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Re: Comments Regarding Future Guidance Implementing Sections 6417 and 6418 of the Internal Revenue Code Pursuant to Notice 2022-50

Submitted electronically

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
United States Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, DC 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical)
Internal Revenue Service
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Dear Ms. Batchelder and Mr. Paul:

We respectfully submit comments to the U.S. Department of Treasury ("**Treasury**") and the Internal Revenue Service (the "**Service**") pursuant to Notice 2022-50[1] regarding the elective payment provisions under Section 6417[2] and the elective credit transfer provisions under Section 6418, as added by Section 13801 of Public Law 117-169, 136 Stat. 1818 (August 16, 2022), referred to as the Inflation Reduction Act of 2022 (the "**IRA**"). We submit our comments on behalf of an investment manager that will form one or more entities to invest in clean energy projects on behalf of investors, including taxable investors, state and other governmental entities, and other U.S. tax-exempt investors. Our comments focus on questions relevant to investment groups that include both taxable and tax-exempt investors.

[1] 2022-43 I.R.B. 325 (Oct. 5, 2022).

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

As Treasury has noted, the IRA "recognizes that state, local and Tribal governments, as well as non-profit organizations and other tax-exempt entities, have played and will continue to play a central role in making investments to build a clean energy economy."[3] The elective payment provisions of Section 6417 are intended to "promote broad-based investment across the country."[4] Accordingly, the IRA "allows these actors to receive certain tax credits as direct payments from the Internal Revenue Service, streamlining these entities' access to key incentives and supporting their investments in local communities."[5] This principle—that the tax law should incentivize community investment in our nation's new equitable clean energy economy—is a foundational element of the IRA[6] that has attracted tremendous interest and enthusiasm from communities.[7]

Unfortunately, however, ambiguity in the statutory language in Sections 6417 and 6418 poses uncertainties for projects funded by governmental and tax-exempt investors, whether they partner with taxable investors or with other governmental or tax-exempt entities. Absent prompt guidance from Treasury and the Service to "support swift and thoughtful implementation of these transformational incentives for . . . communities,"[8] those very communities, including state, local, and Tribal governments, as well as other tax-exempt entities, may find themselves excluded from this historic national initiative, despite clear legislative intent to the contrary. This would be devastating. The issues discussed here are among the most critical as to which IRA guidance is needed, and this guidance is needed in short order.

As discussed below, there is a clear path to resolving these questions through guidance that is consistent with the authority delegated to Treasury to carry out the purposes of Sections 6417 and 6418

[3] *See* Dep't of Treasury, *Fact Sheet, Four Ways the Inflation Reduction Act's Tax Incentives Will Support Building an Equitable Clean Energy Economy*, *available at* https://home.treasury.gov/system/files/136/Fact-Sheet-IRA-Equitable-Clean-Energy-Economy.pdf.

[4] *See id.*

[5] *See id.*

[6] *See id.* (referring to this point as one of "four ways the Inflation Reduction Act's Tax Incentives will support building an equitable clean energy economy"). *See also* Colloquy between Senator Cardin and Senator Wyden on August 6, 2022 (referring to "the goal of encouraging additional investment by expanding the availability of these tax credits to project owners without regard to their ability to claim the credits themselves"), 168 Cong. Rec. S4166 (2022) (statement of Sen. Ben Cardin).

[7] *See, e.g.*, Comments dated Nov. 4, 2022 in response to Notice 2022-50: City and County of Honolulu, Office of Climate Change, Sustainability and Resiliency ("We are excited that many tax provisions included in the IRA can be utilized by tax exempt entities under section § 6417"); Denver Office of Climate Action, Sustainability, and Resiliency (Denver "has ambitious goals pertaining to climate and equity. The IRA provision allowing certain taxpayers to elect to treat certain credits as a direct payment rather than a credit against their federal income tax liabilities stands to accelerate the attainment of Denver's goals. . . .The city is well positioned to make use of § 6417 as soon as federal guidance is published on the process to do so"); City of Los Angeles ("The Inflation Reduction Act (IRA) will dramatically accelerate the City's progress toward its goals . . . . ").

