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

November 4, 2022

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

To Whom It May Concern:

Advanced Energy Economy ("AEE") respectfully submits the comments herein in response to Notice 2022-50[1], *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 facilitate broad use of the clean energy tax credits authorized, modified, and extended in the Inflation Reduction Act of 2022 (the "IRA"). We further appreciate the work of the staff of other federal agencies and administration officials specialized in clean energy finance and development to support the IRS's vital IRA implementation work.

AEE is a national association of businesses committed to making the energy we use secure, clean, and affordable. AEE is the only industry association in the United States that represents the full range of advanced energy technologies and services, both grid-scale and distributed. As we define it, advanced energy includes energy efficiency, demand response, energy storage, wind, solar, hydroelectric, nuclear, electric vehicles, and more. AEE represents more than 100 companies in the $240 billion U.S. advanced energy industry, which employs 3.2 million U.S. workers. Our member companies run the gamut of sizes, stages of development, business models, and technologies. They and others in the industry are and will continue to be at the forefront of the clean energy transition: developing projects, commercializing new technologies, and building the manufacturing facilities that will onshore more of our clean energy supply chain within our borders. As such, they and we have a vested interest in seeing clear and timely IRA guidance that will enable them to make the investments that the IRA is designed to incentivize.

In these comments, we request guidance and make recommendations on specific matters and questions contained in the Notice, as well as other items that are within the regulatory purview of the Department of the Treasury ("Treasury", "the Department") and the IRS. In preparation for submitting these

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

comments, we worked with our member companies to learn what are the most critical questions and needs with respect to the below matters. The views and requests for clarification expressed below are representative of our membership as a whole but should not be interpreted as the view of any individual member company.

While we have endeavored to address the questions posed by Treasury and the IRS below with specificity and granularity where appropriate, there are several overarching themes that thread throughout our comments, and, at the outset, are worth highlighting.

First and foremost, AEE and its member companies appreciate the swift yet deliberate process upon which Treasury has embarked to inform guidance around the provisions covered by these notices. It is our hope that this process will produce clear, consistent, and stable guidance, by which we mean the guidance can be easily interpreted and applied ("clarity"), wherever possible it is consistent across project and technology types, and it is stable over time. Such clarity, consistency, and stability will maximize business investment, project deployment and, ultimately, the decarbonization of our electric grid, transportation system, and built environment—as is one of the express intents of the law. In the same vein, such clarity, consistency, and stability will serve to minimize risk and market uncertainty.

Uncertainty about whether projects or technologies are eligible for these incentives, or whether a project or technology will receive a credit one year only to see that revoked or clawed back subsequently, can have a chilling effect upon investment. Minimizing this should be a significant priority for the Department. To that end, we would recommend that, in the process of issuing guidance, Treasury be explicit about whether such guidance is legally binding or not. We can envision a scenario wherein the Department issues guidance, upon which companies and investors act, only to revise that subsequently, and expose such parties to legal and financial risk. Although market actors will always bear some degree of risk, minimizing that with clarity, consistency, and stability in the *process* of developing and issuing guidance would be greatly appreciated. This is not intended to discourage the Department from issuing draft guidance—indeed, in a number of instances, such as guidance around apprentice and prevailing wage provisions, we would strongly encourage the Department to issue drafts for comment—but rather to encourage clarity in communications about the process being utilized and where the Department is in that process.

Second, AEE would encourage Treasury and the IRS to be flexible and inclusive in its interpretation of the law wherever possible. This overarching recommendation stems from AEE's fundamental outlook with respect to the development of a clean economy. We believe that the development of an American advanced energy economy and industry will require the involvement of a host of technologies—there is no one "silver bullet" that will clean the grid, electrify transportation, and decarbonize buildings. Moreover, some of the technologies that will be integral to achieving that future are still evolving or simply have yet to be invented. As such, we take a technology agnostic approach to the development of advanced energy markets and policies. It is our view this agnosticism is reflected in the policies Congress enacted in the IRA (particularly the technology neutral investment and production tax credits). In practice

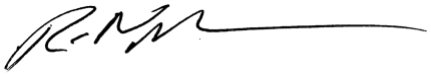
such flexibility and inclusivity would entail broadly interpreting system costs to include necessary upgrades and repairs for the installation of a distributed generation system or broadly constructing what constitutes a component or subcomponent of a given system, to cite just a few examples.

