

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

December 22, 2022

Re: Notice 2022-50 (Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits)

To Whom It May Concern:

We write to provide comments in response to Notice 2022-50¹, Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits (the “Notice”). We appreciate the work of the staff at the Internal Revenue Service (“IRS”) to issue the Notice and prioritize guidance that will maximize public benefit via the use of both the direct payment regime and the transferability regime to propel investment in clean energy projects as provided in the Inflation Reduction Act of 2022 (the “IRA”).²

Our states are on the forefront of the clean energy transition, having adopted the strong Clean Energy Standards and associated state laws requiring and incentivizing the transition to clean energy generation, transportation, building electrification, and more. Our state institutions, such as state colleges, universities, water conservation districts, and hospitals, are actively working to effectuate climate and clean energy plans, such as installing solar generation facilities on-site, electrify and insulate buildings, and electrify their fleet vehicles. These institutions are often large and serve thousands to tens of thousands of people with substantial infrastructure. Despite these plans and strong state climate and clean energy standards, our states have faced severe budget constraints. Accordingly, we want to ensure that the full benefits of the new tax credit regime that are designed for public benefit enable our vital state institutions that serve millions of people, including students, patients, and more, to accomplish their climate mitigation plans.

Sections 6417 and 6418 of the Code, as enacted by the IRA, reflect a new and innovative approach by Congress to cut the cost of capital for clean energy projects by allowing certain taxpayers to elect to treat various credits as a direct payment rather than a credit against their federal income tax, and other taxpayers to transfer credits for cash. These new “direct pay” and “transferability” regimes, together, will have the effect of working like a cash grant program for entities like non-profits and public institutions who do not generally have federal tax liability – in other words, it allows these institutions who would not otherwise be able to leverage clean energy tax credits because they don’t have federal tax liability to have the same access to federal incentives as the private sector. Indeed, the very design of this new regime, by specifically authorizing various public and non-profit entities to elect direct pay, underscores this intent.

¹ 2022-43 I.R.B. 325 (October 5, 2022).

² Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (August 16, 2022) (codified as amended in scattered sections across multiple U.S.C. titles).

We believe that the IRA authorizes state public institutions to participate in both the direct pay and transferability regimes, however, a vital clarification is needed to provide assurances to this effect and enable our state public institutions to have equal access to these clean energy tax credits as the private sector does.

Section 6417, authorizing direct pay, allows an “applicable entity” to “elect” to convert an “applicable credit” into a deemed payment of tax equal to the amount of the credit. The electing taxpayer would then file for a refund from the IRS for this deemed tax “payment,” which for institutions like state public universities, will function like a cash grant to offset the cost of investing in eligible clean energy projects. “Applicable entity” is defined as (among others) (i) any organization exempt from the tax imposed by subtitle A, (ii) *any State or political subdivision thereof*, (iii) the Tennessee Valley Authority, (iv) an Indian tribal government, (v) any Alaska Native Corporation Act (43 U.S.C. 1602(m)), or (vi) any corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas. “Applicable credit” includes various new and revised credits under the IRA.

Section 6418(a), authorizing transferability, permits “eligible taxpayers” to transfer eligible credits to an “unrelated” taxpayer. Section 6418(f)(2) defines “eligible taxpayer” (i.e., the transferor) to mean any taxpayer not described in Section 6417(d)(1)(A) (i.e., a taxpayer other than a tax-exempt entity, governmental entity, or similar entity). Section 6418 broadly provides that the transferee taxpayer, and not the eligible taxpayer, is treated as the “taxpayer” for all purposes of the Code with respect to the credit (or portion thereof) transferred.

Regarding direct pay in Section 6417, the phrase “any State or political subdivision thereof” does not expressly include the term “instrumentalities of the state,” such as a state hospital or public university that provides a public service. State governmental entities are generally not subject to federal income taxation, and accordingly, some are treated as “instrumentalities of the state” for purposes of Section 115, applying the six-factor test in Revenue Ruling 57-128. Furthermore, the phrase “any organization exempt from the tax imposed by Subtitle A” may inadvertently omit certain tax-exempt organizations, including certain public institutions, that may be subject to non-income taxes under the Code.

While “any State or political subdivision” does not expressly include “instrumentalities of the state,” it is clear that use of the word “any” indicates a broad intent to include public institutions; we believe that the omission of instrumentalities was a technical drafting oversight. We therefore respectfully request that Treasury and the IRS clarify the inclusion of “instrumentalities of the state.” Further, although tax-exempt entities described in Sections 401(a) and 501(a) arguably qualify as an applicable entity under such language, we note that under Sections 511-514, such entities may be subject to tax on unrelated business taxable income. We therefore request that future regulations clarify that organizations described in Sections 401(a) and 501(a) are applicable entities for this purpose.

Finally, for the purposes of transferability, Section 6418(a) does not further define who is considered an eligible transferee apart from an eligible “taxpayer.” Section 7701(a)(14) defines “taxpayer” as “any person subject to any internal revenue tax.” Section 7701(a)(1) defines “person” as “an individual, a trust, estate, partnership, association, company or corporation.” Under these broad definitions, we request that a Section 401(a) or 501(a) entity, any State or political subdivision, including an instrumentality of the state, should be treated as a “taxpayer” for purposes of Section 6418. Beyond the broad drafting of Section 6318(a) itself, other support for this exists. For example, Sections 511-514 of the Code subjects certain

tax-exempt entities to U.S. federal income tax on amounts of “unrelated business income.” Moreover, in PLR 8443084³, the IRS ruled that entities that ordinarily do not themselves pay federal income tax are nevertheless treated as “taxpayers” under the Code if they are “subject to other internal revenue taxes such as the federal unemployment tax.”

In conclusion, we respectfully request that the proposed regulations confirm that all instrumentalities of the state and tax-exempt entities under Sections 401(a) and 501(a) are treated as “applicable entities” under Section 6417 and eligible taxpayers under Section 6418. We appreciate your consideration of the recommendations and requests for clarifications discussed herein and look forward to the issuance of proposed regulations and other guidance that will facilitate much-needed investment in clean energy projects across public institutions nationwide.

Sincerely,

Will Toor, Executive Director, Colorado Energy Office

Katie Dykes, Commissioner, Connecticut's Department of Energy & Environmental Protection

Hannah Pingree, Director, Governor's Office of Policy Innovation and the Future, State of Maine

Ramez Ziadeh, P.E., Acting Secretary, Pennsylvania Department of Environmental Protection

³ July 25, 1984.