[8] *See* White House, *How to Engage with Treasury on Clean Energy Tax Incentives*, *available at* https://www.whitehouse.gov/cleanenergy/clean-energy-updates/2022/11/07/how-to-engage-with-treasury-on-clean-energy-tax-incentives/.

and that results in readily administrable procedures akin to reporting procedures already in place. Part I of this letter discusses issues relating to partnership elections under Sections 6417 and 6418 when the partnership's direct or indirect owners include an "applicable entity" as defined in Section 6417(d)(1)(A), including governmental or other tax-exempt investors. Part II discusses the application of Section 6418 when a partnership elects to transfer credits to an "applicable entity." Part III discusses issues relating to the application of Section 50 to partnerships that include governmental or other tax-exempt investors.

I. Partnership Elections under Sections 6417 and 6418

A. The Issues

Section 6417(a) provides that refundable credit elections for most "applicable credits"[9] can be made only by "applicable entities" as defined in Section 6417(d)(1)(A). Under Section 6417(d)(1)(A), only the following are "applicable entities": organizations exempt from the tax imposed by subtitle A of the Internal Revenue Code, states or political subdivisions thereof, the Tennessee Valley Authority, Indian tribal governments, Alaska Native Corporations, and cooperatives furnishing electric energy to persons in rural areas.

Section 6418(a) provides that transferrable credit elections can be made only by "eligible taxpayers," and Section 6418(f)(2) defines "eligible taxpayers" as "any taxpayer which is not described in Section 6417(d)(1)(A)." This means that "applicable entities" under Section 6417(d)(1)(A), including governments and other tax-exempt investors, are not eligible to make transferrable credit elections.

Sections 6417 and 6418 provide special rules for partnerships. Under Section 6417(c), if a partnership directly holds a relevant facility or property, the Section 6417 election must be made by the partnership and may not be made by any partner. If the partnership makes the election, the Secretary is to make a payment to such partnership equal to the amount of the applicable credit. However, a partnership with partners which are "applicable entities" as defined in Section 6417(d)(1)(A) generally is not itself an "applicable entity." Therefore, if applicable entity status were determined by reference only to the partnership itself, rather than by reference to its partners, partnerships holding a relevant facility or property with governmental or tax-exempt partners generally would not be entitled to make the Section 6417 election, even though the applicable entity partners would be entitled to make the Section 6417 election had they held the relevant facility or property directly.

Similarly, Section 6418 requires the partnership, rather than the partners, to make the transferrable credit elections. Section 6418(c)(2) provides that if a partnership directly holds a relevant facility or property, no Section 6418 election by a partner is allowed. If applicable entity status were determined by reference

[9] That is, all applicable credits other than Section 45V, 45Q, and 45X credits.

only to the partnership itself, rather than by reference to its partners, then *any* partnership, even a partnership with applicable entity partners—indeed, even a partnership with *only* applicable entity partners—would be entitled to make the Section 6418 election with respect to all credits generated by the partnership project, even though the applicable entity partners would not have been able to make the Section 6418 election had they held the facility or property directly.

Each of the following structures would raise the questions discussed above because the project is owned by a partnership that is not itself an “applicable entity”: (1) a partnership that constructs and operates a solar or wind project (“**Project Partnership**”) with two direct partners: a project sponsor and an investor partnership with taxable, tax-exempt and governmental investors; (2) a Project Partnership with three direct partners: the project sponsor, an investor partnership with members that are not “applicable entities” under Section 6417(d)(1)(A), and another investor partnership with only members that are such applicable entities; and (3) a Project Partnership with direct members that are all Section 6417(d)(1)(A) “applicable entities.”

Determining eligibility by reference to the nature of the partnership itself, rather than by reference to its partners, would be illogical and would undermine the statutory scheme. It would mean that governments and other tax-exempt investors could not receive refundable credits if they were to partner with other investors, whether taxable or tax-exempt, to construct and own clean energy projects. And it would also mean that governments and tax-exempts ***could*** partner with others to transfer credits generated from clean energy projects. This, too, would be contrary to the statutory scheme. Indeed, it would completely vitiate the “eligible taxpayer” requirement of Section 6418 and would effectively enable all investors to transfer credits.