Third, AEE strongly supports the intent of the IRA to develop a robust domestic advanced energy supply chain in the United States. The development and expansion of domestic production of clean energy technologies, advanced grid components, electric vehicles, critical minerals, transportation electrification infrastructure, and energy efficient appliances and systems will produce a host of benefits for the country, including the revitalization of American manufacturing, sustained economic growth, and increased energy independence. This transition to domestic content will not happen overnight, however. To ensure it occurs consistently and effectively we would recommend that Treasury and the IRS provide reasonable flexibility around issues of domestic content. We believe such flexibility will ultimately result in greater demand-side utilization of these incentives, growing a stable market for domestic producers, while also ensuring our transition to a clean economy continues swiftly.

Finally, AEE respectfully submits the below recommendations and requests for clarification with the purpose of maximizing the ability of the new transferability regime and direct pay regime to open new market entrants and facilitate capital to deploy as much clean energy as possible, all while ensuring good paying jobs and the development of a domestic clean energy workforce and in accordance with Congressional intent. As the IRA was passed via the reconciliation process, lawmakers were not able to provide as much statutory direction as compared with a regular order authorizing bill. We believe our requests for clarification and recommendations will provide needed certainty to clean energy developers and investors who are collaborating to establish new renewable energy projects with greater speed and provide much-needed liquidity to the market for such projects, which fulfills the Congressional intent in enacting the transferability and direct payment regimes. In addition, AEE worked extensively with lawmakers and Congressional staff on these provisions, so we provide the below requests for clarification and recommendations with important contextual knowledge of Congressional intent and purpose.

We appreciate your consideration of the recommendations and requests for clarifications discussed below and look forward to the issuance of proposed regulations and other guidance that will facilitate much-needed investment in facilities and property to reduce greenhouse gas emissions and overall advance the IRA's objectives of promoting high-paying domestic clean energy jobs and energy security. If you have any questions, please do not hesitate to contact us at hgodfrey@aee.net.

Sincerely,



Nat Kreamer
Chief Executive Officer
Advanced Energy Economy

Responses to Specific Questions in the Notice and Related Comments

I. Executive Summary

Sections 6417 and 6418 of the Internal Revenue Code ("Code"),[2] as enacted by the IRA, reflect a new and innovative approach by Congress to incentivize developers and other parties who historically have been unable to receive the full benefits of energy tax credits. This new regime is an adaptation of the prior Section 1603 program ("1603"), authorized under the American Recovery and Reinvestment Act of 2009, (Public Law 111-5)[3] which allowed project developers to receive cash grants in lieu of tax credits in response to a weakened economy and attendant reduction in tax equity investor participation in the market. While the IRA does not provide such direct cash grants like 1603, the motivating factors for the new transferability and direct pay regime in the IRA are very similar in nature, and these motivating factors should inform the IRS's approach to guidance and rulemaking here.

Congress passed both 1603 and the IRA in the wake of economic downturn to spur renewable energy sector financing. Much of the renewable energy sector financing historically and today is heavily dependent upon tax equity, because many clean energy developers do not have significant tax liability to use tax benefits (*e,g.*, depreciation and credits). The need for specialized tax equity investors constrains the availability of private capital for clean energy projects.

Indeed, in the IRS's guidance on the 1603 program, it stated, "[i]t is expected that the Section 1603 program will temporarily fill the gap created by the diminished investor demand for tax credits. In this way, the near term goal of creating and retaining jobs is achieved, as well as the long-term benefit of expanding the use of clean and renewable energy and decreasing our dependency on non-renewable energy sources."[4] These same factors are echoed in the IRA's Congressional record during the Senate debate and passage of the bill, where Senator Cardin stated the IRA's purpose succinctly: "Inflation is also too high, but its root causes are COVID-19 pandemic-related supply chain disruptions and Vladimir Putin's war on Ukraine. The IRA tackles these disruptions by promoting domestic manufacturing and supply chains and reducing our reliance on foreign energy."[5]

More specifically with regard to direct pay and transferability, Senator Cardin in colloquy with Senator Wyden explains how the new regime was designed to open additional financing options to spur the growth of clean energy:

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[2] All references herein to "Section" refer to the Internal Revenue Code of 1986, as amended.

