure tenants are not subject to rent increases due to the installation of the solar or wind facility. The commenter also requested eviction protection, relocation assistance for tenants affected by construction, with a right of return for those tenants after construction, a sales restriction of five years for the building on which the facility is installed, and strong enforcement mechanisms.

The Treasury Department and the IRS considered this comment but did not

adopt the commenter's suggestions because the requirements recommended by the commenter are outside the scope of section 48(e) and therefore what could be implemented by these final regulations.

### *III. Eligible Property, Including Energy Storage Technology Installed in Connection With Solar or Wind Facility*

“Eligible property” as defined by section 48(e)(3) means energy property that (i) is part of a wind facility described in section 45(d)(1) for which an election to treat the facility as energy property was made under section 48(a)(5) (wind facility), or (ii) is solar energy property described in section 48(a)(3)(A)(i) (solar energy property) or qualified small wind energy property described in section 48(a)(3)(A)(vi) (small wind energy property). Eligible property also includes energy storage technology (as described in section 48(a)(3)(A)(ix)) “installed in connection with” such energy property.

The Proposed Rules defined “installed in connection with” for energy storage technology to demonstrate what is required for such energy storage technology to be considered eligible property under section 48(e)(3), providing that this is met if both (1) the energy storage technology and other eligible property are considered part of a single qualified solar or wind facility because the energy storage technology and other eligible property are owned by a single legal entity, located on the same or contiguous pieces of land, have a common interconnection point, and are described in one or more common environmental or other regulatory permits; and (2) the energy storage technology is charged no less than 50 percent by the other eligible property.

The Proposed Rules also added a safe harbor, which would deem the energy storage technology to be charged at least 50 percent by the facility if the power rating of the energy storage technology is less than 2 times the capacity rating of the connected wind facility (in kW AC) or solar facility (in kW direct current (DC)).

A commenter stated that the last sentence relating to the safe harbor appears to have the phrases “power rating” and “capacity rating” reversed, and to have omitted how energy storage is measured. The commenter stated that energy storage is measured in kWh, a measure of energy. A generating facility such as a solar or wind farm produces power, measured in kW. The commenter believes that the apparent intended meaning of the sentence would be better rendered with: “The

Treasury Department and the IRS also propose to add a safe harbor, which would deem the energy storage technology to be charged at least 50 percent by the facility if the [capacity] rating of the energy storage technology [(in kWh)] is less than 2 times the [power] rating of the connected wind facility (in kW AC) or solar facility (in kW DC).” The Treasury Department and the IRS considered this comment, but the final regulations do not adopt the commenter's suggestion.<sup>2</sup> For energy storage, the power rating (measured in kilowatts) indicates how much power can flow into or out of the battery in any given instant. It is similar to the capacity rating of a solar or wind facility, which indicates how much power can theoretically come out of the solar or wind facility in any given instant. In this context, the Treasury Department and the IRS accurately referred to the “power rating” of the energy storage technology.

Additionally, a couple of commenters requested that the Treasury Department and the IRS eliminate the requirement that energy storage technology be charged at least 50 percent by other eligible property. These commenters point to the general language in sections 48(a)(2)(A)(i)(VI) and 48(c)(6) on energy storage technology and argue against including the charging requirement for section 48(e). One commenter said there is no statutory basis to require energy storage technology to be charged by other eligible energy property and this goes against Congressional intent. Another commenter said this rule may set a problematic and inequitable precedent in the context of the underlying section 48 credit, which Congress deliberately moved away from this standard in the IRA to better promote the benefits of energy storage, and that the standard for storage inclusion should not be more burdensome for environmental justice communities or Tribes than for other projects seeking the section 48 credit.

The general language in sections 48(a)(2)(A)(vi) and 48(c)(6) describing energy storage technology eligible for the section 48 credit differs from what Congress included when describing energy storage technology eligible for a section 48(e) Increase. Eligible property as described in section 48(e)(3) includes

<sup>2</sup> The commenter correctly identified that the Proposed Rules omitted how energy storage is measured. The omission was an error, and the Treasury Department and the IRS issued a correction to the Proposed Rules published in the **Federal Register** (88 FR 41340) on June 26, 2023, to clarify that the power rating of the energy storage technology is measured in kW. The final regulations incorporate this correction.

energy storage technology (as described in section 48(a)(3)(A)(ix)) installed *in connection with* other eligible energy property. The use of the phrase “in connection with” limits the energy storage technology eligible for a section 48(e) Increase to energy storage that is installed in connection with the eligible solar or wind facility. The general energy storage technology language in section 48 includes no such limiting language. As required by the statute, the Treasury Department and the IRS determined that the proposed rule serves to ensure that energy storage technology eligible for a section 48(e) Increase has a sufficient nexus to the eligible property. The Treasury Department and the IRS provide taxpayers with the safe harbor described earlier as a means of deeming the energy storage technology as satisfying the requirement that it be charged no less than 50 percent by the other eligible property. The Proposed Rule applies uniformly to all taxpayers seeking an allocation of Capacity Limitation. Therefore, the final regulations retain the requirement that the energy storage technology must be charged no less than 50 percent by the other eligible property. However, to provide additional guidance on the application of this standard, the final regulations clarify that “50 percent” is based on an annual average.

Another commenter suggested eliminating the co-location requirement applicable to energy storage technology because the language of the statute can and should be interpreted to include storage projects that have firm, contractual offtake agreements with offsite solar or wind projects, and that these projects would be located within the same balancing authority, ensuring that all benefits are local. The final regulations do not adopt the commenter’s suggestion because the Treasury Department and the IRS view the Proposed Rule that the energy storage technology be located on the same or contiguous pieces of land as the other eligible property as consistent with the statutory requirement that limits energy storage technology eligible for a section 48(e) Increase to only energy storage technology that is installed in connection with other eligible property.

Finally, one commenter requested clarification that the power rating of connected energy storage technology will not be counted against a facility’s Capacity Limitation allocation. Because the final regulations, consistent with the Proposed Rules, define a qualified solar or wind facility eligible for a Capacity Limitation without reference to energy

storage technology, the Treasury Department and the IRS believe this clarification in the final regulations is unnecessary.

A few commenters also requested that final regulations expand the definition of “in connection with” under section 48(e)(3)(B) applicable to energy storage technology to include interconnection property under section 48(a)(8), so that interconnection costs are eligible for purposes of calculating the section 48(e) Increase.

Section 48(e)(3)(B) provides that energy storage technology defined under section 48(a)(3)(A)(ix) installed in connection with eligible solar or wind property described in section 45(d)(1) or section 48(a)(3)(A)(i) or (vi) is eligible property for purposes of calculating the section 48(e) Increase. Neither section 48(e)(3)(B) nor any other provision applicable to section 48(e) includes interconnection property or costs in the definition of eligible property. Therefore, the final regulations do not adopt these commenters’ suggestion.

#### IV. Location

The Proposed Rules provided that a qualified solar or wind facility is treated as “located in a low-income community” or “on Indian land” under section 48(e)(2)(A)(iii)(I) or located in a geographic area under the Additional Selection Criteria (see part VII of this Summary of Comments and Explanation of Revisions section) if the facility satisfies the nameplate capacity test (Nameplate Capacity Test).

Under the Nameplate Capacity Test, a facility that has nameplate capacity (for example, wind and solar facilities) is considered located in or on the relevant geographic area if 50 percent or more of the facility’s nameplate capacity is in a qualifying area. A facility’s nameplate capacity percentage is determined by dividing the nameplate capacity of the facility’s energy-generating units that are located in the qualifying area by the total nameplate capacity of all the energy-generating units of the facility.

Nameplate capacity for an electricity generating unit means the maximum electricity generating output that the unit is capable of producing on a steady state basis and during continuous operation under standard conditions, as measured by the manufacturer and consistent with the definition provided in 40 CFR 96.202. Energy-generating units that generate DC power before converting to AC (for example, solar photovoltaic) should use the nameplate capacity in DC, otherwise the nameplate capacity in AC should be used (for example, wind facilities). Where applicable, the International Standard

Organization conditions are used to measure the maximum electricity generating output or usable energy capacity. The nameplate capacity of any energy storage technology installed in connection with the qualified solar or wind facility does not affect the assessment of the Nameplate Capacity Test.

A few commenters noted concerns on the Nameplate Capacity Test and what it means to be “located in.” Another commenter suggested that the Nameplate Capacity Test should provide maximum flexibility. This commenter noted that Tribal lands are often not contiguous, and that new housing is limited so it is often off-reservation and there are also issues of right of way.

The Nameplate Capacity Test to determine the location of a facility already inherently provides flexibility because it only requires that 50 percent or more (rather than a larger percentage) of the facility’s nameplate capacity be in a qualifying area. The Treasury Department and the IRS concluded that a 50 percent standard is a reasonable standard, which strikes the right balance between providing flexibility to taxpayers and ensuring that statutory requirements are satisfied. Additionally, this standard is familiar to taxpayers because it is the same standard that is used to determine whether a facility is located in an energy community under Notice 2023–29, 2023–20 IRB 1.

Other commenters had concerns about the use of AC and DC. These commenters said that the Treasury Department and the IRS should update the Proposed Rules to clarify that the use of DC is limited to project location and does not apply to the maximum output of a qualified facility. One commenter also added that the Treasury Department and the IRS should update the Proposed Rules to clarify that an allocation will not be reduced if a qualified facility’s AC output is less than the facility’s DC output. Additionally, a few commenters suggested that the nameplate capacity for both wind and solar facilities should be based on AC as the statute indicates and questioned the differing standard.

In response to these comments, the Treasury Department and the IRS added language in the final regulations to clarify that the Nameplate Capacity Test only applies for purposes of determining whether a facility is located in a qualifying area. The Treasury Department and the IRS did not modify the Nameplate Capacity Test to remove the reference to DC for measuring the nameplate capacity of a solar facility because nameplate capacity for a solar

facility is appropriately measured in DC. Solar facilities produce electricity in DC, which is then converted to AC for end use. Conversely, wind facilities produce electricity in AC.

#### V. Financial Benefits for Category 3 and Category 4 Allocations

Section 48(e)(2)(D) provides that “electricity acquired at a below market rate” will not fail to be taken into account as a financial benefit. The Proposed Rules provided definitions of the terms “financial benefit” and “electricity acquired at a below market rate” under section 48(e)(2)(D), as well as a manner to apply such definitions, appropriately, to qualified low-income residential building projects (section 48(e)(2)(B)) and qualified economic benefit projects (section 48(e)(2)(C)).

#### A. Financial Benefits for Qualified Low-Income Residential Building Projects

For a facility to be treated as part of a qualified low-income residential building project, section 48(e)(2)(B)(ii) provides that the financial benefits of the electricity produced by such facility must be allocated equitably among the occupants of the dwelling units of a Qualified Residential Property. The Proposed Rules reserved allocations under this category exclusively for applicants that would apply the financial benefits requirement under Category 3 in the following manner.

The Proposed Rules provided that financial benefits can be demonstrated through net energy savings as defined later. At least 50 percent of the financial value of net energy savings would be required to be equitably passed on to building occupants. This requirement would recognize that not all the financial value of the net energy savings can be passed on to building occupants because a certain percentage can be assumed to be dedicated to lowering the operational costs of energy consumption for common areas, which benefits all building occupants. The Proposed Rules provided that applicants must equitably pass on net energy savings by distributing equal shares among the Qualified Residential Property’s units that are designated as low-income under the covered housing program, or by distributing proportional shares based on each dwelling unit’s electricity usage.

The Proposed Rules accounted for the specific nature of facilities serving low-income residential buildings and facility ownership, as the facility may be third-party owned or commonly owned with the building.

In scenarios where the facility and the Qualified Residential Property have the

same ownership, the Proposed Rules defined the financial value of net energy savings as the financial value equal to the greater of: (1) 25 percent of the gross financial value of the annual energy produced or (2) the gross financial value of the annual energy produced minus the annual costs to operate the facility. Gross financial value of the annual energy produced is calculated as the sum of (a) the total self-consumed kilowatt-hours produced by the qualified solar or wind facility multiplied by the applicable building’s metered price of electricity and (b) the total exported kilowatt-hours produced by the qualified solar or wind facility multiplied by the applicable building’s volumetric export compensation rate for solar or wind kilowatt-hours. The annual operating costs are calculated as the sum of annual debt service, maintenance, replacement reserve, and other costs associated with maintaining and operating the qualified solar or wind facility.

If the facility and building are commonly owned, a signed benefit-sharing agreement between the building owner and the tenants would be required. The Proposed Rules requested comments on how to adjust definitions of gross financial value to account for scenarios in which building occupants are compensating the facility owner for energy services.

In scenarios where the facility and the Qualified Residential Property have different ownership and the facility owner enters into a power purchase agreement (PPA) or other contract for energy services with the Qualified Residential Property owner, the Proposed Rules defined net energy savings as equal to the greater of: (1) 50 percent of the financial value of the annual energy produced by the facility that accrues to the owner of the Qualified Residential Property in the form of utility bill credit and/or cash payments for net excess generation or (2) the financial value of the annual energy produced by the facility that accrues to the owner of the Qualified Residential Property in the form of utility bill credit and/or cash payments for net excess generation minus any payments made by the building owner to the facility owner for energy services associated with the facility in a given year. In these scenarios, the facility owner must enter into an agreement with the building owner for the building owner to distribute the savings to residents.

#### 1. Requirement To Equitably Allocate Financial Benefits

Two commenters provided that under certain State and Federal housing programs, housing authorities receive utility subsidies based on historical utility costs. These commenters also noted that a housing authority may have their utility allowance decreased if the housing authority reduces their utility costs through savings from the facility. Additionally, these commenters stated that the department managing a housing authority can claim a portion of net metering credits if the housing authority receives net metering credits. One of the commenters, therefore, requested that the Treasury Department and the IRS draft a rule that the housing authority be able to retain 100 percent of net metering credits, regardless of the energy savings received from the program and the facility. The other commenter requested that the Treasury Department and the IRS waive the requirement for public housing authorities to pass financial benefits along to residents. This commenter stated that in public housing, all benefits ultimately accrue to the benefit of residents. Another commenter stated that HUD-utility allowances may need to be increased for buildings if net benefits are to be shared between the owner and tenants, and the external financing is used to build the system, such that additional proceeds will be needed to pay debt service on the energy.

The Treasury Department and the IRS considered these comments but did not adopt them in the final regulations because section 48(e)(2)(B) requires that the financial benefits of the electricity produced by the facility be allocated equitably among the occupants of the Qualified Residential Property.

One commenter warned the Treasury Department and the IRS to guard against owner/related party financing designed to capture all or most of the energy savings benefits by artificially manipulating their terms of the financing to capture the savings during the term of the credit, and against owners seeking to purchase energy wholesale and mark up value to tenants to artificially inflate the value of the energy savings. The commenter says the value of the energy bill savings should be indexed against the approved meter rate as authorized by the relevant public service commission (where applicable) or some other third-party verifiable rate unrelated to the project sponsor or affiliates.

In response to this comment, the Treasury Department and the IRS have

maintained the baseline of 50 percent of the net energy savings calculated from a minimum of 25 percent of the gross financial value of electricity produced as described in the Proposed Rules to ensure the statutory obligation that financial benefits be allocated to tenants. The final regulations clarify, consistent with the comments received, that gross financial value includes the sale of any renewable energy credits or other attributes associated with the facility's production, if separate from the metered price of electricity or export compensation rate.

Many commenters requested that the final regulations provide guidance for facility owners to prove equitable distribution of benefits to tenants. A few commenters stated that in certain cases, like a project using community renewable energy facility rate structures offered by utilities, separately metered residents can subscribe voluntarily, and some residents may choose not to subscribe. Therefore, these commenters requested that the regulations allow for a reduction in the equitable distribution requirement on a pro-rata basis by the (number) of residents who choose not to subscribe. However, one of the commenters recommended a minimum threshold of resident participation, suggesting 50 percent participation at placed in service, for the distribution of benefits to be considered equitable.

In consideration of these comments, the Treasury Department and the IRS have clarified in the final regulations that for any occupant(s) that choose to not receive utility bill savings, the portion of the financial value that would otherwise be distributed to non-participating occupants must be instead distributed equitably to the participating occupants. Additionally, no less than 50 percent of the Qualified Residential Property's occupants that are designated as low-income must participate and receive utility bill savings for the facility to utilize this method of benefit distribution.

## 2. Gross Financial Value

A few commenters suggested changes to the definition of gross financial value. One commenter stated that for purposes of building occupants compensating the facility owner, gross financial value could be calculated based on the average monthly local utility rate for either residential or low-income residential (from the previous calendar year or trailing 12 months) multiplied by the average residential kilowatt hour usage per square foot multiplied by the per square footage of rentable residential space in the building. The commenter

provided variation and detail on how this would be accomplished.

Another commenter requested clarification on how to define "gross financial value." The commenter stated that it is unclear whether the "price of electricity" means only the energy costs or also all the delivery costs and other charges that may be charged on a per kilowatt hour basis. Additionally, the commenter noted that the "export compensation rate for . . . kilowatt hours" may not be solely tied to the energy but may also include additional compensation such as the value of renewable energy certificates or other incentives provided by States.

Finally, one commenter stated that calculating the "gross financial value of the annual energy produced," as defined in the Proposed Rules, would be difficult for buildings due to the complexity of electricity rate structures in many jurisdictions, which may vary depending on the time of day and time of year.

The Treasury Department and the IRS considered the commenters' suggestions but generally did not adopt them because the Proposed Rules provide a clear and accurate framework for defining "gross financial value." However, the final regulations clarify, consistent with the comments received, that gross financial value includes the sale of any renewable energy credits or other attributes associated with the facility's production, if separate from the metered price of electricity or export compensation rate. The same definition of gross financial value applies regardless of the ownership structure.

One commenter requested clarification about whether front of the meter (FTM) volumetric tariff compensation rate, such as Connecticut's Residential Renewable Energy Solutions Buy-All-Sell-All tariff (BASA Tariff), may be included in the gross financial value calculation when the facility and Qualified Residential Property have the same ownership. The commenter believes that the BASA tariff \$/kWh revenue would be included in the definition of gross financial value because it is included in the definition as part of "the total exported kilowatt-hours produced by the qualified solar or wind facility multiplied by the applicable building's volumetric export compensation rate for solar."

The Treasury Department and the IRS considered this comment but ultimately concluded that additional clarification in the final regulations to address specific State tariff rates is not necessary. The definition of gross financial value included in the final regulations, consistent with the

Proposed Rules, already includes the total exported kilowatt-hours produced by the qualified solar or wind facility multiplied by the applicable building's volumetric export compensation rate for solar or wind kilowatt-hours, which would include compensation from the electricity produced from the facility.

Another commenter stated that it is not appropriate to define financial benefits in terms of the value of energy savings. Instead, this commenter claimed that the only financial benefit that can be generated by facilities in Category 3 would be through net metering, where the facility generates excess capacity that is sold back to the grid for off-site consumption. The commenter also implied that, in the case of net metering credits, the credit would go directly to the tenants, and that the building owner will never receive any financial benefit.

The Treasury Department and the IRS considered this comment but did not adopt it in the final regulations. The Treasury Department and the IRS determined that gross financial value from the electricity produced from a qualified solar or wind facility may stem from self-consumed kilowatt-hours produced by the facility, exported kilowatt-hours produced by the facility, or the sale of any renewable energy credits or other attributes associated with the facility's production (if separate from the metered price of electricity or export compensation rate). Further, financial value of energy savings from the electricity produced is a financial benefit of the electricity produced by the facility and section 48(e)(2)(B)(ii) provides that the financial benefits of the electricity produced by such facility must be allocated equitably among the occupants of the dwelling units of a Qualified Residential Property.

## 3. Net Financial Value

One commenter stated that rather than creating two methods, the Treasury Department and IRS should adopt a single method to calculate net energy savings. The commenter stated that for both scenarios (commonly owned and third-party owned), the final regulations should adopt the method from the Proposed Rules that was only proposed to apply when the facility and Qualified Residential Property have the same ownership. The Treasury Department and the IRS considered this comment but did not adopt it in the final regulation because it is appropriate for "net financial value" to be defined differently depending on whether the facility is commonly owned or third-party owned because in third-party

owned scenarios calculating the facility's levelized cost of energy would be overly complex and potentially vulnerable to manipulation. Instead, relying on the PPA rate is simpler and more reliable. The final regulations clarify that in case of a commonly owned facility "net financial value" is defined as the gross financial value of the annual energy produced minus the annual average (or levelized) cost of the qualified solar or wind facility over the useful life of the facility (including debt service, maintenance, replacement reserve, capital expenditures, and any other costs associated with constructing, maintaining, and operating the facility). In the case of a third-party owned facility, "net financial value" is defined as gross financial value of the annual energy produced minus any payments made by the building owner and/or building occupants to the facility owner for energy services associated with the facility in a given year.

Another commenter cited to the Connecticut's Residential Renewable Energy Solutions BASA Tariff, which involves FTM projects, and requested a change to the net financial value definition for third-party owned facilities. The commenter proposed that, to include FTM projects in Category 3, the first definition of net financial value needs to be amended to reference "the total financial value of energy produced by the facility that accrues to the owner of the qualified residential property, or the facility owner, the tenants, or a combination thereof." The commenter further provided that a set percentage can be required to be provided, like 25 percent, to the tenants, and the rest of the revenue can be allocated between the facility owner and the property owner in whatever manner is requested. This commenter also requested that the second definition of net financial value be amended to say that "the total financial value of the annual energy produced by the facility that accrues to the owner of the qualified residential property, or the facility owner, the tenants, or a combination thereof minus any payments made, or revenue allocated, to the facility owner for energy services associated with the facility in a given year" to consider solar site lease structures (for FTM project like BASA) in addition to PPAs.

Another commenter generally recommended that the Treasury Department and the IRS adopt a baseline requirement of passing on at least 25 percent of net energy savings to tenants, to ensure meaningful financial benefits are afforded to households in Category 3.

The Treasury Department and the IRS considered these comments but did not adopt them in the final regulations and maintain the baseline of 50 percent of the net energy savings calculated from a minimum of 25 percent of the gross financial value of electricity produced as described in the Proposed Rule, which is a higher value of meaningful financial benefits than the commenter suggests. The other 50 percent of the net energy savings can be assumed to be dedicated to lowering the operational costs of energy consumption for common areas, which benefits all building occupants. The Treasury Department and the IRS determined that the baseline of 50 percent of the net energy savings is consistent with the statutory intent for Category 3, which is to provide the financial benefits of the electricity produced directly to building occupants.

#### 4. Single Family Housing

One commenter generally noted that the financial benefit definitions for Category 3 only contemplate multi-family housing. This commenter requests clarification for Tribal housing programs, which the commenter states primarily consist of Tribal single-family residences that would have their own meter.

In response to the comment, the Treasury Department and the IRS have modified the financial benefit definition to provide clarity for single-family residences that meet the criteria of a Qualified Residential Property. The final regulations state that a Qualified Residential Property could either be a multifamily rental property or single-family rental property. The same rules for financial benefits for Category 3 apply to both property types.

#### 5. Benefits Sharing Agreement

Several commenters expressed concern over the signed benefits sharing agreement between the building owner and the tenants if the facility and building are commonly owned. Generally, commenters suggested the elimination of this requirement. A few commenters noted the administrative burdens and challenges on the building owner in obtaining signed agreements from all tenants. Likewise, another commenter said that this requirement is overly burdensome, and that requiring each resident to voluntarily sign a benefits sharing agreement would prevent a facility from proceeding. This commenter also noted the possibility that requiring such an agreement may conflict with consumer protection laws, and another commenter agreed suggesting certain customer protection

disclosures may be required. One commenter also stated that this process would potentially present a 'false promise' to residents should the project not be selected for an allocation. Some commenters offered alternatives to a signed benefits sharing agreement. Several commenters recommended that the facility owner or building owner provide notice to all building occupants of the expected financial benefits and the proposed method of allocating the benefit. Similarly, another suggested that owners be required to develop a benefits sharing plan that must be communicated to tenants, with owners ensuring that sufficient time is given for tenants to provide feedback. Finally, a few commenters suggested that applicants instead submit a self-attestation form certifying that they will equitably distribute benefits in accordance with the standards set forth in HUD guidelines.

One commenter supported the requirement for a signed benefits sharing agreement. However, the commenter requested additional guidance on the contents of such a benefits sharing agreement, including specific required consumer protection disclosures, such as resources tenants can access to better understand or renegotiate the agreement. This commenter additionally encouraged the Treasury Department and the IRS to adopt a model affidavit or agreement between building owners and tenants based on the options considered and used in California's Solar on Multifamily Affordable Housing (SOMAH) program. Another commenter generally asked for clarification on how to prove or attest that financial benefits are due to cost savings associated with solar.

Several Tribal commenters requested that facilities owned by Tribes or Tribal housing authorities should be presumed to result in an economic benefit to Tribal members who reside on the reservation or who live in Tribal-owned housing, and thus should not be required to enter into a benefits sharing agreement with Tribal members to show the financial benefit to Tribal members.

The Treasury Department and the IRS agree that requiring a signed benefits sharing agreement between the building owner and the tenants is burdensome and not necessary to demonstrate compliance with Program requirements. Instead, to better achieve the goal of verifying Program compliance and to provide clarification to applicants regarding how they can demonstrate that statutory requirements are met the final regulations require that facility owners for all Category 3 facilities must

prepare a Benefits Sharing Statement, which must include (1) a calculation of the facility's gross financial value using the method described in the final regulations, (2) a calculation of the facility's net financial value using the method described in the final regulations, (3) a calculation of the financial value required to be distributed to building occupants using the method described in the regulations, (4) a description of the means through which the required financial value will be distributed to building occupants, and (5) if the facility and Qualified Residential Property are separately owned, indication of which entity will be responsible for the distribution of benefits to the occupants. In addition, the Qualified Residential Property owner must formally notify the occupants of units in the Qualified Residential Property of the development of the facility and planned distribution of benefits.

