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# The briefing will start soon

**How Cities Can Take Advantage  
of Direct Pay**

January 25, 2024 | 2:00pm ET

# Agenda

## **I. Opening Remarks**

Jason Walsh, Executive Director, BlueGreen Alliance

Mike Williams, Senior Fellow, Center for American Progress

## **II. The “Nuts & Bolts” of Direct Pay**

Jillian Blanchard, Lawyers for Good Government

## **III. Tax Incentive Adders**

Rachel Chang, Center for American Progress

Jillian Blanchard, Lawyers for Good Government

Jaron Goddard, Wilson Sonsini Goodrich & Rosati

## **IV. Labor Standards, Domestic Content & Apprenticeship**

### **Requirements**

Brennen Cain, BlueGreen Alliance

## **V. Municipal Capacity**

Carolyn Berndt, National League of Cities

## **VI. Questions & Contact Information**

# Legal Disclaimer

**This webinar provides a high-level overview only and should not be considered direct legal advice.**

**Please consult an attorney for legal assistance with your specific matter.**

**Legal Disclaimer:** The information provided in this webinar does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available from this webinar and associated materials are for general informational purposes only. Information contained in any associated materials or website may not constitute the most up-to-date legal or other information.

# Overview

## **What is Elective Pay (informally referred to as “direct pay”)?**

- Eligible entities (including local governments & nonprofits) would not normally owe large amounts of federal income tax, if any.
- However, by filing a return and using elective pay, these entities can receive the value of certain clean energy and clean transportation tax incentives as a tax-free cash payment from the IRS.

## **Brand New Source of Funding for States, Local governments, Tribes, nonprofits, etc. to be reimbursed for creating new clean energy projects, like:**

- Investing in and constructing clean energy (wind, solar, green hydrogen, etc.)
- Transition government vehicle fleet to EVs
- Placement of EV infrastructure in rural, urban and low income
- Rooftop Solar

# The “Nuts & Bolts” of Direct Pay

## What parties are eligible for direct pay?

- Exempt organizations under Section 501 of the Tax Code
- States and local governments, other instrumentalities (public schools/libraries)
- Territories, agencies, instrumentalities
- Municipally-owned utilities
- Indian tribal governments
- Alaska Native Corporations
- Tennessee Valley Authority
- Rural electric coops

### BUT

NOT Eligible: partnerships,  
taxpayers

Must own the asset

Nontaxpayers cannot use  
transferability

# 12 Tax Credits Available

## Section 30C

Alternative fuel  
refueling property

## Section 45

Renewable electricity  
production tax credit  
(PTC)

## Section 45Q

Carbon dioxide  
sequestration credit

## Section 45U

Zero-emission  
nuclear power  
production credit

## Section 45V

Clean hydrogen  
production credit

## Section 45X

Advanced  
manufacturing  
production credit

## Section 45Y

Clean electricity  
production credit

## Section 45Z

Clean fuel production  
credit

## Section 48

Energy investment  
tax credit (ITC)

## Section 48C

Qualifying advanced  
energy project credit

## Section 48E

Clean electricity  
investment credit

## Section 45W

Qualified commercial  
vehicles

# Tax Credits & Projects - Most Relevant to Local Governments

## Example Projects:

EV Infrastructure  
Placement in  
non-urban or low  
income areas



Section 30C  
Alternative fuel  
refueling property

## Example Projects:

EV Fleet Transition

- Gov. vehicles, school buses, public transit, etc.
- Stacking available with EPA funding



Section 45W  
Qualified  
commercial vehicles

Section 45  
Renewable  
electricity production  
tax credit (PTC)



## Example Projects:

- Microgrid/  
Community Solar
- Storage deployed at  
distribution level
- Port electrification
- Rooftop Solar or  
Wind on gov.  
buildings or  
affordable housing
- Geothermal HVAC



Section 48  
Energy investment  
tax credit (ITC)

**\*Important Role for Munis: Educate & Provide Resources for Nonprofits and Communities**

# Direct Pay Process in More Detail

1. **Identify** qualifying projects for 2023 and start planning 2024/beyond projects with direct pay in capital stack
2. **Build Internal team:** Work with financial officers (CFO) and in house counsel to identify eligible credit, authorized party, etc.
3. **Timeline:** Identify taxable year project was placed in service - 2023? 2024?\*
4. **Pre-Reg Portal:** File using the [IRS Pre-filing Registration Portal](#) to obtain Unique Registration Number for each “applicable credit property”
5. **File Tax Forms:** 4.5 months after end of Fiscal Year or 10.5 months with an extension - ***automatic 6 month extension for first-time filers!***
  - Forms: 990-T, 3800, 8936-A (include registration number for each eligible property on the form)
  - Can include multiple applicable credit properties (registration IDs) on the same 990-T Form, *if* same applicable tax year (plan for one 990-T Form for each taxable year)
6. **Get Paid:** Receive payment after the return is processed (no clear timeline; financial institutions estimate 12+ months)

