



DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

March 5, 2024

via Email

Dear Tribal Leader:

As the Point of Contact for Tribal Consultation for the U.S. Department of the Treasury (Treasury), I invite you to a consultation on a Notice of Proposed Rulemaking (NPRM) involving the treatment of certain unincorporated entities owned by elective pay eligible applicable entities. Specifically, the NPRM is entitled "[Election to Exclude Certain Unincorporated Organizations Owned by Applicable Entities from the Application of Subchapter K](#)" (REG-101552-24). The NPRM contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 761(a) of the Internal Revenue Code (Code) to carry out the purposes of elective payment of applicable credits (Elective Pay) provisions under the Inflation Reduction Act of 2022 (IRA) under section 6417 of the Code. The consultation will be held virtually on Friday, April 5, 2024, 1pm-3pm EDT.

Background

As explained in Treasury's June 14, 2023, Dear Tribal Leader Letter, Section 6417 of the IRA allows, in relevant part, certain governmental entities like Indian Tribal governments to access the value of twelve clean energy tax credits from the Internal Revenue Service (IRS) through a mechanism called "elective pay."¹ Indian Tribal governments and other eligible entities are defined as "applicable entities" under Section 6417. On March 5, 2024, Treasury and IRS released final regulations² and a consultation feedback summary on Section 6417.³

Importantly, during the public comment and Tribal consultation period on Section 6417, the Treasury Department and the IRS received comments requesting that partnerships owned either in whole or in part by applicable entities be eligible for elective pay. This was in response to proposed §1.6417-2(a)(1)(iv) which provided that partnerships are not applicable entities described in section 6417(d)(1)(A) or proposed §1.6417-1(c), regardless of how many of their partners are themselves applicable entities.

Accordingly, any partnership making an elective payment election must be an electing taxpayer (as defined in proposed §1.6417-1(g)), and, as such, the only applicable credits with respect to which the partnership could make an elective payment election would be credits determined under sections 45Q, 45V, and 45X for the time periods

¹ See June 14, 2023, Dear Tribal Leader Letter on Section 6417
<https://home.treasury.gov/system/files/136/Elective-Pay-DTLL-061423.pdf>

² See IRS Elective Pay site <https://www.irs.gov/credits-deductions/elective-pay-and-transferability>

³ See Treasury's Consultation page <https://home.treasury.gov/policy-issues/tribal-affairs/tribal-consultations>

allowed in section 6417(d). However, proposed §1.6417-2(a)(1)(iii) provided that if an applicable entity is a co-owner in an applicable credit property through an organization that has made a valid election under section 761(a) to be excluded from the application of the partnership tax rules of subchapter K of chapter 1 of the Code (subchapter K), then the applicable entity's undivided ownership share of the applicable credit property would be treated as a separate applicable credit property owned by such applicable entity. As a result, the applicable entity may make an elective payment election for the applicable credit(s) determined with respect to such share of the applicable credit property.

Comments were received in response to the section 6417 proposed regulations requesting that the Treasury Department and the IRS provide additional guidance as to the types of applicable credit property co-ownership arrangements that could validly elect under section 761 to be excluded from the application of subchapter K. Specifically, commenters raised that certain facts and circumstances common to jointly owned and operated renewable energy projects appear to violate certain provisions of §1.761-2(a). Commenters requested that the Treasury Department and the IRS provide that applicable credit property indirectly owned via ownership of an interest in an entity (other than an entity required to be treated as a corporation under the Code) would still be considered owned as co-owners for purposes of §1.761-2(a)(3)(i). Commenters also requested that parties to a joint ownership arrangement of applicable credit property producing electricity be permitted to delegate the authority to enter into multi-year power purchase agreements (PPAs).

Overview of section 761 and §1.761-2(a)(3)

Section 761(a) provides, in part, that under regulations the Secretary may, at the election of all of the members of an unincorporated organization, exclude such organization from the application of all or part of subchapter K if the income of the members of the organization may be adequately determined without the computation of partnership taxable income and the organization is availed of:

1. for investment purposes only and not for the active conduct of a business,
2. for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted, or
3. by dealers in securities for a short period for the purpose of underwriting, selling, or distributing a particular issue of securities.

The Treasury Department and the IRS understand that unincorporated organizations seeking to be excluded from the application of subchapter K so that one or more of their members can make an election under section 6417 are likely to be availed of for the joint production of property, but not for the purpose of selling services or property produced or extracted.

Section 1.761-2(a)(3) provides additional requirements for such unincorporated organizations to elect to be excluded from the application of subchapter K. These

additional requirements include that the participants of such unincorporated organizations:

1. own the property as co-owners, either in fee or under lease or other form of contract granting exclusive operating rights (co-ownership requirement),
2. reserve the right separately to take in kind or dispose of their shares of any property produced, extracted, or used (severance requirement), and
3. do not jointly sell services or the property produced or extracted (joint marketing requirement), although each separate participant may delegate authority to sell the participant's share of the property produced or extracted for the time being for the participant's account, but not for a period of time in excess of the minimum needs of the industry, and in no event for more than one year.

Overview of Proposed Regulations

At a high level, subject to compliance with the rules below, the proposed regulations will allow Indian Tribal governments to access elective pay for an applicable credit property through certain joint ownership arrangements. This may include arrangements through a limited liability company, including a limited liability company organized under Tribal law. The proposed rule would also allow an Indian Tribal government to delegate its authority to negotiate a long-term PPA that extends beyond the one-year term of a delegation agreement.

