Brendan Herron

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SUBMITTED ELECTRONICALLY

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-49 and Notice 2022-50)
Room 5203
P.O. Box 5203, Ben Franklin Station
Washington, D.C. 20044

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, D.C. 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief
Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: Comments on Regulatory Implementation of the Inflation Reduction Act and Sections 6417 and 6418 of the Code Pursuant to Notice 2022-50.

Dear Ms. Batchelder and Mr. Paul:

My background includes approximately 20 years' experience as a senior executive focused on climate change solutions, including having developed the concept for and served as the CFO of a climate solutions public company. I have extensive hands-on expertise and experience with renewable energy tax credits, tax equity, renewable project finance and the use of partnership structures as well as renewable energy technologies and the carbon credits and renewable energy markets. I am submitting these comments personally with the goal of making the IRA implementation as effective as possible to address climate change.

I. BACKGROUND

The Treasury Department and the IRS requested comments on any questions arising from §§ 6417 and 6418, as added by the IRA, that should be addressed in guidance.

II. QUESTIONS RAISED BY IRS

(12) Please provide comments on any other topics that may require guidance.

The Congressional intent of both direct pay and transferability was to expand the ability of projects to benefit from the tax credits and to overcome the capacity and complexity limitations of the current tax equity market. If this intent is to be realized, it is important that Treasury and the IRS implement the regulations in a manner that facilitates the market acceptance of both direct pay and transferability without impacting the credit ratings of tax-exempt organization or requiring complex partnership structures and significant risk exposure to the transferee of the credit. This is especially important given the implied economic costs already associated with the fact that accelerated depreciation is not addressed in direct pay and transferability.

For example, many state and local governments as well as other tax-exempt organizations have limitations on the amount of debt and thus capital expenditures. Thus historically, some of these have implemented renewable energy programs through power purchase agreements (which may be service agreements under the IRS code) and which allow them to benefit from the renewable power but avoid impacting their capital budgets or other necessary capital projects. To the maximum extent possible, the regulations should be drafted to allow project structures where project can receive refundability if the economic value of the projects output (e.g. the renewable power) is being utilized by the tax-exempt organization. To require the tax-exempt organization to outright own 100% of the project has the potential to severely limit the deployment of renewable energy by such organizations as it bring into play other limits around capital budgets, credit ratings, etc that would not exist in the case of a power purchase agreement.

With regard to transferability, to the maximum extent possible, the risk of the credit, including audit, recapture and criminal liability should remain with the transferor. Due to the impact of the depreciation, it is likely that transferability will mainly be used by smaller developers and projects who tend to be less credit worthy. Thus, if the transferee has significant exposure to these developers, they are likely to require a bigger discount to the value of the credit, more collateral or other protections which in many cases may duplicate existing tax equity structures, costs and complexities. In addition, it is unclear how many new potential purchasers of the credits would enter a complex market with such risks as if they were comfortable with tax equity, they would likely already be in the market. To the extent possible, such rules should also allow for different transferee risk requirements, similar to how different rules exist for small businesses. For example, the transfer of credits below or the purchase below a certain $ limit a year would provide for different levels of risk transfer without exposing the IRS to higher levels of fraud.