#### 6. Impact of Metering on Delivery of Financial Benefits

Regardless of ownership, residential buildings may have master-metered or sub-metered utilities. Therefore, the Proposed Rules provided that for sub-metered buildings, the tenants must receive the financial value associated with utility bill savings in the form of a credit on their utility bills. HUD has issued guidance for residents of sub-metered HUD-assisted housing that participate in community solar, providing an analysis of how community solar credits may affect utility allowance and annual income for rent calculations.<sup>3</sup> The Proposed Rules provided that applicants follow the HUD guidance and future HUD guidance on this issue to ensure that tenants' utility allowances and annual income for rent calculations are not negatively impacted.

The Treasury Department and the IRS are aware that in some States or jurisdictions it may not be administratively, or legally, possible to apply utility bill savings on residents' electricity bills. The Proposed Rules requested comments on this issue and how financial benefits, such as services and building improvements, can be provided to residents in such residential buildings.

<sup>3</sup> U.S. Department of Housing and Urban Development, Treatment of Community Solar Credits on Tenant Utility Bills (July 2022); MF Memo re Community Solar Credits, ([https://www.hud.gov/sites/dfiles/Housing/documents/MF\\_Memo\\_Community\\_Solar\\_Credits\\_signed.pdf](https://www.hud.gov/sites/dfiles/Housing/documents/MF_Memo_Community_Solar_Credits_signed.pdf)) and Community Solar Credits in PIH Programs (August 2022), ([https://www.hud.gov/sites/dfiles/documents/Solar%20Credits\\_PH\\_HCV.pdf](https://www.hud.gov/sites/dfiles/documents/Solar%20Credits_PH_HCV.pdf)).

For master-metered buildings, the Proposed Rules provided that because residents do not have individually metered utilities and do not receive utility bills, the building owner must pass on the savings through other means, such as by providing certain benefits to the building residents beyond those provided prior to the qualified solar or wind facility being placed in service. HUD has issued guidance for how residents of master-metered HUD-assisted housing can benefit from owners' sharing of financial benefits accrued from an investment in solar energy generation.<sup>4</sup> The Proposed Rules provided that applicants follow the HUD guidance and future HUD guidance on this issue to ensure that tenants' utility allowances and annual income for rent calculations are not negatively impacted.

Many commenters noted that it is difficult for utility bill credits to be distributed to residents even in sub-metered buildings and suggested that the financial benefit structure available under the Proposed Rules for master metered buildings be similarly applied to sub-metered buildings. Several commenters noted that it is not possible to distribute utility bill credits to residents in sub-metered buildings because most States lack legislation or regulations governing the allocation of solar credits to consumer utility bills, and, one commenter further stated, that even in States that do, the utilities may not have the administrative infrastructure to allocate credits across bills. Another commenter supported this by stating that only 21 States and DC have statewide policies that support sharing solar savings in multi-family housing in the form of utility bill credits. Many commenters also voiced general concern that the process of distributing utility credits is administratively burdensome on the owner of the facility. One commenter stated that many of the residents who would be eligible to receive bill credits on their utility bills will already receive a subsidized electricity price from their distribution company, which would result in their cost of power already being lower than other consumers in their service territory. This commenter asserts that it be more economical to "sell" or "allocate" the bill credits to another consumer in the same service territory and offset their higher energy

<sup>4</sup> U.S. Department of Housing and Urban Development, Treatment of Solar Benefits in Mastered-metered Buildings (May 2023), MF Memo re Community Solar Credits in MM Buildings.pdf ([https://www.hud.gov/sites/dfiles/Housing/documents/MF\\_Memo\\_re\\_Community\\_Solar\\_Credits\\_in\\_MM\\_Buildings.pdf](https://www.hud.gov/sites/dfiles/Housing/documents/MF_Memo_re_Community_Solar_Credits_in_MM_Buildings.pdf)).

costs and provide a greater overall financial benefit to tenants. The commenter states that this system would be similar to the process proposed for master-metered buildings.

Many commenters asked for flexibility in providing financial benefits to residents. A few commenters suggested that metering configuration should not be regarded for purposes of defining financial benefits. One commenter stated that financial benefits should be defined by HUD, and should be applicable to all properties, regardless of whether the residential unit is sub-metered or if the building is master-metered. This commenter specifically stated that financial benefits should be allowed to accrue to the common area meters and then be disbursed equitably to occupants based upon any approved method—without regard to metering configuration and without requiring a bill credit allocation method. Several other commenters suggested, as alternatives, services such as free or reduced cost high speed internet, shuttle services, public transportation subsidization, job training programs, community events, and building improvements as alternatives to be allowed instead of utility bill credits.

One commenter suggested that if utility bill credits are not available, applicants could determine a baseline year and calculate the average price per kilowatt hour for that year and then for all subsequent years (after placed in service date) and multiply it by the kilowatt hours of production multiplied by an annual acceptable adjustment. The commenter stated that net energy savings from a given period (month, quarter, or year) would then be required to be spent on residential service programs (available to the largest group of residents), facility upgrades benefiting residents, and other services that benefit a large group of residents.

A few commenters, although supportive, noted that the HUD guidance allowing for services or other benefits to be provided in master metered buildings, in lieu of direct financial savings to tenants, is limited in scope. One commenter pointed out that the HUD memorandum cited in the Proposed Rules only covers developments subsidized through HUD's multifamily programs. This commenter noted that this guidance does not cover HUD's Project Voucher Program and that the USDA does not provide matching guidance for the USDA supported housing. Therefore, this commenter suggests that the regulations directly define financial benefits for master metered housing,

rather than by reference to memoranda, so that this provision is clearly applicable to all master metered affordable housing developments. Similarly, one commenter stated that the types of benefits provided under the HUD guidance for community solar programs should be available as a mechanism to distribute financial benefits for all Category 3 applicants.

Similarly, another commenter noted that certain financial benefits distributed directly to residents may be includable in a household's annual income. The commenter noted that HUD has determined that providing financial benefits in the form of gift cards or cash payments would generally be included in income. Therefore, this commenter supported the inclusion of language in the rules that would state that financial benefits can include credits on utility bills or could include benefits that can be equitably provided to residents but are not direct payments to the residents, such as resident services, free or reduced cost internet, job training, or building upgrades. However, another commenter requested the opposite, stating that direct payments or other financial benefits like rent reductions should be the preferred form of benefits.

In response to these comments, the Treasury Department and the IRS modified the Proposed Rules in the final regulations to provide maximum flexibility to equitably allocate financial benefits to residents while also ensuring the statutory requirements are satisfied. Accordingly, the final regulations provide that financial value can be distributed to building occupants via utility bill savings or through different means, and depending on the method selected, the final regulations prescribe the requirements that must be met. For purposes of this via utility bill savings provision, financial benefits will be considered to be equitably allocated if at least 50 percent of the financial value of the energy produced by the facility is distributed as utility bill savings in equal shares to each building dwelling unit among the Qualified Residential Property's occupants that are designated as low-income under the covered housing program or other affordable housing program (described in section 48(e)(2)(B)(i)) or alternatively distributed in proportional shares based on each low-income dwelling unit's square footage, or each low-income dwelling unit's number of occupants. For any occupant(s) that choose to not receive utility bill savings (for example, exercise their right to "opt out" of a community solar subscription in applicable jurisdictions), the portion of the financial value that would otherwise

be distributed to non-participating occupants must be instead distributed to all participating occupants. No less than 50 percent of the Qualified Residential Property's occupants that are designated as low-income must participate and receive utility bill savings for the facility to utilize this method of benefit distribution. If financial value is not distributed via utility bill savings, financial benefits will be considered to be equitably allocated if at least 50 percent of the financial value of the energy produced by the facility is distributed to occupants using one of the methods described in HUD guidance, or other guidance or notices from the Federal agency that oversees the applicable housing program identified in section 48(e)(2)(B).

With respect to allocating financial value via utility bill savings, commenters addressed the language in the Proposed Rules that provided an alternative method for net energy savings to be distributed in proportional shares based on each dwelling unit's electricity unit. The commenters stated that this method is not permitted by HUD. These commenters also proposed a third option for equitable distribution, which they claim is used in California's SOMAH program, where shares are distributed to each unit based on square footage. In response to this comment, the Treasury Department and the IRS added language in the final regulations to clarify that the financial value should be distributed in equal shares to each building dwelling unit among the Qualified Residential Property's occupants that are designated as low-income under the covered housing program or other affordable housing program (described in section 48(e)(2)(B)(i)) or alternatively distributed in proportional shares based on each low-income dwelling unit's square footage, or each low-income dwelling unit's number of occupants.

Another commenter suggested that in a master-metered building, the facility owner be allowed to allocate the value of energy savings to the building's tenant association to distribute equally as the association sees fit. This was suggested in addition to and as alternative to the options provided in the HUD guidance.

In response to this comment, the Treasury Department and the IRS considered but did not adopt this suggestion. The Treasury Department and the IRS have provided additional clarity on the applicability of HUD guidance in the final regulations to provide flexibility to the applicant to determine the methodology most appropriate for allocation of the value of

energy savings based on the circumstances of the Qualified Residential Property. This includes options that have been determined to not affect a tenants utility allowance and annual income for rent calculations.

#### B. Financial Benefits in Qualified Low-Income Economic Benefit Projects

For a facility to be treated as part of a qualified low-income economic benefit project, section 48(e)(2)(C) requires that at least 50 percent of the financial benefits of the electricity produced by the facility be provided to qualifying low-income households. To satisfy this standard, the Proposed Rules required that the facility serve multiple households and at least 50 percent of the facility's total output is distributed to qualifying low-income households under section 48(e)(2)(C)(i) or (ii). In addition, to further the overall goals of the Program, the Proposed Rules reserved allocations under this category exclusively for applicants that would provide at least a 20-percent bill credit discount rate for all such low-income households. The Proposed Rules defined a "bill credit discount rate" as the difference between the financial benefit distributed to the low-income household (including utility bill credits, reductions in the low-income household's electricity rate, or other monetary benefits accrued by the household) and the cost of participating in the Program (including subscription payments for renewable energy and any other fees or charges), expressed as a percentage of the financial benefit distributed to the low-income household. The bill credit discount rate can be calculated by starting with the financial benefit distributed to the low-income household, subtracting all payments made by the low-income customer to the facility owner and any related third parties as a condition of receiving that financial benefit, then dividing that difference by the financial benefit distributed to the low-income household.

##### 1. Category 4 Community Solar

Because of the financial benefits requirements that are structured for community solar projects, several commenters thought that the Proposed Rules too narrowly limited Category 4. Commenters noted that the Proposed Rule precluded otherwise eligible facilities from qualifying under Category 4, including behind the meter (BTM) facilities that meet the Category 4 requirements. One commenter suggested that Category 4 should be open to projects that directly benefit Tribal member small businesses. Similarly, a

commenter noted that Category 4 should be open to all projects, whether FTM or BTM, that directly benefit Tribal member small businesses (where the small business can apply for the section 48 credit) or Tribal enterprises, located on Tribal lands, that may want to deploy commercial roof-top or ground-mount solar (such as canopies) to offset energy costs, provide energy security, or support job creation. Another commenter also criticized the narrow nature of Category 4 noting that the Proposed Rules have made eligibility for Category 4 solely applicable to multifamily and community solar.

Some commenters also made suggestions on how to define Category 4. One commenter suggested that projects under Category 4 allow only on-site commercial and industrial projects to reach overall deployment and savings goals. Similarly, one commenter requested that Category 4 incentivize larger agribusiness projects that employ residents living in these areas and working at these agribusiness facilities (or similar industries) and stated that the 50 percent household requirement is too complicated. This commenter felt that residential facilities are being prioritized in categories 1, 3, and 4, and, therefore, that Category 4 should be modified to incentivize facilities supplying power to businesses but providing financial benefits to low-income residents in the same area. Another commenter recommended that the Category 4 allocation give priority to qualified low-income benefit projects less than 1 MW that are located in low-income communities.

The Treasury Department and the IRS recognize the commenters' concerns that Category 4 is limited. However, projects must meet the statutory requirements under section 48(e)(2)(C) to be considered eligible for Category 4. To ensure these requirements are not too narrowly construed, the Treasury Department and the IRS adopted a change to the FTM definition in the final regulations applicable to Category 4 to ensure that projects meeting the intent of Category 4, as that intent was described in the Proposed Rules, are not unintentionally disqualified due to an overly strict definition of FTM. The final regulations clarify that a facility is FTM if it is directly connected to a grid and its primary purpose is to provide electricity to one or more offsite locations via such grid or utility meters with which it does not have an electrical connection; alternatively, FTM is defined as a facility that is not BTM. The final regulations also clarify that for the purpose of Category 4, a qualified solar or wind facility is also

FTM if 50 percent or more of its electricity generation on an annual basis is physically exported to the broader electricity grid.

However, the Treasury Department and the IRS emphasize that this does not change the intent of Category 4 that projects falling under the definition of BTM are not eligible for Category 4, and that financial benefits to eligible low-income households can only be delivered via utility bill savings. Based on industry and market research, community solar programs primarily use utility bill savings to deliver financial benefits to households. For this reason, the Treasury Department and the IRS have defined financial benefits in this manner.

At least one other commenter requested allowing public and affordable housing buildings to participate in Category 4 through the use of geo-eligibility to establish qualification for a Category 4 site. One of these commenters mentioned the process being adopted in New York for its Inclusive Community Solar Adder, which will allow anyone who lives in a designated "Disadvantaged Community" to qualify upon demonstration that their address is in one of the so-called DAC zones. This commenter noted that the Climate and Economic Justice Screening Tool (CEJST) map is already being used to qualify sites for Category 1 participation.

Because section 48(e)(2)(C) provides requirements for ensuring that the financial benefits of the electricity produced by a qualified solar or wind facility are provided to qualifying households, establishing categorical eligibility for Category 4 based on geographic location of the project is inappropriate. Similarly, as discussed in more detail later under part V.B.6. of this Summary of Comments and Explanation of Revisions section, qualifying households based on geography is also inappropriate because of statutory requirements. Similarly, establishing eligibility for multifamily buildings (including master-metered buildings), agribusinesses, or other arrangements that do not directly result in utility bill savings for low-income households is also inappropriate. As discussed earlier, financial benefits to eligible low-income households can only be delivered via utility bill savings under these regulations. Therefore, the final regulations do not adopt these comments.

## 2. Twenty Percent Bill Credit Discount

One commenter urged the Treasury Department and the IRS to require a

higher bill discount rate than 20 percent, stating the programs in Illinois, Massachusetts, and Maryland already provide discounts at or above the proposed threshold level. This commenter believes that the increased credit for qualified low-income economic benefit projects should allow for an increase in the amount of financial benefit delivered to low-income customers in these markets.

Another commenter supported the method of requiring financial benefits in the form of bill credits, but suggested an additional requirement to be included in cases where beneficiaries have no cost of participation through a subscription fee. In this situation, the commenter suggested that the bill credit discount rate should be calculated as the total savings on a customer's utility bill, annually, divided by the total value of the electricity produced by the project, as measured by the income to the project paid by the utility, independent system operator (ISO), or other customer procuring power from the project.

Another commenter requested clarification on the interpretation of bill credit discount rate, which the commenter read to mean that 20 percent of the total export credit rate would be the minimum required revenue share with the low-income customer, rather than 20 percent of the customer's pre-solar electricity bill. This commenter also requested clarification as to whether the calculation will be annual, and whether the form of benefits must specifically be "utility bill credits" or could be other documented financial benefits provided to tenants.

One commenter stated that a 20 percent cost savings requirement will likely be unattainable in some energy markets, specifically States and localities that have less amicable laws and utility regulations for community solar. This commenter recommended a 15 percent cost savings for 2023, stating that 15 percent is still on the higher end of the current industry average for community solar cost savings. This commenter also requested that the benefit should be an annual reduction (of 15 percent) because there can be cost savings fluctuations throughout a calendar year. Although the Treasury Department and the IRS considered various percentages for required cost savings between 5 percent and 20 percent, based on a review of various State program rates and market information, the Treasury Department and the IRS have decided to maintain the 20 percent rate. This rate will allow for the greatest savings to the low-income households and further the

requirement of section 48(e)(2)(C) that 50 percent of the financial benefits of the electricity produced by the facility are provided to such households. Additionally, in response to comments, the Treasury Department and the IRS clarified that the 20 percent bill discount is an annual savings.

Tribal commenters requested that projects owned by Tribes or Tribal housing authorities should be presumed to result in an economic benefit to Tribal members who reside on the reservation or who live in Tribal-owned housing.

The Treasury Department and the IRS decline to adopt the suggestion of presumption of economic benefit. The statutory requirements for the Program require that an qualified low-income economic benefit project serves multiple households and at least 50 percent of the facility's total output is distributed to qualifying low-income households under section 48(e)(2)(C). To help applicants meet this requirement, the Treasury Department and the IRS have provided in the final regulations an illustrative list of categorical eligibility options to provide maximum flexibility to qualify low-income households. This includes eligibility based on Tribal programs and housing programs, among many other options.

### 3. Single Household

Several commenters have requested that the Treasury Department and the IRS add eligibility under Category 4 for projects that benefit one single-family residence where 100 percent of the facility's total output is distributed to the qualifying low-income household residing at that residence, provided that the project meets all other Category 4 criteria, and the facility provides at least a 20-percent utility bill savings for such low-income household. Several commenters also added that Congress's use of the term "households" is more properly read as a programmatic term applying to all low-income households that can benefit from the Program, rather than a narrower reading suggested in the Proposed Rules. One commenter argued that this narrow reading (excluding single family households from Category 4) would unnecessarily and unfairly discriminate against certain households.

After consideration of all these comments, the final regulations do not adopt the commenter's suggestion. Section 48(e)(2)(C) applicable to Category 4 facilities requires that at least 50 percent of the financial benefits of the electricity produced by the facility be provided to "households" with certain income levels. Because the statute uses the plural term

"households," the Treasury Department and the IRS determined that providing financial benefits to a single household is insufficient to meet the requirements of section 48(e)(2)(C) applicable to Category 4 facilities.

### 4. Utility Bill Savings

Several Tribal comment letters requested that Category 4 should not be limited to projects that provide only individual benefits or community-scale projects. These commenters urged the Treasury Department and the IRS to expand the definition of "financial benefit" to include community-wide benefits, such as direct benefits to the Tribal government from the additional tax credit (especially for projects owned by the Tribe and receiving elective payments from the Treasury Department), job creation and economic benefits to low-income Tribal members. These same commenters also stated that Category 4 should be open to all projects, regardless of metering, that directly benefit Tribal member small businesses (where the small business can apply for the section 48 credit) or Tribal enterprises located on Tribal lands. Additionally, some of the Tribal comments requested flexibility for Tribal housing or economic development projects that are serving Tribal lands and Tribal households to define benefits collectively (rather than individually), because many of the Tribal commenters are located in States that do not allow for community solar. These commenters stated that they will have to negotiate directly with a utility to deploy community scale projects on the Reservation.

To promote more flexibility with respect to financial benefits requirements in Category 4, a few commenters requested that the Treasury Department and the IRS extend the same flexibility is provided for Category 3 projects regarding financial benefits to Category 4 projects as well. These commenters requested that a manner other than bill credits be permitted to provide financial benefits directly to low-income subscribers in Category 4 that still meets the nominal 20 percent discount requirement, like gift cards, direct payments, or checks. One commenter asked whether master-metered projects are eligible for Category 4 if a project adheres to the same HUD guidance used for Category 3 projects.

The Treasury Department and the IRS considered the comments requesting expansion or flexibility with respect to financial benefits for Category 4 to allow methods other than utility bill savings but ultimately decided not to adopt the

commenters' suggestions in these final regulations. Requiring financial benefits via utility bill savings is the only means through which the Treasury Department and the IRS can ensure that the provision of financial benefits to qualifying households is sufficiently regulated such that the requirements of section 48(e)(2)(C) are satisfied. Therefore, the final regulations clarify that financial benefits for Category 4 must be tied to a utility bill of a qualifying household. The Treasury Department and the IRS may consider other methods of determining Category 4 financial benefits in future years.

The final regulations, however, address comments regarding the potential unsuitability of the proposed rules to net-credit billing, or other structures where the qualifying household does not make a direct payment to the project owner by providing an alternative methodology for calculating a 20 percent bill credit discount rate in this scenario. In cases where the qualifying household has no or only a nominal cost of participation, the bill credit discount rate should be calculated as the financial benefit provided to a qualifying household (including utility bill credits, reductions in a qualifying household's electricity rate, or other monetary benefits accrued by a qualifying household on their utility bill) divided by the total value of the electricity produced by the facility and assigned to the qualifying household (including any electricity services, products, and credits provided in conjunction with the electricity produced by such facility), as measured by paid by the utility, ISO, or other off-taker procuring electricity (and related services, products, and credits) from the facility.

### 5. Fifty Percent of the Facility's Total Output to Low-Income Households

One commenter requested that the facility should not have to provide power to households, as long as the financial benefits were distributed to residents of qualifying households. In this case, the commenter stated that a non-profit organization planned to build a facility on the non-profit office building but distribute the savings the non-profit derived from the facility to the residents of apartments the non-profit administers. Similarly, another commenter noted that the use of "distribute" rather than "assigned" in the requirement in the Proposed Rules that 50 percent of the facility's total output is distributed to qualifying low-income households may imply that beneficiaries are expected to receive the physical flows of electricity from the

facility, which is not how community solar works in most cases, nor is it what the statute requires.

In response to these comments and to clarify the intent of the Proposed Rules, which was to structure Category 4 consistent with the market as it exists today (including community solar business models), the final regulations adopt the suggestion of the commenter to change “distributed” to “assigned.” Therefore, the full clause in the final regulations is “at least 50 percent of the facility’s total output must be assigned to Qualified Households.”

#### 6. Low-Income Verification

To ensure the requirements of section 48(e)(2)(C) are met, verification of households’ qualifying low-income status is required. The Proposed Rules provided that applicants are responsible for proof-of-income verification and would be required to submit documentation upon placing the qualified solar or wind facility in service that identifies each qualifying low-income household, the output allocated to each qualifying low-income household in kW, and the method of income verification utilized.

The Proposed Rules provided that applicants may use categorical eligibility or other income verification methods to qualify low-income households. Categorical eligibility consists of obtaining proof of household participation in a needs-based Federal,<sup>5</sup> State, Tribal, or utility program with income limits at or below the qualifying income level for the specific facility (qualifying program). State agencies (for example, State community solar/wind program administrators) can also provide verification of low-income status if the State program’s income limits are at or below the qualifying income level for the qualified solar or wind facility. If a household is not enrolled in a qualifying program, additional income verification methods can be used such as: paystubs, tax returns, or income verification through crediting agencies and commercial data sources. Eligibility based on the applicant (or contractors or subcontractors) collecting self-attestations from households is not permitted.

Several commenters commented on the verification methods to qualify low-income households. On self-attestation,

many commenters disagree with the Proposed Rules prohibiting eligibility based on self-attestation. Many commenters were in favor of self-attestation, which according to one commenter could include an attestation to the effect that the household either participates in one of the programs that has the relevant standard as a criterion or otherwise meets the standard to the best of the resident’s knowledge. One commenter stated that self-attestation is the fastest and most efficient way to ensure maximum low-income customer participation. This commenter noted that many customers will be skeptical of providing documents, and that the process of obtaining, processing, and verifying the documentation is administratively burdensome and time consuming. Another commenter noted a practical consideration that by accepting self-certification, households who are not yet enrolled in Federal or State energy assistance programs but are eligible or in the process of enrolling may still participate in qualified low-income economic benefit projects. Another commenter stated that only a fraction of eligible households currently participate in existing State, Federal, utility, or Tribal programs for which they are eligible, and many barriers—including knowledge, time, documentation, and language fluency—prevent many households from participating.

Some of the commenters’ recommendations also tied into the use of State programs. One commenter suggested removing the self-attestation limitation where self-attestation is permitted by State agencies. Two other commenters similarly suggested the rules accept income verification via State-program verification where States specifically accept self-attestation with one of the commenters noting that subscribers and applicants should not have to double verify a household if self-attestation is used on the State level. Another commenter encouraged that applicants be allowed to use benefit cards as sufficient evidence of participation in qualifying programs where such cards are the means by which a State makes the benefit available to participants.

Another commenter requested that the rules clarify whether the use of State-approved geo-qualification maps or CEJST are approved income verification methods and recommended that, for individuals who reside within a CEJST or Persistent Poverty County (PPC), the rules should consider allowing self-attestation as a means of income-qualification in States where it is a permissible method for income-

qualification. Another commenter asked for clarification about the interaction between this Program and State agency provided income verification, as well as Department of Energy’s (DOE) community solar subscription tool tying eligibility, initially, to LIHEAP. The commenter noted that some State agencies allow self-attestation and/or State-approved geo-qualification maps in various programs and requested that the rules allow self-attestation and geo-qualification (including both State maps and CEJST) meeting certain standards to the maximum extent allowable by law. Another commenter suggested expanding those who can provide verification to not just the State agencies but also utilities. In contrast, another commenter instead recommended removing the concept of allowing State agencies to provide verification at all and proposed adding a requirement to make clear that the requirement is on applicants to receive verification directly from the customers.

