Tribal Consultation Summary & Federal Response
Elective Payment of Applicable Credits under the Inflation Reduction Act of 2022
March 5, 2024

Background

On July 17, 2023, the Department of the Treasury (Treasury) held a consultation on proposed regulations (REG-101607-23) for the Elective Payment of Applicable Credits under the Inflation Reduction Act of 2022 (IRA), codified as section 6417 of the Internal Revenue Code[1] (Section 6417 or Elective Pay).[2] Details about the proposed regulations and the topics of conversation for the consultation can be found in the Dear Tribal Leader Letter that was published on June 14, 2023. The consultations were held virtually to maximize Tribal participation across Indian country. Over 80 attendees joined the consultation and thirteen letters were received. The comment period ended on August 18, 2023. The final rule was published in the federal register.

Pursuant to Treasury's Tribal consultation policy, below is a summary of the feedback received in Tribal consultation and the federal response to this feedback.

Broad Feedback

Importance of the IRA: Commenters expressed that Tribes are the primary source of infrastructure, investment and development on Tribal lands because private investors and companies have long avoided working with Tribes or investing in their communities. Tribes expressed that clean energy development in Tribal communities will not happen without active participation by Tribes. The provisions in the IRA providing Tribes the opportunity to access federal grant funding and tax credits is a significant step towards making progress on the development of clean energy projects in Indian Country.

Federal Response: Treasury recognizes that Elective Pay is a historic opportunity for Tribes given the historical challenges they have encountered accessing tax credits. We intend to work in partnership with Tribes throughout implementation to create awareness of this opportunity in Indian Country.

Capacity-Constraints: Commenters noted that since passage of the IRA, as well as the Bipartisan Infrastructure Law (BIL), Tribes have become eligible to receive historic investments for critical infrastructure projects. While these investments are long overdue, Tribes expressed that they still require significant investment and allocation of resources for technical assistance as well as the hiring of additional personnel to apply for these funds and manage these projects. In addition to these capacity challenges, Tribes explained that these laws and the regulations being promulgated by departments often are calibrated to the needs of state and local governments and place burdensome and non-applicable eligibility and compliance and reporting requirements on Tribes. Additionally, commenters expressed that COVID-19 severely impacted

[1] Unless otherwise specified, all "Section" or "§" references are to sections of the Code and the Income Tax Regulations (26 CFR part 1).
[2] See the IRS Elective Pay site for the latest updates and guidance https://www.irs.gov/credits-deductions/elective-pay-and-transferability

Tribes and disproportionately strained their governmental resources compared to other governments and their workforces have yet to recover.

Federal Response: We understand that Tribal governments have unique resource constraints that differ from other governments. We are working on educational resources and training that will be responsive to Tribal questions. Further, where legally possible, we seek to provide guidance that is customized to a matter specific to Tribes. However, Section 6417 applies the same statutory processes to numerous applicable entities which limits the ability of Treasury to completely have a separate process for different applicable entities.

Need for Customized Guidance: Commenters expressed that they appreciate Treasury's issuance of customized guidance for Tribes in its administration of COVD-19 programs and requested that Treasury continue this approach in development of IRA guidance.

Federal Response: Please see above related answer.

Educational Assistance & the Trust Responsibility: Noting the significant and unique access barriers experienced by Tribes, commenters stated that federal funding opportunities must be accessible to be meaningful. They further explained that federal agencies, as a result of the trust responsibility, have an obligation to support Tribal access to federal funding through provision of technical assistance in the form of education and training. Specifically, commenters requested Treasury and IRS provide educational assistance for Tribes in preparation for the upcoming registration and filing processes.

Commenters explained that this assistance and support should be carried out similar to the "Office Hours" Treasury held during implementation of programs under the American Rescue Plan Act. They also requested that Treasury conduct a webinar on registration and filing requirements and provide a recording of it for Tribes to reference. Further, Tribes requested that Treasury work with its federal partners to assist Tribes in identifying additional resources to facilitate project and facility completion. In issuing guidance and regulations on elective payment, Tribes requested that Treasury also identify specific points of contacts within the department and its agencies that Tribes can approach to obtain assistance.