Project owners in clean energy projects are often organized as partnerships. For example, wind and solar projects with “tax equity” investors are generally structured as partnerships for tax purposes.[10] If Section 6417 were interpreted as requiring (or, in the case of Section 6418, as permitting) elections to be determined by reference to the nature of the partnership itself, then applicable entities such as states, local governments, and tax-exempt investors would not be eligible for refundable credits if they invest through this common structure.[11]

B. Proposed Treatment

The only way to implement these provisions of Sections 6417 and 6418 in a manner that is consistent with the structure and purpose of the statutory scheme is to issue guidance providing that

[10] *See* Rev. Proc. 2007-65, 2007-45 I.R.B. 967 (2007) (addressing partnerships among project developers and investors that own and operate wind farms).

[11] This would not be the case for projects qualifying for credits under Sections 45Q (carbon capture), 45V (clean hydrogen production), or 45X (advanced manufacturing production), but the structure of Section 6417 would not make

partnership elections under these sections are to be made by reference to the partners in the partnership to which the credits are allocable. Thus, guidance should provide that, in the case of Section 6417, partnership elections may be made to the extent credits are allocable to “applicable entity” partners, and in the case of Section 6418, partnership elections may be made to the extent credits are allocable to “eligible taxpayer” partners, i.e., partners that are not applicable entities as defined in Section 6417(d)(1)(A) (a “**Proportionate Partnership Election**”). This result would accurately reflect the dichotomy the legislative framework establishes: governmental and other tax-exempt entities can receive direct payments from Treasury, whereas—apart from the case of the three special credits specified in Section 6417—taxable investors would not receive government cash payments but instead will be permitted to transfer credits to third parties in return for cash payments.

Our proposed approach follows a well-established path. We have identified a number of analogous situations in which Congress, Treasury and the Service have provided for partnership-level elections to be made, or for partnership reporting or withholding obligations to arise, based on facts specific to their partners, including:

- Section 1603 of the American Recovery and Reinvestment Act of 2009 (the “**ARRA**”), pursuant to which Treasury implemented a reporting system for partnerships to certify their eligibility for Section 1603 payments in lieu of tax credits by making certifications as to the nature of their partners (i.e., that their partners did not include governments or tax-exempt entities, among others);
- Treasury regulations section 1.108(i)-2(b), pursuant to which Treasury implemented a statutory provision that required an election to defer recognition of cancellation of indebtedness income to be made at the partnership level by permitting the partnership to allocate the deferred COD income among its partners “in any manner”[12] —expressly recognizing that “there are instances in which the inclusion of COD income would be beneficial to some partners, but not to others”;[13]
- Treasury regulations section 1.168(k)-2(f)(1)(ii)(G), which permit partnerships to make elections out of Section 168(k) bonus depreciation on a partner-by-partner basis with respect to each partner’s basis adjustment in partnership assets under Section 743(b), which is determined based on each partner’s adjusted basis in its partnership interest—i.e., facts specific to each partner; and

sense if interpreted to mean that Section 6417(d)(1)(A) entities can invest in partnerships only in the case of projects that qualify for those credits.

[12] *See* Treas. Reg. § 1.108(i)-2(b)(1) (“The electing partnership may determine, in any manner, the portion, if any, of a partner’s COD income amount . . . that is the deferred amount, and the portion, if any, that is the included amount.”).

[13] *See* Application of Section 108(i) to Partnerships and S Corporations (preamble to temporary Treasury regulations), T.D. 9498, 75 Fed. Reg. 49381 (Aug. 13, 2010) (“The IRS and the Treasury Department recognize that there are instances in which the inclusion of COD income would be beneficial to some partners, but not to others. As a result, the temporary regulations, while not changing the general rules under section 704, permit a partnership to determine the portion of each partner’s allocable share of COD income resulting from a reacquisition of an applicable debt instrument that is deferred under section 108(i) (deferred amount) and the portion that is not deferred (included amount).”).

- Section 743, pursuant to which partnerships are permitted to elect (via Section 754 elections) to adjust the basis of partnership property in respect of a partner's transfer of its interest in the partnership, by reference to the sales price for that partner-level transfer.

In these cases, Treasury has either relied on partnership certifications or has promulgated rules designed to ensure an information-gathering process that Treasury deemed sufficient. As discussed in more detail in Section D below, we recommend that guidance provide for similarly administrable procedures here. And as discussed immediately below, we believe that Treasury has authority to issue guidance providing for Proportionate Partnership Elections.

