November 4, 2022

The Honorable Janet L. Yellen
U.S. Secretary of the Treasury
Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50)
Room 5203, P.O. Box 7604
Ben Franklin Station, Washington, D.C., 20044

Re: Notice 2022-50, Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

Dear Secretary Yellen:

Marin Clean Energy ("MCE") hereby submits these comments in response to the U.S. Department of the Treasury's ("Treasury") above referenced request for comments to issue guidance regarding the elective payment provisions under Code[1] Section 6417 and the elective credit transfer provisions Code Section 6418, as added by Section 13801 of Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 ("IRA").

MCE is a California Community Choice Aggregator ("CCA") and California Joint Power Authority ("JPA") that provides electricity generation service to approximately 575,000 customer accounts across 37 Bay Area communities. Established in 2002 by AB 117,[2] California's CCA program allows for communities to join together as public agencies to purchase electricity and advance clean energy on behalf of community members. CCAs reinvest in our communities through a wide variety of programs, with many focused on energy efficiency, demand reduction, and decarbonizing buildings and transportation.

MCE has been committed to environmental justice since its launch in 2010 and continues to work with member communities to advance equity through tailored programs and services. MCE has prioritized equitable access to clean energy benefits that support customers who have been underserved by traditional energy programs or who are most impacted by the frontline effects of fossil fuel generation.

[1] All references to the "Code" herein are to the Internal Revenue Code of 1986, as amended and restated.
[2] AB 117 was codified in several separate sections of the California Public Utilities Code, notably sections 331.1, 381.1, 366.2, and 707. In 2011, SB 970 strengthened the CCA program by prohibiting utilities from marketing against CCAs except through a separate marketing division that is separated from the utility's other operations. In 2016, AB 1110 established a greenhouse gas emission ("GHG") disclosure framework that applies to all electricity providers, including CCAs.

I. Treasury should confirm in guidance that CCAs are applicable entities within the meaning of Code Section 6417(d)(1)(A)(ii)

Code Section 115 states "gross income does not include income derived from any public utility or the exercise of any essential government function and accruing to a State or any political subdivision thereof, or the District of Columbia."

CCAs are authorized pursuant to California Public Utilities Code Sections 331.1, 381.1, 366.2, and 707. As such, each CCA is a political subdivision of the state of California, constitutes a public utility, and exercises an essential government function. Income earned by the CCA in the performance of its services of providing electricity to customers is therefore exempt.

Given that a CCA is a political subdivision of the State of California, it is clearly also an "applicable entity" under Code Section 6417(d)(1)(A)(ii) and may benefit from the election for direct payment of applicable credits under Code Section 6417. However, with the unique nature of CCAs, MCE requests that Treasury specifically note in guidance issued under Code Sections 6417 and 6418 that CCAs qualify as "political subdivisions" and therefore are applicable entities for purposes of elective payment and credit transfers, respectively.

Confirming that CCAs are applicable entities will avoid uncertainty and further encourage CCA participation in advanced clean energy projects. By pooling the purchasing power of the communities served by a CCA, CCAs benefit those communities by managing local energy rates, encouraging local job creation within the areas served by the CCAs, and promoting greater renewable energy development through aggressive GHG-reduction goals and targets. Making it clear that CCAs are applicable entities for purposes of Code Section 6417 will provide additional incentives for CCAs to invest in clean energy projects within their jurisdictions and accelerate the adoption of clean energy generation and storage facilities by CCAs.

II. Direct pay guidance applicable to state and political subdivisions should be simple and coordinated with other federal grant programs to the maximum extent possible

MCE requests that direct pay be implemented in a way that is clear and administrable. Organizations that are exempt from tax pursuant to Code Section 501 may elect direct pay in the context of routine annual reporting on Form 990. However, this process is more difficult for States, political subdivisions, and tribes, all of which are government organizations that are generally not subject to U.S. federal income tax and generally do not file with the Internal Revenue Service ("IRS") other than in respect of employment taxes.

MCE suggests that IRS should develop a simple form or mechanism that States, political subdivisions, and tribes may use to claim direct pay. This could take a few forms. For example, IRS could adapt the method currently used by disregarded entities that are owned by a foreign person, *e.g.*, a Form 1120 with identifying information only that accompanies a separate form that includes substantive information, for example, Form 3468 or Form 8835.

Treasury should scrutinize elections under Code Section 6417 and the corresponding property using a level of review that is no higher than that applied to taxable organizations and their tax credit-qualified property. In addition, Treasury should not select for audit returns solely within the pool of direct pay elections, but include those elections in the total audit pool for federal income tax credits.

Treasury should also quickly clarify filing deadlines for States, political subdivisions, and tribes. These organizations generally do not file federal income tax returns, so existing return deadlines are generally meaningless for them. Moreover, there is no reason why these organizations could not submit an election for direct pay at or immediately after the time property or a facility is placed in service or even before that time. MCE urges Treasury to think creatively about how to not only collect election requests, but also how early a state, political subdivision, or tribe must file an election for direct pay.

