Comment from Tax Executives Institute, Inc.

Dear Sir or Madam:

Attached please find comments of Tax Executives Institute, Inc. (TEI) on Notice 2022-50. Please note the attached letter also includes comments on Notices 2022-47 and -51 and we will also submit it to the separate portals for those notices. Should you have any questions about TEI's comments, please do not hesitate to contact Ben Shreck of TEI's Legal Staff, at bshreck@tei.org or 202.464.8353.

Respectfully submitted,

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November 4, 2022

Internal Revenue Service
1111 Constitution Ave. NW
Washington, DC 20224

Via online submission

RE: Comments on Notices 2022-47, -50, and -51

Dear Sir or Madam:

The U.S. Department of the Treasury ("Treasury") and the Internal Revenue Service (the "Service"; together with Treasury the "Government") issued several notices[1] on October 05, 2022, requesting input from interested stakeholders on the various energy and renewables incentives included in the Inflation Reduction Act ("IRA").[2] I am pleased to respond to the Government's request for input in Notices 2022-47, -50, and -51 on behalf of Tax Executives Institute, Inc. ("TEI").[3]

About Tax Executives Institute, Inc.

TEI was founded in 1944 to serve the needs of business tax professionals.[4] Today, the organization has 57 chapters in North and South America, Europe, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 6,000 individual members represent over 2,900 of the leading companies around the world.

TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and

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1 *See* Notices 2022-46 through 51, 2022-43 I.R.B. 306 *et. seq*.

2 Pub. L. 117-169.

3 TEI's comments begin on page 2 for Notice 2022-47, page 3 for Notice 2022-50, and page 6 for Notice 2022-51.

4 TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the Internal Revenue Code of 1986, as amended (the "Code").

compliance costs to the benefit of both government and taxpayers. These goals can be attained only through the members' voluntary actions and their adherence to the highest standards of professional competence and integrity. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner. The diversity, professional training, and global viewpoints of our members, enable TEI to bring a balanced and practical perspective to the issues raised in the notices.

TEI Comments

Comments on Notice 2022-47[5]

Notice 2022-47 requests comments pertaining to the implementation and administration of the advanced manufacturing production credit under section 45X[6] and the qualifying advanced energy project credit under section 48C. Below we set forth areas where we believe could benefit from additional guidance and clarification.

Section 45X(a)(3)(B) provides for an election to treat a sale of components to a related person as made to an unrelated person, subject to requirements as may be set forth by the Treasury for information or registration "for purposes of preventing duplication, fraud, or any improper or excessive credit amount . . . ." TEI recommends the Government clarify the form and timing of this election, as well as why taxpayers may choose to not make such an election.

Under section 45X(c)(1)(B) an "eligible component" does not include any property produced at a facility if the basis of any property that is part of such facility is taken into account for purposes of the section 48C advanced energy project credit. TEI recommends the Government issue guidance clarifying what factors determine where a "facility" starts and stops. For example, could an expanded production line, with some shared infrastructure and raw material feeds, but separate and distinct production / packaging that is clearly separate and identifiable in relation to the existing production, be treated as a separate "facility?" Could those factors become some minimum standard / safe harbor for defining a facility? Expansion projects should qualify for the section 48C credit without disqualifying separate and distinct production from claiming section 45X credits.

Under subsections 48C(e)(3)(B) and (C) (as in effect beginning on January 1, 2023) each applicant for certification for a section 48C credit has two years from the date of acceptance by the Treasury of the application to provide evidence that the requirements of the certification have been met. In addition, an applicant who receives a certification has two years from the date of issuance of the certification to place the project in service and to notify the Treasury that such project has been placed in service. TEI recommends clarification of whether the application process will be the same as the prior round of funds

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5 2022-43 I.R.B. 312 (Oct. 5, 2022).

6 All "section" references are to the Code.

allocated to section 48C projects, as outlined in Notice 2009-72.[7] If the process will not be the same, TEI recommends the Government issue an outline of the new process and a timeline for how and when the application process will be rolled out. Perhaps more importantly, TEI recommends the Government consider giving some sort of relief to the two-year placed-in-service date if supply chain problems or lack of qualified engineering / construction talent causes significant delays in meeting that date. If significant investment and progress is being made, but long lead equipment and materials are in short supply, it seems possible that the two-year timelines may not be achievable for many projects.