Some commenters asked for the expansion of categorical eligibility. For example, one commenter recommended that public housing, USDA Rural Development, and the Project Based Voucher Program be added to the list of categorically eligible Federal assistance programs noted in footnote 5 of the Proposed Rules. Another commenter asked if the listed methods are the only possible methods of verification or if other State-approved methods may be considered as well. Another commenter also suggested for purposes of Category 4 that the rules allow participation in more programs as proof of income and that paystubs, tax returns, and credit checks should be removed as possibilities as these could alienate low-income households. An additional commenter noted their view on the importance of protecting Tribal data sovereignty. This commenter said the rules should not tie Tribes to external sources of data. This commenter believes that self-certification as to poverty levels or other metrics by Tribes should be sufficient.

A few commenters suggested adding geographic eligibility to verify low-income status. One commenter suggested adding geographic eligibility to the “category eligibility” and “other income verification methods” to qualify low-income households, where “geographic eligibility” is defined as a household that is currently residing in a LIHTC Qualified Census Tract (LIHTC Qualified Census Tract) and where at least one adult in that household has resided for at least the previous six months. The commenter claims that the LIHTC Qualified Census Tract

<sup>5</sup> Federal programs may include, but are not limited to: Medicaid, Low-Income Home Energy Assistance Program (LIHEAP), Weatherization Assistance Program (WAP), Supplemental Nutrition Assistance Program (SNAP), Section 8 Project-Based Rental Assistance, and the Housing Choice Voucher Program.

household income standard is stricter than that in section 48(e)(2)(C)(ii), and thus this standard is an administratively efficient method of qualifying low-income households for a tax credit similar to the Low-Income Communities Bonus Credit. Another commenter recommended adding the physical location of the customer's home as an additional qualifying criterion, noting a reasonable criterion for inclusion as areas where at least 20 percent of the population falls below the poverty line, with prevalent harmful environmental impacts as outlined in the 2014–2018 5-year American Community Survey (ACS), conducted by the U.S. Census Bureau. Moreover, one commenter suggested including geo-qualification based on State maps and the CEJST Tool.

In contrast, one commenter supported the Proposed Rules noting that categorical income verification decreases costs and increases available low-income customer benefits. Another commenter provided an entirely different suggestion stating that income verification is a vestige of the community solar subscription model and is alternatively achieved by serving communities in low-income areas as measured by area or State median income census data. The commenter suggested that income verification through the Statewide Shared Clean Energy Facility (SCEF) program (which is a Connecticut program) relies on the distribution utilities determining customer eligibility.

After consideration of all of comments on the verification methods to qualify low-income households, the final regulations adopt these comments in part. The Treasury Department and the IRS considered numerous verification methods in crafting the Proposed Rules and the final regulations to strike a balance between reducing administrative burden for taxpayers and households and ensuring adequate checks that the facilities receiving a Capacity Limitation under Category 4 meet the requirements of section 48(e)(2)(C). The final regulations adopt the Proposed Rules' prohibition on self-attestations because they are not sufficiently reliable or verifiable. However, this prohibition on direct self-attestation from a household does not extend to categorical eligibility for needs-based Federal, State, Tribal, or

utility programs with income limits that rely on self-attestation for verification of income. The final regulations clarify that income verification is accepted via program verification where the relevant jurisdiction specifically accepts self-attestation.

The Treasury Department and the IRS agree that subscribers and applicants should not have to double verify when a State program accepts self-attestation. The final regulations, consistent with the Proposed Rules, provide flexibility for applicants to qualify households through several means, including categorical eligibility and paystubs, tax returns, or income verification through crediting agencies and commercial data sources. Moreover, the list of Federal programs included in footnote 5 of the Proposed Rules is not the exclusive list of Federal programs that could be used to demonstrate categorical eligibility, which provide additional flexibility to qualify households. However, in response to the comments, the final regulations will include additional examples of programs that will be considered categorically eligible based on income status. Therefore, in response to the commenter's request the following additional programs will be added to the illustrative list that was provided in the Proposed Rules: Federal Communication Commission's Lifeline Support for Affordable Communications, USDA's National School Lunch Program; U.S. Social Security Administration's Supplemental Security Income; or any verified government or non-profit program serving Asset Limited Income Constrained Employed (ALICE) persons or households. The final regulations also clarify that to qualify for categorical eligibility under one of these programs, an individual in the household must be currently enrolled or must have received an award letter or other written documentation from the program in the last 12 months.

With respect to State programs, the final regulations, consistent with the Proposed Rules, provide that categorical eligibility also consists of obtaining proof of household participation in a needs-based State or utility program, so long as the income limits are at or below the qualifying income level for the specific facility. The final regulations clarify that the qualifying income level for a household is based on where such

household is located. Without additional information or requirements, geographic-based eligibility verification does not prove that a particular household necessarily meets the income parameters of section 48(e)(2)(C). Although one commenter, for example, noted that LIHTC Qualified Census Tracts have stricter income requirements, this does not address the concern that a particular household's income may not qualify under the statute but only that there are households in the census tract that would qualify.

Two commenters requested eligibility of low-income households be established only at the time of enrollment and remain for the length of the subscription and that there should not be a continual obligation to verify households as low-income. This request is consistent with the Proposed Rules, which provided that applicants are responsible for proof-of-income verification and would be required to submit documentation once upon placing the qualified solar or wind facility in service that identifies each qualifying low-income household as well as other information. The final regulations maintain the Proposed Rule but clarify that the low-income status of a household is determined at the time the household is enrolled in the community program and does not need to be re-verified. Similarly, the recapture rules discussed in part XIII of this Summary of Comments and Explanation of Revisions section are not imposed if the low-income status of households change in later years; however, the Treasury Department and the IRS determined that a change in the final regulations to clarify this point is unnecessary.

**VII. Annual Capacity Limitation**

Under section 48(e)(4)(C), the total annual Capacity Limitation is 1.8 gigawatts (GW) of DC capacity for each of the calendar year 2023 and 2024 programs. Consistent with section 4.02 of Notice 2023–17, the Proposed Rules specified how the annual Capacity Limitation would be allocated across the four facility categories for 2023. The Proposed Rules, consistent with Notice 2023–17, reserved a portion of the total annual Capacity Limitation of 1.8 GW of DC capacity for each facility category for calendar year 2023 as follows:

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.

The Proposed Rules also provided that the Treasury Department and the IRS would retain the discretion to reallocate Capacity Limitation across categories and sub-reservations to maximize allocation in the event one category or sub-reservation is oversubscribed and another has excess capacity.

One commenter suggested eliminating the 1.8 GW Capacity Limitation altogether, in favor of the same uncapped allocation that they view other solar customers, typically customers in a higher income bracket, have previously received. However, section 48(e)(4)(C) provides the 1.8 GW Capacity Limitation, and it cannot be modified by the final regulations. Therefore, the final regulations do not adopt this comment.

Another commenter suggested re-allocating the Capacity Limitation under Category 3 to Category 4 to increase the total number of MW that can be deployed efficiently while yielding the highest economic benefit. Similarly, a different commenter recommended increasing Category 4 by combining Category 1 and 4 into a single 1.4 GW category applicable to both. In addition, this commenter suggested that the Treasury Department and the IRS should layer on preferences for economic benefits over location in facility selection, similar to its preferences around ownership and location (discussed in part VII of this Summary of Comments and Explanation of Revisions section). Procedurally, an applicant would submit an application for this combined category in the applicable sub-allocation and indicate under which category qualification, and thus bonus level, for the project is sought. The commenter added that the Treasury Department and the IRS can apply a similar approach to the Proposed Rules to sub-allocate capacity among facility types within that combined category, subdividing among commercial, community, and single-family residential solar as strongly recommended by both industry and environmental justice groups since last year. Another commenter also had recommendations about how to re-allocate capacity taking into account the Additional Selection Criteria (ASC). The commenter suggested that the Treasury Department and the IRS reallocate unused capacity in the same year. Specifically, the commenter suggested that if there is unused capacity from a category or an ASC reservation that it be allocated in the same year to ensure all 1.8 GW of projects can be efficiently deployed annually. The commenter encouraged the Treasury Department

and the IRS to consider implementing subcategory capacity carveouts within each category to effectively allow for a rolling application system. For example, in Category 4, there should be more capacity dedicated to certain projects over others. Two commenters expressed disagreement for the large total reservation in Category 1. These commenters suggested that some of the Category 1 reservation should be moved to Category 4.

After consideration of these comments, the final regulations, consistent with the Proposed Rules, provide that the total Capacity Limitation for each Program year will be divided across the 4 facility categories and that the Treasury Department and the IRS retain the discretion to reallocate Capacity Limitation across categories and sub-reservations to maximize allocation in the event one category or sub-reservation is oversubscribed and another has excess capacity. The Treasury Department and the IRS continue to believe that the reservations based on facility category best allow a wide variety of facilities and benefits to go to low-income communities to further the intent of the statute. Absent category reservations, all the annual Capacity Limitation could get allocated to one facility category, which is contrary to the statute providing four distinct categories.

The final regulations clarify that the specific reservations for a Program year are provided in guidance published in the Internal Revenue Bulletin. For Program year 2023, Notice 2023–17 and Revenue Procedure 2023–27 provide the specific reservation amounts for each category. As clarified in the final regulations, the specific reservation amounts are established based on factors such as the anticipated number of applications that are expected for each category and the amount of Capacity Limitation that needs to be reserved for each category to encourage market participation in each category consistent with statutory intent.

One commenter stated that sub-allocations should be adaptable in future Program years to account for lessons learned. However, the commenter said that the 200 MW for Indian land should not be reallocated to other categories even if not fully claimed by applications in any given year, nor should any shortfall of applications be used to justify smaller future allocations. The Treasury Department and the IRS understand the importance of all of the categories provided by Congress in the statute and agree that the Capacity Limitation allocated to each facility category

should be adaptable. Accordingly, the Treasury Department and the IRS have retained discretion to reallocate Capacity Limitation and to revise amounts reserved for each category in each Program year. After the 2023 Program year, the Treasury Department and the IRS will determine whether to change the facility category reservation amounts for the 2024 Program year based on the factors provided in the final regulations and will announce the specific reservation amounts in Program guidance applicable to 2024.

#### *VIII. Additional Selection Criteria*

The Proposed Rules provided that facilities that meet at least one of the two categories of Ownership and Geographic Criteria, collectively the ASC, would receive priority for an allocation within each facility category described in section 48(e)(2)(A)(iii). The Proposed Rules also provided that at least 50 percent of the total Capacity Limitation in each facility category would be reserved for facilities meeting ASC.

The Proposed Rules provided that in evaluating applications received during the initial application window, priority would be given to eligible applications for facilities meeting at least one of the two ASC. If the eligible applications for Capacity Limitation for facilities that meet at least one of the two ASC criteria exceed the Capacity Limitation for a category, facilities meeting both ASC criteria would be prioritized for an allocation.

Several commenters expressed overall agreement and support for the inclusion of ASC, and the purpose behind these criteria, which commenters feel will promote community ownership. One commenter expressed disagreement with the use of ASC in the Program or that it should not be used for the 2023 Program. Another commenter echoed this by saying that the Treasury Department and the IRS should first assess the Program and applications received for 2023, and then consider including the ASC and a corresponding capacity reserve amount.

Other commenters suggested that if ASC is used, the percentage of the total Capacity Limitation in each facility category for ASC should be reduced from 50 percent to 25 percent or to 10 percent. Another commenter stated that the Ownership Criteria is too restrictive, and few applicants will be able to meet the high standard. This commenter recommended giving preferential allocation of capacity limitation to groups that meet one or both of the ASC, without reserving 50 percent of the capacity under each category on a

rolling basis. One commenter similarly stated that an inflexible reservation of 50 percent of the total Capacity Limitation in each category for facilities meeting ASC may result in potentially hundreds of MW of unclaimed Capacity Limitation for 2023. This commenter suggested that a smaller amount of reservation should be reserved for ASC projects in 2023, and that the amount of reservation should be increased in future years. A few other commenters, similarly, suggested that in the first year of the Program, ten percent of the capacity in each sub-reservation should be reserved for ASC applicants, with the Treasury Department and the IRS retaining authority to reallocate the capacity and expand the capacity reservations in future Program years.

One commenter separately stated that except for reallocations (meaning reallocations of capacity between categories) for facilities meeting the ASC, the Treasury Department and the IRS should ensure that proposed reallocations more than 50 MW are subject to public notice and comment.

A few commenters who supported reduction of the ASC reservation amounts, stated that it will take significant time and coordinated effort for new community solar markets to emerge where efforts to establish Program frameworks have been lacking to date. These commenters stated that it is likely that there will be few applicants who meet the ASC, or that the projects developed by owners that would qualify tend to be small scale projects. Some commenters also asserted that the restrictive Ownership Criteria would likely encourage gaming.

In contrast, some commenters expressed support for at least 50 percent of the total Capacity Limitation being reserved for facilities meeting ASC. Additionally, one of the commenters supporting the reduction in the ASC reservation amounts stated that the Treasury Department and the IRS should prioritize reallocations to facility categories with more than 25 percent of the facilities meeting the ASC.

One commenter suggested that a third set of "Market-based" criteria should be added to ASC. The commenter stated that these criteria would prioritize projects that maximize the benefit delivered to the largest number of low-income customers. The two criteria provided by the commenter under this category are: 1. Proposed discount rate: Savings delivered to low-income customers; and 2. Percentage of project reserved for low-income customers: The percentage of the output capacity that will service low-income customers. However, the commenter only includes

community solar projects in discussing the reason for this proposal. Two other commenters also proposed a third set of criteria focused on prioritizing projects that are participating in State low-income renewable energy programs, with one commenter specifically naming programs funded under the Environmental Protection Agency's (EPA) Greenhouse Gas Reduction Fund Solar For All Program. However, one of the comments specifically limits these criteria to Category 1 projects. Neither of the comments explain how these criteria would be equitably applied to facilities applying from all States, especially States that do not have such programs, nor do the commenters explain how wind facilities would be eligible under the previously recommended criteria. Other commenters provided additional criteria that could be considered including the use of minority and woman-owned businesses as contractors and employment of workers from low-income communities. Finally, a group of commenters suggested that the Treasury Department and the IRS consider applicants under ASC if the applicant signs a binding commitment to provide financial benefits for longer than the statute requires; or if the applicant sign a binding commitment promising to provide greater financial benefits than required. Another commenter, similarly, suggested incorporating a new category of ASC based on whether the project provides benefits to the local community and its members. The commenter suggested that this would better ensure that Category 1 and Category 2 projects are providing direct benefits to households or the local community. This comment gives examples of criteria for this "provision of benefits" category including: targeted hiring provisions, local procurement standards for Minority, Women and Disadvantaged owned Business Enterprises, Community Workforce Agreements, and Community Benefit Agreements; provision of direct financial benefits to community members, such as energy bill savings or reduction of energy burden; and for Category 1 projects, actual low-income status of households who would be benefited.

After consideration of these comments, the final regulations, consistent with the Proposed Rules, maintain that at least 50 percent of the total Capacity Limitation be reserved for facilities meeting ASC to help achieve the Treasury Department and the IRS's stated goals of the Program in Notice 2023-17 to (1) increase adoption of and access to renewable energy facilities in

low-income communities and communities with environmental justice concerns; (2) encourage new market participants in the clean energy economy; and (3) provide social and economic benefits to people and communities that have been marginalized from economic opportunities and overburdened by environmental impacts. While many of the comments provide suggestions for alternative or additional ASC, many of the suggestions could not be applied to all categories or applied nation-wide such as the use of enrollment in a specific State energy program. Other suggestions are infeasible due to statutory conflict such as providing benefits for a longer duration than the statute requires. Lastly, the Treasury Department and the IRS are anticipating upwards of 100,000 applications annually for the Program. Selection criteria that is qualitative, subjective, and would require significant review such as a Community Benefits Agreement, Workforce Agreement, or procurement or hiring targets are administratively infeasible to have timely decisions made throughout the year. The Treasury Department and the IRS heard from many stakeholders that timely decisions will be key to Program success. The ASC proposed by the Treasury Department and the IRS are also directly connected to the applicant (ownership) or the facility (geography), which allows objective criteria. The Treasury Department and the IRS may consider other ASC in future guidance that help achieve these goals and are administratively feasible for the Program. However, the Treasury Department and the IRS did not adopt the commenters' suggestions to add other ASC at this time because the Treasury Department and the IRS determined the ASC provided in the Proposed Rules best promote the Program goals discussed earlier and should be the focus of the Program.

The final regulations maintain that at least 50 percent of the Capacity Limitation in each facility category will be reserved for facilities meeting the ASC but clarify that the method for utilizing the ASC and the specific amount of the reservation (at or above 50 percent) will be provided in guidance published in the Internal Revenue Bulletin. For program year 2023, those procedures are provided in Revenue Procedure 2023-27. The final regulations clarify that the total Capacity Limitation in each facility category reserved for qualified facilities meeting the ASC may be reevaluated in future guidance provided at least 50

percent is reserved. The final regulations also clarify that after the reservation for qualified facilities meeting the ASC is established in guidance, it may later be re-allocated across facility categories and sub-reservations in the event one category or sub-reservation within a category is oversubscribed and another has excess capacity.

One commenter stated that most, if not all, categories, will be oversubscribed, and acknowledged that there will need to be a selection process other than a first-come, first-served application process. However, this commenter recommended against using the proposed Ownership and Geographic Criteria as a means for prioritizing applications. This commenter asserted that criteria related to the ownership or location of a project provides no indication of project viability. This commenter stated that instead, applicants should be prioritized based on project maturity, providing a list of factors that are already included in the Proposed Rules for the Program, for some or all categories, such as site control and possession of all non-ministerial permits. The commenter suggested that a lottery be used in oversubscribed categories for projects that meet the commenters stated project maturity factors. A few other commenters requested that applicants who have made meaningful financial investments in relatively mature projects should be shown preference for an allocation. Specifically, this group of commenters suggested that the Treasury Department and the IRS, in addition to the Ownership and Geographic Criteria, prioritize projects that have signed agreements with income-qualified customers representing 10 percent of a project's capacity.

After consideration by the Treasury Department and the IRS, these comments are not adopted. The project maturity selection criteria that these commenters suggest are already part of the minimum Program requirements to apply that were provided in the Proposed Rules. ASC are selection factors for prioritizing projects in addition to the already required minimum project maturity level that this commenter requests. Prioritizing signed agreements with customers would not work for all categories, and applicants in Category 4

#### A. Ownership Criteria

The Proposed Rules provided that the Ownership Criteria category is based on characteristics of the applicant that owns the qualified solar or wind facility. A qualified solar or wind

facility will meet the Ownership Criteria if it is owned by a Tribal enterprise, an Alaska Native Corporation, a renewable energy cooperative, a qualified renewable energy company meeting certain characteristics, or a qualified tax-exempt entity. If an applicant wholly owns an entity that is the owner of a qualified solar or wind facility, and the entity is disregarded as separate from its owner for Federal income tax purposes (disregarded entity), the applicant, and not the disregarded entity, is treated as the owner of the qualified solar or wind facility for purposes of the Ownership Criteria.

The Proposed Rules provided that a Tribal enterprise, for purposes of the Ownership Criteria, (1) is an entity that is owned at least 51 percent, either directly or indirectly (through a wholly owned corporation created under its Tribal laws or through a section 3 or section 17 Corporation),<sup>6</sup> by an Indian Tribal government (as defined in section 30D(g)(9) of the Code), and (2) the Indian Tribal government has the power to appoint and remove a majority (more than 50 percent) of the individuals serving on the entity's board of directors or equivalent governing board.

The Proposed Rules provided that an Alaska Native Corporation, for purposes of the Ownership Criteria, is defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(m).

The Proposed Rules provided that a Renewable Energy Cooperative, for purposes of the Ownership Criteria, is an entity that develops qualified solar and/or wind facilities and owns at least 51 percent of a facility and is either (1) a consumer or purchasing cooperative controlled by its members who are low-income households (as defined in section 48(e)(2)(C)) with each member having an equal voting right, or (2) a worker cooperative controlled by its worker-members with each member having an equal voting right.

The Proposed Rules provided that a Qualified Renewable Energy Company (QREC), for purposes of the Ownership Criteria, is an entity that serves low-income communities and provides pathways for the adoption of clean energy by low-income households. In addition to its general business purpose, the Proposed Rules noted that the Treasury Department and the IRS were considering the following requirements and specifically requested comments on

these potential requirements that a QREC would need to satisfy:

(1) At least 51 percent of the entity's equity interests are owned and controlled by (a) one or more individuals, (b) a Community Development Corporation (as defined in 13 CFR 124.3), (c) an agricultural or horticultural cooperative (as defined in section 199A(g)(4)(A) of the Code), (d) an Indian Tribal government (as defined in section 30D(g)(9)), (e) an Alaska Native corporation (as defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(m)), or (f) a Native Hawaiian organization (as defined in 13 CFR 124.3);

(2) After applying the controlled group rules under section 52(a) of the Code, the entity has less than 10 full-time equivalent employees (as determined under section 4980H(c)(2)(E) and (c)(4) of the Code) and less than \$5 million in annual gross receipts in the previous calendar year;

(3) The entity first installed or operated a qualified solar or wind facility as defined in section 48(e)(2)(A) two or more years prior to the date of application; and

(4) The entity has installed and/or operated qualified solar or wind facilities as defined in section 48(e)(2)(A) with at least 100 kW of cumulative nameplate capacity located in one or more Low-Income Communities as defined in section 48(e)(2)(A)(iii)(I).

The Proposed Rules provided that a "qualified tax-exempt entity", for purposes of the Ownership Criteria, is (1) An organization exempt from the tax imposed by subtitle A of the Code by reason of being described in section 501(c)(3) or section 501(d); (2) Any State, the District of Columbia, or political subdivision thereof, any territory of the United States, or any agency or instrumentality of any of the foregoing; (3) An Indian Tribal government (as defined in section 30D(g)(9)), political subdivision thereof, or any agency or instrumentality of any of the foregoing; or (4) Any corporation described in section 501(c)(12) operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas.

The final regulations modify the definition of "qualified tax-exempt entity" by striking "any territory of the United States." The Treasury Department and the IRS made this change to correct a drafting error. The tax rules in section 50(b) related to investment tax credits (ITCs), such as section 48, generally provide that credit-eligible property cannot be used predominantly outside the United States

<sup>6</sup> A "section 17 corporation" is a corporation incorporated under the authority of section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. 5124. A "section 3 corporation" is a corporation that is incorporated under the authority of section 3 of the Oklahoma Indian Welfare Act, 25 U.S.C. 5203.

(the fifty States and the District of Columbia) unless the property is owned by a U.S. corporation or U.S. citizen (other than a citizen entitled to the benefits of section 931 (Guam, American Samoa, or the Northern Mariana Islands) or section 933 (Puerto Rico)). Therefore, property used in the territories and owned by a territory government, or an entity created in or organized under the laws of a U.S. territory, generally would not qualify for a section 48 credit.

Another commenter stated that the Ownership Criteria should be eliminated because Congress indicated no intent in the IRA to prefer applications for the Program on project ownership. This commenter asserts that the Ownership Criteria results in non-profits organizations receiving outright allocation awards, while qualified business taxpayers will be subject to a lottery system for any remaining credit. Similarly, another commenter stated that the ASC and the reservations for ASC are not grounded in the statute. Although Congress did not include Ownership Criteria directly in the statute, it did direct the Treasury Department to create a Program to allocate the annual Capacity Limitation of 1.8 GW as measured in DC. As discussed earlier, the Treasury Department and the IRS stated three goals for the Program: (1) increase the adoption of and access to renewable energy facilities in low-income communities and communities with environmental justice concerns; (2) encourage new market participants in the clean energy economy; and (3) provide social and economic benefits to people and communities that have been marginalized from economic opportunities and overburdened by environmental impacts. Based on the breadth of research around the barriers to adoption of renewable energy technology by low-income communities and to meet statutory objectives and Program goals, the inclusion of Ownership Criteria will allow the participation of institutions that are well positioned to increase adoption of clean energy in low-income communities and by low-income households. Moreover, all applicants, with limited exception, in a given category and sub-category, are generally required to meet the same requirements to be awarded an allocation amount based on the projected net output of the facility. No applicant is being awarded the actual bonus credit amount during the application and selection period. All facility owner-applicants who are awarded an allocation will then have to place the facility in service and meet

certain requirements before the owner can claim the section 48(e) Increase for the section 48 credit.

A few commenters stated that it is not appropriate to apply the ASC to Category 3 facilities. One commenter said that multi-family affordable housing guarantees that the benefits in Category 3 will be provided to low-income households. Another commenter claimed that Category 3 facilities are subject to existing rules that conflict with the ASC.

Several commenters stated that the current Ownership Criteria may conflict with ownership structures typically used for LIHTC projects. One commenter expressed concern that a tax-exempt applicant who is an owner of a facility through a partnership structured as a limited liability company or a limited partnership for State law purposes would not be considered a qualified tax-exempt entity because the tax-exempt applicant is not the sole owner. This commenter requested revision of the Ownership Criteria to ensure that tax-exempt entities (and other prioritized owner types) remain eligible if the entity controls the managing member or general partner of the partnership that owns the facility for Federal income tax purposes. Another commenter suggested that additional language should state that a qualified tax-exempt entity would still meet the Ownership Criteria if the tax-exempt entity directly serves as the managing member or general partner of the partnership that owns the facility for Federal income tax purposes. A few commenters also stated that most tax-exempt entities entering into a renewable energy tax credit transaction related to a LIHTC project will enter into a partnership with a tax equity investor where the tax-exempt entity is a general partner or managing member and has control over the partnership's operations, but is not the majority owner. The tax equity investor is usually the majority owner to allow the investor to claim most of the tax credits generated by the project.