[3] *See also* American Recovery and Reinvestment Tax Act, as amended by Section 707 of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (Public Law 111-312).

[4] *See, e.g., Payments for Specified Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009*, U.S. TREASURY DEPARTMENT, July 2009, Revised March 2010 and April 2011.

[5] 168 CONG. REC. S4212 (2022) (statement by Sen. Cardin).

> "Mr. President, I rise today to engage in a colloquy with the distinguished chairman of the Senate Finance Committee, Senator Wyden. I want to comment on the transferable tax credit provision supporting sustainability in the bill…As the chairman knows, the bill includes a historic investment in tax credits and incentives to promote the development of various clean energy technologies and ***provides a broad regime to permit eligible credits to be transferred from the project owners to another unrelated taxpayer***. Under current law, the ability to claim general business tax credits is subject to a number of potential limitations in section 38…based on the taxpayer[']s income tax liability. The bill language does not appear to apply the section 38 limitations to reduce the amount of the credit eligible to be transferred by the transferor of tax credits. ***This would be consistent with the goal of encouraging additional investment by expanding the availability of these tax credits to project owners without regard to their ability to claim the credits themselves.***"[6] (emphasis added).

Senator Wyden confirms Senator Cardin's statements above in the record immediately following these remarks, and Senator Cardin goes on to conclude that the transferability and direct pay regime is intended to "***expand*** investment in projects that will achieve the broader climate goals of this bill."[7] (emphasis added).

The new direct pay and transferability regimes provide liquidity that is similar to the 1603 program. Further, these new regimes offer administrative and other efficiency benefits that improve upon the 1603 program. Substantively, Congress significantly expanded the scope of eligible entities in the IRA compared with 1603, for example, by authorizing Section 501(c) organizations and various other non-taxpaying entities that were expressly prohibited under 1603.

The ability of certain taxpayers to elect to treat certain credits as a direct payment rather than a credit against their federal income tax liability, and other taxpayers to transfer credits for cash, without collateral tax consequences, is intended to greatly expand the universe of potential counterparties and investors in clean energy projects. This will incentivize the development and deployment of technologies to address climate change and create high-paying, quality American jobs through prevailing wage, apprenticeship, and domestic content requirements for bonus credits embedded throughout the Code under the IRA. The direct payment regime will allow and incentivize certain "applicable entities" to enter the pool of investors that invest in energy projects. The transferability regime will reduce the complexity and cost that is normally involved in monetizing tax credits by allowing a buyer with sufficient tax capacity or access to the direct pay regime to simply purchase tax credits without acquiring a long-term ownership interest in the project as, for example, is required in a traditional tax-equity partnership. Transferability will enable

[6] 168 CONG. REC. S4166 (2022) (statement by Sen. Cardin).

[7] *Id.* (emphasis added).

a market-based system, similar to the existing renewable energy certificate ("REC") system whereby project owners can incentivize tax credit buyers to purchase tax credits, presumably at a discount.

II. Key Recommendations and Requests for Clarification

AEE recommends that Treasury and the IRS adopt guidance that clarifies certain definitional aspects and substantive aspects of the direct payment regime in Section 6417 and the transferability regime in Section 6418. We request clarification on the following matters:

- Clarify that an "eligible taxpayer" as defined under Section 6418 can transfer a credit to an "applicable entity" under Section 6417 and the applicable entity may make the election for a direct cash payment under Section 6417.

- Clarify that if a lessor of an energy project elects to pass through the credits pursuant to Section 48(d)(1) (as in effect immediately prior to enactment of P.L. 101-508 (1990), made applicable pursuant to Section 50(d)(5)) to an "applicable entity" under Section 6417(d)(1) that is a lessee of the project, such lessee is eligible to receive direct payment under Section 6417. We believe this is the intent of the law as many non-profit and other tax-exempt entities, such as community choice aggregators or local public entities, might choose to structure projects in this manner.