Comments on Notice 2022-50[8]

Partnerships and the Election Under Section 6417

Notice 2022-50 states that the Government will issue guidance implementing the elective payment provisions of section 6417 and the elective credit transfer provisions of section 6418. Section 6417 permits an "applicable entity" to make an election to treat certain credits as a payment against the tax imposed by subtitle A of the Code (*i.e.*, the income tax). Section 6417(d)(1)(A) defines applicable entity to generally include tax exempt entities – whether private or a State and its political subdivisions – including Alaska Native Corporations ("ANCs") as defined in section 3 of the Alaska Native Claims Settlement Act.[9] Section 3.01(4)(a) of Notice 2022-50 asks "[w]hat, if any, issues could arise when a partnership or S corporation makes an election under [section] 6417(a) and what, if any, guidance is needed with respect to such issues?"

Under the IRA, a partnership can apply for, and the Service must pay for, qualifying direct pay tax credits. However, partnerships are likely to have both applicable entities and nonapplicable entities as partners. Applicable entities may own anywhere from 1% to 99% of partnership capital and will have income (or loss) allocations from the partnership that may or may not mirror those percentages depending on the partnership's structure.

Also, applicable entities in partnerships may receive special allocations of tax benefits generated by the partnership, including direct payment of tax credits, resulting in a different allocation of tax benefits to those entities than their capital or income (loss) allocations indicate. This is very common in the renewable energy space currently and will likely continue to be in the future. In addition, partners (both applicable and non-applicable entities) may enter, leave, or change their ownership percentages throughout the year. As a result, if the partnership desires to receive less than 100% of the qualifying tax credit direct payments for allocation to applicable entity partners, there needs to be a mechanism to split the tax credits into direct pay and non-direct pay amounts to make the initial application accurate. This would enable direct pay tax credit allocations for applicable entities to be passed through in cash, while

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7 2009-37 I.R.B. 325 (Aug. 13, 2009).

8 2022-43 I.R.B. 325 (Oct. 5, 2022).

9 43 U.S.C. 1602(m).

enabling other non-cash tax credits to be passed through on K-1s, consistent with current practice. There also needs to be a mechanism to inform the Service of changes in allocations to applicable entities after the initial application to the Service for the credit.

Finally, instead of an annual filing / application mechanism, it would be more advantageous for the direct pay tax credit allocations to be applied for and paid quarterly as there does not seem to be a limit on frequency of payments. Similarly, an election resulting in a refund is potentially subject to audit and then review by the Joint Committee on Taxation. For example, the rules could be modeled on the fuel credit rules under section 6426 and permit quarterly refunds.

These changes would make investment by applicable entities even more attractive to them because they would be able to apply direct payment of their allocation of tax credits to their capital accounts instead of having to advance cash. These investments are usually quite expensive and anything that would decrease out-of-pocket cash while waiting on direct payment of tax would aid in expanding qualifying projects, which is the purpose of the incentives.

Definition of Applicable Entity

Regarding the definition of "applicable entity," section 3.05(5)(a) of Notice 2022-50 asks "[w]hat, if any, guidance is needed to clarify which entities are applicable entities for purposes of [section] 6417(d)(1)(A), and which taxpayers may elect to be treated as applicable entities under [section] 6417(d)(1)(B), (C), or (D) for purposes of [section] 6417?"

ANCs are specifically listed as an applicable entity in section 6417(d)(1)(A)(v). Most ANCs, however, also have an ANC Settlement Trust established under section 247. While the ANC Settlement Trust and its associated ANC are separate legal entities, the trustees of the ANC Settlement Trust are the same individuals that are shareholders of the ANC. For this reason, an ANC Settlement Trust should be an applicable entity so long as its affiliate ANC is such an entity.

Relatedly, ANCs may make tax deductible contributions to their ANC Settlement Trust(s) consisting of cash and/or non-cash items, including contributing the ANC's interest in a partnership receiving direct pay tax credits. TEI recommends an ANC Settlement Trust receiving such a partnership interest from its associated ANC be able to continue receiving direct payments after the interest is contributed. ANC Settlement Trusts can also make cash minority investments in partnerships that qualify for direct payment of tax credits. For the same reasons, the ANC Settlement Trust should be able to invest cash in partnership interests eligible to receive direct payments for tax credits.