The Treasury Department and the IRS understand that for tax credit monetization purposes, LIHTC projects and solar and wind facilities are often financed using tax equity partnership structures where a tax-exempt entity (or other Ownership Criteria entities) owns a minority interest (either directly or indirectly) in an entity treated as a partnership for Federal income tax purposes that owns the project or facility. In response to these comments, the Treasury Department and the IRS have clarified through additional language in the final regulations that a

qualified solar or wind facility owned by an entity treated as a partnership for Federal income tax purposes is eligible for ASC consideration if an entity that meets the Ownership Criteria has at least a one percent interest (either directly or indirectly) in each material item of partnership income, gain, loss, deduction, and credit of the partnership and is a managing member or general partner (or similar title) under State law of the partnership (or directly owns 100 percent of the equity interests in the managing member or general partner) at all times during the existence of the partnership. Because indirect ownership is permissible, this means an entity that meets the Ownership Criteria can hold its partnership interest through a taxable subsidiary. This clarification should allow tax partnerships formed for the purpose of monetizing LIHTCs or section 48 credits that are directly or indirectly owned and managed by an entity that satisfies the Ownership Criteria to meet the ASC and thus better reflect potential applicants and financing structures for all Categories. The final regulations also clarify that a facility that has received a Capacity Limitation allocation based, in part, on meeting the Ownership Criteria will not be disqualified and lose its allocation if it is transferred by the original applicant to a tax partnership, prior to being placed in service, in which the original applicant retains the requisite direct or indirect ownership of the tax partnership and is a managing member or general partner (or similar title) under State law of such partnership (or directly owns 100 percent of the equity interests in the managing member or general partner) at all times during the existence of the partnership.

One commenter specifically noted that some Tribal enterprises do not have a "board of directors or equivalent governing board," but the corresponding Tribes own utilities and have the power to appoint and remove the utility's leadership. Therefore, the commenter asked that the Treasury Department and the IRS to clarify Tribally owned utilities (or those Tribally owned entities that do not have a "board," such as an LLC) meet the Ownership Criteria set forth in the Program. The commenter also stated that "Ownership" should stem from a Tribe's sovereign decision to construct a project rather than how a managing entity is structured and stated that Tribes should be able to attest to ownership control without further documentation. Several commenters included a similar statement. Another commenter further requested that the Tribe be considered the applicant and

not the LLC, but that the LLC should also be allowed to apply, if it is a disregarded entity, and wholly owned by the Tribe (or Tribal enterprise).

In response to these comments, the Treasury Department and the IRS have modified the definition of Tribal enterprise in the final regulations by providing that a Tribal enterprise for purposes of the Ownership Criteria is an entity that (1) an Indian Tribal government (as defined in section 30D(g)(9) of the Code) owns at least a 51 percent interest in, either directly or indirectly (through a wholly owned corporation created under its Tribal laws or through a section 3 or section 17 Corporation), and (2) is subject to Tribal government rules, regulations, and or codes that regulate the operations of the entity.

Several commenters requested revisions to the definition of QREC. One commenter requested that QREC be further defined but did not provide specific language to further define the term. Additionally, a few commenters recommended that the Treasury Department and the IRS change the “and” at the end of the list of requirements that a QREC must satisfy to “or” so that the applicant only needs to meet one requirement, inclusive of the general business purpose to serve low-income communities. One commenter added that this would be more inclusive for new market entrants. Another commenter requested that the criteria for QREC be modified to include trusts as individuals, and that the requirement that 51 percent of the equity interest be controlled by an individual be reduced to 45 percent or, alternatively, at least 25 percent employee owned, and that the second requirement be expanded to provide that the company must have less than 100 full time employees and less than \$30 million in annual gross receipts from the previous calendar year. The same commenter also suggested that the definition of a QREC be expanded to include public benefit corporations. One commenter suggested that Category 1(a) of the QREC definition, which currently reads as “one or more individuals,” should be replaced with “renewable energy cooperative,” claiming that this keeps the consistency of the definition with the previous section and requires more rigorous working agreements.

A few commenters variously commented on employee requirements for QRECs. Two commenters, also commenting on the gross receipts threshold, suggested that a QREC maintain less than 10 full time employees and less than \$30.4 million in annual gross receipts from the

previous calendar year. Another commenter stated that requiring a QREC to have fewer than ten full-time equivalent employees is excessively restrictive and unrealistic. This commenter also stated that the less than \$5 million threshold for annual gross receipts in the previous calendar year may be unrealistically low. One commenter stated that the small size requirement appears to be arbitrary and suggested that the Treasury Department and the IRS use the Small Business Administration (SBA) small business size and revenue requirement to promote small business entrants. Further, another commenter stated that imposing an additional requirement to employ workers in certain low-income communities would be too onerous. Additionally, one commenter stated that it is unclear whether the requirement to employ low-income persons would be applicable at the time of application or through the life of the project. This commenter requested that the Treasury Department and the IRS clarify that this requirement is applicable at the time of application, and then consider allowing State or Federally approved workforce training programs, supported through the project, as a means of qualification. However, another commenter, who generally opposed the inclusion of QRECs as an ASC Ownership Criteria category, requested that the Treasury Department and the IRS require such companies to enter into Community Workforce Agreements to ensure workers within low-income and disadvantaged communities benefit from the wealth building opportunities provided by the Program. This commenter also provided a list of the community benefits that should be incorporated into the commenter’s suggested agreements.

Additionally, one commenter stated that new market entrants are altogether barred from meeting this definition. Overall, the same commenter suggested as modification adding other consumer protection measures, minority- or women-owned business enterprise criteria, individual rather than company-based experience thresholds, and providing flexibility with regard to size, so as to enable more local clean energy business growth. A separate commenter also noted that new entrant companies, that would otherwise meet the QREC definition, will not qualify due to the specific experience requirement. Another commenter requested the Treasury Department and the IRS update the definition of QREC to include qualified rooftop lessors. This commenter provided an example of

projects installed by small businesses that otherwise meet the definition but are counterparties to a lease provided by a third-party project developer. This commenter said that many single-family residential rooftop facilities use third-party ownership (TPO) models to meet the requirements of section 48 but claims that in many States legal title to such facilities is not possible for entities meeting the definition of a QREC, which, by virtue of their small size, do not have access to a lease fund. One commenter also noted that many new market entrants have prior experience as part of other solar projects that they do not own and suggested that companies that have been subcontractors be included for criteria (3) and (4), and that the scope be broadened to be “any solar provider.” A Tribal comment letter also stated that the definition of a QREC is too limited and does not support newly formed entities that are owned in part by Tribes. This commenter claims that, prior to the IRA, Tribes were not able to create joint ventures to deploy solar or wind projects.

After consideration of all comments on the definition of QREC, the final regulations adopt some changes and do not adopt others. The Treasury Department and the IRS will maintain the inclusion of QREC in the final regulations. However, to provide increased flexibility and to encourage new market participants, the Treasury Department and the IRS have modified the QREC definition to allow for previous participation in a renewable energy project as a service provider (either as an individual or a company) to demonstrate a track record for serving low-income communities. While some commenters stated that brand new entities may not meet the criteria for QREC, the Treasury Department and the IRS developed the QREC criteria to support companies or entrepreneurs with a commitment and track record of serving low-income communities that have not been able to grow their market share. The Treasury Department and the IRS also increased the annual gross receipts threshold based on the comments and additional market research to allow for flexibility to growing companies that may still not have significant market-share. After careful assessment of all the proposals provided in the comments and current market information, the final regulations provide additional flexibility to new market entrants by modifying the requirements that a QREC would need to satisfy:

(1) At least 51 percent of the entity’s equity interests are owned and controlled by (a) one or more

individuals, (b) a Community Development Corporation (as defined in 13 CFR 124.3), (c) an agricultural or horticultural cooperative (as defined in section 199A(g)(4)(A) of the Code), (d) an Indian Tribal government (as defined in section 30D(g)(9)), (e) an Alaska Native corporation (as defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(m)), or (f) a Native Hawaiian organization (as defined in 13 CFR 124.3);

(2) Has less than 10 full-time equivalent employees (as determined under section 4980H(c)(2)(E) and (c)(4) of the Code) and less than \$20 million in annual gross receipts in the previous calendar year;

(3) First installed or operated a qualified solar and/or facility as defined in section 48(e)(2)(A) two or more years prior to the date of application; or

(4) Has provided solar services as a contractor or subcontractor to qualified solar or wind facilities as defined in section 48(e)(2)(A) with at least 100 kW of cumulative nameplate capacity located in one or more Low-Income Communities as defined in section 48(e)(2)(A)(iii)(I).

The Treasury Department and the IRS may consider other changes to the definition of a QREC in future guidance based on updated market information and what is administratively feasible for the Program.

Another commenter suggested that the definition of QREC be revised to provide that the 51 percent ownership requirement applies as an average over the life of the project because of tax credit equity partnerships that may change facility ownership for a period of time.

In response to these comments, the Treasury Department and the IRS have clarified through additional language in the final regulations that a partnership for Federal income tax purposes is eligible for ASC consideration so long as an entity that meets the Ownership Criteria has at least a one percent interest (either directly or indirectly) in each material item of partnership income, gain, loss, deduction, and credit of the partnership that owns the qualified solar or wind facility and is a managing member or general partner (or similar title) under State law of the partnership (or directly owns 100 percent of the equity interests in the managing member or general partner) at all times during the existence of the partnership. Therefore, there is no need to revise the 51 percent ownership requirement as it applies as an average over the life of the project as the commenter suggests. This also allows more flexibility for all applicants that

meet the Ownership Criteria to enter financing arrangements such as tax equity partnerships.

This commenter also suggested that the definition of Renewable Energy Cooperatives be revised to require not only that each member have an equal voting right, but also that each member have rights to profit distributions based on patronage as defined by the proportion of either (i) volume of energy or energy credits purchased (kWh), (ii) volume of financial benefits delivered (\$), or (iii) volume of financial payments made (\$), and in which at least 50 percent of the patronage in the qualified project is by cooperative members who are low-income households. The commenter noted that the second requested change clarifies that the Renewable Energy Cooperative as a whole does not need to be made up solely of low-income households, but only that for qualified projects that are seeking the Low-Income Bonus Credit, over 50 percent of the participating member interests (and corresponding member benefits) must accrue to households that qualify as low-income (as defined in section 48(e)(2)(C)).

One commenter stated, regarding Renewable Energy Cooperatives, that it may be difficult for cooperatives to ensure income verification of their members, and suggested adding eligibility pathways, potentially based on geography or charter documents, that retain an equity and justice focus while allowing greater flexibility.

Based on these comments, the Treasury Department and the IRS have modified the definition of Qualified Renewable Energy Cooperative in the final regulations to account for different energy cooperative models where profits could be distributed to members based on volume of energy, volume of financial benefits delivered, or volume of financial payments made. The modified language states that a Qualified Renewable Energy Cooperative is an entity that develops qualified solar and/or wind facilities and is either (1) a consumer or purchasing cooperative controlled by its members with each member having an equal voting right and with each member having rights to profit distributions based on patronage as defined by the proportion of either (i) volume of energy or energy credits purchased (kWh), (ii) volume of financial benefits delivered (\$), or (iii) volume of financial payments made (\$), and in which at least 50 percent of the patronage in the qualified project is by cooperative members who are low-income households (as defined in section 48(e)(2)(C)) or (2) a worker

cooperative controlled by its worker-members with each member having an equal voting right.

One commenter expressed that qualified tax-exempt entity should not include all section 501(c)(3) entities without additional guardrails. This commenter further suggests that if QRECs are required to submit documentation of "general business purpose," then section 501(c)(3) organizations applying as a qualified tax-exempt entity should be required to provide minimal documentation showing relevant charitable purposes. This commenter additionally requested clarification about the manner of application for tax-exempt entities in Puerto Rico and other territories. Similarly, one commenter noted that many large corporations have section 501(c)(3) organizations that could deploy renewable energy projects without tax credits but will be eligible under the definition in the Proposed Rules. This commenter proposed adding to the definition the following requirements: annual gross receipts of no more than \$30.4 million (consistent with recommendations for QRECs); prior experience owning, operating, or consulting on a renewable energy project; and an organizational mission statement and/or values that show alignment with the Program.

One commenter requested more clarity on how Tribal enterprises, as well as Tribal governments, political sub-divisions, and agencies or instrumentalities thereof under the qualified tax-exempt entity definition and Tribally owned QRECs can satisfy the Ownership Criteria.

The Treasury Department and the IRS have not adopted any changes in the final regulations regarding qualified tax-exempt entities. The addition of guardrails such as requiring a particular business or charitable purpose is infeasible. All tax-exempt organizations that qualify for ASC will need to demonstrate a charitable purpose through their tax-exempt designation. The Treasury Department and the IRS anticipate that a wide variety of qualified tax-exempt entities may participate in the Program that may include community-based organizations, educational institutions of all sizes, and State and local governments, among others. Accordingly, there is no one business or charitable purpose for qualified tax-exempt entities that would apply to the range of entities that support meeting the stated goals of the Program. The Treasury Department and the IRS may consider changes in future guidance based on updated market information

and what is administratively feasible for the Program. The Treasury Department and the IRS are also providing clarity through modifications in the definition of Tribal enterprise, and the circumstances in which Tribal governments, political sub-divisions, and agencies or instrumentalities thereof would meet the criteria of the qualified tax-exempt entity definition and other Ownership Criteria based on a variety of comments provided by Tribes.

#### B. Geographic Criteria

The Proposed Rules provided that the Geographic Criteria category is based on where the facility will be placed in service. To meet the Geographic Criteria, a facility would need to be located in a PPC<sup>7</sup> or in a census tract that is designated in the CEJST as disadvantaged based on whether the tract is either (a) greater than or equal to the 90th percentile for energy burden and is greater than or equal to the 65th percentile for low income, or (b) greater than or equal to the 90th percentile for PM<sub>2.5</sub> exposure and is greater than or equal to the 65th percentile for low income.<sup>8</sup> The Proposed Rules provided that applicants who meet the Geographic Criteria at the time of application are considered to continue to meet the Geographic Criteria for the duration of the recapture period, unless the location of the facility changes.

The Proposed Rules defined a PPC generally as any county where 20 percent or more of residents have experienced high rates of poverty over the past 30 years. For the purposes of the Program, the Proposed Rules provided that the PPC measure adopted by the USDA should be used to make this determination. The most recent measure, which would apply for the 2023 Program year, incorporates poverty estimates from the 1980, 1990, 2000 censuses, and 2007–11 ACS 5-year average.

Generally, commenters were supportive of the Geographic Criteria, including several commenters who had

concerns with Ownership Criteria. However, one commenter stated that the Geographic Criteria conflict with existing Federal housing policy because it would encourage facilities to be built in connection with housing in certain areas, rather than supporting low-income residents no matter where they live. Another commenter stated that the Geographic Criteria is imprecise because it does not take into account disadvantaged communities in certain areas, especially those that are highly disadvantaged but border affluent communities.

Several commenters on behalf of Tribes stated that Geographic Criteria should not be applied to Category 2 Projects. However, a few Tribal commenters asked that the Treasury Department and the IRS retain Geographic Criteria for Category 3 and Category 4 projects that are located on Indian land so that Tribal projects can better compete. In response to these comments, the Treasury Department and the IRS have decided to not include Geographic Criteria as an ASC for Category 2 but maintain the use of Geographic Criteria as an ASC as stated in the Proposed Rules in all other categories.

Another commenter provided several suggestions for revising the Geographic Criteria, stating that the Treasury Department and the IRS should consider broadening the Geographic Criteria by including all Indian land or not applying additional Geographic Criteria to them; adding LIHTC and New Markets Tax Credit designations; applying all or at least more of CEJST's burden thresholds as well as the Environmental Protection Agency's EJScreen's thresholds; allowing State screening tools and maps; providing for community self-nomination; or perhaps including adjacent tracts.

Another commenter, providing a comment on Category 3 projects, generally supported the use of Geographic Criteria to prioritize allocations, but recommended reconsideration of the use of the PPCs as a poverty measure. This commenter stated that the PPCs provide data at a county-level designation and that this masks significant variation within counties and does not capture persistent poverty within counties not registering as PPCs. This commenter instead recommended that the LIHTC Qualified Census Tract geographic definition be utilized as an option to determine whether a project meets the Geographic Criteria, stating that the QCT designation denotes census tracts where either (1) 50 percent or more of the households have an income less than 60

percent of the Area Median Gross Income, or (2) the poverty rate is over 25 percent. One Tribal commenter recommended that the Treasury Department and the IRS use a geographic determination based on the LIHTC, or the NMTC because Tribes have been using these to build new Tribal housing or invest in clean energy. Additionally, another commenter suggested that the Geographic Criteria should be expanded to include: disadvantaged communities in other burdened categories; a process for communities to be recognized as communities with environmental justice concerns based on State environmental justice screening tools; and a self-nomination process for communities to submit additional information to demonstrate that they are communities with environmental justice concerns that may not be captured by CEJST or other screening tools. This commenter additionally requested the provision of a publicly accessible mapping tool to identify the areas that meet the geographic criteria.

After consideration of these comments, the Treasury Department and the IRS have not adopted the suggestions. The intent of the Geographic Criteria as applied to Category 3 and to other categories is to encourage the construction of energy facilities in areas across the country that have high energy costs and that might otherwise suffer from underinvestment. This includes areas of the country where affordable housing currently exists but where the adoption of renewable energy technology may be challenging. The Treasury Department and the IRS have determined ASC based on their applicability across all categories. While LIHTC Qualified Census Tract as a Geographic criteria may meet some goals of the program, it is a methodology that is used primarily in the LIHTC industry and not widely known or used by other housing programs or in energy programs. Therefore, its inclusion as a Geographic Criteria is not adopted. Additionally, an allocation based on Geographic Criteria in Category 3 for a facility built in connection with an existing Federally subsidized housing building does not impact the Federal housing policy with regards to siting of the housing itself. The Treasury Department and the IRS may consider other metrics for Geographic Criteria in future guidance that help achieve the Program goals and are administratively feasible for the Program. A publicly accessible mapping tool will be available on DOE's Program website.

<sup>7</sup> <https://www.ers.usda.gov/data-products/poverty-area-measures/>.

<sup>8</sup> <https://screeningtool.geoplatform.gov/en/#/33.47/-97.5>. The CEJST website provides further detail on the terms used in identifying census tracts for the Energy category. "Energy cost" is defined as "Average household annual energy cost in dollars divided by the average household income." PM<sub>2.5</sub> is defined as "Fine inhalable particles with 2.5 or smaller micrometer diameters. The percentile is the weight of the particles per cubic meter." "Low income" is defined as "Percent of a census tract's population in households where household income is at or below 200% of the Federal poverty level, not including students enrolled in higher education." See Methodology & data—Climate & Economic Justice Screening Tool ([geoplatform.gov](https://geoplatform.gov)).

### *IX. Sub-Reservation of Allocation for Facilities Located in a Low-Income Community*

The Proposed Rules provided that the 700 MW Capacity Limitation reservation for facilities seeking a Category 1 allocation would be sub-divided with 560 MW reserved specifically for eligible residential BTM facilities, including rooftop solar. The Proposed Rules provided that the remaining 140 MW of Capacity Limitation would be available for applicants with FTM facilities as well as non-residential BTM facilities.

Several commenters opposed to the reservation of capacity in Category 1 for BTM residential facilities. Generally, these commenters requested that the 560 MW capacity reserved for BTM residential facilities be eliminated (leaving a general 700 MW reservation) or that the amounts should be revised. The main concern of commenters is that the proposed 140 MW will provide very limited eligibility for FTM projects, including community solar projects that would otherwise qualify under the statute. One commenter strongly recommended against subdividing the Category 1 Capacity Limitation into BTM and FTM MW blocks. This commenter stated that a BTM project typically requires a credit review and/or a long-term financial commitment from the customer, which the commenter believes is antithetical to the objective of a Program intended to ease financial burdens on low-income households, not impose them. The commenter suggested to instead require that a certain percentage of all generating facilities' capacity be allocated to low-income, residential subscribers. Another commenter pointed out that location is the only requirement in Category 1 under the statute, and that the focus on BTM residential facilities does not fit with the statute.

Other commenters have noted that this focus on BTM residential facilities limits the potential of other applicants to benefit from Category 1. For example, at least two commenters have noted that the prioritization of residential facilities limits the potential for non-profit organizations and municipalities from obtaining an allocation for facilities built to power schools, libraries, food pantries, shelters, houses of worship, education facilities, local community-based non-profits, assisted living facilities, performing arts centers, and community development corporations. One of these commenters explains that these organizations play crucial roles in their communities, providing necessary services and support to the residents of

the surrounding area, and the sub-reservation overlooks the fact that commercial and industrial scale solar benefits may be more impactful. In arguing against the sub-reservation, another commenter noted the belief that Category 1 should be reserved specifically for facilities that are "Located in a Low-Income Community," which directly benefit the residents of that community. As an alternative, the commenter asks that non-profits, public facilities, and municipalities be included in the larger sub-reservation. Another commenter, in its suggestion to revisit this sub-reservation, stated their view that community facilities represent the "highest and best use" of the 10 percent low-income adder from the standpoint of ensuring meaningful community benefit. Similarly, another commenter stated that the reservation of 560 MW exclusively for residential BTM ignores the fact that most agrivoltaic and agribusiness BTM projects that benefit farmers (and thus consumers) would also benefit from Category 1. This commenter states that the benefit of using renewable energy solar and storage is an emerging renewable agribusiness industry that would benefit America significantly by lowering energy input costs and lowering food prices for the nation by extension.

One commenter suggested to amend the requirements from focusing on FTM versus BTM to instead distinguish "on-site usage of credits" from "off-site usage of credits" to more accurately prioritize residential projects. Similarly, another commenter had concerns with the limitation of defining residential rooftop solar as BTM. The commenter appreciated the efforts to set aside an allocation for residential rooftop solar, but the commenter believed that the Proposed Rules go too far by defining residential rooftop solar as solely BTM. This commenter explained that Connecticut's regulated utilities offer a FTM solar tariff for residential and commercial solar projects and that FTM residential solar projects, though somewhat rare in Connecticut, are particularly attractive for projects in low-income communities. Therefore, this commenter suggested an updated definition that accounted for single family or multi-family residential that does not qualify under Category 3 and has a maximum net output (and is not limited as BTM). Another commenter noted that BTM arrangements are not achievable in States like Vermont and offered suggestions for redefining BTM.

Commenters had other suggestions on how to handle the sub-reservations in Category 1. One commenter

recommended expanding the criteria for qualifying Category 1 projects to allow 600 MW (85 percent) of the allocated MW for FTM facilities. Another commenter noted that if the concern is that the 700 MW capacity allocation will be monopolized by businesses in low-income areas, the rules could reserve a portion of the total allocation for businesses, but that the rules should consider a larger reservation for commercial and industrial scale solar projects for non-profit community organizations, public entities, and other impactful entities that play a key role in these low-income communities. This commenter suggests considering, in addition to the 140 MW reservation for businesses, a 280 MW carve out for residential solar and a separate 280 MW carve out for community-based not-for-profit organizations. Another commenter suggested a sub-allocation of at least 400 MW for BTM installations at community facilities.

One commenter suggested that if the 560 MW amount cannot be changed, the rules should allow any facility that serves at least 50 percent residential customers to qualify. This commenter noted that the goal of the sub-reservation is a laudable intent, but that community solar, though predominantly deployed FTM, is also positioned to serve residential customers, especially low-income customers. Another commenter recommended altering the sub-reservations by providing a third sub-reservation in Category 1 of at least 150–200 MW for eligible community solar projects that are located on (non-residential) rooftops or parking lots in low-income communities, are less than 1 MW, reserve at least 50 percent of off-take for low-income households, and offer a minimum 20 percent discount to low-income subscribers.

Two commenters had additional concerns with Category 1, particularly related to consumer protections for residential customers. While this commenter is opposed to prioritization of residential rooftop solar over other types of solar installations within Category 1, the comment implied this is because of serious consumer protection issues associated with how these allocations are being implemented by the private marketplace. This commenter provided an example of solar installers telling potential customers that the IRS will send them a check for 70 percent of the cost of the solar installation if they sign up with the installer. Therefore, this commenter encourages the Treasury Department and the IRS to be vigilant and to ensure that companies awarded these credits are held accountable within the scope of

the Treasury Department and the IRS’s authority.

After consideration of the comments recommending elimination or significant modification of the rules regarding the Category 1 sub-reservation, the comments are not adopted. The purpose of the residential BTM sub-reservation is to preserve capacity for projects that directly benefit residential customers and would not otherwise be eligible for Category 3 or Category 4, while also recognizing the large and established market share of companies using the TPO single-family residential business model. Additionally, residential BTM (of which the majority is expected to be single-family) have faster development timelines, allowing this capacity to be efficiently allocated. Moreover, a separate set-aside allows like-projects to compete for capacity and will allow for more streamlined application processing.

