

Snell & Wilmer

ONE EAST WASHINGTON STREET
SUITE 2700
PHOENIX, AZ 85004-2556
602.382.6000 P
602.382.6070 F

Marc Schultz
(602) 382-6358
mschultz@swlaw.com

November 4, 2022

The Honorable Lily Batchelder
Assistant Secretary of Tax Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Charles P. Rettig
Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Notice 2022-50 Guidance Regarding “Political Subdivisions” as Applicable Entities for Section 6417

Dear Assistant Secretary Batchelder and Chief Counsel Rettig:

Snell & Wilmer LLP is pleased to submit, on behalf of our client, Peninsula Clean Energy Authority (“PCE”), this response to the request by the Internal Revenue Service (the “Service”) and the U.S. Treasury Department (“Treasury”) under Notice 2022-50 (the “Notice”) for comments regarding the elective payment provisions (the “Elective Payment Option”) under Section 6417 of the Internal Revenue Code of 1986, as amended (the “Code”), as added by the Inflation Reduction Act of 2022 (the “IRA”).

In response to Request for Comment (5) of the Notice with respect to the guidance needed to clarify which entities are “applicable entities” for purposes of Code Section 6417(d)(1)(A), we recommend that regulations pertaining to the definition of “political subdivision” in Code Section 6417(d)(1)(A)(ii) be broad and, at a minimum, consistent with the Code’s definition of “political subdivision” and prior Treasury regulations regarding the meaning of this term in effect at the time the IRA was signed into law, namely Treasury Regulation Section 1.103-1(b) with respect to the issuance of tax-exempt bonds. A definition of “political subdivision of the State” consistent with past regulations and guidance would include the widely used joint powers agencies, particularly those that act as Community Choice Aggregation organization, such as PCE.

PCE is a government-controlled, joint powers agency formed to be a Community Choice Aggregation (“CCA”) organization by San Mateo County (the “County”) and all 20 of its cities and towns in 2016, and joined by the City of Los Banos in 2020. The State of California, like other

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states, has statutorily empowered California public agencies to combine and cooperatively provide services and exercise shared powers outside of each agency's normal jurisdiction. This allows for the more effective and efficient use of public resources in achieving a public purpose.

The California Joint Exercise of Powers Act enables California governmental entities, such as the cities and towns of the County, to form a joint powers agency by executing a joint powers agreement. A joint powers agency is typically governed by a board of directors appointed by the municipalities and is delegated the right to exercise the sovereign power relevant to its purpose.

In addition, a CCA organization is another creation of California law that exists for the specific purpose of allowing local governments to combine their constituents' electricity demand and act as a single electricity purchaser in order to achieve economies of scale and public purposes, such as the local governments' clean energy goals. PCE's status as a CCA enables it to aggregate electricity demand within the County's jurisdiction and procure renewable-sourced electricity at more favorable rates. PCE's public purpose as a CCA is enhanced by its efficiency as a joint powers agency.

As a CCA organization and joint powers agency, PCE was created and authorized by the County to promote, develop, conduct, operate, and manage energy production, energy efficiency and conservation, and other energy-related programs, and to exercise all other powers necessary and incidental to accomplishing this purpose on behalf of the County, including the eminent domain power. In performing these various public¹ functions, PCE fills the role of multiple administrative agencies that would otherwise exist within the County and helps to fulfill California's mandate² to local governments to reduce greenhouse gas emissions.

PCE is developing and plans to own renewable energy projects in its service area in order to make renewable energy more accessible and affordable for its constituents. PCE is encouraged by the powerful and thoughtfully designed incentives Congress has provided in the IRA. PCE intends to qualify for the Elective Payment Option as an "applicable entity" under Code Section 6417. Code Section 6417(d)(1)(A)(ii) provides that a "State or political subdivisions thereof" is one of the categories of "applicable entities".

The term "political subdivision" is defined in Treasury Regulations Section 1.103-1(b) with respect to the issuance of tax-exempt bonds.³ The Service has previously stated that the term has

¹ See e.g., Private Letter Ruling 200629005 (Aug. 14, 2006) (conserving, developing, and utilizing energy sources of the state to make those resources available to state residents was a public purpose for a hydroelectric utility); see also Private Letter Ruling 200326012 (Mar. 5, 2003); see also Private Letter Ruling 201114010 (Apr. 8, 2011) (operating a utility has been deemed a public purpose).

² The State of California's Global Warming Solutions Act of 2006 mandates the state's local government to find ways to reduce greenhouse gas emissions to 1990 levels.

³ Treas. Reg. § 1.103-1(b) provides that term "political subdivision" denotes "any division of a state or local governmental unit which is a municipal corporation, or which has been delegated the right to exercise part of the sovereign power of the unit".

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been defined consistently for all federal tax purposes.⁴ Entities granted similar authority as that granted to PCE have been held to meet the “political subdivision” definition for tax-exempt bond financing purposes.⁵ PCE is recognized as a public agency by the state law under which it was created, by the California Joint Exercise of Powers Act.

In summary, PCE recommends that the regulations related to Code Section 6417 with respect to the definition of an applicable entity be sufficiently broad and such that, at a minimum, it encompasses the same definition of “political subdivision” found in Treasury Regulation section 1.103-1. PCE appreciates the opportunity to comment on this request for comment regarding the Elective Payment Option. Please let us know if we can provide any additional information. We would be pleased to continue the discussion.

Respectfully submitted,

Snell & Wilmer LLP



Marc Schultz

Cc:

Jan Pepper
Chief Executive Officer
Peninsula Clean Energy Authority

Marc Hershman
Director of Government Affairs
Peninsula Clean Energy Authority

Rafael Reyes
Director of Energy Programs
Peninsula Clean Energy Authority

⁴ Rev. Rul. 77-143; 1977-1 C.B. 340

⁵ See e.g., Rev. Rul. 77-143; 1977-1 C.B. 340 (finding a port authority created by state law with the purposes of acquiring property, by purchase or condemnation, to erect and maintain port facilities in New York is a political subdivision).