# Mechanics & Other Considerations

- **Pre-Filing Registration Portal**: [IRS Video Tutorial](#) walks through process (12-min -- slow, but worth it!). Submit through Portal, receive either response with unique ID number or follow up comments/questions from Treasury. Can make changes once submitted, but only after you receive response from Treasury
- **Documentation to collect NOW for 2023 projects:**
  - Info for each eligible project/property (EV purchase, EV infrastructure, Solar/Wind/Geothermal/etc)
  - Identify each credit you intend to earn
  - Date Placed in Service
  - Size (for EV - make/model)
  - Internal party who is authorized to complete form
- **Cannot Amend Tax Return Once Filed** (may change in final regs)
- **Automatic Extension for first-time filers so take time and do it right!**

# Practical Guidance

## Identifying Eligible Projects

- ◆ EV Worksheets - [EV Purchase](#) and [EV Infrastructure](#)
- ◆ ITC Info Sheet - [Identifying ITC-Eligible Projects](#)
- ◆ EV Infrastructure Placement - Non-urban and Low Income
  - DOE just created [new mapping tool](#) to help identify eligible non-urban and low income locations (January 19, 2024)
- ◆ **Caution\*\*:** 179D Commercial Building Energy Efficiency Upgrades are NOT eligible for Direct Pay - only for straight tax deductions

# Practical Project Development and Financing Tips

1. Work with your utility, port, state energy office, national orgs working on federal funding (L4GG) etc. to identify opportunities to combine funding given large volume of IRA related funding. Most federal funding opportunities are stackable with direct pay. **NOTE:** Be mindful of reductions in direct pay for tax-exempt bond financing (e.g., 25.5% vs. 30% ITC) and cost-share restrictions with federal grants.
2. Construct project timelines and identify if bridge financing will be required; consider collateral package
3. Ownership Issues:
  - Identify “City-owned” versus “City-supported” projects (e.g., “City owned” projects = transitioning City-owned vehicles to EVs; “City-supported” projects = issuing grants to non-profits for electrification projects where non-profits are eligible for direct pay)
  - Identify and clarify ownership models (e.g., long-term leases of properties may not be good candidates for direct pay).
  - Identify upcoming procurement and contract opportunities, and if considering going around direct pay, make vendors prove they are more cost-effective than direct pay methods (e.g., electric school bus procurement and fleet management contracts).
4. **Bonus Credits and Aggregation Rules:** Majority of cities will consider for ITC projects (solar, etc) that fall below the 1 MW threshold for PWA requirements; however, please note proposed aggregation rules.
5. **Consider how City ownership of assets can generate revenues (e.g., installing City-owned chargers in public parking/curbside or ports for public use for a customer fee), revenue from bidirectional charging/grid storage for fleets, revenue from carbon credit or REC sales, or improve property values for declining commercial real estate property.**

# Practical Project Development and Financing Tips Example

## 1. Example Project: City fleet electrification

- Project Development Considerations: Larger scale fleet electrification requires significant project planning, from identifying changes to a transportation yard, to how many chargers need to be installed and when to meet ultimate goals, upgrades to accommodate future chargers, what kind of chargers (bidirectional, etc.) and ensuring charger compatibility with vehicles, microgrid or resiliency needs, average distance and use profile of vehicles, driver training, etc.
- Utility Regulatory Considerations: Understanding local utility tariffs and requirements regarding installing adjacent storage with EV chargers, rebates utilities offer for specified purposes (e.g., LCFS in California), other technical assistance.
- Credit Stacking: Credit or incentive stacking with other federal funds (e.g., DERA).
- Project Design and Tax Credit Selection: Storage + charging infrastructure or storage/solar + charging infrastructure; [solar canopies](#) over parking lots, etc.
- Bonus Credits: Projects 5MWac and under for the ITC can include qualified interconnection costs.

# Layering Incentives: Adding to and Subtracting from Direct Pay

## Prevailing Wage and Apprenticeship Requirements

(Potential Reduction)

\*\*Projects larger than 1 MW

Projects generally must meet labor standards to receive the **full 30% base** commensurate with pre-IRA levels. Otherwise, most credits are **reduced to 6%**. Applies to:

- **48, 45: Clean Electricity Investment Tax Credit and Production Tax Credit**
- **30C: Alternative Fuel Refueling Property Credit**
- 45Q: Credit for Carbon Dioxide Sequestration
- 45V: Credit for Production of Clean Hydrogen
- 45Z: Clean Fuel Production Credit
- 48C: Advanced Energy Project Credit

## Domestic Content Requirement

(Potential Bonus & Reduction)

ITC/PTC only

\*\*Projects larger than 1 MW

Projects or facilities that meet domestic content requirements are eligible for a **10% increase** to the PTC, or up to 10 percentage point increase to the ITC.