Accordingly, the final regulations provide that the Program includes a sub-reservation for eligible BTM residential facilities but clarifies that the specific amount of the sub-reservation for a Program year will be provided in guidance published in the Internal Revenue Bulletin. The final regulations also clarify that the amount of the sub-reservation is established based on factors such as promoting efficient allocation of Capacity Limitation and allowing like-projects to compete for an allocation. Revenue Procedure 2023–27 provides the Category 1 sub-reservation for eligible BTM residential facilities for the 2023 Program year.

In response to the commenters’ concerns about restrictions on FTM facilities and the ability of community facilities to apply for Category 1, FTM community facilities serving residential customers may apply for an allocation of the remaining Capacity Limitation in Category 1 and receive a section 48(e) Increase of 10 percentage points, assuming they do not meet Category 4 requirements, or apply for an allocation under Category 4 if they meet all of the requirements of Category 4 and receive a section 48(e) Increase of 20 percentage points. The Treasury Department and

the IRS note that the rules do not impose additional requirements on Category 1 beyond the statutory location requirement, given the importance of creating an objective and administrable process that will allow taxpayers to quickly receive feedback on their applications. However, the Treasury Department and the IRS seek to encourage community solar projects to apply in Category 4 as opposed to Category 1 because, although Category 1 facilities must be located in low-income communities, they do not necessarily have to serve low-income customers and do not have to comply with Category 4 financial benefits requirements. Therefore, directing more community solar projects to Category 4 where there is a protected set aside of 700 MW better promotes programmatic goals.

In response to comments, the Treasury Department and the IRS agree that the 560 MW carve-out for residential BTM limits the potential for community organizations such as non-profit organizations and municipalities that serve communities from obtaining an allocation, and they will need to compete for limited capacity with for-profit nonresidential businesses (and all other projects that are located in a low-income community). As a result, the Treasury Department and the IRS modified the Category 1 sub-reservation for BTM residential in Revenue Procedure 2023–27 to reduce this sub-reservation to 490 MW for the 2023 Program. Therefore, a larger portion of the Capacity Limitation in Category 1 (210 MW) will be available to FTM and non-residential BTM projects. The Treasury Department and the IRS may change this sub-reservation amount for future years.

The Proposed Rules defined a FTM facility as a facility that is directly connected to a grid, and its sole purpose is to provide electricity to one or more offsite locations via such grid; alternatively, FTM is defined as a facility that is not BTM.

The Proposed Rules defined an eligible residential BTM facility as single-family or multi-family residential qualified solar or wind facility that does not meet the requirements for Category

3 and is BTM. A qualified wind and solar facility is BTM if: (1) it is connected with an electrical connection between the facility and the panelboard or sub-panelboard of the site where the facility is located, (2) it is to be connected on the customer side of a utility service meter before it connects to a distribution or transmission system (that is, before it connects to the electricity grid), and (3) its primary purpose is to provide electricity to the utility customer of the site where the facility is located. This also includes systems not connected to a grid and that may not have a utility service meter, and whose primary purpose is to serve the electricity demand of the owner of the site where the system is located. Commenters requested clarification on the meaning of “residential.”

The final regulations generally adopt the definition of BTM from the proposed rules, but the final regulations clarify that a qualified solar or wind facility is residential if it generates electricity for use in a dwelling unit used as a residence. The final regulations also clarify that a facility is FTM if it is directly connected to a grid and its primary purpose is to provide electricity to one or more offsite locations via such grid or utility meters with which it does not have an electrical connection; alternatively, FTM is defined as a facility that is not BTM. For the purposes of Category 4, a qualified solar or wind facility is also FTM if 50 percent or more of its electricity generation on an annual basis is physically exported to the broader electricity grid.

*X. Application Process*

A. Documentation and Attestations

The Proposed Rules provided the general framework for evaluating applications for Capacity Limitation, including that applicants would be required to submit with each application certain information, documentation, and attestations specified in Program guidance.

The Proposed Rules described the following required documents and attestations.

**DOCUMENTATION AND ATTESTATIONS TO BE SUBMITTED FOR ALL FACILITIES**

	FTM	BTM ≤1 MW AC	BTM >1 MW AC
<b>Proposed Document Requirement</b>			
An executed contract to purchase the facility, an executed contract to lease the facility, or an executed PPA for the facility.	No .....	Yes .....	Yes.
A copy of the final executed interconnection agreement, if applicable <sup>9</sup> .....	Yes .....	No .....	Yes.

DOCUMENTATION AND ATTESTATIONS TO BE SUBMITTED FOR ALL FACILITIES—Continued

	FTM	BTM ≤1 MW AC	BTM >1 MW AC
<b>Proposed Attestation Requirement</b>			
The applicant has site control through ownership, an executed lease contract, site access agreement or similar agreement between the property owner and the applicant.	Yes .....	No .....	No.
The facility has obtained all applicable Federal, State, Tribal, and local non-ministerial permits, or that the facility is not required to obtain such permits.	Yes .....	Yes .....	Yes.
The applicant is in compliance with all Federal, State, and Tribal laws, including consumer protection laws (as applicable).	Yes .....	Yes .....	Yes.
The applicant has appropriately sized the facility (to meet no more than 110 percent of historical customer load).	No .....	Yes .....	Yes.
The applicant has appropriately sized the customer’s facility output share and has based facility output share on historical customer load.	Yes .....	No .....	No.
The applicant has inspected installation sites for suitability (for example, roofs) .....	Yes .....	Yes .....	Yes.

DOCUMENTATION AND ATTESTATIONS TO BE SUBMITTED FOR CERTAIN FACILITIES DEPENDING ON CATEGORY AND ASC

	Category 1	Category 2	Category 3	Category 4
<b>Proposed Document Requirement</b>				
Documentation demonstrating property will be installed on an eligible residential building.	No .....	No .....	Yes .....	No.
Plans to ensure tenants receive required financial benefits .....	No .....	No .....	Yes .....	No.
<i>If applying under ASC:</i> Documentation demonstrating applicant meets Ownership Criteria.	Yes .....	Yes .....	Yes .....	Yes.

<b>Proposed Attestation Requirement</b>				
Facility location is eligible <sup>10</sup> .....	Yes .....	Yes .....	No .....	No.
Consumer disclosures informing customers of their legal rights and protections have been provided to customers that have signed up and will be provided to future customers.	Yes .....	Yes .....	Yes (provided to tenants).	Yes.
The applicant will ensure at least 50 percent of the facility’s total output will be provided to qualifying low-income households and that each receive at least a 20 percent bill credit discount rate.	No .....	No .....	No .....	Yes.
<i>If applying under ASC:</i> Facility location is eligible based on PPC/CEJST .....	Yes .....	No .....	Yes .....	Yes.

The final regulations adopt the requirement that applicants must submit specified information, documentation, and attestations to demonstrate Program eligibility and project viability but clarify that the specific information, documentation, and attestations will be provided in guidance published in the Internal Revenue Bulletin. For the 2023 Program year, Revenue Procedure 2023–27 provides the application requirements. The specific information,

<sup>9</sup> If an interconnection agreement is not applicable to the facility (for example, due to utility ownership), this requirement is satisfied by a final written decision from a Public Utility Commission, cooperative board, or other governing body with sufficient authority that financially authorizes the facility. If the facility is located in a market where the interconnection agreement cannot be signed prior to construction of the facility or interconnection facilities, this requirement is satisfied by a signed conditional approval letter from the jurisdictional utility and an affidavit from a senior corporate officer of the applicant (or someone with authority to bind the applicant) stating that an interconnection agreement cannot be executed until after construction of the facility.

<sup>10</sup> Facility location would be reviewed using latitude and longitude coordinates when possible.

documentation, and attestations that applicants are required to submit may get updated in future Program guidance for Program years following 2023.

In developing the application requirements for the 2023 Program year provided in Revenue Procedure 2023–27, the Treasury Department and the IRS carefully considered the comments submitted in response to the Proposed Rules.

One commenter requested that the Treasury Department and the IRS design the application intake mechanism to allow for bulk application submissions, including attestations. For example, the commenter stated that applicants could potentially be allowed to submit a spreadsheet for many projects at one time, along with required attestations. The commenter also cited to the efficient allocation language at section 48(e)(4)(A), which states “. . . the Secretary shall provide procedures to allow for an efficient allocation process, including, when determined appropriate, consideration of multiple projects in a single application if such

projects will be placed in service by a single taxpayer.”

One commenter cited to the language in the Proposed Rules that states a Category 1 or Category 2 facility that also qualifies as a Category 3 or Category 4 facility is considered a Category 3 or Category 4 facility, and requested that these facilities be automatically reviewed under Category 1 if their application is denied for an allocation in Category 4. As provided in Revenue Procedure 2023–27, the Treasury Department and the IRS will not move applications from the category and sub-reservation under which the facility owner applied for an allocation. The statement the commenter cited was intended to remind applicants that if their facility meets the requirements under Category 1 or 2 and under Category 3 or 4, the applicant should apply under Category 3 or 4, as applicable, to be considered for the section 48(e) Increase of 20 percentage points. Additionally, as provided in Notice 2023–17 and Revenue Procedure 2023–27 each applicant may only apply

for consideration of its facility, or for each facility if the applicant owns multiple facilities, under one category in 2023. If the facility is not awarded an allocation under the category in which the applicant applies, the facility will not be considered for an allocation in another category.

#### 1. Permits

Several commenters were concerned with the required attestation that the facility has obtained all applicable Federal, State, Tribal, and local non-ministerial permits, or that the facility is not required to obtain such permits. A few commenters suggested alternatively that the rule instead require applicants to provide sufficient documentation that the project “expects to receive” or has received all necessary permits to comply with and Federal, State, or local requirements. Another commenter uses the phrase “proof of initiating” in its suggestion.

Commenters provided reasons for their concerns about the required permits. For example, a commenter stated that the requirement to have all necessary permits in place as a requirement for application (given the limited application window) as out of their direct control and not necessary given the other requirements of the guidelines. Another commenter considering the same issue noted that because there is tremendous variation in the scope and applicability of State and local permit requirements that eligible projects may be subject to depending on their geographic location, a completed permit requirement would serve to disqualify projects in locations that have suitable and appropriate permitting requirements and potentially advantage projects either already advancing without the benefit of Federal support or projects in jurisdictions with the lowest State and local permitting requirements.

Additionally, commenters requested guidance on the definition of non-ministerial permits. For example, a commenter requested clarity on whether “local non-ministerial permits” includes such things as building and/or electrical permits. The commenter noted their agreement with the need to ensure applications for projects that are likely to move forward but that obtaining such permits requires significant expenditure of funds and investment of time in a project and that if all permits are required, many developers will be unlikely to invest in projects that need the low-income community bonus credit. Other commenters assumed building permits are required as non-ministerial permits and noted their

disagreement with the requirement. Another commenter suggested that the Treasury Department and the IRS should clarify whether the appeals period for non-ministerial permits must have lapsed prior to application submission. Finally, a commenter noted that given the uncertainty of a competitive program, projects should not be required to secure building permits. Another commenter said rooftops particularly should not require building permits in the application. Further, one commenter requested that if a roof is found to be unsuitable for installation of a facility, after an inspection, that the application to the Program allow for the inclusion of a scope of work contract to make the roof suitable, in lieu of attesting that the roof is suitable. The commenter additionally requested that the cost of such construction work be allowed to be included in the cost of the overall installation.

The Treasury Department and the IRS considered these comments but determined that a standard such as “expects to receive” or has “proof of initiating” with respect to required permits is not enough to demonstrate sufficient project maturity to give assurances of the viability of the project. As explained in the Proposed Rules, section 48(e)(4)(A) directs the Secretary to provide procedures to allow for an efficient allocation process. Additionally, section 48(e)(4)(E)(i) requires that facilities allocated an amount of Capacity Limitation be placed in service within four years of the date of allocation. Therefore, as explained in the Proposed Rules, the Treasury Department and the IRS determined that to promote efficient allocation and to ensure that allocations will be awarded to facilities that are sufficiently viable and well defined to allow for a review for an allocation and sufficiently advanced such that they are likely to meet the four-year placed in service deadline, applicants are required to submit certain documentation and attestations when applying for an allocation. This requirement includes an attestation that the facility has obtained all applicable Federal, State, Tribal, and local non-ministerial permits, or that the facility is not required to obtain such permits, which demonstrates completion of a critical project milestone.

In response to the concerns commenters raised regarding the lack of clarity with respect to the definition of non-ministerial permits, the Treasury Department and the IRS included the following definition of non-ministerial permits in Revenue Procedure 2023–27,

clarifying that building and electrical permits are not considered non-ministerial permits. Revenue Procedure 2023–27 provides that non-ministerial permits are defined as: “Permits in which one or more officials or agencies consider various factors and exercise some discretion in deciding whether to issue or deny permits. This does not include ministerial permits based upon a determination that the request complies with established standards such as electrical or building permits. Non-ministerial permits typically come with conditions and usually require public notice or hearings. Examples of non-ministerial permits include local planning board authorization, conditional use permits, variances, and special orders.” Lastly, on the question of whether the appeals period for non-ministerial permits must have lapsed prior to application submission, the lapse of this period is not a requirement for application submission.

With respect to the comment about unsuitable roofs, applicants will continue to be required to attest that the location of the qualifying facility has been determined suitable for installation at application, to give assurances of the viability of the project. Additionally, the Treasury Department and the IRS cannot accommodate the request for the cost of roof repairs to be includable in the overall cost of the project, presumably, so that the repair costs are eligible costs for determining the bonus credit amount. The statutory language provides for the energy percentage increase with respect to eligible property that is part of a solar or wind facility. The roof of a building is not part of a solar or wind facility, and therefore, costs associated with building improvements are not includable in the basis of the solar or wind facility to determine the section 48(e) Increase.

#### 2. Interconnection Agreements

Several commenters disagree with the documentation requirement in the Proposed Rules that for FTM and BTM larger than 1 MW, a copy of the final executed interconnection agreement, if applicable, is required. Commenters suggested that requiring negotiated or approved interconnection agreements is premature for the first application period. Some commenters suggested an interconnection proxy, such as a submitted interconnection application or some other documentation from the utility that acknowledges the interconnection process has formally begun.

Many commenters noted practical considerations. For example, a commenter pointed out that an executed

interconnection agreement and all applicable permits are typically received up to the date (and often after) a financial closing on a transaction occurs; it is not anticipated that a debt and equity investor will close on financing without prior receipt of an award letter by the IRS. Therefore, the commenter argues that requiring such documents at time of application will slow down the development process, increase the cash requirements of a developer prior to financial closing, and lengthen the construction timing. The commenter instead suggests that these documents be required when the facility is placed in service. As an alternative for the application, this commenter suggests requiring teaming agreements be in place and that each of the teaming parties provide a resume outlining at least 3 years of experience obtaining permits and interconnection agreements within the specified jurisdictions along with the number of renewable energy facilities that each of the parties has placed in service in such jurisdictions. Echoing that concern, another commenter suggested that this requirement of mandating signed interconnection agreements sets a high bar and would only make the Program accessible to those developers with financing readily available for upgrades before being accepted into the Program. Another commenter provided that an applicant should not be disadvantaged due to stricter requirements on permitting and interconnection agreements in one locality versus another. Another commenter said that by requiring eligible projects to submit final executed interconnection agreements, the Treasury Department and the IRS prevent taxpayers in certain States from being able to apply for capacity under the Program. The commenter explained that in California, Connecticut, North Carolina, and Washington, DC, utilities often do not execute or sign interconnection service agreements until after a project has received permission to operate (PTO). The commenter noted that a footnote in the Proposed Rules elaborates that if a taxpayer is not able to present a signed interconnection agreement, the taxpayer can instead submit a final written decision from the Public Utilities Commission or other governing body or a signed conditional interconnection approval letter that authorizes the facility. However, the commenter said that these alternatives to providing an executed interconnection agreement are infeasible in States and regions like those listed. The commenter suggests as an alternative to the proposed

rulemaking, the Treasury Department and the IRS should allow taxpayers to submit an unsigned or customer-signed contingent approval to interconnect for projects located in utility zones that don't provide executed interconnection agreements until PTO.

Other commenters suggested additional alternatives. For example, instead of an executed interconnection agreement, a commenter suggested allowing FTM facilities to submit interconnection applications and studies. Another commenter also suggested proof of an interconnection application stating it should be adequate given the differing processes across utilities districts (which reiterates the comment earlier describing limitations in certain States and Washington, DC). Another suggestion for a larger project is proof that such project has an active queue position and an attestation from the applicant that the project is not in default, payment or otherwise, with the relevant transmission and distribution companies. This commenter pointed out that with the time required, most applicants with an actual executed interconnection agreement started their projects before the IRA was enacted. This commenter suggested that for future application rounds for larger projects, an "executed interconnection agreement" may be a more feasible expectation. Another commenter similarly suggested that projects that are actively in the queue for interconnection, and projects with a proposed timeline for site interconnection application should suffice. Lastly, a commenter recommended that for BTM projects smaller than 1 MW, a "limited notice to proceed" with an EPC (engineering, procurement and construction) contractor authorizing the EPC to produce a design for a renewable energy facility and apply for interconnection should be considered adequate documentation in lieu of an executed contract to purchase the energy facility.

The Treasury Department and the IRS considered these comments but ultimately decided not to make a change to the interconnection agreement requirements, and the proposed requirements are included in Revenue Procedure 2023–27. For the same reasons explained earlier under part X.A.1. of this Summary of Comments and Explanation of Revisions section, the interconnection agreement documentation requirements are necessary to achieve Program goals including ensuring applications represent mature, viable projects. In response to the comment that these projects with executed interconnection

agreements would have begun prior to the implementation of the IRA, the Treasury Department and the IRS believe that this issue will be mitigated as the Program progresses.

Additionally, in response to the commenters who raised scenarios where interconnection agreements are not possible or feasible, footnote 9 of the Proposed Rules explained that if the facility is located in a market where the interconnection agreement cannot be signed prior to construction of the facility or interconnection facilities, the interconnection agreement requirement is satisfied by a signed conditional approval letter from the jurisdictional utility and/or an affidavit from a senior corporate officer of the applicant (or someone with authority to bind the applicant) stating that an interconnection agreement cannot be executed until after construction of the facility. The Treasury Department and the IRS determined that this alternative provided in the Proposed Rules covers the scenarios identified by commenters. Lastly, a commenter requested clarification if an interconnection service agreement (ISA) is amended after submission of the initial application, whether this amendment must be submitted to the Treasury Department and the IRS. Details on these procedural requirements will be provided in later Program information.

### 3. 110 Percent Historical Customer Load

Generally, commenters requested eliminating the attestation that the applicant has appropriately sized the facility (to meet no more than 110 percent of historical customer load). One commenter stated that many utility rules for net metering already have a limit (typically 125 percent), and the Program rules should defer to those local rules. The commenter said these limits can be verified or validated through the approved interconnection agreement (or utility approval of rooftop solar projects). Furthermore, this commenter, similar to others described previously, agrees with the idea that size should be able to increase noting that if a Tribal housing authority or Tribal member also implements electrification efforts, the electric load of a Tribal residence will increase and that rooftop solar projects should be allowed to "oversize" with the expectation that the load will increase.

At least one commenter recognized that the purpose of a limitation may be to prevent abuse or waste in connection with the ability to claim section 48 credits, but the commenter anticipated there would also be renewable energy projects that could feasibly produce and

benefit from more than 110 percent of historical customer load. Another commenter argued that after the IRA, energy usage is likely to increase with the adoption of heat pump technology, electric vehicle chargers, and induction stoves, for example, so applicants need to build solar facilities that account for increased future usage. The commenter believed that the flexibility to oversize facilities relative to customers' current demand could be a way to provide direct financial benefits to residents of affordable housing properties noting that the commenters' particular technology allows facilities to maximize the size of the roof to produce net energy metering credit beyond the host properties' consumptions. The commenter explained the credits can then be allocated to qualifying low-income customers in the surrounding neighborhood including those who live in buildings that cannot support solar facilities. Similarly, focusing on arguments that the limitation prevents greater benefits to low-income individuals, another commenter agreed that facility sizing requirements should be set at the local/utility level and not specified in the Program requirements because limiting the size of the facility will reduce the benefits available to tenants. Another commenter mentioned the need to expand the limitation due to the need to accommodate the installation of defined electrification projects.

Another commenter gave additional reasons why it views the limitation as problematic noting that a Category 3 residential building may have multiple historical customer loads; this concept of limiting facility size to historical customer loads has previously been proposed to reduce the size of onsite solar facilities, limit financial benefits, and hinder overall distributed generation, which contradicts the intent of the statute; and that a limit to BTM facilities creates significant inconsistencies with other provisions of guidance referring to the fact that in certain States a Category 3 facility may only be allowed to interconnect to the local utility grid through a BTM configuration and this rule might be inconsistent with the requirement on 50 percent financial benefits.

Comments on behalf of Tribal entities also disagreed with the limitation. These commenters said that for Tribal housing clean energy projects that qualify under Category 3, the rule should not limit the size of a BTM project to 110 percent of load. Additionally, one commenter stated that many utility rules for net metering already have a limit (typically 125

percent of historical load) and another commenter said that several States permit facilities of up to 200 percent historical load, and the rules should defer to those local rules. The commenter said these limits can be verified or validated through the approved interconnection agreement (or utility approval of roof top solar projects). Furthermore, this commenter, similar to others described previously, agrees with the idea that size should be able to increase, noting that if a Tribal housing authority or Tribal member also implements electrification efforts the electric load of a Tribal residence will increase and that rooftop solar projects should be allowed to "oversize" with the expectation that the load will increase.

While some commenters recommended removing the limitation, other commenters suggested modifications. One commenter suggested slightly increasing the historical customer load limitation to 120 percent based on rules in place in Minnesota for BTM facilities. Another commenter seemed to agree with keeping the attestation but removing the limit, noting that the rules simply require attestation that the project is appropriately sized based on applicable State and local solar program or utility interconnection rules, which they generally must already comply with, and that this would better accommodate concurrent or future additions of electrical load. Another commenter agreed with keeping the attestation and removing the limitation but noted that if the 110 percent of historical customer load requirement is retained, it should be clarified to allow for reasonable estimates of customer usage in cases where the customer does not have a full 12 months of historical usage at the specific location. Lastly, one of the commenters suggested as an alternative, and to maintain a rule that will preclude gaming, the following attestation requirement along the lines of the Category 4 attestation: "For any facility that is projected to produce more than 110 percent of the its host property's historic annual kWh energy consumption, the applicant will ensure that either (A) any exported kWh will be provided to occupants of a qualified residential property at a 20 percent or greater bill credit discount related to the host property's volumetric export compensation rate for solar kWh, or (B) the applicant has reasonably accounted for an anticipated increase of the applicable building's energy consumption." Similarly, another commenter also thought the attestation

for Category 3 should be similar to that for Category 4 noting that "applicants should not be constrained to "110 percent of the historical customer load" for rooftop projects for Categories 3 and 4. A more reasonable approach would be to size the "customer's facility output share" appropriately as is proposed for FTM projects.

One commenter asked for clarification on how the Treasury Department and the IRS plan to define "appropriately sized" for purposes of the requirement applicable to FTM projects that the "applicant has appropriately sized the customer's facility output share and has based facility output share on historical customer load." This commenter suggested as an example that their standard process for determining subscribers' allocation sizing is to size allocations at 85–90 percent of the customer's 12-month historical average kWh usage. The final regulations will not adopt a more detailed standard on this term and will use a reasonableness approach on whether an output share is appropriately sized.

In response to these comments, the Treasury Department and the IRS believe that the attestation for BTM facilities related to the host properties' historic energy usage should be retained to prevent Capacity Limitation allocations from going to facilities that are oversized. However, the Treasury Department and the IRS recognize the need to modify the attestation requirement to account for future load projections and to not limit sizing to 110 percent where State and local requirements may allow for more. Accordingly, Revenue Procedure 2023–27 includes the following revised attestation requirement: "The applicant has appropriately sized the facility, or the customer/offtaker subscriptions will be sized to meet the customer's energy needs, considering historical customer load and/or reasonable future load projections, in accordance with applicable State and local requirements."

#### 4. Tribal Documentation Requirements

Some Tribal commenters requested modifications specifically regarding Tribal documentation requests. Commenters stated that development on certain Category 2 Indian land are subject to Tribal approval and regulatory authority and involve the co-management of the Department of Interior. To ensure applicants on Indian land understand documentation requirements, these commenters requested that the attestation requirements reflect a Tribal approval or a Tribal resolution for projects on lands

subject to Tribal civil jurisdiction under 25 U.S.C. 3501(2)(A)–(B).

The United States has a trust relationship with Tribal governments whereby the Federal government manages certain Indian land for Tribal governments and Tribal citizens as the beneficial owners based on the cessation of Tribal lands.<sup>11</sup> As a component of this relationship, Tribal governments are recognized as nations with inherent sovereignty and the ability to exercise criminal and civil jurisdiction over lands classified as Indian Country, which includes all lands identified in 25 U.S.C. 3501(2)(A)–(B).<sup>12</sup> This civil authority includes the right to regulate activities on their lands including taxation, and the ability to condition consent for development on Indian land via regulatory processes that might include approvals, permitting, and the right of exclusion.<sup>13</sup> With regard to land described in 25 U.S.C. 3501(2)(C), Alaska Native Corporations have management and regulatory authority over their lands under the Alaskan Native Claims Settlement Act.<sup>14</sup> Because Tribal governments and Alaska Native Corporations must approve development on Indian land described in 25 U.S.C. 3501(2)(A)–(C) under existing legal authorities, the comment to include Tribal approval as an attestation requirement for applications for a Category 2 allocation on such lands is adopted.