Federal Response: We agree with Tribes that educational training and resources are critical to understanding Elective Pay. In response to feedback, IRS has adopted Office Hours on Elective Pay and Treasury has conducted Tribal webinars on Elective Pay and recently on the new pre-filing registration portal. We intend to continue these Tribal trainings and are currently engaged with Federal partners to support leveraging of cross-departmental clean energy resources.

Tribal Responses to Consultation Questions

A. What questions and/or comments do Tribal governments have with regard to eligibility under §1.6417-1(c)(7), which treats any agency or instrumentality of any Indian tribal government or political subdivision thereof as an applicable entity? Treasury and the IRS further request comments on whether the proposed definitions encompass the entity structures that Indian tribal governments employ

in activities that would give rise to applicable credits for which elective payment elections may be made, including activities of entities with partial Indian tribal government ownership.

Eligibility of Section 17 Corporations: Commenters requested that Treasury confirm that Section 17 corporations are applicable entities and thus eligible to receive elective payments under Section 6417 because these entities are treated as "arms of the Tribe" and/or political subdivisions of the Tribe by IRS. It was noted that during the consultation, Treasury clarified that Section 17 corporations are disregarded entities. Tribes requested that this treatment be reflected in the final rules.

Federal Response: In response to these comments, the final regulations clarify the definition of disregarded entity under § 1.6417-1(f), consistent with the current rule in § 301.7701-1(a)(3), to expressly state that the term includes a tribal corporation incorporated under section 17 of the Indian Reorganization Act of 1934, as amended (25 U.S.C. 5124), or under section 3 of the Oklahoma Indian Welfare Act, as amended (25 U.S.C. 5203), that is not recognized as an entity separate from the Tribe for Federal tax purposes, and therefore for purposes of Section 6417.

Eligibility of Tribal Enterprises: Commenters requested that Treasury confirm that applicable entity includes other Tribal enterprises, regardless of whether wholly or partially owned and regardless of how chartered (e.g., a Tribally chartered sole member, limited liability corporation (LLC) or partnership (LLP)). In addition, commenters requested that Tribal Energy Development Organizations (TEDOs), certified by the Department of the Interior be included in the definition of "applicable entity."

Related to Tribally chartered entities, commenters observed that Treasury was seeking comment on their tax status and had recently included Tribal enterprises in Section 48(e) guidance as eligible entities in that credit's Additional Selection Criteria. Tribes stated that these Tribal entities should be tax-exempt and requested that Treasury harmonize its guidance between the tax status of these corporations, 48(e) eligibility, and elective pay eligibility for consistency.

Federal Response: It is possible that in certain cases a Tribal law entity (including a TEDO) and/or inter-governmental partnership could be an applicable entity. The Treasury Department and the IRS are actively working on guidance regarding the Federal tax status of Tribal law entities organized and controlled by Tribes. Treasury and the IRS would conduct additional Tribal consultation before finalizing any such guidance.

Guidance on Applicable Entities: Commenters noted that the proposed rules rely on other guidance to define subdivisions as well as agencies and instrumentalities of a government. Specifically, the proposed rule cross references § 1.103-1(b) for the definition of subdivision and Rev. Rul. 57-128, 1957-1 C.B. 311 for the definition of instrumentality. Commenters noted that the guidance is unclear on what constitutes an instrumentality, agency, or political subdivision of a Tribe as these documents refer to state and local governments.

Tribes requested that Treasury interpret these terms broadly to include Tribally owned, operated, or chartered entities regardless of whether they are wholly or majority owned to ensure that the

intent of elective pay is realized in Indian Country via the diversity of entities that generate revenue for Tribal governments. Commenters also explained that some Tribes partner with other Tribes on energy projects that benefit many Tribal citizens and highlighted that Tribes may engage in joint ventures and inter-Tribal companies in some instances.