We also make the following recommendations:

- We recommend that regulations clarify that all organizations referred to in Sections 401(a) and 501(a) are treated as "applicable entities" for purposes of Section 6417. We also recommend that government instrumentalities that are tax-exempt under Section 115 be treated as applicable entities. We believe the Congressional intent of the IRA was to establish a tax credit market for entities to access financing to rapidly build out clean energy projects to reduce greenhouse gas emissions and create high-paying domestic clean energy jobs, therefore this clarification will help effectuate such intent by clarifying the scope of "applicable entities."

- We recommend that for the purposes of creating an efficient and verifiable documentation process for disbursements of direct payments under Section 6417, the following information should be obtained: legal name of the applicable entity (or taxpayer deemed to be an applicable entity for purposes of receiving direct payment of the Section 45Q, 45V, and 45X credits), type of applicable entity, contact person, placed in service date, property location, energy property type, installed nameplate capacity or estimated annual production, applicable credit, bonus credit eligibility, tax year in which credit is generated, amount of credit in dollars, and signatures of the applicable entity.

- We recommend that for the purposes of creating an efficient and verifiable documentation process for verifying transfers of credits under Section 6418, the following information should

be obtained: legal name of the transferor, legal name of the transferee, entity classification of transferee, contact person, property location, energy property type, installed nameplate capacity of estimated annual production, amount of credit in dollars, signatures of both transferor and transferee.

- We recommend that the guidance clarify that (1) the term "taxpayer" in Section 6418 includes governmental entities and instrumentalities, pension funds, public universities, charities, and any other person who has the potential for any kind of tax liability under the Code and (2) such parties may elect to receive direct payment under Section 6417. The text of the IRA is silent on this matter, so we make this recommendation to ensure that public entities such as public universities who are working to decarbonize their large campuses, for example, can access the full benefits of the transferability and direct pay regimes.

- We recommend that a purchaser of credits for purposes of Section 6418 be entitled to the purchased credits regardless of the guarantees, indemnities, insurance or other protection provided to the purchaser by the transferor or a third party.

- We recommend that guidance clarify that an allocation of transferred credits by a transferee partnership or S corporation to such entity's partners or shareholders, as applicable, is not an impermissible second transfer for purposes of Section 6418.

III. Statutory Background

A. Section 6417

Section 6417 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." "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. This list of authorized "applicable entities" in the IRA is expanded from the list of eligible entities under the 1603 program, which directed Treasury *not* to make any grant to any federal, state, or local government (or any political subdivision, agency, or instrumentality thereof), any organization described in Section 501(c), any partnership or other pass-thru entity, and any entity referred to in paragraph (4) of Section 54(j) of the Code (*i.e.*, cooperative electric companies, qualified energy tax credit bond lenders, and governmental bodies). This notable expansion of "applicable entities" in the IRA as compared with 1603 signals Congressional intent to ensure that a broad array of tax-exempt entities are eligible for direct pay.

The term "applicable credit" includes various new and revised credits under the IRA. Generally, taxpayers are permitted to make direct payment elections for taxable years beginning after December 31, 2022

through December 31, 2032. Importantly, in the case of the production tax credit described in Section 45(a), any election for direct payment (i) applies separately with respect to each qualified facility, (ii) must be made for the taxable year in which the qualified facility is originally placed in service, and (iii) applies to such taxable year and to any subsequent taxable year which is within the period described in the production tax credit period set forth in Section 45(a)(2)(A)(ii) with respect to such qualified facility.

B. Section 6418

Section 6418(a) permits "eligible taxpayers" to transfer eligible credits to an "unrelated" taxpayer. Section 6418(d) provides that a transferred credit is taken into account in the first taxable year in which the credit was transferred. Section 6418(e)(1) provides that any transferability election must be made no later than the due date (with extensions) for the tax return of the transferor, but no earlier than 180 days after enactment of the IRA. Any such election is irrevocable once made. Further, no subsequent transfers of the same credit for a particular tax year are allowed, under Section 6418(e)(2).