C. Statutory Authority

Treasury has ample statutory authority to issue the Proportionate Partnership Election guidance proposed above. Section 6417(h) and Section 6418(h) direct that the Secretary "shall" issue "such regulations or other guidance as may be necessary to carry out the purposes of this section." This statutory directive requires Treasury to issue guidance to the effect that partnerships will be permitted to make Sections 6417 and 6418 elections only to the extent of credits allocable to the appropriate category of their partners (i.e., "applicable entities" for Section 6417 elections and "eligible taxpayers" for Section 6418 elections). Guidance to this effect would carry out the purposes of Sections 6417 and 6418 by (1) permitting governments and other tax-exempt investors to benefit from refundable credits by participating in clean energy projects—a cornerstone of the IRA—and (2) ensuring that governments and other tax-exempt investors are excluded from the transferrable credit regime of Section 6418.

Guidance to this effect would also be consistent with many other provisions in Subchapter K that apply the "aggregate" theory of partnership taxation. Under the "aggregate" theory, a partnership is treated as an aggregate of its partners—i.e., the partners are treated as owning the partnership's assets and conducting the partnership's operations. The fundamental precept of partnership taxation—the "flow through" treatment of partnerships codified in Section 701—is an application of the "aggregate" theory.[14] Other examples of Subchapter K provisions that apply the "aggregate" theory include Section 702 (preserving character of each item of partnership income or loss in the hands of the partners), Section 705 (adjusting basis of a partner's interest in a partnership by taking into account items of partnership income and loss), Section 752 (treating increase or decrease of a partner's share of the liabilities of a partnership as a contribution by the partner or a distribution by the partnership, respectively), and Sections 721 and 731

[14] *See* McKee et al., *Federal Taxation of Partnerships & Partners* ¶ 9.01. Section 701 provides that "[a] partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities."

(transfers of property between a partner and the partnership generally do not result in recognition of gain or loss).[15]

Indeed, existing Treasury regulations under Section 701 provide ample authority for the Proportionate Partnership Election approach recommended here. Treasury regulations section 1.701-2(e) provides that "[t]he Commissioner can treat a partnership as an aggregate of its partners in whole or in part as appropriate to carry out the purpose of any provision of the Internal Revenue Code or the regulations promulgated thereunder" unless the Code or regulations "prescribe" an entity approach and entity treatment and its ultimate tax results are clearly contemplated by that provision. These regulations thus treat the "aggregate" approach as the default so long as appropriate to carry out the statutory purpose. In the case of Sections 6417 and 6418, an entity approach would undermine the statutory scheme by excluding governments and tax-exempt investors that invest in clean energy projects. The aggregate approach is therefore the only approach that can carry out the purpose of the legislation.

Guidance to the contrary (i.e., determining "applicable entity" or "eligible taxpayer" status by reference only to the partnership, and not to its partners) would be inconsistent with, and would affirmatively undermine, the purposes of Sections 6417 and 6418. Absent affirmative guidance, these questions are likely to stall or preclude the very investments the IRA was intended to incentivize.

Moreover, the IRA grants Treasury express authority to address the administrative issues that will arise under Sections 6417 and 6418, in each case providing that "the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments."[16] This express grant of authority to address administrative concerns supports the suggestions discussed immediately below for guidance establishing a reliable and administratively sound reporting system to implement the statutory scheme when project investments are funded through partnerships.

D. Administrability

We recommend that Treasury and the Service implement reporting procedures for Proportionate Partnership Elections that require the partnership and its authorized partner to certify under penalties of perjury, with respect to its Section 6417 election, as to the percentage of its eligible credits that are

[15] The alternative to the "aggregate" approach is the "entity" approach. The "entity" approach views a partnership as an entity separate from its partners and treats the partnership itself as owning partnership property and conducting partnership operations. The Code and the Treasury regulations, including the Subchapter K provisions, blend the "aggregate" approach with the "entity" approach and use different approaches based on the context. The "entity" approach is used, for example, in Section 703 (partnerships required to compute their taxable income separately), Section 706 (partnerships having their own taxable years), and Section 6031 (partnerships required to file separate tax returns).