Finally, Treasury should expedite payment in the context of Code Section 6417 elections. These payments are not refunds and should not be processed in the context of other refunds. Rather, direct payments should be paid quickly after IRS receives a Code Section 6417 election and in a manner similar to that used for the prior 1603 grant program. In many cases, the electing organization will have been forced to obtain bridge financing to cover the gap between other funding sources and direct pay. The longer that a CCA or any government organization must carry bridge financing, the longer the people in those jurisdictions must bear the cost to install renewable energy property designed to benefit them. A long waiting period between filing a direct pay election and obtaining the capital only imposes additional burdens on the people of the United States and delays their opportunity to benefit from the federal government's drive to accomplish the transition to clean energy.

III. Treasury should expressly provide that eligible entities may pledge their credits as security for the payment of debt service on bonds

MCE requests that Treasury also confirm that direct payments of tax credits may be pledged by applicable entities as security for the payment of debt service on bonds issued to finance clean energy. This is generally permitted in the context of refunds and investor capital contributions in respect of tax credits. Without certainty around this point, it will be more difficult for MCE and other applicable entities to obtain financing to close the gap in time between when payments on a project are due and the direct payment is made. This would, of course, reduce the chance that applicable entities may use direct pay and lead the energy transition.

IV. Treasury should allocate tax-exempt bonds to the property that qualifies for the tax-exempt financing when calculating a reduction in the amount of tax credit available and, therefore, the amount of direct pay available

Tax-exempt bonds are generally available only in respect of certain types of property. In many cases, that property may constitute only a portion of a complete system that otherwise qualifies for tax credits. This is a concern for taxable organizations, but is of particular importance for states and political subdivisions because projects built by them are often funded at least in part with exempt bonds.

Most of the new income tax credits include language that indicates that those tax credits will be reduced proportionately (up to 15%) when tax-exempt loans are used to finance the qualified property or facility. This is a particularly acute issue in the context of investment tax credit-style credits, *e.g.*, Code Section 48 and 48E, when an exempt bond can only be issued in respect of a portion of the property comprising a whole system. Particularly in that case, Treasury should clarify in guidance that available credits will be reduced only in respect of the that portion of the qualified property integrated into a complete project (or that portion of the property integrated into a facility) that may be funded by any exempt bond proceeds.

V. Treasury should confirm in guidance that an eligible entity for purposes of Code Section 6418 may transfer eligible tax credits to an applicable entity and the applicable entity may then elect direct pay under Code Section 6417

CCAs and many other political subdivisions purchase power from renewable energy generation facilities as a way to both serve customers' energy needs and further decarbonization goals. Power purchase agreements are essential for financing projects and placing them in service. Monetizing tax credits are also essential. (These points are also true for hydrogen and biogas production facilities.) Combining these two transactions will significantly reduce transaction costs and dramatically accelerate the time to place renewable energy projects in service.

By excluding applicable entities (*i.e.*, entities that may use direct pay) from the definition of eligible taxpayers (*i.e.*, persons permitted to transfer tax credits), Code Section 6418(f)(2) bars applicable entities from transferring tax credits. However, nowhere does Code Section 6418 provide that *eligible taxpayers* may not transfer tax credits to applicable entities. Moreover, Code Section 6417 allows any applicable entity to elect direct pay "with respect to any applicable credit <u>determined with respect to such entity</u>." (Emphasis added.) As used, "determined with respect to" appears to mean that an applicable credit is available to an applicable entity, *i.e.*, it is determined that the applicable entity qualifies for the credit. Given that Code Section 6418(a) specifies that "the transferee taxpayer specified in such election (and not the eligible taxpayer) shall be treated as the taxpayer for purposes of this title with respect to such credit (or such portion thereof)," it seems clear that an eligible credit is "determined with respect to" the transferee of that credit. Accordingly, there seems to be no impediment to an applicable entity such as a CCA paying cash to an eligible taxpayer in consideration for a tax credit that is both an eligible credit for Code Section 6418 and an applicable credit for Code Section 6417 and then electing direct pay in respect of that credit.

Given that there is some disagreement in the community about the interplay of Code Section 6418 and 6417, MCE urges Treasury to issue clear guidance interpreting these provisions in this context. In MCE's view, Code Section 6417 and 6418 permit MCE to purchase eligible credits from an eligible taxpayer and then elect direct pay in respect of such credits (assuming they are also applicable credit). MCE urges Treasury to adopt this view for the reasons stated above.

VI. When evaluating the sale of energy to related parties, Treasury should adopt a "look-through" rule under which certain controlled entities are treated as agents rather than as separate entities for purposes of determining when the initial sale of energy occurs

MCE requests Treasury establish a "look-through" rule with respect to sales of energy to related parties. Two examples of related parties include: (1) a bond issuer created by a member for the purpose of prepaying electricity, or (2) a joint purchasing authority (*e.g.* a JPA) on behalf of multiple CCAs.

The look-through rule should clarify that the energy sold at the retail level to the public should count as the initial sale of energy and that the transfer of energy from a related party (e.g. a bond issuer or a joint purchasing company) to a CCA not be treated as a "sale" of energy for purposes of determining credit eligibility. This approach is used under the IRS rules related to Clean Renewable Energy Bonds, and for the same reason we request it here.

Thank you for considering MCE's comments. MCE looks forward to continuing to work with the Treasury and IRS on implementation of this historic investment in clean energy and decarbonization.

Sincerely,

DocuSigned by:
Nathaniel Malcolm
A028C75D90C84D5...

Nathaniel Malcolm
Senior Policy Counsel
Marin Clean Energy