Section 6418(f)(1)(A) provides a list of eligible credits for purposes of the transferability regime. For purposes of the investment tax credit under Section 48, the transferability election must be made with respect to each separate facility for which a credit is available. For purposes of the production tax credit under Section 45 and related credits (*e.g.*, the Section 45V clean hydrogen production credit), the transferability election must be made with respect to each separate taxable year during the 10-year credit period (12-year period for purposes of the Section 45Q carbon sequestration credit).

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). In the case of an "excessive credit transfer" the tax imposed upon the transferee for such year is increased by the amount of the excessive credit transfer plus 20% of the amount of such transfer.

Section 6418(g)(1) allows the Treasury to request information or registrations as a condition precedent to the transfer of any eligible credit, to prevent fraud, duplicate transfers, improper payments, or excessive payments of credits. Section 6418(g)(2) provides certain rules regarding "excessive credit transfers" to transferees. Section 6418(g)(3) provides special coordination rules for purposes of the recapture provisions in Section 50 with respect to the investment tax credit.

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. If a taxpayer elects to transfer all or a portion of a credit, the consideration for the transfer: (1) must be paid in cash, (2) is not includible in the transferor's gross income, and (3) is not deductible by the transferee. In the case of facilities or project property held by an S corporation or partnership, the entity must make the transferability election, in which case any consideration received from the transferee is treated as tax-exempt income under Sections 705 and 1366, for partnerships/LLCs and S corporations, respectively. Further, each partner or shareholder's distributive share of such tax-exempt income is based on such partner or shareholder's distribute share of the transferred credit that they otherwise would have been able

to receive. No partner or shareholder can themselves make the transferability election; only the entity can make such an election.

Finally, the transferability regime is effective beginning 180 days after enactment of the IRA, and to taxable years beginning after December 31, 2022.

IV. Clarification of Standards for Transfers of Credits and Direct Pay

A. The Forms and Documentation Noted Below Should Be Required to Verify Direct Pay and Transferability Eligibility

Notice 2022-50 specifically seeks input regarding proper documentation for any amount treated as a payment made by an applicable entity under Section 6417(a) and with respect to any transfer of any portion of an eligible credit pursuant to Section 6418(a). We believe that both regimes were established to enable a tax credit market similar to REC markets, and accordingly, we believe that the IRS should require verifiable yet streamlined information to be submitted with applicable tax returns. AEE provides these recommended data points based on two factors: (1) ability of the IRS to independently and quickly verify the submitted data to increase administrative efficiency and verification and enable a REC-like tax credit market by promptly certifying the submitted forms, and (2) reliance on prior application materials developed in the 1603 program to streamline the process for purposes of the IRA.

Specifically, for purposes of the Section 6417 direct pay regime, an electing taxpayer should submit the information noted below with their required annual tax return, or if no such return is required to be filed, using a form developed by the IRS for tax-exempt entities. For purposes of the Section 6418 transferability regime, both the transferor and transferee should submit the information noted below with their required annual tax return, or, if no such return is required to be filed, using a form developed by the IRS for tax-exempt entities.

For Section 6417, we recommend the following data points:

- Legal name of the applicable entity, including employer identification number ("EIN"), as applicable
- Type of applicable entity (*e.g.*, local government, non-profit, etc.)
- Contact Person and related contact information
- Placed in service date
- Property location, including census tract if such information facilitates verification of bonus credit eligibility
- Energy property type (*e.g.*, solar facility, geothermal facility, microturbine property, etc.)

- Installed nameplate capacity or estimated annual production, as applicable
- Applicable credit
- Bonus credit eligibility
- Tax year in which the credit is generated
- Amount of the credit in dollars
- Signature of the applicable entity

The information above reflects much of the 1603 application data fields, and as both the 1603 program and Section 6417 are designed to increase private capital for renewable energy projects, we believe the information collected for purposes of the 1603 program has direct relevance for purposes of Section 6417.