[16] *See* § 6417(d)(5); § 6418(g)(1).

allocable to Section 6417(d)(1)(A) "applicable entities," and, as to its Section 6418 election, the percentage of its eligible credits that are *not* allocable to such applicable entities. To ensure that the partnership has access to the information it needs to support its certifications, partners should be required to provide the partnership with forms certifying as to their status, similar to the procedures currently in place with respect to Forms W-8 and W-9. Each certifying partner should be required to provide the partnership with the same information it would be required to provide directly to the Service if it were filing a direct claim. As to partners that are themselves partnerships or other flow-through entities, an intermediary certification form should be provided, and that intermediary should itself be required to collect relevant forms from its owners. These procedures are similar to reporting systems already in place in analogous contexts (discussed below), and they should not create any undue administrative burdens. And requiring that these forms be signed under penalties of perjury, along with the risk of additional penalties for excessive claims imposed under Sections 6417(d)(6) and 6418(g)(2), should result in accuracy in the partnership's certifications.

Under the closely analogous ARRA Section 1603 clean energy grant program, Treasury developed a partnership certification process for partnership applications for payments in lieu of tax credits for specified energy property under Section 1603 of the ARRA. As noted above, partnerships with any partners that were governmental or tax-exempt entities were not entitled to payments under Section 1603 of the ARRA.[17] An application for Section 1603 payments was signed under penalties of perjury, and it included the following line items: [18]

Section 1: Applicant Eligibility

1A. Type of Applicant — indicate which choice best describes the applicant. Governments, 501(c) organizations, 54(j)(4) entities, partnership or pass-thru entities with any government /501(c)/54(j)(4) entity as a partner (or other holder of an equity or profits interest), and in some cases foreign persons and entities are not eligible for Section 1603 payments.

- Federal, State, or local government or any political subdivision, agency, or instrumentality thereof - **do not continue with application**
- Organization described in section 501(c) of the Internal Revenue Code and exempt from tax under section 501(a) of such Code - **do not continue with application**
- Entity referred to in paragraph (4) of section 54(j) of the Internal Revenue Code - **do not continue with application**
- Partnership or pass-thru entity with a government or any political subdivision, agency, or instrumentality thereof, 501(c) organization, or 54(j)(4) entity as a direct or indirect partner (or other direct or indirect holder of an equity or profits interest) - **do not continue with application** (Note: If such entity only owns an indirect interest in the applicant through a taxable C corporation, do not choose this selection.)

Partnerships were also required to sign a Terms and Conditions agreement under penalties of perjury, in which they affirmed that they were "not a partnership or pass-thru entity that has a person described in section 2.c above [referencing, among others, federal, state or local governments, any political subdivision, agency or instrumentality thereof, or any section 501(c) organization] as a direct or indirect partner (or other

[17] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, Section 1603(g), 123 Stat. 115 (2009). Application *available at* https://home.treasury.gov/system/files/216/D-Sample-Application-PIS.pdf.

[18] *See* Sample Application posted on Treasury website: Application for Section 1603: Payments for Specified Renewable Energy Property in Lieu of Tax Credits (Property that has already been placed in service), *available at* https://home.treasury.gov/system/files/216/D-Sample-Application-PIS.pdf.

holder of an equity or profits interest) unless this person only owns an indirect interest in the applicant through a taxable C corporation."[19]

As noted above, Treasury and the Service have adopted analogous procedures where partnership-level elections or obligations are made or satisfied by reference to the nature of the partners:

- **Section 108(i)(5)(B)(iii) partnership elections:** Enacted in the ARRA, Section 108(i) provided businesses the ability to choose to defer the inclusion of cancellation of indebtedness income from certain debt restructurings arising in 2009 or 2010.[20] Section 108(i)(5)(B)(iii) provides that in the case of a partnership, the election is made at the entity level. However, under the Treasury regulations, an electing partnership is allowed to allocate ***in any manner*** the portion of each partner's share of the CODI that is the partner's deferred amount (if any) and any portion that is the partner's included amount (if any).[21] Therefore, the Treasury regulations under Section 108(i) preserve the statutory requirement of partnership-level elections but at the same time provide flexibility for each partner within the partnership—expressly recognizing that "there are instances in which the inclusion of COD income would be beneficial to some partners, but not to others." [22] With respect to partners as to which a deferred amount is allocated, an electing partnership is required to determine the "deferred Section 752 amount"[23] and to report that amount on its Schedule K-1.[24] To ensure that the partnership has the information it needs to comply with its reporting obligations, pursuant to a

[19] *See* Payments for Specified Energy Property In Lieu of Tax Credits under the AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009, TERMS AND CONDITIONS, *available at* https://home.treasury.gov/system/files/216/energy-terms-and-conditions.pdf.