One commenter also suggested that Tribally owned qualified solar or wind facilities have priority [for an allocation] over other third-party facility owners with respect to Category 2. Another commenter stated that Category 2 allocation should be fully reserved (not 50 percent reserved) for projects that meet the Tribal Ownership Criteria.

Commenters provided that projects owned directly by a Tribe, Tribal enterprise, Tribal utility, or Tribal housing authority, regardless of the category, should not have to comply with certain documentation and attestation requirements, such as site control, customer disclosures, benefit sharing agreement requirements, leases, contracts to purchase, PPAs (which should only be required if the project is structured to include a third-party owner), permits, and compliance with Tribal law. Another commenter agreed

that for transactions not involving third parties, Tribes should not be required to provide certain application or attestation documents, and that Tribes should be able to self-certify that qualifying projects are compliant. Other Tribal commenters support the ability to self-certify and additionally advised the Treasury Department and the IRS not to rely on external census data to track poverty levels on Indian land. Similarly, another commenter agreed that documentation requirements should be tailored for Category 3 and Tribal-enterprise owned projects should be allowed more flexibility, based on Tribal recommendations.

The Treasury Department and the IRS considered these comments but did not adopt them in Revenue Procedure 2023–27 because, as explained in the Proposed Rules, the documentation and attestation requirements are critical for all projects to ensure an efficient allocation process (that is, to ensure that projects receiving an allocation are viable and can satisfy Program requirements). Moreover, some of the requirements, such as site control, permits, and compliance with Tribal laws are attestations that merely require Tribal entities to attest that the Program requirements are satisfied, similar to self-certification.

##### 5. Other Documentation Requirements

A commenter suggested that the Treasury Department and the IRS require applicants to submit documentation that they have received (or have contracted with a service provider that will be handling beneficiary personally identifiable information and that has received) a third-party cybersecurity assessment against a technology industry-standard framework such as SOC 2 Type II (sponsored by the American Institute of Certified Public Accountants), and that the assessment does not include unaddressed or unremediated material findings.

The Treasury Department and the IRS recognize that the Program requires information and documentation that may contain confidential information. The IRS and DOE are following all required protocols to protect information submitted to the IRS or DOE. However, the Treasury Department and the IRS think that it would be administratively impractical to impose cybersecurity assessment requirements on applicants, so this suggestion is not included in Program guidance.

Another commenter provided that the final regulations should confirm that executed contracts and other documents

containing personally identifying and/or business confidential information submitted in connection with the applications constitute trade secrets and/or commercial or financial information that is exempt from disclosure under the Freedom of Information Act (FOIA).

After consideration of this comment, it is not adopted in these final regulations. Commenting on the IRS, DOE, or the Treasury's Department's response to any FOIA request is outside the scope of what can be appropriately addressed in Program guidance.

In contrast to the commenters who requested relaxing or eliminating certain documentation and attestation requirements, three commenters were supportive of the project maturity requirements and some suggested that the final regulations should impose additional requirements. One commenter is pleased that maturity requirements for all capacity categories are included and recommends further strengthening these maturity requirements by necessitating a documentation requirement providing an interconnection agreement or State approved interconnection process, a community solar State program capacity award or a PPA, and proof of non-ministerial permits rather than an attestation. The other commenter suggested enhancing application requirements for the initial application period and subsequent rolling application process. The commenter suggests that demonstration of site control (for example, an executed contract, lease, or option to lease or purchase or similar agreement between the property owner and the developer/installer) and all non-ministerial permits should be included as a "Proposed Document Requirement," rather than a "Proposed Attestation Requirement" for FTM and BTM that are smaller than 1 MW. The commenter says these milestones, as well as an executed interconnection agreement, are clearest and most efficient. The final commenter was supportive as long as the information submitted was kept strictly confidential and not subject to public disclosure as discussed earlier.

For Category 3 specifically, one commenter suggested that the Documentation and Attestations table should be updated to add a line for "An executed contract to purchase the facility, an executed contract to lease the facility, or an executed power purchase agreement for the facility." This same commenter also suggested that for Category 3, there should be a multifamily building financial benefits assignment plan to illustrate how the

<sup>11</sup> See *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 20 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832) (setting forth foundational principles of Federal Indian law).

<sup>12</sup> *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982).

<sup>13</sup> See 25 CFR 169.10 and 25 CFR part 162.

<sup>14</sup> See 43 U.S.C. 1601.

financial benefits will reach the tenants. Additionally, this commenter said the rules should implement milestone requirements along this four-year period to ensure the complete and efficient usage of the annual capacity limitation (speed timeline for placing in service).

Other commenters included suggestions for documentation alternatives or requests for clarification on documentation requirements. One commenter suggested that for BTM projects, site control should also be accepted through other recordable documents such as “Option Agreements” or “Memoranda of Understanding,” including attestation that such documents exist, similar to what the transmission and distribution companies accept for site control. The commenter stated that the three documents listed as required in Table 1 for BTM are all proprietary to an applicant and contain business sensitive information. In addition, executing these documents may depend on if the applicant receives the “adders (bonus).” To clarify, the site control document attestations are required for FTM; these attestations are not required for BTM so this commenter’s particular concerns do not arise. Another commenter asked for clarification whether a lease option agreement satisfies the requirement for FTM facilities, which requires showing that the applicant has site control through ownership, an executed lease contract, site access agreement or similar agreement between the property owner and the applicant. The same commenter asked also for clarification that a submitted executed contract may have an execution date of August 16, 2022, or later. Lastly, a commenter urged the Treasury Department and the IRS to consider a guaranteed maximum price contract or other design/build contract in lieu of the requirement that BTM facilities provide documentation in the form of an executed contract to purchase the facility, an executed contract to lease the facility, or an executed PPA for the facility. This commenter said that in most cases, the commenter expects to develop the project themselves and hire a contractor to install the solar arrays, and so there would be no need for a purchase, lease, or PPA contract.

The Treasury Department and the IRS considered these comments but decided not to impose additional requirements. The Treasury Department and the IRS view the Proposed Rules as striking the right balance between requiring adequate documentation and attestations to ensure projects are viable and well defined to allow for a review for an allocation, and sufficiently

advanced such that they are likely to meet the four-year placed in service deadline, while not being unduly burdensome for applicants. Additional documentation and attestations suggested by these commenters do not appear necessary to verify compliance with Program requirements.

On the requests for alternatives (a lease option agreement requested by one commenter and guaranteed maximum price contract or other design/build contract requested by another), the Treasury Department and the IRS also considered these suggestions but believe the original documents described in the Proposed Rules are best able to demonstrate a project is viable and well defined to allow for a review for an allocation, and sufficiently advanced such that they are likely to meet the four-year placed in service deadline, while not being unduly burdensome for applicants. Lastly, on the question of timing and whether a submitted executed contract may have an execution date of August 16, 2022, or later, the rules do not have any date restrictions on the documentation required.

#### B. Lottery

The Proposed Rules also provided a that a lottery system may be used in oversubscribed categories to decide among similarly situated applications.

A few commenters requested that the lottery process be eliminated, and that the application process be entirely on a first-come, first-served basis. One commenter advised against a lottery system and advised that in the event the Program is oversubscribed, the Treasury Department and the IRS should select projects based on “project readiness”, which, the commenter states, in most existing solar markets, uses the earliest-in-time date of permit or ISA as a proxy for project maturity. Other commenters stated that they understand the purpose of a lottery in tie-breaker situations, but caution that a lottery may incentivize speculative project developers. The Treasury Department and the IRS made the decision to retain the lottery to provide an equitable review process for similarly situated applications. Due to the anticipated volume of applications, it would not be administratively feasible to select between applications for similar situated facilities that are submitted during the same time period for review without a lottery process that objectively prioritizes projects for review. The lottery process will allow for an efficient allocation process by ordering applications for review and allowing applications to be divided

among reviewers for simultaneous review.

The final regulations adopt the lottery system from the Proposed Rules to be used if a facility category or sub-reservation is oversubscribed but clarifies that details regarding how the lottery procedures will operate are specified in guidance published in the Internal Revenue Bulletin. The final regulations also clarify that a category or sub-category is oversubscribed if it receives applications in excess of Capacity Limitation reserved for the facility category or reservation within a facility category. For the 2023 Program year, Revenue Procedure 2023–27 provides the application review and selection procedures. The specific review and selection procedure may be updated in future Program guidance for Program year 2024.

#### C. Application Window

The Treasury Department and the IRS proposed an approach that includes an initial application window in which applications received by a certain time and date would be evaluated together, followed with a rolling application process if Capacity Limitation is not fully allocated after the initial application window closes.

Several commenters requested a first-come, first-served application process, with a few commenters adding that it should be first-come, first-served with respect to projects that are similarly situated. Additionally, several comment letters referred to the 60-day application period previously provided for the Program under Notice 2023–17. These comment letters generally state that a 60-day period is too short and request instead that the Program accept applications on a rolling basis. The Proposed Rules already provided for a change from the 60-day window under Notice 2023–17. This change was noted under “Selection Process” in the Proposed Rules.

As provided in Revenue Procedure 2023–27, for Program year 2023 there will be an initial 30-day window followed by a rolling application process thereafter for any capacity that remains in a given category or sub-reservation. At the end of the initial window, any category or sub-reservation that is oversubscribed will be subject to the lottery system. Applications may still be submitted in oversubscribed categories or for the Category 1 sub-reservation after the 30-day period and until the close of a Program year. Those applications may be reviewed in the order received only after DOE’s review and the IRS’s award determinations regarding all applications submitted

within the first 30 days. Applications submitted will only be reviewed if there is remaining Capacity Limitation. Applicants should refer to Revenue Procedure 2023–27 for additional details regarding the Program application process.

A few commenters additionally suggested that any category that has remaining capacity at the close of the Program for a particular capacity year should enter into a continuous rolling application process, rather than requiring a new application window. One commenter further specified that if the category remains in a rolling application process through the end of the calendar year, then on January 1 of the following year, new annual capacity should be allocated to the category and the rolling application process should continue. Otherwise, these commenters state that there will be a backlog of applications. One of the commenters also urged the Treasury Department and

the IRS to create a waitlist for the following year’s capacity allocation, with applications prioritized in the order received. This commenter stated that this would obviate the need for a lottery system for similarly situated applications in oversubscribed categories. Finally, a few commenters expressed concern about the short application period for the 2023 Program year. These commenters generally stated their belief that the 2023 Program will close on December 31, 2023 and that any unallocated Capacity Limitation will immediately rollover and be added to the 2024 Capacity Limitation on January 1, 2024.

The Treasury Department and the IRS will assess the 2023 Program and initial applications before determining any capacity changes to the 2024 Program and any changes to the application process. The Treasury Department and the IRS can also adjust Capacity Limitation among categories within a

Program year. Moreover, although the statute provides for a Capacity Limitation for each calendar year, with the ability to rollover unused Capacity Limitation to the next year, there is no requirement to close the application and allocation period for the 2023 Program year on December 31, 2023. Applicants should refer to Revenue Procedure 2023–27 for additional details regarding the Program application process.

*XI. Documentation and Attestations To Be Submitted When Placed in Service*

The Proposed Rules also required facilities that received a Capacity Limitation allocation to report to DOE that the facility has been placed in service, and to submit additional documentation or complete additional attestations with this reporting.

The Proposed Rules provided that an owner must submit documentation or attest to the following:

	Category
<b>Proposed Attestation Requirement</b>	
Confirmation of material ownership and/or facility changes from application or that there has been no change from the application.	All.
<b>Proposed Document Requirement</b>	
Permission to Operate (PTO) letter (or commissioning report verifying for off-grid facilities) that the facility has been placed in service and the location of the facility being placed in service.	All.
Final, Professional Engineer (PE) stamped as-built design plan, PTO letter with nameplate capacity listed, or other documentation from an unrelated party verifying as-built nameplate capacity.	All.
Benefits Sharing Agreement for qualified residential building projects between building owner and tenants (including for facilities that are third-party owned, additional sharing agreement between the facility owner and the building owner).	3.
Final list of households or other entities served with name, address, subscription share, and income status of qualifying low-income households served, and the income verification method used.	4.
Spreadsheet demonstrating the expected financial benefit to low-income subscribers to demonstrate the 20 percent bill credit discount rate.	4.

The final regulations adopt the requirement that the owner of a facility must report to DOE that the facility has been placed in service, and to submit additional documentation or complete additional attestations with this reporting but clarify that the specific information, documentation, and attestations that applicants are required to submit will be specified in guidance published in the Internal Revenue Bulletin. For the 2023 Program year, Revenue Procedure 2023–27 provides the placed in service documentation procedures. The specific information, documentation, and attestations that applicants are required to submit when a qualified facility is placed in service may get updated for Program year 2024.

One commenter provided that a final, PE stamped as-built design plan is unnecessary. The commenter stated that applicants should instead be able to rely

upon the as-built design plan for the project (without a PE stamp, at least in jurisdictions where such a stamp is not required), or other permitting documentation from the authority having jurisdiction, demonstrating the nameplate capacity. This suggestion is partially adopted in the Revenue Procedure 2023–27, allowing as-built design plans to be submitted without a PE stamp in cases where the local jurisdiction does not require such a stamp. The Treasury Department and the IRS further note that the as-built design plan is only one of three options for verifying as-built nameplate capacity, which provides flexibility for applicants. A PTO letter with nameplate capacity listed or other documentation from an unrelated party verifying as-built nameplate capacity are also reliable and acceptable options.

Also, as discussed in part V.5 of this Summary of Comments and Explanation of Revisions section, the Treasury Department and the IRS determined that to better achieve the goal of verifying Program compliance, the final regulations will require that facility owners must prepare a Benefits Sharing Statement, which must include certain information, and that the Qualified Residential Property owner must formally notify the occupants of units in the Qualified Residential Property of the development of the facility and planned distribution of benefits. Therefore, this Benefits Sharing Statement, instead of a Benefits Sharing Agreement, will be required documentation upon placing a Category 3 property in service.

### *XII. Placed in Service Prior to Allocation Award*

The Proposed Rules, consistent with an earlier statement in section 4.05 of Notice 2023–17, provided that facilities placed in service prior to being awarded an allocation of Capacity Limitation would not be eligible to receive an allocation.

Some commenters disagreed with the proposal that facilities must be placed in service after being awarded an allocation of Capacity Limitation to be eligible to receive an allocation. These commenters focused on the impact this will have on the economics of their projects for the Program as well as timing issues they argue arise due to waiting for allocation. For example, one commenter stated that they will not be able to complete projects without the bonus credit because the “economics” of their projects will be “severely impacted”, and if they must apply first to get an award, that the projects will be delayed to 2024. Another commenter noted specifically for Category 3 that multifamily affordable housing owners have been relying on the initial guidance and the February 13, 2023, statutory due date, and they have been planning on deploying solar power and storage that benefits residents of affordable housing since the day the IRA became law. The commenter added that these projects would not be economically viable without the Low-Income Communities Bonus Credit, and absent the bonus credit, these same developers would have planned to develop significantly smaller solar installations that offset common area electric loads only and would not have planned larger solar and storage facilities that also provide a direct economic benefit to low-income residents. This commenter disagreed with the statement that facilities placed in service prior to the allocation process do not increase adoption of and access to renewable energy facilities. Additionally, two commenters noted that the rationale for not allowing projects placed into service after January 1, 2023, but before receiving an allocation, to be eligible for the bonus allocation is insufficient, and should be rescinded.

Some commenters expressed concern over the potential impact that this proposal would have on low-income residents, including Tribal members. Likewise, another commenter suggested that the Treasury Department and the IRS should reconsider the placed into service requirements due to reliance concerns and negative economic impacts on Tribes. The commenter

explained that many new Tribal projects were planned, developed and started construction after the IRA passed in anticipation of qualifying for the bonus credit. This expectation escalated Tribal projects that might not otherwise have been developed—just as the statute intended. This commenter specifically suggested that Tribal projects that are placed in service after January 1, 2023, should be eligible for this bonus allocation. Another commenter noted a particular project for which they would be able to provide 25 percent energy savings directly to low-income families if they receive the allocation, and without that bonus amount, their financing costs would rise (due to increased returns provided to their equity investor) and consequently they would have to reduce the economic savings to 20 percent. In this example, the commenter believed that providing an additional 5 percent in direct economic benefits to low-income families would increase adoption and access to renewable energy. Similarly, another commenter contended that, due to this requirement that a project must be placed in service after an allocation award, it would be more burdensome and therefore less likely that low-income communities with environmental justice concerns will benefit from the Program.

Two commenters suggested allowing facilities that were placed in service after the date of the initial guidance, February 13, 2023. Another commenter suggested including facilities for which construction began after the enactment of the IRA on August 16, 2022. One commenter made some specific recommendations depending on the type of project. This commenter suggested allowing all facilities (in addition to Category 1 facilities) that have allocations awarded under the rolling application process to be placed in service prior to an allocation award. Alternatively, this commenter suggested allowing single-family residential rooftop facilities in Category 1 that have allocations awarded under the rolling application process to be placed in service prior to allocation award. This commenter also agreed with other commenters that 2023 capacity allocations be allowed for any qualifying Category 3 facility placed in service after final Program rules are issued noting that this suggestion is based on the longer development timelines and unique cost considerations for Category 3 projects.

Another commenter suggested modifying the requirement to instead provide that projects must be placed in

service after application, rather than after allocation.

After consideration of the comments described herein, the final regulations adopt the Proposed Rule providing that projects must be placed in service after allocation. The Treasury Department and the IRS considered these comments but ultimately decided not to make a change because requiring projects be placed in service after allocation provides the best way to promote the increase of, and access to, renewable energy facilities that would not be completed in the absence of the Program. Although Treasury and IRS recognize the economic and business-model concerns raised by commenters, these issues are largely the result of allocations not being readily available before the Program opens. These issues are therefore expected to significantly diminish in the future. Further, section 48(e)(4)(E)(i) provides a lengthy window of four years to place a facility in service following an allocation of Capacity Limitation, supporting that statutory intent is for allocations to go to new facilities that have not yet been placed in service. The Treasury Department and the IRS therefore believe that this rule best accomplishes Congress’s intent of the Program to encourage new development of renewable energy and the corresponding benefits to low-income communities. The Program cannot encourage additional renewable energy facilities in connection with low-income communities if those facilities were already placed in service without the Program.

### *XIII. Disqualification After Receiving an Allocation*

The Proposed Rules provided that a facility that was awarded a Capacity Limitation allocation is disqualified from receiving that allocation if prior to or upon the facility being placed in service: (1) the location where the facility will be placed in service changes; (2) the nameplate capacity of the facility increases such that it exceeds the less than 5 MW AC maximum net output limitation provided in section 48(e)(2)(A)(ii) or decreases by the greater of 2 kW or 25 percent of the Capacity Limitation awarded in the allocation; (3) the facility cannot satisfy the financial benefits requirements under section 48(e)(2)(B)(ii) as planned (if applicable) or cannot satisfy the financial benefits requirements under section 48(e)(2)(C) as planned (if applicable); (4) the eligible property that is part of the facility that received the Capacity Limitation allocation is not placed in service within four years after the date

the applicant was notified of the allocation of Capacity Limitation to the facility; or (5) the facility received a Capacity Limitation allocation based, in part, on meeting the Ownership Criteria and ownership of the facility changes prior to the facility being placed in service such that the Ownership Criteria is no longer satisfied, unless (a) the original applicant retains an ownership interest in the entity that owns the facility and (b) the successor owner attests that after the five year recapture period, the original applicant that met the Ownership Criteria will become the owner of the facility or that this original applicant will have the right of first refusal.

Commenters expressed concern over some of the disqualification factors set forth in the Proposed Rules. In response to the proposal that a certain decrease in nameplate capacity results in a disqualification, one commenter suggested increasing the threshold for disqualification due to a size reduction from 25 percent to at least 30 percent. Another commenter recommended that the 2 kW or 25 percent threshold be applicable to both increasing and decreasing the system's size.

Based on an assessment of other similar State programs and because this is an allocated credit with a finite amount of capacity awarded each year, the Treasury Department and the IRS have declined to adopt the comment to increase the size reduction to 30 percent.

For a different disqualification factor that would occur when the eligible property that is part of the facility that received the Capacity Limitation allocation is not placed in service within four years after the date the applicant was notified of the allocation, a commenter suggested that projects receiving an allocation of bonus credits be allowed to show alternative forms of completion within the four-year window apart from "placed in service," which commenter says unfairly depends on the utility's timeline for signing off on the project. Another commenter recommended adding additional requirements for the topic of placed in service for Category 1. This commenter suggested that for BTM projects that are smaller than 1 MW, these projects be required to attest that the project is active and moving forward towards being placed in service on an annual basis after receiving an allocation, or until the eligible property is placed in service. The commenter proposed that if the applicant is non-responsive or declines to attest that the project is active, then the allocation should be forfeited and the capacity returned and

that applicants should also be able to proactively forfeit an allocation. The commenter's reasoning for this is that in commenter's view four years is far beyond the necessary time frame for smaller projects that can be completed in months instead of years.

The Treasury Department and the IRS did not adopt these recommendations. Section 48(e)(4)(E) sets the placed in service deadline for the Program by providing that section 48(e)(1) does not apply with respect to any property that is placed in service after the date that is four years after the date of the allocation with respect to the facility of which such property is a part. Therefore, providing any type of alternative forms of completion within the four-year window apart from "placed in service" is inconsistent with the statute and not allowed. Similarly, additional burdens (and repercussions for non-compliance) of annual attestation requirements for smaller Category 1 projects should not be imposed.

The Proposed Rules provided that if the facility received a Capacity Limitation allocation based, in part, on meeting the Ownership Criteria and ownership of the facility changes prior to the facility being placed in service such that the Ownership Criteria is no longer satisfied, unless (a) the original applicant retains an ownership interest in the entity that owns the facility and (b) the successor owner attests that after the five year recapture period, the original applicant that met the Ownership Criteria will become the owner of the facility or that this original applicant will have the right of first refusal. Commenters observed that put options, which are often used in tax equity structures, were excluded from the proposed rule. The Treasury Department and the IRS have modified this rule to better reflect contractual arrangements used with tax equity financing structures and to avoid unintended complications with other tax guidance. The final regulations eliminate the attestation regarding a call, put, or right of first refusal is that such contractual rights exist. Rather, the final regulations provide that if the facility received a Capacity Limitation allocation based, in part, on meeting the ownership criteria and if ownership of the facility changes prior to the facility being placed in service the facility is disqualified, unless the original applicant transfers the facility to an entity treated as a partnership for Federal income tax purposes and retains at least a one percent interest (either directly or indirectly) in each material item of partnership income, gain, loss, deduction, and credit of such

partnership and is a managing member or general partner (or similar title) under State law of the partnership (or directly owns 100 percent of the equity interests in the managing member or general partner) at all times during the existence of the partnership.

#### *XIV. Recapture of Section 48(e) Increase*

In accordance with section 48(e)(5), the Proposed Rules provided for recapturing the benefit of any section 48(e) Increase with respect to any property that ceases to be property eligible for such section 48(e) Increase (but that does not cease to be investment credit property within the meaning of section 50(a)). In accordance with section 48(e)(5), the Proposed Rules provided that the period and percentage of such recapture is determined under rules similar to the rules of section 50(a). In accordance with section 48(e)(5), the Proposed Rules acknowledged such recapture may not apply with respect to any property if, within 12 months after the date the applicant becomes aware (or reasonably should have become aware) of such property ceasing to be property eligible for such section 48(e) Increase, the eligibility of such property for such section 48(e) Increase is restored. In accordance with section 48(a)(5), the Proposed Rules provided that such restoration of a section 48(e) Increase is not available more than once with respect to any facility.

The Proposed Rules provided that the following circumstances result in a recapture event if the property ceases to be eligible for the increased credit under section 48(e): (1) property described in section 48(e)(2)(A)(iii)(II) fails to provide financial benefits over the 5-year period after its original placed in service date; (2) property described under section 48(e)(2)(B) ceases to allocate the financial benefits equitably among the occupants of the dwelling units, such as not passing on to residents the required net energy savings of the electricity; (3) property described under section 48(e)(2)(C) ceases to provide at least 50 percent of the financial benefits of the electricity produced to qualifying households as described under section 48(e)(2)(C)(i) or (ii), or fails to provide those households the required minimum 20 percent bill credit discount rate; (4) for property described under section 48(e)(2)(B), the residential rental building the facility is a part of ceases to participate in a covered housing program or any other housing program described in section 48(e)(2)(B)(i), if applicable; and (5) a facility increases its output such that the facility's output is 5 MW AC or greater,

unless the applicant can prove that the output increase is not attributable to the original facility but rather is output associated with a new facility under the 80/20 Rule (the cost of the new property plus the value of the used property). See Rev. Rul. 94–31, 1994–1 C.B. 16.

Commenters submitted recommendations and questions related to the recapture provisions in the Proposed Rules. One commenter suggested stricter rules by requiring attestations that the owner of the facility will maintain eligibility under the Program for a minimum of 15 years, or the lifetime of the project. This commenter said if it is not possible to require this sort of covenant or attestation, the Treasury Department and the IRS should instead implement continual and spontaneous audits of projects. The Treasury Department and the IRS did not adopt this suggestion. Under the recapture provisions of section 48(e)(5), Congress provided that the period and percentage of such recapture must be determined under rules similar to the rules of section 50(a). Section 50(a) generally provides that this is a five year period with differing applicable percentages depending on when the property ceases to qualify. Therefore, under section 48(e)(5), stricter restrictions related to recapture should not be imposed.

