nationalgrid

November 16, 2022

SUBMITTED ELECTRONICALLY

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 Implementation of the Inflation Reduction Act Pursuant to Notice 2022-50

Dear Ms. Batchelder and Mr. Paul:

National Grid North America Inc. ("NGNA") respectfully submits these comments to the U.S. Department of the Treasury ("Treasury Department") and the Internal Revenue Service (the "IRS") pursuant to Notice 2022-49.

NGNA, a Delaware corporation, is an indirect wholly-owned subsidiary of National Grid plc, a public limited company incorporated under the laws of England and Wales. NGNA indirectly owns regulated operating company subsidiaries that own and operate electric transmission and distribution facilities in New York and New England, as well as gas distribution networks across the northeastern United States. NGNA, through its subsidiary NGV US LLC ("NGV US"), operates in competitive markets separately from NGNA's core regulated divisions. NGV US indirectly owns National Grid Renewables Development, LLC ("NG Renewables"), formerly known as Geronimo Energy, LLC, and has investments in several joint ventures that own and operate across the United States utility-scale and residential renewable energy assets, battery energy storage systems, and off-shore wind developments in the northeastern United States.

NG Renewables is a leading developer and operator of large-scale renewable energy assets across the United States, including solar, wind, and energy storage. As a farmer-friendly and community-focused business, NG Renewables seeks to repower America's electricity grid by reigniting local economies and reinvesting in a sustainable, clean energy future. NG Renewables supports National Grid's vision of being at the heart of a clean, fair, and affordable energy future for all.

NGNA appreciates the opportunity to comment on issues arising under Section 6417 and Section 6418.[1] Section 6417(a) provides that, in the case of an applicable entity making an election (the "Direct Pay Election") with respect to any applicable credit determined with respect to such entity, such entity is treated as making a payment against federal income tax for the

[1] Unless otherwise indicated, all "Section" references are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treasury Regulation" references are to the final, temporary, and proposed U.S. Treasury regulations promulgated thereunder.

taxable year with respect to which such credit was determined equal to the amount of such credit. Section 6418(a) provides that, in the case of an eligible taxpayer that makes an election (the "Transferability Election") to transfer all or a portion of an eligible credit determined with respect to such taxpayer for any taxable year to another taxpayer that is not related to the eligible taxpayer, the other taxpayer is treated as the taxpayer for purposes of the Code with respect to such credit or such portion thereof. Section 6418(f)(2) defines the term "eligible taxpayer" to mean any taxpayer that is not described in Section 6417(d)(1)(A). Accordingly, absent the application of Section 6417(d)(1)(B), (C), or (D), "eligible taxpayer" and "applicable entity" are generally mutually exclusive, applicable entities generally can make a Direct Pay Election but not a Transferability Election, and eligible taxpayers generally can make a Transferability Election but not a Direct Pay Election.[2]

Section 6417 and Section 6418 do not explicitly address the application of the Direct Pay Election and the Transferability Election to partnerships that have both an applicable entity and an eligible taxpayer as partners or to partnerships that want to make such an election with respect to some partners that otherwise would be eligible to make the applicable election but not with respect to others. As explained more fully below, to give appropriate effect to Section 6417 and Section 6418, guidance should clarify that, although the Code provides that the partnership is the entity that must make the elections, the elections should be applied in a manner that gives effect to partner-level determinations, including whether a particular partner is eligible to make an election and, if so, whether the election is to be made with respect to that partner. Specifically, NGNA respectfully recommends that any guidance or proposed regulations (the "Guidance") include the following items:

1. A partnership may make a Direct Pay Election or Transferability Election with respect to all or a portion of a partner's distributive share of a credit pursuant to Treasury Regulation Section 1.704-1(b)(4)(ii)[3]. Such a partner is referred to herein as a "monetizing partner".