[20] § 108(i)(1).

[21] *See* Treas. Reg. § 1.108(i)-2(b)(1). Similarly, "[i]f a partnership (upper-tier partnership) is a direct or indirect partner of an electing partnership and directly or indirectly receives an allocation of a COD income amount from the electing partnership, all or a portion of which is deferred under section 108(i), the upper-tier partnership . . . may determine, in any manner, the portion, if any, of a partner's COD income amount with respect to an applicable debt instrument that is the deferred amount, and the portion, if any, that is the included amount." Treas. Reg. § 1.108(i)-2(b)(4)(i). "However, no partner's deferred amount with respect to an applicable debt instrument may exceed that partner's COD income amount with respect to such applicable debt instrument, and the aggregate amount of the partners' COD income amounts and deferred amounts with respect to each applicable debt instrument must equal the electing partnership's COD income amount and deferred amount, respectively, with respect to each such applicable debt instrument." Treas. Reg. §§ 1.108(i)-2(b)(1), -2(b)(4)(i).

[22] *See* Application of Section 108(i) to Partnerships and S Corporations (preamble to temporary Treasury regulations), T.D. 9498, 75 Fed. Reg. 49381 (Aug. 13, 2010) ("The IRS and the Treasury Department recognize that there are instances in which the inclusion of COD income would be beneficial to some partners, but not to others. As a result, the temporary regulations, while not changing the general rules under section 704, permit a partnership to determine the portion of each partner's allocable share of COD income resulting from a reacquisition of an applicable debt instrument that is deferred under section 108(i) (deferred amount) and the portion that is not deferred (included amount).").

[23] *See* Treas. Reg. § 1.108(i)-2(b)(3)(i). A "deferred Section 752 amount" arises in respect of a decrease in a partner's share of partnership liabilities under Section 752(b).

[24] *See* Rev. Proc. 2009-37, 2009-36 I.R.B. 309 (2009); Schedule K-1 (Form 1065) box 11.

statutory grant of authority similar to that granted under Sections 6417 and 6418,[25] the final regulations under Section 108(i) allow an electing partnership to request each direct partner that has a deferred Section 752 amount to provide the partnership with a written statement containing information requested by the partnership that is necessary to determine the partner's deferred amount, and if the partnership so requests, each direct partner that has a deferred Section 752 amount must provide the partnership with a written statement, signed under penalties of perjury, containing the requested information as necessary to determine the partner's relevant amounts.[26]

- **Section 168(k) bonus depreciation elections:** Treasury regulations under Section 168(k) allow the partnership to make partner-by-partner elections to the extent of additional first-year depreciation (i.e., bonus depreciation) arising in respect of Section 743 adjustments. Specifically, an election out of bonus depreciation is an entity-level election.[27] Various partners, however, may be differently situated and thus have varying interests as to whether to claim bonus depreciation with respect to increases in basis resulting from transfers of partnership interests. Treasury regulations section 1.168(k)-2(f)(1)(ii)(G) permits the partnership to make separate elections with respect to the 743 adjustments attributable to individual partners by treating each "partner's basis adjustment in partnership assets under section 743(b) for each class of property" as a separate class of property with respect to which the partnership may choose not to take the bonus depreciation.[28] Such is the case even though the partnership has not made this election for other partners' Section 743(b) adjustments or for the partnership's property that belongs to the same class to which the Section 743(b) adjustment corresponds.[29] Therefore, Treasury regulations section 1.168(k)-2(f)(1)(ii)(G) maintains the partnership-level election and simultaneously accounts for each partner's particular circumstance. To ensure that the partnership has access to the information it needs regarding partner-level information, the regulations under Section 743 require transferee partners to provide written notice, signed under penalties of perjury, to the partnership within 30 days of the sale or exchange and to include information as specified in the regulation.[30]
- **Section 743(b) adjustments:** Section 743 of the Code requires certain partnerships (rather than partners in such partnerships) to make and report basis adjustments under Section 743(b) as a result

[25] Section 108(i)(7) provides that "[t]he Secretary may prescribe such regulations, rules, or other guidance as may be necessary or appropriate for purposes of applying this subsection, including rules for the application of this subsection to partnerships."

