November 9, 2022

The Honorable Lilly Batchelder
Assistant Secretary
U.S. Department of Treasury
Washington, DC 20220

The Honorable Charles Rettig
Commissioner
Internal Revenue Service
Washington, DC 20224

Re: Notice 2022-49 - Request for Comments on Certain Energy Generation Incentives
Re: Notice 2022-50 - Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits
Re: Notice 2022-51 - Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022

Dear Assistant Secretary Batchelder and Commissioner Rettig:

On behalf of the nation's government finance officers, counties, and cities, we appreciate the opportunity to provide comments in response to the U.S. Department of Treasury (Treasury) and Internal Revenue Service Notice (IRS) Notice 2022-49 – *Request for Comments on Certain Energy General Incentives*; Notice 2022-50 – *Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits*; and Notice 2022-51 – *Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022*. **We offer our comments and recommendations on these notices below.**

Collectively, our organizations represent the nation's 3,069 counties, 19,000 cities, towns and villages and more than 22,000 government finance officials. GFOA, NLC and NACo work closely on market and tax matters to help communities nationwide. All of our members are dedicated to ensuring that reliable electric power is accessible for the long-term interests of the residents and businesses in their communities. The tax credit provisions included in the Inflation Reduction Act (IRA) apply to governmental entities, including public power and municipal water utilities, and, as a result,

clarifications and guidance are important to the communities and residents we serve.

As Treasury and IRS develop guidance that supports the implementation of provisions authorized under the IRA, our organizations offer the following recommendations to ensure that local and state governments can take advantage of the tax incentives now in the law. These provisions are critical to supporting clean energy projects in communities to help achieve local climate action goals while also spurring economic and community development.

<u>Notice 2022-49 - Request for Comments on Certain Energy Generation Incentives</u>

Please see our comments in response to Notice 2022-49, including recommendations regarding tax-exempt bonds and requirements around unrelated persons.

1. Tax-exempt bond allocations rules and pledged payment credits are not federal guarantees of governmental debt

Many public sector projects are financed with tax-exempt and taxable bonds. Therefore, the same cost allocation rules should be able to be used by a project owner for both determining what percentage of a project is financed with tax-exempt debt and for calculating any reduction necessary when energy tax credits are utilized.

Additionally, when direct payment credits are pledged as part of paying interest on outstanding debt, this action should not be considered a federal guarantee of that debt under Section 149 of the Code.

2. Do not require an "unrelated persons" standard to the selling of an investment credit facility

Section 45 of the IRA would require an "unrelated persons" standard when electricity from a production tax credit facility is sold. Many public power facilities and water utilities are owned or operated by or partner with county and city governments. There can be no decoupling of these relationships.

Imposing such a standard in the public sector would undercut the opportunities and incentives offered by the IRA. In addition, the unrelated party sale rule should not be extended to the Section 48 Investment Tax Credit.

<u>Notice 2022-50: Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits</u>

Please see our comments in response to Notice 2022-50, including recommendations regarding the definition of political subdivisions, the processes for electing for a direct payment, and the timing for claiming the credit.

1. The definition of political subdivisions must be refined for effective utilization of tax credits in the public sector

Section 6417(d)(4)(A) of the IRA would allow any government or political subdivision described in 6317(d)(1) of the IRA to be able to claim direct pay tax credits for a variety of types of facilities. It is imperative that Treasury and IRS adopt a broad definition of "political subdivisions" so that all intended governments and entities, including cities and counties, can take advantage of these credits and the full benefits of the IRA can be realized. It is clear that Congress intended that the benefits available under

Section 6417 of the IRA would be accessible to all types of governmental entities.

We urge Treasury and IRS to align its definition of "political subdivision" with the definition outlined in Treas. Reg. § 1.103-1(b). This alignment would provide certainty that tax-exempt status is afforded to the 50,000-plus entities covered by this definition.

We believe that Treasury has the authority to do this under Section 6417(h) of the IRA, which permits the Department to issue regulations and other guidance "as may be necessary to carry out the purposes" of this section of the law.

This simple but extremely important acknowledgement and corresponding language, rooted in established language and principles articulated in Treas. Reg. § 1.103-1(b), is essential for effective utilization of the tax credits included in the IRA.