2. If a partnership makes a Direct Pay Election or Transferability Election with respect to a portion of a credit, the partners other than the monetizing partners ("non-monetizing partners")[4] will take into account their distributive shares of the credit just as they would have if the partnership had not made the election. In the case of a Direct Pay Election, Section 6417(e) will not apply to the distributive shares of the credit of the non-monetizing partners.

3. If a partnership makes a Direct Pay Election or Transferability Election with respect

---

[2] Section 6417(d)(1)(B), (C), and (D) allows certain entities that otherwise would not be applicable entities to elect to be treated as applicable entities with respect to the credits pursuant to Section 45Q, Section 45V, and Section 45X.

[3] Treasury Regulation Section 1.704-1(b)(4)(ii) requires that tax credits must be allocated in accordance with the partners' interests in the partnership as of the time the tax credit arises and provides special rules concerning the allocations of tax credits. The preamble to the final regulations states: "Allocations made in accordance with these special rules are deemed to be in accordance with the partners' interests in the partnership." T.D. 8065 (Dec. 31, 1985).

[4] Non-monetizing partners include those partners that are not otherwise eligible to make a Direct Pay Election or a Transferability Election, as applicable, and those partners that are otherwise eligible to make such an election but with respect to which the partnership does not make such an election. In addition, if an election is made with respect to less than all of a partner's distributive share of a credit, the partner could be a monetizing partner to the extent of that portion of the distributive share and a non-monetizing partner with respect to the remainder.

to a portion of a credit, the tax exempt income from the applicable credit (in the case of the Direct Pay Election) or from the cash received from the transfer of the credit (in the case of the Transferability Election), as well as any basis adjustments pursuant to Section 50(c)(5) and the capital account adjustments pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv)(j) with respect to such credit, should be allocated to the monetizing partners that are applicable entities (in the case of the Direct Pay Election) or the monetizing partners that are eligible taxpayers (in the case of the Transferability Election), in each case to the extent of each partner's distributive share of the portion of the credit with respect to which such election was made.

The issues addressed here reflect the tension between the aggregate and entity approaches to the treatment of partnerships. Under the Code, a partnership is considered to be an aggregate of its members for certain purposes and a separate entity for others. Under the aggregate approach, each partner is treated as an owner of an undivided interest in partnership assets. Under the entity approach, the partnership is treated as a separate entity in which partners have no direct interest in partnership assets. Section 6417(c)(1) and (2) and Section 6418(c)(1) and (2) adopt the entity approach with respect to the procedure for making the Direct Pay Election and the Transferability Election—i.e., the partnership makes the election, and the partners cannot make the election. Congress could well have decided that having a partnership make a single election on behalf of its partners, rather than having each partner make its own election, would simplify administration of the Direct Pay Election and the Transferability Election. But Section 6417 and Section 6418 do not require that the substance of the elections be determined by the entity approach. In fact, for the reasons discussed below, Congressional intent requires the application of the aggregate approach for determining how the Direct Pay Election and Transferability Election should be applied.

Issues 1 and 2: Direct Pay Elections and Transferability Elections with Respect to Portions of Credits

In determining the extent to which a partnership is eligible to make a Direct Pay Election or the Transferability Election, the aggregate approach is unavoidable, at least to some extent, because eligibility is determined by the characteristics of the partners. The question remains exactly how to apply the Direct Pay Election and the Transferability Election to partnerships that have both applicable entities and eligible taxpayers as partners. There are at least three conceivable alternatives[5]:

- Allow an election with respect to all the credit of a partnership if any partner is an applicable entity (in the case of the Direct Pay Election) or an eligible taxpayer (in the case of the Transferability Election).

- Allow an election with respect to none of the credit of a partnership if any partner is not an applicable entity (in the case of the Direct Pay Election) or not an eligible taxpayer (in the case of the Transferability Election).