Two commenters raised concerns about the recapture event that occurs when the property ceases to provide at least 50 percent of the financial benefits of the electricity produced to qualifying households as described under section 48(e)(2)(C). Another commenter raised a similar issue regarding the Proposed Rule that projects can only cure an issue related to low-income verification one time if the 50 percent financial benefits threshold is not met. This commenter stated that, due to the complexity of subscription management, potential defaults, and subscription termination, it is possible that projects will dip below this 50 percent threshold more than once due to no fault of the project owner. This commenter recommended that the rules be revised to allow projects to dip below the 50 percent threshold if there is proven effort to restore the low-income percentage. The Treasury Department and the IRS did not adopt these recommendations because it is inconsistent with section 48(e)(5). Section 48(e)(5) allows only a one-time restoration of section 48(e) eligibility per facility if the facility ceases to qualify for an allocation of Capacity Limitation before recapture of the section 48(e) Increase is triggered.

A different commenter suggested an additional recapture event that rooftop

solar lease and PPA providers should attest that they will adhere to the provisions of the Consumer Leasing Act (15 U.S.C. 1667–1667f), and the rules should make documented violations of the Consumer Leasing Act an event that would trigger recapture of the allocation. While the Treasury Department and the IRS understand the commenter's concern, the statute provides no requirements related to the Consumer Leasing Act, and therefore, the final regulations do not impose this requirement on the applicants.

The final regulations related to recapture adopt the requirements from the Proposed Rules but also include a clarification that any event that results in recapture under section 50(a) will also result in recapture of the benefit of the section 48(e) Increase. The exception to the application of recapture provided in § 1.48(e)–1(n)(2) does not apply in the case of a recapture event under section 50(a).

### Special Analyses

#### *I. Regulatory Planning and Review—Economic Analysis*

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

#### *II. Paperwork Reduction Act*

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) requires that a Federal agency obtain the approval of OMB before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. The collections of information in these final regulations contain reporting and recordkeeping requirements that are required to obtain the section 48(e) Increase. This information in the collections of information would generally be used by the IRS and DOE for tax compliance purposes and by taxpayers to facilitate proper reporting and compliance. A Federal agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The recordkeeping requirements mentioned within this final regulation are considered general tax records under Section 1.6001–1(e). These records are required for the IRS to validate that

taxpayers have met the regulatory requirements and are entitled to receive a section 48(e) Increase. For PRA purposes, general tax records are already approved by OMB under 1545–0123 for business filers, 1545–0074 for individual filers, and 1545–0047 for tax-exempt organizations.

The final regulations also describe reporting requirements for providing attestations and supporting documentation for the initial application, providing supporting documentation for specific facilities, and confirming a facility is placed in service as detailed in these final regulations.

These attestations and documentation would allow IRS to allocate Capacity Limitation and ensure taxpayers maintain compliance. To assist with the collections of information, DOE will provide certain administration services for the Program. Among other things, DOE will establish a website portal to review the applications for eligibility criteria and will provide recommendations to the IRS regarding the selection of applications for an allocation of Capacity Limitation. These collection requirements will be submitted to the Office of Management and Budget (OMB) under 1545–2308 for review and approval in accordance with 5 CFR 1320.11. The likely respondents are business filers, individual filers, and tax-exempt organization filers. A summary of paperwork burden estimates for the application, supporting documentation, and attestations is as follows:

*Estimated number of respondents:* 70,000.

*Estimated burden per response:* 60 minutes.

*Estimated frequency of response:* 1 for initial applications, 1 for supporting documentation, and 1 for projects placed in service.

*Estimated total burden hours:* 210,000 burden hours.

The IRS solicited feedback on the collection requirements for the application, supporting documentation, and attestations. Although no public comments received by the IRS were directed specifically at the PRA or on the collection requirements, several commenters generally expressed concerns about the burdens associated with the documentation requirements contained in the Proposed Rules. As described in the relevant portions of this preamble, the Treasury Department and IRS believe that the documentation requirements are necessary to administer the Program.

### III. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis (FRFA) of the final regulations. The Treasury Department and the IRS have not determined whether the final regulations will have a significant economic impact on a substantial number of small entities. This determination requires further study and an FRFA is provided in these final regulations.

Pursuant to section 7805(f) of the Code, these final regulations were submitted to the Chief Counsel of Advocacy of the Small Business Administration, and no comments were received.

#### 1. Need for and Objectives of the Rule

The final regulations would provide guidance for purposes of participation in the Program to allocate the environmental justice solar and wind capacity limitation under section 48(e) for the Program. The final regulations are expected to encourage applicants to invest in solar and wind energy. Thus, the Treasury Department and the IRS intend and expect that the final regulations will deliver benefits across the economy and environment that will beneficially impact various industries.

#### 2. Significant Issues Raised by Public Comments in Response to the IRFA

There were no comments filed that specifically addressed the Proposed Rules and policies presented in the IRFA. Additionally, no comments were filed by the Chief Counsel of Advocacy of the Small Business Administration.

#### 3. Affected Small Entities

A total of 1800 MW of capacity are eligible for the section 48(e) bonus credit annually. Assuming the average size of each successful application is near 1 MW, then there will be approximately 2,000 successful applications each year. The Treasury Department and the IRS expect the total number of applications to be significantly higher than this. In addition, the Treasury Department and the IRS also assume that some

successful applicants will submit more than one successful application. The Treasury Department and the IRS do not have information on the expected business entity size distribution of successful applicants but will continue to examine this issue when data is collected during the first round of allocations.

#### 4. Impact of the Rules

The recordkeeping and reporting requirements would increase for applicants that participate in the Program. Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of this preamble. In particular, the Paperwork Reduction Act section of this preamble contains a summary of paperwork burden estimates for the application, supporting documentation, and submissions when projects are placed in service. The IRS solicited feedback on the collection requirements for the application, supporting documentation, and attestations.

Although no public comments received by the IRS were directed specifically at the PRA or on the collection requirements, several commenters generally expressed concerns about the burdens associated with the documentation requirements contained in the Proposed Rule. As described in the relevant portions of this preamble, the Treasury Department and IRS believe that the documentation requirements are necessary to administer the Program.

#### 5. Steps Taken To Minimize Impacts on Small Entities and Alternatives Considered

The Treasury Department and the IRS considered alternatives to the final regulations. For example, the Treasury Department and the IRS considered exclusively using a lottery system for all over-subscribed categories, rather than creating reservations for facilities meeting ASC. Although a lottery system may ultimately need to be used for an oversubscribed category, the Treasury Department and the IRS decided that it was important to propose reserving Capacity Limitation for facilities that meet certain ASC that further the policy goals of the Program.

Additionally, when considering how to define "in connection with," the Treasury Department and the IRS were mindful that the statute requires the energy storage technology to be installed

in connection with a qualifying solar or wind facility to be eligible for an increase in the energy percentage used to calculate the amount of the section 48 credit. Different alternatives were considered on how to address this definition. For example, the Treasury Department and the IRS considered but ultimately decided not to incorporate the safe harbor (deeming the energy storage technology to be charged at least 50 percent by the facility if the power rating of the energy storage technology is less than 2 times the capacity rating of the connected wind or solar) as part of the general rule to define "in connection with." The final regulations instead generally require the energy storage technology to have a sufficient nexus to the other eligible property because it is part of the single project and is significantly charged by the eligible property. The Treasury Department and the IRS maintain the safe harbor in the final regulations, but only as a means of deeming the energy storage technology charging requirement to be satisfied.

Another example where different alternatives were considered was with respect to application materials. Section 48(e)(4)(A) directs the Secretary to provide procedures to allow for an efficient allocation process, and section 48(e)(4)(E)(i) allows an applicant up to four years after receiving a Capacity Limitation allocation to place eligible property into service. Alternatives were considered on how best to balance these statutory requirements, considering practical issues for taxpayers and residents as well as the traditional structure and arrangement of these solar or wind transactions, including considerations on the type of facility (BTM or FTM) and the capacity of the facility. Among other things, the Treasury Department and the IRS considered whether an application for an interconnection agreement or an executed interconnection agreement should be required as part of the application materials. The final regulations are based on the view that the executed interconnection agreement, if applicable, is essential documentation to demonstrate sufficient project maturity.

Additionally, the Treasury Department and the IRS considered a variety of bill credit discounts for Category 4 qualified low-income benefit project facilities. The bill credit discounts considered included 10 percent, 15 percent, or 20 percent. Alternatively, the Treasury Department and the IRS considered the option of a range of discounts from 10 percent to 20 percent from which applicants could

choose the discount rate to provide low-income customers. However, to ensure that low-income customers are receiving meaningful financial benefits, the Treasury Department and the IRS decided to propose a 20 percent discount.

#### IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. This final rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

#### V. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. These regulations do not have federalism implications and do not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

#### VI. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) prohibits an agency from publishing any rule that has Tribal implications if the rule either imposes substantial, direct compliance costs on Indian tribal governments, and is not required by statute, or preempts Tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive Order. These regulations do not have substantial direct effects on one or more federally recognized Indian tribes and do not impose substantial direct compliance costs on Indian tribal governments within the meaning of the Executive Order.

Nevertheless, on June 26, 2023, the Treasury Department and the IRS held a consultation with Tribal leaders requesting assistance in addressing

questions related to Low-Income Communities Bonus Credit Program, which informed the development of these regulations.

#### VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a major rule as defined by 5 U.S.C. 804(2).

#### Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

#### Drafting Information

The principal author of these regulations is the Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

#### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

#### Amendments to the Regulations

Accordingly, the Treasury Department and IRS amend 26 CFR part 1 as follows:

#### PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry for § 1.48(e)–1 in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805, unless otherwise noted. 26 U.S.C. 7805, unless otherwise noted. 26 U.S.C. 7805. 26 U.S.C. 401(m)(9) and 26 U.S.C. 7805.

\* \* \* \* \*  
Section 1.48(e)–1 issued under 26 U.S.C. 48  
\* \* \* \* \*

■ **Par. 2.** Section 1.48(e)–1 is added:  
The additions read as follows:

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This section lists the captions contained in § 1.48(e)–1.

#### § 1.48(e)–1 Low-Income Communities Bonus Credit Program.

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- (b) Qualified solar or wind facility defined.
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  - (2) Facility categories.
    - (i) Category 1 Facility.
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(iv) Category 4 Facility.

- (3) Single project treated as single facility.
  - (c) Eligible property.
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**§ 1.48(e)–1 Low-Income Communities Bonus Credit Program.**

(a) *In general.* For purposes of section 48 of the Internal Revenue Code (Code), the energy percentage used to calculate the amount of the energy investment credit determined under section 48(a) (section 48 credit) is increased under section 48(e)(1) in the case of eligible property (as defined in paragraph (c) of this section) that is part of any qualified solar or wind facility (as defined in paragraph (b) of this section) placed in service in connection with low-income communities with respect to which an allocation of the environmental justice solar and wind capacity limitation (Capacity Limitation) is made under the Low-Income Communities Bonus Credit Program (Program) established under section 48(e)(4) of the Code on February 13, 2023. See Notice 2023–17, 2023–10 I.R.B. 505. In this section, the terms *applicant* and *taxpayer* are used

interchangeably as the context may require.

(b) *Qualified solar or wind facility defined—*(1) *In general.* A qualified solar or wind facility means any facility that—

(i) Generates electricity solely from a wind facility (described in section 45(d)(1) of the Code) for which an election to treat the facility as energy property was made under section 48(a)(5) (wind facility), solar energy property (described in section 48(a)(3)(A)(i) (solar energy property), or small wind energy property (described in section 48(a)(3)(A)(vi) (small wind energy property);

(ii) Has a maximum net output of less than 5 megawatts (MW) (as measured in alternating current (AC)); and

(iii) Is described in at least one of the four categories described in section 48(e)(2)(A)(iii) and paragraph (b)(2) of this section.

(2) *Facility categories—*(i) *Category 1 Facility.* A facility is a *Category 1 Facility* if it is located in a low-income community. The term *low-income community* is generally defined under section 45D(e)(1) of the Code as any population census tract if the poverty rate for such tract is at least 20 percent based on the 2011–2015 American Community Survey (ACS) low-income community data currently used for the New Markets Tax Credit (NMTC) under section 45D, 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 metropolitan area median family income. The term *low-income community* also includes the modifications in section 45D(e)(4) and (5) for tracts with low population and modification of the income requirement for census tracts with high migration rural counties. Low-income community information for NMTC can be found at <https://www.cdfifund.gov/cims3>. For purposes of this paragraph (b)(2)(i), if updated ACS low-income community data is released for the NMTC program, a taxpayer can choose to base the poverty rate for any population census tract on either the 2011–2015 ACS low-income community data for the NMTC program or the updated ACS low-income community data for the NMTC program for a period of 1 year following the date of the release of the updated data. After the 1-year transition period, the updated ACS low-income community data for the NMTC program

must be used to determine the poverty rate for any population census tract. Populations census tracts that satisfy the definition of low-income community at the time of application are considered to continue to meet the definition of low-income community for the duration of the recapture period described in paragraph (n)(1) of this section unless the location of the facility changes.

(ii) *Category 2 Facility.* A facility is a *Category 2 Facility* if it is located on Indian land. The term *Indian land* is defined in section 2601(2) of the Energy Policy Act of 1992 (25 U.S.C. 3501(2)).

(iii) *Category 3 Facility.* A facility is a *Category 3 Facility* if it is part of a qualified low-income residential building project. 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 that participates in a covered housing program or other affordable housing program described in section 48(e)(2)(B)(i) (Qualified Residential Property) and the financial benefits of the electricity produced by such facility are allocated equitably among the occupants of the dwelling units of such building as provided in paragraph (e) of this section. A facility is considered installed on a Qualified Residential Property even if not on the building if the facility is installed on the same or an adjacent parcel of land as the Qualified Residential Property, and the other requirements to be a Category 3 Facility are satisfied.

(iv) *Category 4 Facility.* A facility is a *Category 4 Facility* if it is part of a qualified low-income economic benefit project. A facility will be treated as part of a *qualified low-income economic benefit project* if, as provided in paragraph (f) of this section, at least 50 percent of the financial benefits of the electricity produced by such facility are provided to households with income of less than—

(A) Two-hundred percent of the poverty line (as defined in section 36B(d)(3)(A) of the Code) applicable to a family of the size involved, or

(B) Eighty percent of area median gross income (as determined under section 142(d)(2)(B) of the Code).

(3) *Single project treated as single facility.* Multiple solar or wind facilities or energy properties that are operated as part of a single project are aggregated and treated as a single facility or energy property for purposes of determining if it is a qualified solar or wind facility under paragraph (b)(1) of this section. Any facility or energy property treated as part of a single facility under this paragraph (b)(3) will also be treated as a single facility for all other purposes

under this section and all other guidance applicable to section 48(e) published in the Internal Revenue Bulletin. See § 601.601 of this chapter. Whether multiple facilities or energy properties are operated as part of a single project will depend on the relevant facts and circumstances and a single factor may not be dispositive. Factors indicating that multiple facilities or energy properties are operated as part of a single project may include—

(i) The facilities or energy properties are owned by a single legal entity;

(ii) The facilities or energy properties are constructed on contiguous pieces of land;

(iii) The facilities or energy properties are described in a common power purchase agreement (PPA) or more than one common power purchase agreements (PPAs);

(iv) The facilities or energy properties have a common interconnection;

(v) The facilities or energy properties share a common substation;

(vi) The facilities or energy properties are described in one or more common environmental or other regulatory permits;

(vii) The facilities or energy properties were constructed pursuant to a single master construction contract; or

(viii) The facilities or construction of the energy properties was financed pursuant to the same loan agreement.

(c) *Eligible property*—(1) *In general.* *Eligible property* is energy property that is part of a qualified solar or wind facility described in paragraph (b) of this section. Eligible property also includes energy storage technology (as described in section 48(a)(3)(A)(ix)) installed in connection with such qualifying energy property.

(2) *Energy storage technology installed in connection with qualified solar or wind facility.* Energy storage technology is installed in connection with other eligible property if the requirements of both paragraph (c)(2)(i) of this section and paragraph (c)(2)(ii) of this section (including by reason of paragraph (c)(3) of this section) are satisfied.

(i) The requirements of this paragraph (c)(2)(i) are satisfied if the energy storage technology and other eligible property are considered part of a single qualified solar or wind facility based on the energy storage technology and other eligible property being:

(A) Owned by a single legal entity,

(B) Located on the same or contiguous pieces of land,

(C) Having a common interconnection point, and

(D) Described in one or more common environmental or other regulatory permits.

(ii) The requirement of this paragraph (c)(2)(ii) is satisfied if the energy storage technology is charged no less than an annual average of 50 percent by the other eligible property.

(3) *Safe harbor for requirement of paragraph (c)(2)(ii) of this section.* For purposes of paragraph (c)(2)(ii) of this section, energy storage technology is deemed to be charged at least 50 percent by the facility if the power rating of the energy storage technology (in kW) is less than 2 times the capacity rating of the connected wind facility (in kW AC) or solar facility (in kW direct current (DC)).

(d) *Location*—(1) *In general.* A qualified solar or wind facility is treated as *located in a low-income community* or *located on Indian land* under section 48(e)(2)(A)(iii)(I) if the qualified solar or wind facility satisfies the Nameplate Capacity Test of paragraph (d)(2) of this section. Similarly, a qualified solar or wind facility is treated as located in a geographic area under the additional selection criteria described in paragraph (h) of this section if it satisfies the Nameplate Capacity Test.

(2) *Nameplate Capacity Test.* A qualified solar or wind facility is considered located in or on the relevant geographic area described in paragraph (d)(1) of this section if 50 percent or more of the facility's nameplate capacity is in a qualifying area. The percentage of a facility's nameplate capacity (as defined in paragraph (d)(2)(i) of this section) that is in a qualifying area is determined by dividing the nameplate capacity of the facility's energy-generating units that are located in the qualifying area by the total nameplate capacity of all the energy-generating units of the facility.

(i) *Nameplate capacity for purpose of Nameplate Capacity Test.* *Nameplate capacity* for an electricity generating unit means the maximum electricity generating output that the unit is capable of producing on a steady state basis and during continuous operation under standard conditions, as measured by the manufacturer and consistent with the definition provided in 40 CFR 96.202. Where applicable, the International Standard Organization conditions are used to measure the maximum electricity generating output or usable energy capacity. For purposes of assessing the Nameplate Capacity Test, qualified solar facilities use the nameplate capacity in DC and qualified wind facilities use the nameplate capacity in AC.

(ii) *Exclusion of energy storage technology.* The nameplate capacity of

any energy storage technology installed in connection with the qualified solar or wind facility is disregarded in applying the Nameplate Capacity Test.

(e) *Financial benefits for a Category 3 Facility*—(1) *In general.* To satisfy the requirements of a Category 3 Facility as provided in paragraph (b)(2)(iii) of this section, the financial benefits of the electricity produced by the facility must be allocated equitably among the occupants of the dwelling units of the Qualified Residential Property. A Qualified Residential Property could either be a multifamily rental property or single-family rental property. The same rules for financial benefits for Category 3 Facilities apply to both types of Qualified Residential Property.

(2) *Threshold requirement.* At least 50 percent of the financial value of the energy produced by the facility (as defined in paragraph (e)(3) of this section) must be equitably allocated to the Qualified Residential Property's occupants that are designated as low-income occupants under the covered housing program or other affordable housing program.

(3) *Financial value of the energy produced by the facility.* For purposes of this paragraph (e), the *financial value of the energy produced by the facility* is defined as the greater of:

(i) Twenty-five percent of the gross financial value (as defined in paragraph (e)(4) of this section) of the annual energy produced by the energy property, or

(ii) The net financial value (as defined in paragraph (e)(5) of this section) of the annual energy produced by the energy property.

(4) *Gross financial value.* For purposes of this paragraph (e), *gross financial value* of the annual energy produced by the facility is calculated as the sum of:

(i) The total self-consumed kilowatt-hours produced by the qualified solar or wind facility multiplied by the applicable building's metered volumetric price of electricity,

(ii) The total exported kilowatt-hours produced by the qualified solar or wind facility multiplied by the applicable building's volumetric export compensation rate for solar or wind kilowatt-hours, and

(iii) The sale of any attributes associated with the facility's production (including, for example, any Federal, State, or Tribal renewable energy tax credits or incentives), if separate from the metered price of electricity or export compensation rate.

(5) *Net financial value defined*—(i) *Common ownership.* For purposes of this paragraph (e), if the facility and

Qualified Residential Property are commonly owned, *net financial value* is defined as the gross financial value of the annual energy produced minus the annual average (or leveled) cost of the qualified solar or wind facility over the useful life of the facility (including debt service, maintenance, replacement reserve, capital expenditures, and any other costs associated with constructing, maintaining, and operating the facility).

(ii) *Third-party ownership*. For purposes of this paragraph (e), if the facility and the Qualified Residential Property are not commonly owned and the facility owner enters into a PPA or other contract for energy services with the Qualified Residential Property owner and/or building occupants, *net financial value* is defined as the gross financial value of the annual energy produced minus any payments made by the building owner and/or building occupants to the facility owner for energy services associated with the facility in a given year.

(iii) *Equitable allocation of financial benefits*. There are different rules to ensure an equitable allocation of financial benefits depending on whether or not financial value is distributed to building occupants via utility bill savings or through different means.

(A) *If financial value distributed via utility bill savings*. If financial value is distributed via utility bill savings, financial benefits will be considered to be equitably allocated if at least 50 percent of the financial value of the energy produced by the facility is distributed as utility bill savings in equal shares to each building dwelling unit among the Qualified Residential Property's occupants that are designated as low-income under the covered housing program or other affordable housing program (described in section 48(e)(2)(B)(i)) or alternatively distributed in proportional shares based on each low-income dwelling unit's square footage, or each low-income dwelling unit's number of occupants. For any occupant(s) who choose to not receive utility bill savings (for example, exercise their right to not participate in or to opt out of a community solar subscription in applicable jurisdictions), the portion of the financial value that would otherwise be distributed to non-participating occupants must be instead distributed to all participating occupants. No less than 50 percent of the Qualified Residential Property's occupants that are designated as low-income must participate and receive utility bill savings for the facility to utilize this method of benefit distribution. In the case of a solar facility, applicants must follow the

Department of Housing and Urban Development (HUD) guidance on the Treatment of Community Solar Credits on Tenant Utility Bills (July 2022), located at [https://www.hud.gov/sites/dfiles/Housing/documents/MF\\_Memo\\_Community\\_Solar\\_Credits\\_signed.pdf](https://www.hud.gov/sites/dfiles/Housing/documents/MF_Memo_Community_Solar_Credits_signed.pdf), Community Solar Credits in PIH Programs (August 2022), located at [https://www.hud.gov/sites/dfiles/documents/Solar%20Credits\\_PH\\_HCV.pdf](https://www.hud.gov/sites/dfiles/documents/Solar%20Credits_PH_HCV.pdf), or future HUD guidance, or other guidance or notices from the Federal agency that oversees the applicable housing program identified in section 48(e)(2)(B) to ensure that tenants' utility allowances and annual income for rent calculations are not negatively impacted. Applicants should apply similar principles in the case of a wind facility.

(B) *If financial value is not distributed via utility bill savings*. If financial value is not distributed via utility bill savings, financial benefits will be considered to be equitably allocated if at least 50 percent of the financial value of the energy produced by the facility is distributed to occupants using one of the methods described in HUD guidance on the Treatment of Solar Benefits in Master-metered Building (May 2023) located at [https://www.hud.gov/sites/dfiles/Housing/documents/MF\\_Memo\\_Community\\_Solar\\_Credits\\_in\\_MM\\_Buildings.pdf](https://www.hud.gov/sites/dfiles/Housing/documents/MF_Memo_Community_Solar_Credits_in_MM_Buildings.pdf), or future HUD guidance, or other guidance or notices from the Federal agency that oversees the applicable housing program identified in section 48(e)(2)(B). In the case of a solar facility, applicants must comply with HUD guidance, or future HUD guidance, for how residents of master-metered HUD-assisted housing can benefit from owners' sharing of financial benefits accrued from an investment in solar energy generation to ensure that tenants' utility allowances and annual income for rent calculations are not negatively impacted. Applicants should apply similar principles in the case of a wind facility.

(6) *Benefits Sharing Statement*—(i) *In general*. The facility owner must prepare a *Benefits Sharing Statement*, which must include:

(A) A calculation of the facility's gross financial value using the method described paragraph (e)(4) of this section,

(B) A calculation of the facility's net financial value using the method described in paragraph (e)(5) of this section,

(C) A calculation of the financial value required to be distributed to building occupants using the method described in paragraph (e)(3) of this section,

(D) A description of the means through which the required financial value will be distributed to building occupants, and

(E) If the facility and Qualified Residential Property are separately owned, indication of which entity will be responsible for the distribution of benefits to the occupants.

(ii) *Notification requirement*. The Qualified Residential Property owner must formally notify the occupants of units in the Qualified Residential Property of the development of the facility and planned distribution of benefits.

(f) *Financial benefits for a Category 4 Facility*—(1) *In general*. To satisfy the requirements of a Category 4 Facility as provided in paragraph (b)(2)(iv) of this section:

(i) The facility must serve multiple qualifying low-income households under section 48(e)(2)(C)(i) or (ii) (Qualifying Household),

(ii) At least 50 percent of the facility's total output in kW must be assigned to Qualifying Households, and

(iii) Each Qualifying Household must be provided a bill credit discount rate (as defined in paragraph (f)(2) of this section) of at least 20 percent.