Specifically, the NPRM would amend the regulations under section 761 to provide an exception to certain rules in §1.761-2(a)(3) in the case of an unincorporated organization that meets four requirements.

- First, the unincorporated organization must be owned, in part or in full, by one or more applicable entities (as defined in section 6417(d)(1) and §1.6417-1(c)).
- Second, the unincorporated organization's participants must enter into a joint operating agreement with respect to the applicable credit property in which the participants reserve the right separately to take in kind or dispose of their pro rata shares of the electricity or any other property produced, extracted, or used.
- Third, the unincorporated organization must, pursuant to a joint operating agreement, be organized to and operate an applicable credit property (as defined in §1.6417-1(e)) that produces electricity and for which one or more of the applicable credits listed in section 6417(b)(2), (4), (8), (10), and (12) is determined. This requirement may be satisfied prior to the applicable credit property being placed in service (if necessary), provided the unincorporated organization is in the process of completing the applicable credit property and will operate the applicable credit property once it is placed in service.
- Fourth, one or more of the applicable entities will make an elective payment election under section 6417(a) for the applicable credits determined with respect

to its share of the applicable credit property.

Solely for purposes of an election under section 761(a) by an unincorporated organization meeting those four requirements as well as the other requirements applicable under §1.761-2, the proposed regulations would modify the co-ownership and joint marketing requirements under §1.761-2(a)(3) as follows:

- Co-Ownership: the proposed regulations would modify the co-ownership requirement in §1.761-2(a)(3)(i) to permit the participants in the unincorporated organization to own the applicable credit property through an organization that is an entity (other than an entity that is required to be treated as a corporation under the Code).
- Joint Marketing: The proposed regulations would modify the joint marketing requirement in §1.761-2(a)(3)(iii) to provide that a delegation of authority to sell the participant's share of the property produced may allow the delegatee to enter into contacts that exceed the minimum needs of the industry and may be for longer than one year, provided that the delegation of authority to act on behalf of the participant may not be for a period of time that exceeds the minimum needs of the industry, and in no event for more than one year.
 - In other words, a participant would not be permitted to enter into an agreement binding the participant to an agency relationship for longer than one year, but an agent of a participant may enter into a PPA that binds a participant to sell electricity generated by the participant's share of the applicable credit property for longer than one year.

To illustrate these rules, the NPRM contains the below proposed example:

T is an Indian Tribal government and an applicable entity, and T and Y own an applicable credit property that will produce electricity through a limited liability company organized under T's Tribal law (TLLC). No election has been made to treat TLLC as an association for Federal tax purposes. T and Y enter into a joint operating agreement with respect to the ownership and operation of the applicable credit property in which each of T and Y reserve the right separately to take in kind or dispose of their pro rata shares of the electricity produced and any associated renewable energy credits or similar credits.

On January 1st of year 1, T and Y enter into delegation agreements with Q that delegate T's and Y's authority to Q to sell electricity generated by T's and Y's shares of the applicable credit property. The term of the delegation agreements is one year, which does not exceed the minimum needs of the industry. On June 1st of year 1, Q enters into a power purchase agreement with Utility on T's and Y's behalf that commits T and Y to sell the electricity produced from their shares of the applicable credit property to Utility for a term of 15 years. At the end of the day on December 31st of year 1, the delegation agreements terminate.

As described further in the NPRM, assuming compliance with the proposed rules in this example and section 6417, T can make an elective payment election for the applicable credits determined with respect to its share of the applicable credit property. The analysis in this example would be the same whether Y is also an Indian Tribal government, another applicable entity, or some other person.

Consultation Content

Pursuant to Executive Order 13175, President Joseph R. Biden's Presidential Memorandum for Tribal Consultation and Strengthening Nation to Nation Relationships; the Presidential Memorandum on Uniform Standards for Tribal Consultation; and Treasury's Secretarial Order on Tribal Consultation, Treasury is commencing Tribal consultation on this NPRM.

Specifically, Treasury requests the assistance of Tribal leaders in addressing the following questions:

- A. What questions and/or comments do Tribal governments have with regard to the four eligibility requirements for the proposed exceptions to co-ownership and joint marketing requirements in the case of an unincorporated organization seeking to claim Elective Pay for tax credits generated by applicable credit property held by the organization?
- B. What questions and/or comments do Tribal governments have with regard to the proposed changes to the co-ownership requirement?
- C. What questions and/or comments do Tribal governments have with regard to the proposed changes to the joint marketing requirement?
- D. Are similar exceptions necessary for joint ownership arrangements of that own applicable credit properties that do not produce electricity? If so, please explain why.
- E. Does the NPRM provide a viable alternative to mixed partnerships?
- F. What other questions or comments, if any, do Tribal governments have regarding any of the remaining regulations in the NPRM?

[Register here](#) for the consultation.

We respectfully request that each Tribe register one person to participate in the consultation. All others are welcome to register as listen-only participants.

In addition to a Tribal consultation, Treasury is accepting written or electronic comments received by Friday, May 10, 2024, 11:59 p.m. Alaska Time. Submit written comments at tribal.consult@treasury.gov.

Please note that consultations are off the record and not for press purposes.

We will send out an Agenda and a list of registered speakers before or on April 4, 2024.

We hope that you will be able to join us for this important discussion and value your participation.

Sincerely,

Chief Lynn Malerba
Treasurer
Point of Contact for Tribal Consultation
U.S. Department of the Treasury