November 4, 2022

SUBMITTED ELECTRONICALLY

Internal Revenue Service
CC:PA:LPD:PR (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: Request for Meeting and 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:

Rainbow Energy Center, LLC ("REC") appreciates the opportunity to submit comments regarding the Inflation Reduction Act ("IRA") pursuant to Notice 2022-50.

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

(2) With respect to the Secretary's discretion to determine the time and manner for making an election under § 6417(a): . . . (b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

REC requests that the Treasury Department permit applicable entities to make the election with respect to any taxable year at any time during at least the two years preceding the date referenced in Section § 6417(d)(3)(A)(i)(II) for such year (i.e., the statutory outside date), or with as much timing flexibility as is otherwise reasonably practicable. Moreover, there should be a process for prompt automated acknowledgment of the election.

REC is concerned that the timing required by § 6417(d)(4)(B) (seeming to delay taxpayer's ability to monetize the credit until well after the end of the taxable year in which it makes the expenditures) may require projects that count on tax credit financing to solve this timing issue by initially drawing on private

lending arrangements that are effectively secured by the expectancy of the direct pay credit. To this end, it would be essential for the election form to have the following optional features:

(a) If the taxpayer is a partnership or S corporation, the taxpayer should be permitted to specify at the time of the election the bank account into which the cash payment described in § 6417(c)(1)(A) would be paid (to the extent earned); and

(b) In connection with providing such bank account information, the taxpayer should be permitted to check a box for such account information to itself be considered an irrevocable part of the election (unless the taxpayer self-certifies, under penalty of perjury, that the relevant account no longer exists in the taxpayer's name with the financial institution).

The IRS automated acknowledgement should include (1) a transcription of the bank account information and whether the account designation is irrevocable and (2) a statement acknowledging that the taxpayer's direct pay proceeds, if any, are freely transferable and may be pledged as collateral for a loan.

This is to facilitate the ability of the direct pay expectancy and the future cash derived thereby under § 6417(c)(1)(A) to serve as security in financing the projects for which tax credits are provided. Banks will want to have this written IRS acknowledgment confirming that the direct payment under § 6417(c)(1)(A) will be made into what they know is a contractually ring-fenced collateral account, and that this is proper under the law. Treasury has an opportunity to design the election form and automated acknowledgment thereof in a way that will be significantly useful for borrowers in securing financing for tax credit-motivated projects prior to actual receipt of the direct pay cash.

We emphasize that the delay in financing promised by the statute is a significant problem and failure to solve it will materially and adversely impact the effectiveness of the tax credit financing intended by Congress. We have proposed this solution to facilitate the ability of private capital to plug what we believe may be an otherwise fatal gap in funding for many worthy projects. We have proposed a solution that we believe will involve minimal devotion of effort by IRS employees (i.e., utilizing a well-designed election form and a plan to effectively leverage the IRS's existing automated acknowledgment systems for taxpayer mid-year elections, similar to the form-generated acknowledgment for check-the-box elections).

(3) In determining the amount treated as making a payment against tax under § 6417(a), is guidance needed to clarify the application of any other Code provision? If so, what is the Code provision and what clarification is needed?

Guidance should clarify that an entity that receives all or a portion of an eligible credit pursuant to an election made under § 6418 should be entitled to make an election under § 6417 with respect to that credit to the same extent as any other taxpayer. We caution that the Treasury Department, if it issues such clarification, should not do so in a narrower manner than substantially as stated above; we have seen, for example, other comments suggest that the § 6417 election should be permitted if the § 6418 transferee is an "applicable entity." We would urge the Treasury Department not to overlook the ability for, e.g., a partnership transferee to make the election under § 6417(c) even though it may not be a transferee that is itself an "applicable entity."

Guidance is also requested to clarify that if direct pay is elected under § 6417 for any years, transferability may be elected for the remaining years under § 6418.

(4) With respect to an election under § 6417(a) made by a partnership or S corporation pursuant to § 6417(c)(1) for any applicable credit determined with respect to any facility or property held

directly by a partnership or S corporation: . . . (a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues?

Guidance is needed to address scenarios in which a partnership is partially owned by "applicable entity" investors and partially not. Failure to provide guidance would create issues raising capital from private investment funds who have both types of investors and have the capacity to provide significant financing with respect to renewable energy projects. We believe that in clarifying the manner in which direct pay will be permitted with respect to the indirect interests of "applicable entities" through partnerships, Treasury must balance several interests: (1) certainty in predicting how a partnership agreement affects the direct pay calculations; (2) administrability both for taxpayers and the IRS; and (3) honoring the Congressional objective in enacting § 704(b) that tax consequences will follow from the agreement of the partners.

Section 6417(c)(1)(D), in describing how a partnership allocates the tax-exempt income associated with the § 6417(c)(1)(A) payment, provides:

> a partner's distributive share of such tax exempt income shall be based on such partner's distributive share of the otherwise applicable credit for each taxable year.