ANCs are often the parent company in a consolidated group of companies that may contain other C-corps, disregarded entities ("DREs") and partnerships. For reasons similar to those above C-corps part of such a consolidated group should be able to hold partnership interests or whole investments in qualifying direct pay tax credit receiving projects.

Section 3.05(5)(b) of Notice 2022-50 asks "What types of structures are anticipated to be used by applicable entities, and taxpayers who have elected to be treated as applicable entities under [section] 6417(d)(1)(B), (C), or (D), when seeking to apply [section] 6417(a)?"

ANCs may use limited partnership investment structures, especially in a tax equity role, but the actual holder of the investment could be an LLC, a C-corp or an ANC Settlement Trust. As mentioned above, many ANCs are the parent company in a consolidated group. The group could contain many DREs, greater than 80% interests in C-corps, and partnership interests, any of which should qualify for direct payment for tax credits if they are part of a consolidated filing group.

Elections under section 6417(d)(1)(B), (C), or (D)

Section 3.05(6)(a) of Notice 2022-50 asks "[w]hat, if any, issues could arise when an entity makes an election under [section] 6417(d)(1)(B), (C), or (D) and what, if any, guidance is needed with respect to such issues?"

Again, an ANC may be the reporting parent company of a consolidated group for federal income tax purposes. Such group may include any number of C-corps and DREs. Each of these subsections of 6417(d)(1) should include any of the legal entities included in the consolidated filing group of the ANC.

Section 3.05(6)(b) of Notice 2022-50 asks "[w]hat factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?"

Normally, the original due date of the income tax return that includes the tax credits for which direct pay will be elected would be the appropriate time and manner for making such an election. However, taxpayers should be permitted to make the election at any time prior to the extended due date of the tax return that includes the tax credits for which the election is being made. If, however, the Service decides to make the direct payment of tax credits a quarterly event, then the election should be made prior to the due date for the quarterly application for direct payment. In any event, an online election form should be available to initiate the direct payment of tax credits as soon as possible. There are no requirements that the direct payment application for tax credits or the payment itself are to be an annual event and making them a quarterly event would serve to put even more investment into the market.

Proper Taxable Year to Claim Credit After an Election Under Section 6418(a)

Section 3.02(5) of Notice 2022-50 asks "For purposes of [section] 6418(d), what, if any, guidance is required to determine the proper taxable year in which to claim any credit that was transferred pursuant to an election made under [section] 6418(a)?"

TEI recommends the Government provide guidance answering the following questions: (i) are credits transferred in a particular taxable year required to be used in such year and, if not, (ii) do the same carryovers granted to the transferor of a credit apply to the transferee and does the timeline follow the year in which the credit is generated or the year in which it was transferred? Guidance answering these questions will assist taxpayers in their utilization of the relevant credits.

Comments on Notice 2022-51[10]

Notice 2022-51 requests comments on questions pertaining to the prevailing wage, apprenticeship, domestic content, and energy community requirements for increased or bonus credit (or deduction) amounts related to various incentives enacted in the IRA. TEI recommends the Government clarify, for purposes of the manufactured products rule (where referenced in the IRA incentives), that the cost of components (e.g., polysilicon and wafers) that are incorporated upstream into the end product (e.g., a solar panel) be included when determining the eligible domestic content. For example, the cost of polysilicon and wafers produced in the United States should be counted towards the required percentage, whereas in the case of solar panels manufactured in the United States using polysilicon and wafers produced outside the United States, the cost of such non-U.S. components should not be included in the cost base to determine domestic content.

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TEI appreciates the opportunity to comment on the questions raised in Notices 2022-47, -50, and -51. TEI's comments were prepared under the aegis of its Federal Tax Committee, whose chair is Julia Lagun. Should you have any questions regarding TEI's comments, please do not hesitate to contact Ms. Lagun at JLagun@comerica.com, or Benjamin Shreck of TEI's legal staff at bshreck@tei.org or 202.464.8353.

Respectfully submitted,

Wayne G. Monfries
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[10] 2022-43 I.R.B. 331 (Oct. 5, 2022).