- Allow an election with respect to the portion of the credit that otherwise would have been allocable (pursuant to Treasury Regulation Section 1.704-1(b)(4)(ii)) to the

[5] We assume for the moment that the partnership intends to make the election with respect to all otherwise eligible partners. We will consider below the application of the rules to an election with respect so some, but not all, otherwise eligible partners.

partners that are applicable entities (in the case of the Direct Pay Election) or eligible taxpayers (in the case of the Transferability Election). Allow the partners that are not applicable entities (in the case of the Direct Pay Election) or not eligible taxpayers (in the case of the Transferability Election) to take into account their distributive shares of the credit just as they would have if the partnership had not made the election.

The first alternative would frustrate Congressional intent by allowing a partnership to make a Direct Pay Election or Transferability Election with respect to partners that would not have been able to make the election had they directly owned the property or undertaken the partnership's trade or business. The second alternative would frustrate Congressional intent by not allowing a partnership to make a Direct Pay Election or Transferability Election with respect to partners that would have been able to make the election had they directly owned the property or undertaken the partnership's trade or business. The third alternative furthers Congressional intent by allowing a partnership to make a Direct Pay Election or Transferability Election with respect to all its partners, and only those partners, that would have been able to make the election had they directly owned the property or undertaken the partnership's trade or business. Furthermore, if the amount of the credit subject to the Direct Pay Election or Transferability Election is determined by the amount of the credit that otherwise would have been allocable to the applicable partners pursuant to Treasury Regulation Section 1.704-1(b)(4)(ii), the third alternative puts the partners of a partnership in a position no more and no less favorable than the position they would have been in if Congress had drafted Section 6417 and 6418 so that the Direct Pay Election and Transferability Election were made at the partner level. We believe this view is consistent with the mechanics of the partnership elections in Section 6417 and Section 6418, which provide for an election by partnerships but do not include partnerships as either applicable entities or eligible taxpayers. We also believe this view is consistent with Section 6417(h), which directs the Secretary to "issue such regulations or other guidance as may be necessary to carry out the purposes of this section, including guidance to ensure that the amount of the payment or deemed payment made under this section is commensurate with the amount of the credit that would be otherwise allowable." (Emphasis added.)

The question remains how to apply the Direct Pay Election and the Transferability Election to partnerships that would like to make the election with respect to some, but not all, partners that otherwise would be eligible to make the applicable election. As with the question concerning partnerships that have both applicable entities and eligible taxpayers as partners, there are three conceivable possibilities. Furthermore, by application of similar principles, Congressional intent is furthered by (i) allowing the Direct Pay Election or Transferability Election with respect to the portion of the credit that otherwise would have been allocable (pursuant to Treasury Regulation Section 1.704-1(b)(4)(ii)) to certain partners and (ii) allowing the other partners to take into account their distributive shares of the credit just as they would have if the partnership had not made the election.

We note that Section 6417 includes provisions intended to ensure that the Direct Pay Election cannot lead to a "double benefit" with respect to an applicable credit. Section 6417(c)(1)(B) provides that, to the extent a Direct Pay Election has been made with respect to an applicable credit, Section 6417(e) "shall be applied with respect to such credit before determining any partner's distributive share, or shareholder's pro rata share, of such credit." Section 6417(e) states: "In the case of an applicable entity making an election under this section with respect to an applicable credit, such credit shall be reduced to zero and shall, for any other purposes under this title, be deemed to have been allowed to such entity for such taxable year." We believe that, to the extent a Direct Pay Election has not been made with respect to the distributive shares of

the applicable credit for certain partners, allowing those partners to take into account their distributive shares of the applicable credit just as they would have if the partnership had not made the election (i.e., without reduction pursuant to Section 6417(e)) does not contravene Congressional intent to avoid a "double benefit". We respectfully recommend that guidance include an explicit statement to the effect that Section 6417(e) will apply only to the distributive shares of the applicable credit with respect to which the Direct Pay Election is made.