2. Simplicity in the execution of credit elections and payments/use of forms

We urge Treasury and IRS to design the mechanisms and forms for the election of direct pay as simply as possible and comparable to what taxable entities already use to claim credits. We also look forward to participating in the development and testing of these processes and to work with Treasury and IRS as they are designed and implemented.

3. Allow for ample time to claim credit

We urge Treasury and IRS to provide adequate time for entities to claim the credit and allow the election to be set as late as possible. There are numerous justifications for this, including project and supply chain disruptions that are currently causing significant delays in starting projects.

Knowing the various costs associated with any given project remains uncertain, we ask that Treasury and IRS allow entities to determine the parameters of the potential credits late in the project process to make an informed decision of what is best for tax and ratepayers.

Notice 2022-51: Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022

Please see our comments on Notice 2022-51 below, including recommendations regarding domestic content requirements and the definition of energy community.

1. Domestic content requirements

To qualify for a direct payment, tax-exempt domestic content requirements must be met once the domestic content rules become fully effective. At that time, if the domestic content rules are not satisfied by a tax-exempt entity, that entity will receive no tax credits. Local governments remain committed to satisfying the scope of local, state and federal procurement policies when considering new and ongoing construction objectives.

It is imperative for regulations to be flexible, clear and straightforward as to how entities must account for procurement parameters in capital asset investment. Local governments, political subdivisions and

other participants in the public sector will rely on this flexibility as they plan projects in light of the domestic content requirement to determine if these standards can be met generally and are fiscally responsible.

2. *Definition of "energy community"*

The IRA provides an increased credit amount of 10 percent under certain credit for qualified projects located within an 'energy community.' The IRA defines an energy community as:

1. A brownfield site;
2. A census tract or any directly adjoining census tract in which after December 31, 1999, a coal mine has closed or after December 31, 2009, a coalfired electric generating unit has been retired; or
3. A metropolitan statistical area or non-metropolitan statistical area that has (or, at any time during the period beginning after December 31, 2009, had):
    a. 0.17 percent or greater direct employment or 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas **AND**
    b. An unemployment rate at or above the national average unemployment rate for the previous year.

While the first two definitions are relatively clear, Treasury and IRS must work to explicitly state how a community may qualify under the parameters set forth under the third definition. Currently, this definition is difficult to comply with and could prevent communities that should be designated as 'energy communities' under the IRA from receiving that qualification.

For example, it is unclear what kind of taxes should be considered when calculating whether 25 percent of greater are related to the processing, extraction, transport, or storage of coal, oil, or natural gas. Further, for the 0.17 percent or greater direct employment calculation, should communities take into account all municipalities located within the metropolitan or non-metropolitan statistical area? Or should it be limited to the community in which the project is actually being placed into service?

Additionally, are communities that previously experienced unemployment rates at or above the national average still able to take advantage of this definition? Or would they need to meet a certain number of years of high unemployment in order to qualify? Unemployment rates can fluctuate from month to month, and if an energy community designation can be taken away based on that fluctuation it will be difficult for these areas to attract and make the kind of investments in clean energy that the IRA is seeking to achieve.

We urge Treasury and the IRS to be clear and specific in its definition of an energy community. In doing so, we recommend the following:

a) Use a clearer geographical definition than metropolitan or non-metropolitan statistical areaby analyzing qualifying metrics at the county or city level.
b) Clarify which taxes energy communities should take into account when determining whether they meet the 25 percent requirement and clarify which sectors should be considered in the 0.17 percent direct employment calculation.

c) Set specific parameters around the unemployment qualification with regard to changes in unemployment, industries represented, and the period of time communities should use in determining whether they meet the unemployment requirement.
d) Identify energy communities using data from the Energy Information Administration or the Economic Development Administration and make public an evolving list of these communities.
e) Provide qualified energy communities with documentation that they meet the requirements so that both the communities and prospective investors can be confident in investing in long-term clean energy projects.

Conclusion

On behalf of the nation's cities, counties and government finance officers, we thank you for considering these comments and recommendations and we look forward to working with Treasury and IRS to ensure that any final guidance and regulation will best help local governments realize the full benefits of the IRA. If you have any questions, please contact our staff: Michael Gleeson (NLC) at gleeson@nlc.org; Emily Brock (GFOA) at ebrock@gfoa.org; or Sarah Gimont (NACo) at sgimont@naco.org.

Sincerely,

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