[26] Treas. Reg. § 1.108(i)-2(b)(3)(iv).

[27] *See* Treas. Reg. § 1.168(k)-2(f)(2)(ii)(B).

[28] This is because a taxpayer may make an election not to deduct bonus depreciation (i.e., an election out of bonus depreciation) for any class of property that is qualified property placed in service during the tax year. *See* § 168(k)(7); Treas. Reg. § 1.168(k)-2(f)(1).

[29] *See* Treas. Reg. § 1.743-1(j)(4)(i)(B).

[30] *See* Treas. Reg. § 1.743-1(k)(2).

of a transfer of an interest in the partnership.[31] Partnerships are required to set forth on their tax returns the computation of the adjustment and the partnership properties to which the adjustment has been allocated.[32] To facilitate taxpayer compliance and administrability of the statutory rule,[33] Treasury issued regulations requiring a transferee to notify the relevant partnership in writing within 30 days of a sale or exchange, and this written notice must include "information necessary for the partnership to compute the transferee's basis" in the case of sale or exchange of interest in the partnership.[34] A partnership may rely on a written notice provided by a transferee,[35] and the partnership is not required to make the adjustment under Section 743(b) until it has been notified of the transfer.[36] Because Section 743 prescribes obligations dependent upon partner-level facts that must be administered and satisfied by the partnership, the Treasury regulations establish a system that mandates partner certifications to ensure that the partnership has access to the information it needs to report accurately.

II. Transfer of Credits under Section 6418

Analogous questions arise when a partnership elects to transfer credits ***to*** a Section 6417(d)(1)(A) applicable entity. Two possible types of credit transfer transactions are described below.

In the first type of credit transfer transaction, a partnership that directly owns a clean energy project directly transfers credits to a Section 6417(d)(1)(A) applicable entity. Guidance should clarify that "applicable entities" within the meaning of Section 6417 are entitled to make an election to claim a refund under Section 6417 with respect to any credits transferred to them under Section 6418. Guidance should

[31] § 743(a). A partnership is required to make the basis adjustment under Section 743 either if an election under Section 754 is in effect with respect to such partnership or if the partnership has a substantial built-in loss immediately after the transfer of interest in the partnership.

[32] Treas. Reg. § 1.743-1(k)(1)(i).

[33] Congress granted the Secretary of the Treasury the power to "prescribe such regulations as may be appropriate to carry out the purposes of this subsection, including regulations for applying this subsection to tiered partnerships." Section 743(e)(6).

[34] Specifically, information required to be included in such notice in the case of sale or exchange of an interest in a partnership includes "names and addresses of the transferee and (if ascertainable) of the transferor, the taxpayer identification numbers of the transferee and (if ascertainable) of the transferor, the relationship (if any) between the transferee and the transferor, the date of the transfer, the amount of any liabilities assumed or taken subject to by the transferee, and the amount of any money, the fair market value of any other property delivered or to be delivered for the transferred interest in the partnership, and any other information necessary for the partnership to compute the transferee's basis." Treas. Reg. § 1.743-1(k)(2)(i). Special rules are provided in the case of acquisition on the death of a partner and transfer of partnership interest to a nominee. *See* Treas. Reg. § 1.743-1(k)(2)(ii) and -(iii).

[35] *See* Treas. Reg. § 1.743-1(k)(3).

[36] *See* Treas. Reg. § 1.743-1(k)(4).

also address the process by which such applicable entities may apply for refunds of credits transferred to them under Section 6418 by a partnership that directly owns a project.

In the second type of credit transfer transaction, credits are transferred to an applicable entity from an upper-tier partnership rather than from the partnership that owns the project directly. Given that Section 6418(c)(2) provides that no election by any partner is allowed with respect to any facility or property held directly by a partnership, guidance should address whether the project partnership may make an election on behalf of an upper-tier partnership that itself transfers the credit to an applicable entity and receives payment therefor directly from the applicable entity. In particular, guidance should address whether the partnership that owns the project directly may make the Section 6418 election on behalf of a single partner (i.e., the upper-tier partnership), rather than on behalf of all of its partners.