For purposes of Section 6418, we recommend substantially similar data points as for 6417, but due to the fact that the recapture risk falls on the transferee, we recommend that less information is collected for these purposes to increase efficiency:

- Legal name of the transferor, including EIN, as applicable
- Legal name of the transferee, including EIN, as applicable
- Entity classification of eligible transferee
- Contact Person and related contact information
- Property location, including census tract if applicable
- Energy property type (*e.g.*, solar facility, geothermal facility, microturbine property, etc.)
- Installed nameplate capacity or estimated annual production, as applicable
- Amount of credit in dollars
- Signatures of both the transferor and transferee

The above suggestions for documentation requirements are meant to be sufficiently detailed to prevent improper elections for direct payment and transferability but without being administratively burdensome. We believe the existing framework for claiming tax credits and filing appropriate forms with tax returns is the most appropriate means of accomplishing these objectives. Requiring additional documentation, such as an independent accountant's report to validate eligible costs for investment tax credit purposes and actual energy generation for production tax credit purposes for the applicable credit period, would go

beyond this framework, and is both unnecessary to ensure compliance with the statutory requirements and burdensome. AEE understands the need for a centralized process for tracking direct pay and transferability elections but believes the existing tax return filing framework is sufficient for this purpose. Both the direct pay election and the transferability election are made only once per taxable year per eligible credit. The direct pay election requires only a single taxpayer, and the transferability election requires only two taxpayers to validate the transfer. Thus, additional compliance mechanisms such as indicated above are unwarranted.

B. Tax-Exempt Entities Should be Treated as Eligible Transferees under Section 6418(a)

Section 6418(a) provides that a transferor can elect to transfer credits to a "taxpayer." The statute does not further define who is considered an eligible transferee. 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, a Section 401(a) or 501(a) entity, a governmental entity, or similar entity should be treated as a "taxpayer" for purposes of Section 6418. For example, Sections 511-514 of the Code subject certain tax-exempt entities to U.S. federal income tax on amounts of "unrelated business income". Moreover, in PLR 8443084,[8] 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."

Further, Section 6418(g)(2) provides the "excess credit transfer" penalty regime, which generally requires the transferee to be liable for any credits that are reduced by the IRS on audit. For this purpose, the IRS may impose an amount of tax on the transferee "regardless of whether such entity would otherwise be subject to tax under chapter 1 [referring to income taxes]." Thus, Congress broadly construed the meaning of transferee taxpayer to include entities that would not otherwise be subject to federal income tax liability. This also appears to be consistent with the policy underlying these provisions, which is to bring tax-exempt entities into the market as investors in renewable energy projects. We therefore request that clarification is promulgated in guidance making clear that tax-exempt entities are treated as eligible transferees under Section 6418(a).

C. The Term "Applicable Entity" in Section 6417(d)(1) Should Include Any Organization Exempt from Tax Under Sections 401(a) and 501(a)

Section 6417(d)(1)(A)(i) provides that the term "applicable entity" includes, among other entities, "any organization exempt from the tax imposed by subtitle A." Although tax-exempt entities described in Sections 401(a) and 501(a) should 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

[8] July 25, 1984.

applicable entities for this purpose. Further, instrumentalities of a government, which are exempt from federal income tax under Section 115, should also be treated as applicable entities. For example, public universities are often considered instrumentalities of a state. We encourage Treasury and the IRS to list as comprehensively as possible examples of other tax-exempt entities that are eligible for direct pay.

D. An Applicable Entity Lessee to Whom Tax Credits are Passed Through Under Section 50(d)(5) Should be Entitled to Elect Direct Payment Under Section 6417

Under Section 50(d)(5) and former Section 48(d), a lessor may elect to treat the lessee as the owner of the energy property for tax credit purposes. In such case, under a plain reading of the statute, the lessee should be able to elect to receive direct payment if it is an applicable entity. We request that future regulations specifically provide that this is the case.

E. The Transferability Regime Should Not Be Affected by Third Party Guarantees and Other Third-Party Assistance

Under Section 6418, a taxpayer may purchase tax credits from an "eligible taxpayer," and include such tax credits on its return (or elect to receive direct payment in the case of an applicable entity purchaser). If the applicable investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period, it is the purchaser of the credits that will incur the recapture tax.