A partner's distributive share of credit is governed by § 704(b). Under the general rule of § 704(b), a partner's distributive share of items, specifically including "credit," shall be determined "by the partnership agreement." However, the agreement of the parties is not controlling if an allocation specified in the agreement does not have substantial economic effect. Treas. Reg. 1.704-1(b)(4)(ii) thus provides that allocations of tax credits "cannot have economic effect" because they do not affect capital accounts, and generally provides that credits must be allocated in proportion to costs and expenditures giving rise to the credit.

Because of new § 6417 (and § 6418, discussed below), the predicate of Treas. Reg. 1.704-1(b)(4)(ii) is no longer true. A credit in respect of which a direct pay election is made gives rise to an item of tax-exempt income, which is an item that is allocated to capital accounts and which does have economic effect. An agreement to specially allocate credits with respect to which the § 6417 election is made (so long as the special allocation is to parties in respect of whom the election is available) indeed would have economic effect, and therefore must be determinable by agreement of the parties in accordance with the general rule of Section 704(b).

We suggest that Treas. Reg. 1.704-1(b)(4)(ii) must be modified to acknowledge that § 704(b) requires respect for an agreement to specially allocate credits that result in tax-exempt income under § 6417 or § 6418. We acknowledge that this would permit partnerships great flexibility to increase the amount of a credit eligible for direct pay by admitting a potentially relatively small investor who is an "applicable entity." We suggest this is not abusive, no more than if, instead of admitting such investor, the credit were transferred to such "applicable entity" under § 6418 for a cash payment equivalent to what its capital contribution would have been, followed by such party making its own election under § 6417.

It would be appropriate for existing Treasury regulations with respect to "shifting allocations" or "transitory allocations" to limit the effectiveness of taxpayers' partnership agreements to specially allocate credits. It would also be appropriate for "disguised sale" concepts to apply so that partnerships may not be used to effectively circumnavigate the § 6418 prohibition on transfers to related parties. However, the requirements of Treas. Reg. 1.704-1(b)(4)(ii), as applied to credits that result in tax-exempt

income, must be eliminated to keep the regulations in compliance with the statutory requirements of § 704(b).

(6) With respect to the elections under § 6417(d)(1)(B), (C), or (D): . . . (a) What, if any, issues could arise when an entity makes an election under § 6417(d)(1)(B), (C), or (D) and what, if any, guidance is needed with respect to such issues?

REC seeks clarification that even though a "partnership" is not itself an "applicable entity" under § 6417(d)(1)(A), any election it might make under (d)(1)(B), (C) or (D) will only apply with respect to its partners that are not themselves "applicable entities." In other words, a partnership should not be viewed as making such election for itself as a whole.

For example, if a partnership makes the election under § 6417(d)(1)(C), it should not thereby surrender its ability to elect under § 6417(c) on behalf of its partners that are indeed themselves "applicable entities" to take direct pay for the entire period specified § 6417(d)(3)(C)(i)(II)(bb) (i.e., partners that are "applicable entities" should still be able to get direct pay for the full 12-year period under (aa) even though the partnership elects to permit the other partners to take direct pay for the reduced 5-year period under (bb)).

This would be well-justified under a general aggregate theory of partnerships to avoid an absurd result.

(10) What, if any, guidance is needed to clarify the application of the excessive payment provisions of § 6417? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6417(d)(6)(B)? What, if any, guidance is needed to calculate the excessive payment amount under § 6417(d)(6)(C)?

On reasonable cause, reference should be made to Treas. Reg. § 1.6664-4(b).

.02 Transfer of Certain Credits (§ 6418).

(2) Section 6418(c)(1) provides that, in the case of any eligible credit determined with respect to any facility or property held directly by a partnership or S corporation, the Secretary determines the manner in which such partnership or S corporation makes an election under § 6418(a) with respect to such credit. . . . (a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6418(a) and what, if any, guidance is needed with respect to such issues?

We note that the transfer of a credit results in tax-exempt income, just as in the direct pay context, and so existing Treas. Reg. 1.704-1(b)(4)(ii) should not control how the parties may agree to allocate this tax-exempt income. As with our similar comment for the allocation of direct pay credits, the general rule of § 704(b) may require Treasury to clarify that the allocation of exempt income from the transfer of credits under § 6418(a) is determined by the partnership agreement, and § 6418(c)(1)(B) does not constrain this flexibility because such allocation of the credit (i.e., by agreement of the parties), and the exempt income derived therefrom, would indeed have substantial economic effect, thus eliminating the justification for existing Treas. Reg. 1.704-1(b)(4)(ii) and requiring such allocation to be respected under the general rule of § 704(b).

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

Payment in Cash

Section 6418(b)(1) provides that consideration for the transfer of tax credits shall be paid in cash. REC requests clarification that this requirement does not prohibit, under step transaction principles or otherwise, the recipient of such cash to subsequently exchange such cash for other property, including a

note or evidence of indebtedness of the credit transferee, whether pursuant to a plan or otherwise. Moreover, REC believes that credit transferors and transferees should be able to recite an imputed circle of cash for this purpose to improve credit liquidity and reduce administrative burdens.

If the "paid in cash" requirement were viewed as placing constraints on the use of the cash received (e.g., so as to avoid a step transaction attack on whether the payment were truly made in cash), we believe this would place an onerous administrative burden on taxpayers and the IRS, to no purpose, and would materially and adversely affect credit liquidity.