III. Application of Section 50

Guidance should also clarify that Section 50 will not apply to reduce available credits when governmental investors participate in clean energy projects.

Section 168(h)(6) provides that a portion of property owned by a partnership that has both taxable partners and tax-exempt entity partners is treated as "tax-exempt use property," resulting in reduced depreciation deductions for all partners, unless all partnership allocations are "qualified allocations" under Section 168(h)(6) or other requirements are met. Under Section 50(b), similar rules apply to reduce the amount of tax credits available to partnerships with governmental investors.[37] More specifically, Section 50(b)(4)(A)(i) provides that no credit shall be determined with respect to property used by a governmental entity, Section 50(b)(4)(D) provides that rules similar to the rules of Sections 168(h)(5) and (6) apply to Sections 50(b)(3) and 50(b)(4), and Section 50(b)(4)(E) refers to Section 168(h) as providing special rules for the application of Section 50(b). By importing the rules of Section 168(h)(6), Section 50(b) can apply to reduce tax credits in respect of property owned by partnerships that have governmental or tax-exempt partners.

Section 6417(d)(2) provides that refundable credits for applicable entities making the Section 6417 election are to be determined "without regard to paragraphs (3) and (4)(A)(i) of Section 50(b)" and "by treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity," but it does not refer expressly to Sections 50(b)(4)(D) or (E). If Sections 50(b)(4)(D) and (E) remained applicable, the restrictions they would import via Sections 168(h)(5) and (6) in the case of a governmental investor in a partnership would result in the reduction of available credits for all partners. Because Sections 50(b)(4)(D) and (E) are merely special rules for purposes of Sections 50(b)(3) and (4) generally, guidance should clarify that, by turning off Section 50(b)(4)(A)(i), Section 6417 has also turned off

[37] *See* §§ 168(h)(5), -(h)(6); *See also* §§ 50(b)(3), -(4) (to which rules similar to the rules of §§ 168(h)(5) and (6) apply).

Sections 50(b)(4)(D) and (E) as they might otherwise apply to governmental partners. Guidance thus should clarify that Section 50(b)(4)(A)(i) ***as modified by Sections 50(b)(4)(D) and (E)*** is disregarded. Moreover, guidance should clarify that, for partnerships with partners that include governments or other tax-exempt investors, these Section 50(b)(4) rules are disregarded for ***all*** purposes of determining the tax credits enumerated in Sections 6417 and 6418—that is, for purposes of determining refundable credits under Section 6417, transferable credits under Section 6418, and allowable credits generally. If the IRA is intended to "encourag[e] additional investment by expanding the availability of these tax credits to project owners without regard to their ability to claim the credits themselves,"[38] then guidance should clarify that Section 50 will not apply to reduce available tax credits for any partner that joins a partnership that includes this investor group.

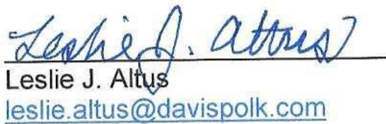
Moreover, given that Section 6417 was intended to attract investment capital for clean energy and infrastructure projects from states and governments, guidance should address the application of the rules of Section 168(h)(6) more generally to partnerships that have governmental and tax-exempt partners—that is, for depreciation purposes, as well as for tax credit purposes.

Finally, Section 6417(g), titled "Basis reduction and recapture," includes an erroneous cross-reference. As currently drafted, Section 6417(g) provides that, except as otherwise provided in "subsection (c)(2)(A)," rules similar to the rules of section 50 shall apply for purposes of Section 6417. But Section (c)(2)(A) does not exist; the correct cross-reference would be to subsection (d)(2)(A) rather than (c)(2)(A). Administrative guidance should clarify that Section 6417(g) will not be read to override Section 6417(d)(2) and thus will not be read to reinstate the credit reduction rules of Section 50(b) that are otherwise turned off under Section 6417(d)(2).

[38] *See* Colloquy between Senator Cardin and Senator Wyden on August 6, 2022, 168 Cong. Rec. S4166 (2022) (statement of Sen. Ben Cardin).

We appreciate the opportunity to comment on these important issues, and we would be pleased to address any questions that your office or its staff may have, which may be directed to Leslie Altus, William Curran or Ethan Goldman of this firm at 212-450-4000 or at the email addresses below.

Very truly yours,



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