Issue 3: Allocation of Tax Exempt Income, Basis Adjustments, and Capital Account Adjustments Resulting from Direct Pay Election or Transferability Election

If guidance clarifies that a partnership may make a Direct Pay Election or Transferability Election with respect to the portion of the credit that otherwise would have been allocable to the monetizing partners pursuant to Treasury Regulation Section 1.704-1(b)(4)(ii), then guidance also should clarify the allocation of tax exempt income with respect to the credit pursuant to Section 6417(c)(1)(D) and Section 6418(c)(1)(B). Specifically, guidance should provide that the tax exempt income should be allocated to the monetizing partners that are applicable entities (in the case of the Direct Pay Election) or the monetizing partners that are eligible taxpayers (in the case of the Transferability Election), in each case to the extent of each partner's distributive share of the portion of the credit with respect to which such election was made. We note that Section 6418(h) specifically directs the Secretary to "issue such regulations or other guidance as may be necessary to carry out the purposes of this section, including regulations or other guidance providing rules for determining a partner's distributive share of the tax exempt income described in subsection (c)(1)." Furthermore, guidance should provide that, in the event of such an election for the energy credit pursuant to Section 48 or the clean electricity investment credit pursuant to Section 48E, the basis adjustments pursuant to Section 50(c)(5) and the capital account adjustments pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv)(j) should be allocated to the monetizing partners that are applicable entities (in the case of the Direct Pay Election) or the monetizing partners that are eligible taxpayers (in the case of the Transferability Election), in each case to the extent of each partner's distributive share of the portion of the credit with respect to which such election was made.

Section 6417 and Section 6418 include provisions that are designed to ensure that, in the event a Direct Pay Election or Transferability Election is made, the aggregate outside basis of the partners in the partnership is the same as it would have been had no election been made. Allocations of tax credits to partners generally do not result in increases or decreases to basis. However, pursuant to Section 733, distributions of cash generally result in decreases to basis. To ensure that a distribution by a partnership to its partners of cash received in respect of a Direct Pay Election or Transferability Election does not result in a net decrease in the outside basis of the partners in the partnership, Section 6417(c)(1)(C) and Section 6418(c)(1)(A) provide that the amount of any credit with respect to which a Direct Pay Election or Transferability Election is made shall be treated as tax exempt income for purposes of Section 705 and Section 1366. Section 6417(c)(1)(D) and Section 6418(c)(1)(B) further provide that a partner's distributive share of such tax exempt income shall be based on such partner's distributive share of the credit.

However, assuming that guidance clarifies that a partnership may make a Direct Pay Election or Transferability Election with respect to the portion of the credit that otherwise would have been allocable to the monetizing partners pursuant to Treasury Regulation Section 1.704-1(b)(4)(ii), Section 6417(c)(1)(D) and Section 6418(c)(1)(B) could be interpreted in a manner that could result in increases or decreases in the outside basis of certain partners even though there would be no net decrease or increase in aggregate outside basis.

For example, consider a partnership (P) with two partners, A, an applicable entity, and B, an eligible taxpayer. In 2023 P places in service a wind project and claims [PTCs] in the amount of $1,000,000. Suppose that absent a Direct Pay Election or Transferability Election, A and B each would be allocated $500,000 of the PTCs pursuant to Treasury Regulation Section 1.704-1(b)(4)(ii). P makes a Direct Pay Election with respect to the $500,000 of the PTCs otherwise allocable to A. P does not make a Transferability Election. P receives $500,000 of cash from the Direct Pay Election, all of which P distributes to A pursuant to the partnership agreement. Section 6417(c)(1)(C) provides that P recognizes $500,000 of tax exempt income with respect to the cash from the Direct Pay Election. If A and B are each allocated $250,000 of the tax exempt income pursuant to Section 6417(c)(1)(D), A's basis will decrease by $250,000 ($250,000 of tax exempt income and $500,000 of distributions) and B's basis will increase by $250,000 ($250,000 of tax exempt income) as a result of the Direct Pay Election and the distribution of cash. On the other hand, if A is allocated all $500,000 of the tax exempt income pursuant to Section 6417(c)(1)(D), the Direct Pay Election will not result in any net change to the outside basis of any partner. A's basis will increase by $500,000 because of the allocation of tax exempt income pursuant to Section 6417(c)(1)(D) and then decrease by $500,000 pursuant to Section 733 because of the distribution of cash. B's basis will remain unchanged.