\*\* For projects or facilities beginning construction in 2024 or later, **elective pay phases down** and eventually is eliminated altogether, unless the domestic content requirement is met. **Exemptions are possible.**

# Layering Incentives: Adding to and Subtracting from Direct Pay

## Energy Communities Bonus (Potential Addition)

ITC/PTC Only

Projects located in “energy communities” may be eligible for a **10% increase** to the PTC, or **10 percentage point increase** to the ITC. Three ways to qualify as an energy community:

- Brownfield sites
- Census tract where coal mine or coal-fired power plant has retired
- Statistical area with higher than average unemployment *AND EITHER*:
  - Significant direct employment related to fossil fuel activity; or,
  - Significant local tax revenue related to fossil fuel activity

## Low Income Communities Bonus Credit Program

(Potential Addition)  
\*Separate Application Required

ITC Only

Capped bonus credit program for the ITC, requiring an application. Provides an additional credit of **10-20% points** for the ITC:

- Category 1, 10%: Located in a low-income community
- Category 2, 10%: Located on Indian land
- Category 3, 20%: Low-income residential building project (affordable housing programs)
- Category 4, 20%: Low-income economic benefit project (financial benefits provided to low-income households)

**LICB Portal open on a rolling basis.** Almost full for 2024!

You must apply and receive allocation, *then* place in service to claim this bonus.

# Labor standards

- The “base rate” is 6% for the ITC or 0.5 cents/per kilo-watt hours (adjusted for inflation) for the PTC.
- The “bonus rate” is 30% for the ITC or 2.5 cents per kilo-watt hours (adjusted for inflation) for the PTC when the following labor standards are met:

## Labor Standards:

- Prevailing Wage: Prevailing Wage: prevailing wage is based on a survey of the pay across any given industry to provide a floor for compensation
- Apprenticeship: RAPs are registered with the DOL office, a minimum of 15% apprenticeship hours on the entirety of the construction

## Commence Construction

- A project will be considered to begin if more than 5% of capital investment has been made, or if “significant work” has started

# Domestic Content Bonus Credit

- 10% Domestic Content Bonus Credit increase in the overall taxable basis or PTC rate
- In order to receive the domestic content bonus credit, 100% of applicable steel and iron and an applicable share of “manufactured products” used in the construction of a project must be produced in the United States
- The Two Parts to Domestic Content
  - 100% Iron and Steel produced in the US; are structural in function
  - 40%\* Manufactured Product-This requirement applies to all manufactured items directly incorporated into the project, excluding those that fall under the iron and steel requirement. The calculation of the domestic percentage takes into account a manufactured product’s components but not its subcomponents.

\*40% initially—increasing to 55% over 3 years—of the total cost of all “manufactured products” are produced in the United States (the percentage starts at 20% for offshore wind projects).

# Domestic Content

## Exemptions for Eligible Entities

December 2023, IRS produces interim guidance on the domestic content requirements  
Exemptions or Waivers for the domestic content provisions are as follows:

- The inclusion of domestic content increases overall construction costs by 25%
- The provisions or products needed to meet the standard are not produced in a meaningfully available way

IRS is considering what information should be necessary to grant an exemption for eligible entities

# Domestic Content Draft Regs: Public Comment Period Open

On December 28, 2022, Treasury issued a notice on Domestic Content:

## 1. RFI re Factors and Process for Evaluating Increased Cost & Non-availability Exceptions

- a. Factors to consider re “overall costs of construction”?
- b. Factors to consider in “sufficient and reasonably available” or “satisfactory quality”?
- c. Should BABA standard be used? Other existing federal standards?
- d. Documentation required?
- e. Steps to reducing burdens for newly Applicable Entities?
- f. How many properties will be affected by this?

## 2. RFP/Solicitation Process - Key for Local Gov Input!!

- a. What solicitation processes do cities use for ITC projects > 1MW? Does the process allow for determining Non-Availability/Increased Cost Exemptions? *NO!*
- b. Do these solicitation processes provide cost, product origin, and/or product availability information?
- c. For RFPs:
  - i. Is it common to specify whether the steel, iron, or manufactured products made in US?
  - ii. What is the range of cost information provided in the proposal and is it auditable?
  - iii. Who is involved in the procurement process? Do developers or installers contracted through the RFP handle the procurement process for Applicable Entities?