Relatedly, commenters requested that IRS provide deference to Tribes on what constitutes a political subdivision, agency or instrumentality and stated that Tribes should not be forced to calibrate their entities to the structures of other governments because Tribes have a diversity of structures. Deferring to Tribes is consistent with the longstanding federal policy of Indian self-determination. To explain the practical reason for this deference, a commenter noted that:

> many tribes are governed by a Tribal Council that is comprised of elected individuals who are authorized to act on behalf of the Tribe. Such tribes may also have a primary leader who is referred to as a Chief, Governor, or Chairperson. But, in California, several tribes continue to have a system of governance where our entire adult citizenship acts as their Council, and the elected representatives are only authorized to perform necessary functions as delegated by the Council. And, in other parts of the country, such as New Mexico, some tribal governments have their elected or appointed leaders serve for the remainder of their lifespans. So, you may actively serve as a Governor of your Pueblo for one year, but you will remain in leadership of your Pueblo for the remainder of your life.

The commenter referenced these forms of traditional Tribal governance because of concern that IRS may use its discretion to narrowly interpret what is a "subdivision" or "agency or instrumentality" of a Tribal government when it comes to the definition of "applicable entity." The commenter stated that they do not believe that the IRS should have the discretion to decide that for a Tribe. They explained that it should suffice that a Tribe identifies or certifies an entity as a "subdivision" or "agency or instrumentality" of its government. For example, if a Tribe has a utility authority, it should be sufficient that the Tribe informs the IRS that their utility is an agency or instrumentality of their government, without separate analysis performed by the IRS. This could be done through a duly authorized certification to the IRS by a Tribe, through its elected or appointed leader(s), officer(s), designee(s), or equivalent(s), that an entity is a subdivision, agency or instrumentality of its government.

Lastly, one commenter requested that the final guidance clearly state that a Tribal utility and the chapters of a Tribe are considered instrumentalities of a Tribe.

Federal Response: The determination of whether an entity is an agency, instrumentality, or a political subdivision (or subdivision in the case of an Indian tribal government) is governed by Federal tax law that is outside the scope of the final regulations. Federal tax determinations of whether an entity is an agency or instrumentality of any government typically are analyzed on a facts and circumstances basis. In determining whether an entity is an agency or instrumentality for Federal tax purposes, federal courts have applied a test similar to the six-factor test in Rev. Rul. 57-128, which generally provides guidance on whether an entity is an instrumentality for purposes of the exemption from employment taxes under sections 3121(b)(7) and 3306(c)(7). *See*, *e.g.*, *Bernini v. Federal Reserve Bank of St. Louis, Eighth District*, 420 F.Supp. 2d 1021

(E.D. Mo. 2005) and *Rose v. Long Island Railroad Pension Plan*, 828 F.2d 910, 918 (2d Cir. 1987), *cert. denied*, 485 U.S. 936 (1988).

Rev. Rul. 57-128 looks to the following six factors:

(1) Whether the organization is used for a governmental purpose and performs a governmental function;
(2) Whether performance of the organization's function is on behalf of one or more States or political subdivisions;
(3) Whether there are any private interests involved, or whether the States or political subdivisions involved have the powers and interests of an owner;
(4) Whether control and supervision of the organization is vested in public authority or authorities;
(5) If express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and
(6) The degree of financial autonomy and the source of its operating expenses.

The Treasury Department and the IRS are unaware of any different Federal tax authority or standard that applies to determine whether an entity qualifies as an instrumentality of an Indian tribal government for Federal tax purposes. The application of the facts-and-circumstances analysis in Rev. Rul. 57-128 to any particular entity is outside the scope of the final regulations.

With respect to political subdivisions, Rev. Rul. 78-276, 1978-2 C.B. 256, states that the term "political subdivision" has been defined consistently for all Federal tax purposes as denoting either (1) a division of a State or local government that is a municipal corporation, or (2) a division of such State or local government that has been delegated the right to exercise sovereign power by the State or local government. The three generally acknowledged sovereign powers are the power to tax, the power of eminent domain, and the police power. *See Commissioner v. Estate of Shamberg*, 3 T.C. 131 (1944), *acq*., 1945 C.B. 6, *aff'd* 144 F.2d 998 (2d Cir. 1944), cert denied, 323 U.S. 792 (1945). It is not necessary that all three sovereign powers enumerated in *Shamberg* be delegated. *See* Rev. Rul. 77-164, 1977-1 C.B. 20. However, possession of only an insubstantial amount of any or all sovereign powers is not sufficient.