Accordingly, to ensure that the outside basis of each partner remains unchanged as a result of a Direct Pay Election or Transferability Election, guidance should clarify that a partner's distributive share of the tax exempt income from the election shall be based on such partner's distributive share of the portion of the credit with respect to which the election is made. We believe this is an appropriate interpretation of the statutory language, which refers to "such partner's distributive share of the otherwise applicable credit" (Section 6417(c)(1)(D)) and "such partner's distributive share of the otherwise eligible credit" (Section 6418(c)(1)(B)). The use of the term "otherwise" indicates that the reference is to the credit that would have been available to the partner if the election had not been made. In a partnership that makes a Direct Pay Election or Transferability Election, the credit that would "otherwise" be available to a <u>monetizing partner</u> is a portion of the credit for which the election actually has been made. However, there is no credit that would "otherwise" be available to a <u>non-monetizing partner</u> because the non-monetizing partner will take into account its distributive share of the credit just as the partner would have if the partnership had not made the election. Accordingly, in our view, basing a partner's distributive share of the tax exempt income from the election on such partner's distributive share of the portion of the credit with respect to which the election is made is consistent with a literal reading of Section 6417(c)(1)(D) and Section 6418(c)(1)(B), as well as the aggregate approach to partnerships that supports such an election with respect to distributive shares of some but not all partners.

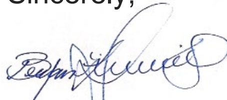
We note that the above analysis implicitly assumes that the rules for allocating tax exempt income should assume that the partnership will distribute the cash received in respect of a Direct Pay Election or Transferability Election to its monetizing partners. We note that nothing in Section 6417 or Section 6418 <u>requires</u> that a partnership distribute cash received in respect of a Direct Pay Election or Transferability Election to its monetizing partners. However, we believe that is an appropriate assumption to make for purposes of formulating these rules because it ensures consistent treatment between monetizing partners and non-monetizing partners. Furthermore, we would expect that many partnerships will distribute cash received in respect of a Direct Pay Election or Transferability Election to their monetizing partners.

Guidance also should clarify the application of the basis adjustments pursuant to Section 50(c)(5) and the capital account adjustments pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv)(j) in the event of a Direct Pay Election or Transferability Election made by a partnership for the energy credit pursuant to Section 48 or the clean electricity investment credit pursuant to

Section 48E. Section 50 provides for basis adjustments with respect to property for which certain investment credits, including the energy credit and the clean electricity investment credit, have been determined. Section 50(c)(5) provides that a partner's outside basis in its partnership interest shall be appropriately adjusted to reflect adjustments in property held by the partnership. Treasury Regulation Section 1.704-1(b)(2)(iv)(j) provides that partners' capital accounts will not be determined and maintained in accordance with Treasury Regulation Section 1.704-1(b)(2)(iv) unless capital accounts are adjusted by the partners' shares of outside basis adjustments.[6] To ensure that each partner's outside basis and capital account remain unchanged as a result of a Direct Pay Election or Transferability Election, the basis adjustments pursuant to Section 50(c)(5) and the capital account adjustments pursuant to Treasury Regulation Section 1.704-1(b)(2)(iv)(j) with respect to such credit, should be allocated to the monetizing partners that are applicable entities (in the case of the Direct Pay Election) or the monetizing partners that are eligible taxpayers (in the case of the Transferability Election), in each case to the extent of each partner's distributive share of the portion of the credit with respect to which such election was made.

Thank you for the opportunity to submit these comments. Please feel free to contact us with any questions you may have regarding this submission.

Sincerely,



Bryan Marcelino
Head of Tax Strategy & Planning

[6] Treasury Regulation Section 1.704-1(b)(2)(iv)(j) refers to provisions under former Section 48 prior to its repeal in 1990. Section 50(c)(5) contains analogous rules.