Comments due February 26, 2024: Reference Notice 2024-9 and file electronically. Details [here](#)

# Domestic Content/PWA Practical Guidance

- **Domestic Content is biggest issue for large scale (>1MW) solar/wind starting in 2025 and beyond:**
  - Include Domestic Content Requirements in RFP Bid Package for ITC Projects
  - Understand your project cost breakdowns and which components will drive compliance (e.g., solar panels often comprise the significant majority or plurality of overall project cost)
- **Ways to Mitigate Risk**
  - Domestic Content is not an issue for Fleet Transition/EV Infrastructure
  - Obtain tax liability insurance
  - Ensure vendors provide adequate documentation on direct cost data to substantiate required attestations to IRS
  - Involve City legal and tax counsel early to update procurement forms, and other contracts to incorporate appropriate representations and indemnities and bonus credit compliance information (e.g., domestic content); properly value your tax credit basis.

# Municipal Capacity

## Questions to ask

- What was your city's experience with the State and Local Fiscal Recovery Funds from the American Rescue Plan Act?
  - Did your municipality struggle with interpretation of rules or compliance?
- Do you have the expertise in house to do this work?
  - General Counsel
  - Accountant
  - Compliance manager for filings
  - Someone with basic familiarity of tax

*The 2022 Census of Governments lists ~19,000 municipalities. ~14,000 have a person employed full-time in a finance capacity (median number of full-time employees is 3).*

- What other expertise is needed? To name a few...
  - Attorney specializing in tax
  - For larger projects, an attorney specializing in transactions
  - For larger projects, an energy tax attorney
  - Bond counsel
- Does your current budget have an expense line for outside consultants/lawyers if you do not have the in-house talent?

# Municipal Capacity

## Project Example

A city wants to do a neighborhood 5 megawatt solar project. The project will cost \$5 million. If the city gets the base credit plus wage & apprenticeship requirement, the city would get a 30% elective pay credit of \$1.5 million.

Advisors that might be needed for this project:

- **Registered Municipal Advisor** - to help determine if the project is financially feasible and suitable and to participate in the structuring of the financing and possible ongoing responsibilities as a fiduciary to the municipal entity.
- **Independent Engineer** - to assess project feasibility and design/build demands
- **Energy Market Advisor** - provides an assessment of energy production and determination of product demand
- **Municipal Bond Tax Counsel** - may provide consultation for energy projects in particular and ensure that the transaction adheres to all bond regulations
- **Municipal Bond Disclosure Counsel** - may provide disclosure advice about information to investors about the transaction
- **Compliance Officer** - monitor rule compliance such as procurement parameters of direct pay sourcing and wage and apprentice rules etc.
- **Broker Dealers/Banks** - parties that would underwrite the bonds and financing and include investor demand and market conditions into the initial pricing of the transaction.

# Municipal Capacity

## Questions About Risk

- Do you understand the risks associated with the tax code?
  - Recapture, excess payments, penalties, reductions in direct pay from tax-exempt bonds
- Safe harbor provisions
- How do you mitigate this risk?
  - Tax Liability Insurance; appropriate representations and indemnities and documentation of bonus credits

**Takeaway:** Elective pay is a huge opportunity to advance clean energy. IRS rules are complex. Municipalities will need to spend time and resources building up internal capabilities or will need to find an outside partner to manage this process for them.

## IRC 6417:

### **6) Excessive Payment**

(A) In general

In the case of any amount treated as payment which is made by the applicable entity under subsection (a), or the amount of the payment made pursuant to subsection (c), which the Secretary determines constitute an excessive payment, the tax imposed on such entity by chapter 1 (regardless of whether such entity would otherwise be subject to tax under such chapter) for the taxable year in which such determination is made shall be increased by an amount equal to the sum of—

(i) the amount of such excessive payment, plus

**(ii) an amount equal to 20 percent of such excessive payment.**

# Resources

- Lawyers for Good Government:
  - General [IRA and Elective Pay Resources](#) Page
  - Ask a discrete [legal question](#) to L4GG's team of legal experts
  - Request for more [hands-on legal assistance](#)
  - From our friends at WRI: [Energy Communities/LICB Bonus Mapper](#)
- Local Infrastructure Hub - Elective Pay Bootcamp - [sign up by Jan. 31](#)
- IRS Office Hours on Portal Pre-filing Registration
  - [Jan. 26, 1-2 pm eastern](#)                      [Jan. 30, 1-2 pm eastern](#)
  - [Feb. 2, 1-2 pm eastern](#)                      [Feb. 6, 1-2 pm eastern](#)                      [Feb. 9, 1-2 pm eastern](#)
- IRS [Pre-Registration Portal](#) and [Video Tutorial](#)
- DOL Wage and Hour [link](#), DOL Apprenticeship [link](#)

# Questions & Contact Information

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