In determining whether an entity is a division of a State or local governmental unit, important considerations are the extent that the entity is (1) controlled by the State or local government unit, and (2) motivated by a wholly public purpose. *See.*, *e.g.*, Rev. Rul. 78-276, 1978-2 C.B. 256 and Rev. Rul. 83-131, 1983-2 C.B. 184.

Determination of agency, instrumentality, or political subdivision (or subdivision in the case of an Indian tribal government) status is based on all the facts and circumstances, and additional guidance on this subject is beyond the scope of these final regulations. Generally, however, taxpayers may request a private letter ruling from the IRS Office of Chief Counsel to apply applicable law to the organization's specific set of facts. *See* Rev. Proc. 2024-1, I.R.B. 2024-1 (containing procedures for letter rulings) and Rev. Proc. 2024-3, I.R.B. 2024-1 (containing a list of areas of the Code relating to matters on which the IRS will not issue letter rulings).

Eligibility of Partnerships: Commenters noted that Tribes are evaluating opportunities to co-own projects with other Tribes, governments, third-party developers or co-investors to develop, finance and own renewable energy projects. Some Tribes noted that they previously commented that Treasury should allow Tribes and their partner(s)) to form special purpose vehicles under an LLC structure to jointly own renewable energy projects located on Tribal lands. They expressed that IRS should treat such jointly owned LLCs consistent with other taxpayer LLC structures and employ the distributive share rules for allocating the "applicable credit" to each LLC member, regardless of the tax status of that member.

For inter-governmental partnerships, whether formed under state law such as joint powers authorities, or formed under Tribal law as inter-Tribal consortia, Tribes requested that the IRS accept those ownership structures as eligible for elective payments for the owners-participants as if the structure was an unincorporated joint venture.

Commenters also requested that Treasury and the IRS provide very clear guidance on what kinds of partnerships and ownership structures are available. Energy projects are very dependent on ownership structures. Tribes requested that Treasury and the IRS provide maximum flexibility to accommodate varied Tribal ownership structures.

Federal Response: Treasury agrees that additional guidance is needed on joint ownership arrangements of applicable credit properties that produce electricity that can be excluded from the application of subchapter K. As a result, Treasury has proposed to add certain exceptions to the election out of requirements contained in the regulations under section 761(a). These exceptions would allow applicable entities to jointly own applicable credit property that produces electricity. Under the proposed regulations, the applicable entity would own their interests through an entity (other than an entity required to be treated as a corporation under the Code). The applicable entity could also delegate their authority to an agent to sell their share of the electricity produced from such applicable credit property. The delegation authority to the agent may not be for more than one year, but the agent may enter into a power purchase agreement binding the applicable entity for a period of more than 1 year. These proposed regulations (REG-101552-24) were released on March 5, 2024 and Treasury has noticed a Tribal consultation for April 5, 2024.[3]

Sale-leasebacks and inverted leases: Commenters expressed their understanding that Tribes cannot monetize their Elective Payments through transferability. As a result, they expressed that they should be able to structure projects through sale-leasebacks or inverted leases – which would allow Tribes to retain ownership of the project, while a third-party receives the tax benefits in exchange for contributing capital to the project.

Federal Response: While it is true that section 6418(f)(2) defines "eligible taxpayer" for purposes of transfer election eligibility as "any taxpayer which is not described in section 6417(d)(1)(A)" (and thus an Indian tribal government (including agencies and instrumentalities) would not be eligible to make a transfer election), an entity that is not described in section 6417(d)(1)(A) would be eligible to make a transfer election, for example, a taxable Tribal entity or a partnership.

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

With respect to sale-leaseback transactions under section 50(d)(4), the proposed regulations did not specifically address these transactions, and Treasury has determined that adopting an explicit rule with respect to sale-leaseback transactions in the section 6417 final regulations is not necessary because a sale-leaseback transaction under section 50(d)(4) is one in which a purchaser/lessor of investment credit property owns the underlying property with respect to which an applicable credit is determined. In that case, provided all of the applicable rules are met, because the applicable credit is determined with respect to applicable credit property owned and treated as originally placed in service by the purchaser/lessor, the purchaser/lessor can make an elective payment election with respect to the property under Section 6417. In short, the Tribe would be eligible for Elective Pay if the Tribe is treated as owning the applicable credit property.