(2) *Bill credit discount rate*—(i) *In general*. A *bill credit discount rate* is the difference between the financial benefit provided to a Qualifying Household (including utility bill credits, reductions in a Qualifying Household's electricity rate, or other monetary benefits accrued by the Qualifying Household on their utility bill) and the cost of participating in the community program (including subscription payments for renewable energy and any other fees or charges), expressed as a percentage of the financial benefit distributed to the Qualifying Household. The bill credit discount rate can be calculated by starting with the financial benefit provided to the Qualifying Household, subtracting all payments made by the Qualifying Household to the facility owner and any related third parties as a condition of receiving that financial benefit, then dividing that difference by the financial benefit distributed to the Qualifying Household.

(ii) *No or nominal cost of participation*. In cases where the Qualifying Household has no or only a nominal cost of participation, the bill credit discount rate should be calculated as the financial benefit provided to a Qualifying Household (including utility bill credits, reductions in a Qualifying Household's electricity rate, or other monetary benefits accrued by a Qualifying Household on their utility bill) divided by the total value of

the electricity produced by the facility and assigned to the Qualifying Household (including any electricity services, products, and credits provided in conjunction with the electricity produced by such facility), as measured by the utility, independent system operator (ISO), or other off-taker procuring electricity (and related services, products, and credits) from the facility.

(iii) *Calculation on annual basis.* In all instances, the bill credit discount rate is calculated on an annual basis.

(iv) *Examples.* The provisions of this paragraph (f)(2) may be illustrated by the following examples:

(A) *Example 1.* A Qualifying Household signs a community solar subscription agreement with the facility owner that (1) requires the facility owner to cause a portion of the electricity generated (or its value) to be assigned to the utility bill of the Qualifying Household on a monthly basis, and (2) requires the Qualifying Household to pay the facility owner the equivalent of 80 percent of the monetary value of the assigned generation (that is, 80 percent of the value of bill credits provided to the Qualifying Household's utility bill) on a monthly basis. In this example, over the course of the first year the facility owner or their agent cause \$200 in utility bill credits to be placed on the Qualifying Household's bill, and the Qualifying Household pays \$160, inclusive of any upfront fees. The subsequent year, due to variation in solar generation and/or the compensation paid by the utility for solar generation, the facility owner, in accordance with the community solar subscription agreement, cause \$220 in bill credits to be provided to the Qualifying Household's bill and the household pays \$176. In each year of facility operation described within this example, a bill credit discount rate of 20 percent is maintained.

(B) *Example 2.* Due to the regulatory structure of the applicable jurisdiction or program, the terms of the community solar subscription, the use of a "net-crediting" mechanism, or other reason, the Qualifying Household does not make a direct payment to the facility owner. Assume that the total value of the electricity produced by the facility and assigned to the household, as measured by the utility, ISO, or other off-taker procuring the electricity, is \$500 in the first year and \$600 in the second year. Assume further that the Qualifying Household receives a "net" bill credit of \$100 in the first year and \$120 in the second year. In this case, the bill credit discount rate is 20 percent in

each year ( $\$500 \times .2 = \$100$ ) and ( $\$600 \times .2 = \$120$ ), respectively.

(3) *Low-income verification*—(i) *In general.* To establish that financial benefits are provided to Qualifying Households as provided in paragraph (f)(1) of this section, applicants must, in accordance with guidance published in the Internal Revenue Bulletin (*see* § 601.601 of this chapter), submit documentation upon placing the qualified solar or wind facility in service that identifies each Qualifying Household, the output from the facility allocated to each Qualifying Household in kW, and the method of income verification utilized for each Qualifying Household. A Qualifying Household's low-income status is determined at the time the household enrolls in the subscription program and does not need to be re-verified.

(ii) *Methods of verification.* Applicants may use categorical eligibility or other income verification methods to establish that a household is a Qualifying Household.

(A) *Categorical eligibility.* *Categorical eligibility* consists of obtaining proof of the household's participation in a needs-based Federal, State, Tribal, or utility program with income limits at or below the qualifying income level required to be a Qualifying Household. Federal programs may include, but are not limited to: Medicaid, Low-Income Home Energy Assistance Program (LIHEAP) administered by the Department of Health and Human Services, Weatherization Assistance Program (WAP) administered by the Department of Energy (DOE), Supplemental Nutrition Assistance Program (SNAP) administered by the Department of Agriculture (USDA), Section 8 Project-Based Rental Assistance, the Housing Choice Voucher Program administered by HUD, the Federal Communication Commission's Lifeline Support for Affordable Communications, the National School Lunch Program administered by the USDA, the Supplemental Security Income Program administered by the Social Security Administration, and any verified government or non-profit program serving Asset Limited Income Constrained Employed (ALICE) persons or households. With respect to the Federal programs listed previously an individual in the household must currently be approved for assistance from or participation in the program with an award letter or other written documentation within the last 12 months for enrollment in that program to establish categorical eligibility of the household. State agencies can also provide verification that a household is

a Qualifying Household if the household participates in a State's solar or other program and income limits for such program are at or below the qualifying income level required to be a Qualifying Household. The qualifying income level for a Qualifying Household is based on where such household is located.

(B) *Other income verification methods.* Paystubs, Federal or State tax returns, or income verification through crediting agencies and commercial data sources can be used to establish that a household is a Qualifying Household.

(C) *Impermissible verification method.* A self-attestation from a household is not a permissible method to establish a household is a Qualifying Household. This prohibition on direct self-attestation from a household does not extend to categorical eligibility for needs-based Federal, State, Tribal, or utility programs with income limits that rely on self-attestation for verification of income.

(g) *Annual Capacity Limitation.* Under section 48(e)(4)(C), the total annual capacity limitation is 1.8 gigawatts of DC capacity for the calendar year 2023 and 2024 Program. The annual Capacity Limitation for each Program year is divided across the four facility categories described in section 48(e)(2)(A)(iii) and paragraph (b)(2) of this section as provided in guidance published in the Internal Revenue Bulletin. *See* § 601.601 of this chapter. The Capacity Limitation for each Program year is divided across the four facility categories based on factors such as the anticipated number of applications that are expected for each category and the amount of Capacity Limitation that needs to be reserved for each category to encourage market participation in each category consistent with statutory intent and the goals of the Program. After the Capacity Limitation for each facility category is established in guidance published in the Internal Revenue Bulletin, it may later be re-allocated across facility categories and sub-reservation in the event one category or sub-reservation is oversubscribed and another has excess capacity. A facility category or sub-reservation is oversubscribed if it receives applications in excess of Capacity Limitation reserved for the facility category or sub-reservation.

(h) *Reservations of Capacity Limitation allocation for facilities that meet certain additional selection criteria*—(1) *In general.* At least 50 percent of the total Capacity Limitation in each facility category described in paragraph (b) of this section will be reserved for qualified facilities meeting

the additional selection criteria described in paragraph (h)(2) of this section (relating to ownership criteria) and paragraph (h)(3) of this section (relating to geographic criteria) as provided in guidance published in the Internal Revenue Bulletin. See § 601.601 of this chapter. Revenue Procedure 2023–27, 2023–35 I.R.B. provides the specific amounts reserved for 2023 and future guidance published in the Internal Revenue Bulletin will provide the amounts reserved for future years. The procedure for utilizing these additional selection criteria is provided in guidance published in the Internal Revenue Bulletin. After the reservation of Capacity Limitation for qualified facilities meeting the additional selection criteria described in paragraphs (h)(2) and (3) of this section is established in guidance published in the Internal Revenue Bulletin, it may later be re-allocated across facility categories and sub-reservations in the event one category or sub-reservation within a category is oversubscribed and another has excess capacity.

(2) *Ownership criteria*—(i) *In general.* The ownership criteria is based on characteristics of the applicant that owns the qualified solar or wind facility. A qualified solar or wind facility will meet the ownership criteria if it is owned by one of the following:

(A) A Tribal enterprise (as defined in paragraph (h)(2)(iii) of this section),

(B) An Alaska native corporation (as defined in paragraph (h)(2)(iv) of this section),

(C) A renewable energy cooperative (as defined in paragraph (h)(2)(v) of this section),

(D) A qualified renewable energy company meeting certain characteristics (as defined in paragraph (h)(2)(vi) of this section), or

(E) A qualified tax-exempt entity (as defined in paragraph (h)(2)(vii) of this section).

(ii) *Indirect ownership*—(A) *Disregarded entities.* If an applicant wholly owns an entity that is the owner of a qualified solar or wind facility, and the entity is disregarded as separate from its owner for Federal income tax purposes (disregarded entity), the applicant, and not the disregarded entity, is treated as the owner of the qualified solar or wind facility for purposes of the ownership criteria.

(B) *Partnership; ownership of a partnership for purposes of ownership criteria.* If an applicant is an entity treated as a partnership for Federal income tax purposes, and an entity described in paragraphs (h)(2)(i)(A) through (E) of this section owns at least a one percent interest (either directly or

indirectly) in each material item of partnership income, gain, loss, deduction, and credit and is a managing member or general partner (or similar title) under State law of the partnership (or directly owns 100 percent of the equity interests in the managing member or general partner) at all times during the existence of the partnership, the qualified solar or wind facility will be deemed to meet the ownership criteria. If the partnership becomes the owner of the facility after an allocation is made to an entity described in paragraphs (h)(2)(i)(A) through (E) of this section, the transfer of the facility to the partnership is not a disqualification event for purposes of paragraph (m)(5) of this section, so long as the requirements of paragraph (m)(5) of this section are satisfied. The original applicant and the successor partnership should refer to guidance published in the Internal Revenue Bulletin for the procedures to request a transfer of the Capacity Limitation allocation to the successor partnership.

(iii) *Tribal enterprise.* A Tribal enterprise for purposes of the ownership criteria is an entity that is:

(A) Owned at least 51 percent directly by an Indian Tribal government (as defined in section 30D(g)(9) of the Internal Revenue Code (Code)), or owned at least 51 percent indirectly through a corporation that is wholly owned by the Indian Tribal government and is created under either the Tribal laws of the Indian Tribal government or through a corporation incorporated under the authority of either section 17 of the Indian Reorganization Act of 1934, 25 U.S.C. 5124 or section 3 of the Oklahoma Indian Welfare Act, 25 U.S.C. 5203), and

(B) Subject to Tribal government rules, regulations, and/or codes that regulate the operations of the entity.

(iv) *Alaska native corporation.* An Alaska Native corporation for purposes of the ownership criteria is defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(m).

(v) *Renewable energy cooperative.* A renewable energy cooperative for purposes of the ownership criteria is an entity that develops qualified solar and/or wind facilities and is either:

(A) A consumer or purchasing cooperative controlled by its members with each member having an equal voting right and with each member having rights to profit distributions based on patronage as defined by proportion of volume of energy or energy credits purchased (kWh), volume of financial benefits delivered (\$), or volume of financial payments made (\$); and in which at least 50 percent of the

patronage in the qualified facility is by cooperative members who are low-income households (as defined in section 48(e)(2)(C)), or

(B) A worker cooperative controlled by its worker-members with each member having an equal voting right.

(vi) *Qualified renewable energy company.* A qualified renewable energy company for purposes of the ownership criteria is an entity that serves low-income communities and provides pathways for the adoption of clean energy by low-income households. In addition to its general business purpose, a qualified renewable energy company must satisfy the ownership requirements described in one of paragraphs (h)(2)(vi)(A) through (F) of this section and each of the requirements in paragraphs (h)(2)(vi)(G), (H), and (I) of this section.

(A) At least 51 percent of the entity's equity interests are owned and controlled by one or more individuals.

(B) At least 51 percent of the entity's equity interests are owned and controlled by a Community Development Corporation (as defined in 13 CFR 124.3).

(C) At least 51 percent of the entity's equity interests are owned and controlled by an agricultural or horticultural cooperative (as defined in section 199A(g)(4)(A)).

(D) At least 51 percent of the entity's equity interests are owned and controlled by an Indian Tribal government (as defined in section 30D(g)(9)).

(E) At least 51 percent of the entity's equity interests are owned and controlled by an Alaska Native corporation (as defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(m)).

(F) At least 51 percent of the entity's equity interests are owned and controlled by a Native Hawaiian organization (as defined in 13 CFR 124.3).

(G) Has less than 10 full-time equivalent employees (as determined under section 4980H(c)(2)(E) and (c)(4)) and less than \$20 million in annual gross receipts in the previous calendar year; this must include the employees or receipts of all affiliates when determining the size of a business. Affiliation with another business is based on the power to control, whether exercised or not. The power to control exists when an external party has 50 percent or more ownership. It may also exist with considerably less than 50 percent ownership by contractual arrangement, or when one or more parties own a large share compared to other parties.

(H) First installed and/or operated a qualified solar or wind facility as defined in section 48(e)(2)(A) two or more years prior to the date of application; or

(I) Has provided solar services as a contractor or subcontractor to qualified solar or wind facilities as defined in section 48(e)(2)(A) with at least 100 kW of cumulative nameplate capacity located in one or more low-income communities as defined in section 48(e)(2)(A)(iii)(I).

(vii) *Qualified tax-exempt entity.* A qualified tax-exempt entity for purposes of the ownership criteria is:

(A) An organization exempt from the tax imposed by subtitle A by reason of being described in section 501(c)(3) or section 501(d);

(B) Any State, the District of Columbia, or political subdivision thereof, or any agency or instrumentality of any of the foregoing;

(C) An Indian Tribal government (as defined in section 30D(g)(9)), a political subdivision thereof, or any agency or instrumentality of any of the foregoing; or

(D) Any corporation described in section 501(c)(12) operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas.

(3) *Geographic criteria*—(i) *In general.* Geographic criteria does not apply to Category 2 Facilities. To meet the geographic criteria, a facility must be located in a county or census tract that is described in paragraph (h)(3)(i)(A) or (B) of this section. Applicants who meet the geographic criteria at the time of application are considered to continue to meet the geographic criteria for the duration of the recapture period, unless the location of the facility changes.

(A) *Persistent Poverty County.* A Persistent Poverty County (PPC) for which information can be found at <https://www.ers.usda.gov/data-products/poverty-area-measures/>, which is generally defined as any county where 20 percent or more of residents have experienced high rates of poverty over the past 30 years. For the purposes of the Program, the PPC measure is that adopted by the USDA to make this determination. The most recent measure, which would apply for the 2023 Program year, incorporates poverty estimates from the 1980, 1990, and 2000 censuses, and 2007–11 ACS 5-year average. If updated data is released by USDA, a taxpayer will have a 1-year period following the date of the release of the updated data to be eligible under the previous data. After the 1-year transition period, the updated data must be used to determine eligibility.

Applicants who satisfy the definition of PPC community at the time of application are considered to continue to meet the definition of PPC for the duration of the recapture period described in paragraph (n)(1) of this section, unless the location of the facility changes.

(B) *Certain census tracts.* A census tract that is designated in the Climate and Economic Justice Screening Tool (CEJST), which can be found at <https://screeningtool.geoplatform.gov/en/#3/33.47/-97.5>, as disadvantaged based on whether the tract is described in paragraph (h)(3)(ii)(A) or (B) of this section. The CEJST website provides further detail on the terms described in paragraphs (h)(3)(ii)(C) through (E) of this section, which are used in identifying census tracts described in paragraphs (h)(3)(ii)(A) and (B) of this section. See CEJST, Methodology & data, <https://screeningtool.geoplatform.gov/en/methodology>.

(ii) *Applicable terms for certain census tracts.* The following terms are applicable to this paragraph (h)(3):

(A) *Energy burden or cost.* The census tract is greater than or equal to the 90th percentile for energy burden (or energy cost) and is greater than or equal to the 65th percentile for low income.

(B) *Exposure.* The census tract is greater than or equal to the 90th percentile for PM<sub>2.5</sub> exposure and is greater than or equal to the 65th percentile for low income.

(C) *Energy cost.* Energy cost is defined as average household annual energy cost in dollars divided by the average household income.

(D) *PM<sub>2.5</sub>.* PM<sub>2.5</sub> is defined as fine inhalable particles with 2.5 or smaller micrometer diameters. The percentile is the weight of the particles per cubic meter.

(E) *Low-income.* Low income is defined as the percent of a census tract's population in households where household income is at or below 200 percent of the Federal poverty level, not including students enrolled in higher education.

(i) *Sub-reservations of allocation for Category 1 Facilities*—(1) *In general.* Capacity Limitation reserved for Category 1 Facilities will be subdivided each Program year for facilities seeking a Category 1 allocation with Capacity Limitation reserved specifically for eligible residential behind the meter (BTM) facilities, including rooftop solar. The remaining Capacity Limitation is available for applicants with front of the meter (FTM) facilities as well as non-residential BTM facilities. The specific sub-reservation for eligible residential BTM facilities in Category 1 is provided

in guidance published in the Internal Revenue Bulletin and is established based on factors such as promoting efficient allocation of Capacity Limitation and allowing like-projects to compete for an allocation. After the sub-reservation is established in guidance published in the Internal Revenue Bulletin, it may later be re-allocated in the event it has excess capacity.

(2) *Definitions*—(i) *Behind the meter (BTM) facility.* For purposes of the Program, a qualified wind or solar facility is BTM if:

(A) It is connected with an electrical connection between the facility and the panelboard or sub-panelboard of the site where the facility is located,

(B) It is to be connected on the customer side of a utility service meter before it connects to a distribution or transmission system (that is, before it connects to the electricity grid), and

(C) Its primary purpose is to provide electricity to the utility customer of the site where the facility is located. This also includes systems not connected to a grid and that may not have a utility service meter, and whose primary purpose is to serve the electricity demand of the owner of the site where the system is located.

(ii) *Eligible residential BTM facility.* For purposes of paragraph (i)(1) of this section, an eligible residential BTM facility is defined as a single-family or multi-family residential qualified solar or wind facility that does not meet the requirements for a Category 3 Facility and is BTM. A qualified solar or wind facility is residential if it is used solar or wind energy to generate electricity for use in a dwelling unit that is used as a residence.

(iii) *Eligible FTM facility.* For purposes of the Program, a qualified solar or wind facility is FTM if it is directly connected to a grid and its primary purpose is to provide electricity to one or more offsite locations via such grid or utility meters with which it does not have an electrical connection; alternatively, FTM is defined as a facility that is not BTM. For the purposes of Category 4 Facilities, a qualified solar or wind facility is also FTM if 50 percent or more of its electricity generation on an annual basis is physically exported to the broader electricity grid.

(j) *Process of application evaluation*—(1) *In general.* Applications for a Capacity Limitation allocation will be evaluated according to the procedures specified in guidance published in the Internal Revenue Bulletin. See § 601.601 of this chapter. If a facility category is oversubscribed, a lottery system may be

used to allocate Capacity Limitation to similarly situated applicants.

(2) *Information required as part of application.* Applicants are required to submit with each application for a Capacity Limitation allocation information, documentation, and attestations to demonstrate eligibility for an allocation and project viability as specified in guidance published in the Internal Revenue Bulletin. See § 601.601 of this chapter.

(3) *No administrative appeal of capacity limitation allocation decisions.* An applicant may not administratively appeal decisions regarding Capacity Limitation allocations.

(k) *Placed in service—(1) Requirement to report date placed in service.* For any facility that received an allocation of Capacity Limitation the owner of the facility must report to DOE the date the eligible property was placed in service. This report is done through the same portal by which the original application for allocation was submitted.

(2) *Requirement to submit final eligibility information at placed in service time.* At the time that the owner reports that eligible property has been placed in service the owner also must confirm information about the facility and submit additional documentation to prove the facility is still eligible to maintain the allocation and the increased energy percentage under section 48(e)(1) as specified in guidance published in the Internal Revenue Bulletin. See § 601.601 of this chapter.

(3) *DOE confirmation.* DOE will review the placed in service documentation and attestations to determine if the facility meets the eligibility criteria for the owner to claim an increased energy percentage. DOE then provides a recommendation to the IRS regarding whether the facility continues to meet the eligibility requirements for the facility to retain its allocation or if the facility should be disqualified (as provided in paragraph (m) of this section). Based on DOE's recommendation, the IRS will decide whether the facility should retain its allocation or if the facility should be disqualified and will notify DOE of its decision. Each applicant must receive confirmation from the IRS that DOE has reviewed the placed in service submissions, and that eligibility is confirmed, prior to the owner (or a partner or shareholder in the case of a partnership or S corporation) claiming the increased credit amount on Form 3468, *Investment Credit* (or Form 3800, *General Business Credit*), or successor form, if eligible, making a transfer election under section 6418 of the Code, or, if eligible, making an elective

payment election under section 6417 of the Code.

(4) *Definition of placed in service.* For purposes of this section, eligible property is considered placed in service in the earlier of the following taxable years:

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

(ii) 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.

(l) *Facilities placed in service prior to an allocation award—(1) In general.* Qualified solar or wind facilities must be placed in service after being awarded an allocation of Capacity Limitation.

(2) *Rejection or rescission.* An application for a qualified solar or wind facility that is placed in service prior to submission of the application will be rejected. If a facility is placed in service after the application is submitted, but prior to the allocation of Capacity Limitation, and the facility is awarded an allocation, the allocation will be rescinded.

(m) *Disqualification.* A facility will be disqualified and lose its allocation if prior to or upon the facility being placed in service an occurrence described in one of paragraphs (m)(1) through (5) of this section takes place.

(1) The location where the facility will be placed in service changes.

(2) The net output of the facility increases such that it exceeds the less than 5 MW AC output limitation provided in section 48(e)(2)(A)(ii) or the nameplate capacity decreases by the greater of 2 kW or 25 percent of the Capacity Limitation awarded in the allocation (AC for a wind facility; DC for a solar facility).

(3) The facility cannot satisfy the financial benefits requirements under section 48(e)(2)(B)(ii) and paragraph (e) of this section as planned, if applicable, or cannot satisfy the financial benefits requirements under section 48(e)(2)(C) or paragraph (f) of this section as planned, if applicable.

(4) The eligible property that is part of the facility that received the Capacity Limitation allocation is not placed in service within four years after the date the applicant was notified of the allocation of Capacity Limitation to the facility.

(5) The facility received a Capacity Limitation allocation based, in part, on meeting the ownership criteria and ownership of the facility changes prior to the facility being placed in service,

unless the original applicant transfers the facility to an entity treated as a partnership for Federal income tax purposes and retains at least a one percent interest (either directly or indirectly) in each material item of partnership income, gain, loss, deduction, and credit of such partnership and is a managing member or general partner (or similar title) under State law of the partnership (or directly owns 100 percent of the equity interests in the managing member or general partner) at all times during the existence of the partnership.

(n) *Recapture of section 48(e) Increase to the section 48(a) credit—(1) In general.* Section 48(e)(5) provides for recapturing the benefit of any increase in the credit allowed under section 48(a) by reason of section 48(e) with respect to any property that ceases to be property eligible for such increase (but that does not cease to be investment credit property within the meaning of section 50(a)). Section 48(e) provides that the period and percentage of such recapture must be determined under rules similar to the rules of section 50(a). Therefore, if, at any time during the five year recapture period beginning on the date that a qualified solar or wind facility property under section 48(e) is placed in service, there is a recapture event under paragraph (n)(3) of this section with respect to such property, then the Federal income tax imposed on the taxpayer by chapter 1 of the Code for the taxable year in which the recapture event occurs is increased by the recapture percentage of the benefit of the increase in the section 48 credit. The recapture percentage is determined according to the table provided in section 50(a)(1)(B).

(2) *Exception to application of recapture.* Such recapture may not apply with respect to any property if, within 12 months after the date the applicant becomes aware (or reasonably should have become aware) of such property ceasing to be property eligible for such increase in the credit allowed under section 48(a), the eligibility of such property for such increase pursuant to section 48(e) is restored. Such restoration of an increase pursuant to section 48(e) is not available more than once with respect to any facility.

(3) *Recapture events.* Any of the following circumstances result in a recapture event if the property ceases to be eligible for the increased credit under section 48(e):

(i) Property described in section 48(e)(2)(A)(iii)(II) fails to provide financial benefits.

(ii) Property described under section 48(e)(2)(B) ceases to allocate the

financial benefits equitably among the occupants of the dwelling units, such as not allocating to residents the required net energy savings of the electricity, as required by paragraph (e) of this section.

(iii) Property described under section 48(e)(2)(C) ceases to provide at least 50 percent of the financial benefits of the electricity produced to qualifying households as described under section 48(e)(2)(C)(i) or (ii), or fails to provide those households the required minimum 20 percent bill credit discount rate, as required by paragraph (f) of this section.

(iv) For property described under section 48(e)(2)(B), the residential rental building the facility is a part of ceases

to participate in a covered housing program or any other affordable housing program described in section 48(e)(2)(B)(i), as applicable.

(v) A facility increases its output such that the facility's output is 5 MW AC or greater, unless the applicant can prove that the output increase is not attributable to the original facility but rather is output associated with a new facility under the 80/20 Rule (the cost of the new property plus the value of the used property).

(4) *Section 50(a) Recapture.* Any event that results in recapture under section 50(a) will also result in recapture of the benefit of the increase in the section 48 credit by reason of

section 48(e). The exception to the application of recapture provided in paragraph (n)(2) of this section does not apply in the case of a recapture event under section 50(a).

(o) *Applicability date.* The rules of this section will apply to taxable years ending on or after October 16, 2023.

**Douglas W. O'Donnell,**

*Deputy Commissioner for Services and Enforcement.*

Approved: August 2, 2023.

**Lily L. Batchelder,**

*Assistant Secretary (Tax Policy).*

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