As described, the policy behind the enactment of Section 6418 is to widen the pool of investors. However, as the purchaser is the party that bears the recapture risk, it will be difficult for such parties to enter the market for tax credits. Rather, for the transfer provision to be used in furtherance of the congressional purpose, it will be critical that purchasers have the ability to obtain contractual protection for the purchased credits, either through warranties, indemnities and guarantees provided by the transferor or by third party insurance or financial guarantor companies. Assuming contractual protections are extensive and truly protect the purchaser of the credits from all or substantially all of the risks from the failure of the applicable investment tax credit property, the issue raised is whether the purchaser is the true owner of the purchased credits under federal income tax law principles.[9] If such principles are applied in such instance, it will preclude or limit the use of such contractual protections and would greatly limit the usefulness of Section 6418.

We therefore recommend that future regulations provide flexibility to allow third-party involvement where transferees can still receive the full benefit of the transferred credits even if they receive third-party guarantees or similar protections.

[9] *See, e.g.*, *Historic Boardwalk Hall, LLC v. Comm'r*, 694 F.3d 425, 450, 454-55 (3d Cir. 2012); *Frank Lyon Co. v. United States*, 435 U.S. 561, 572-73 (1978); *Calloway v. Comm'r*, 135 T.C. No. 3 (July 8, 2010); *Grodt & McKay Realty, Inc. v. Comm'r*, 77 T.C. 1221, 1237 (1981).

F. An Allocation of Credits by a Transferee Partnership or S Corporation Should Not Be Treated as an Impermissible Transfer under Section 6418(e)(2)

Section 6418 does not specifically provide that a partnership or S corporation can be a transferee of acquired credits, nor does it provide how such credits should be allocated among partners or shareholders of such partnership or S corporation, respectively. We propose that existing tax principles should apply to determine the proper treatment of allocations of transferred tax credits. For purposes of partnerships (and LLCs taxed as partnerships), Section 701 provides both that a partnership itself is not subject to income tax and that partners are liable for tax only in their separate capacities. Section 702(a)(7) provides that each partner must take into account separately their distributive share of any income, deductions, gains, losses, or credits. For S corporations, Section 1363(a) provides that an S corporation is generally not subject to income taxes, and Section 1366(a) provides that each shareholder must take into account its pro rata share of the corporation's items of income, deductions, losses, or credits. We respectfully request that guidance clarify that these existing rules will apply with respect to allocations of eligible credits transferred to a partnership or S corporation under Section 6418. Further, we request that guidance provide rules for allocating such credits where the sole asset of the transferee partnership or S corporation is the acquired credits. Finally, we request that guidance make clear that such allocated credits are not considered additional transfers from the partnership or S corporation to partners or shareholders, respectively, which are prohibited under Section 6418(e)(2).

V. Summary and Conclusion

In summary, we recommend that Treasury provide the following guidance in proposed regulations regarding the direct payment regime and the transferability regime.

- Clarify that all tax-exempt entities for U.S. federal income tax purposes can purchase credits and utilize the direct payment regime.

- Confirm and adhere to Congressional intent that all tax-exempt entities under Sections 401(a) and 501(a) should be treated as applicable entities and eligible taxpayers for purposes of both the direct payment regime and the transferability regime, respectively.

- Clarify that a purchaser of credits may report such credits on its return regardless of the extent of the guarantees or contractual protections that it receives from the seller of the credits or a third party.

- Promulgate clear, verifiable, and efficient documentation standards for the purposes of Sections 6417 and 6418 that allow the IRS to quickly verify and enforce submitted information while balancing the need of market participants to effectively transfer credits and elect direct pay in a manner that follows the form of the 1603 program.

- Clarify that in an inverted lease structure that utilizes the Section 50(d) pass-through election, an applicable entity that is a lessee may elect direct payment under Section 6417.

- Clarify that an allocation of credits by a transferee partnership or S corporation is not an impermissible second transfer of the credits under Section 6418(e)(2).