With respect to inverted leases, Treasury understands the commenters to be referring to an election to pass through the applicable credit to a lessee under former section 48(d) (pursuant to section 50(d)(5)). The commenters pointed out that a rule allowing the lessee to make a Section 6417 election with respect to a credit would allow Tribes to retain ownership of the project while a third-party receives tax benefits in exchange for contributing capital to the project. Treasury continues to see a distinction between sale-leaseback transactions under section 50(d)(4) and lease-passthrough elections under former section 48 (pursuant to section 50(d)(5)). In the latter case, it is the lessor that is the party with respect to which the credit is determined, and not the lessee that is allowed to claim the credit as a result of the election. Therefore, the lessee does not meet the requirement of section 6417(a), which requires the applicable credit to be determined with respect to the applicable entity making the elective payment election. In short, the Tribe would not be eligible for Elective Pay if the Tribe does not own the applicable credit property. Treasury has concluded that the rationale underlying the proposed rule is correct. Thus, the section 6417 final regulations adopt the proposed rule without change.

B. Question B – What questions and/or comments do Tribal governments have with regard to the temporary regulations for the pre-filing registration process under §1.6417-5T, including the electronic filing requirements?

Pre-filing requirements: Some commenters stated that their understanding from the current proposal is that a Tribe must wait until the project is complete and placed into service before it can apply for a registration number. They expressed that this requirement seems unnecessary for Treasury to issue a registration number for the project. In contrast, other commenters were of the understanding that a Tribe can pre-register before the tax credit is generated. Overall, commenters requested that Tribes be able to pre-file for registration numbers at the point the Tribe or Tribal entity has sufficient information about the project and not when it is completed.

Federal Response: Treasury and the IRS have determined that a registration number should not be given before the applicable credit property is placed in service, which is an important step to ensuring that the applicable credit property qualifies for the applicable credit for which the applicable entity seeks to make an elective payment election. Because a credit must be determined in the taxable year of the elective payment election, maintaining the proposed requirement will ensure that taxpayers are not attempting to make an elective payment election in

a year in which a credit is not determined. Further, this information will help the IRS prevent fraud.

Registration Numbers & Renewal Process: Commenters expressed that it seems unnecessary to require a Tribe to renew its registration number if the project is extended or delayed from going into operation. Additionally, commenters requested that once the Tribe registers for itself and receives an entity registration number, the Tribe should be able to retain and reuse that registration number rather than renewing the number for future projects. Commenters explained that requiring Tribes to renew, amend, or re-file for registration numbers can be an obstacle and unnecessary barrier for them to claim and obtain their tax credit elective payment.

Federal Response: The final regulations under §1.6417-2(c)(3) state that a renewal must be made "in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts." This applicable guidance will be in subsequent forms and instructions. Treasury and the IRS expect that renewal will likely be more streamlined compared to the initial pre-filing registration, if provided in applicable guidance. Further, a registration number is not provided until an applicable credit property is placed in service; therefore, project delays should be irrelevant to the pre-filing registration process.

Registration Numbers & Multiple Projects: Commenters expressed that it is unclear whether a Tribe will have to obtain multiple registration numbers for multiple projects or segments of a single project. Different applicable tax credits could be used for a single project and be "placed into service" at different periods and timeframes of the project's development. As a result, commenters requested additional clarification on the definition of "placed into service" because their understanding is that elective payment of certain credits only applies when a "single process train is placed into service," rather than an entire, completed project or facility being placed into service. Furthermore, commenters expressed that if Tribes have to obtain multiple registration numbers for multiple projects or segments of a project this could create confusion and be burdensome to Tribes when it comes time to claim the applicable tax credit each taxable year. They expressed that this could be especially problematic if these registration numbers must be renewed annually or if an applicable credit is being claimed for a certain segment of a project that is not completed within the taxable year and results in an extension.

Overall, commenters requested that this process be streamlined to enable Tribes to have a single registration number with some sort of identifier system of projects, the applicable credits, and the registration expiration dates housed under the Tribe's registration number.

Federal Response: Multiple commenters asked that the final regulations allow the option to group multiple qualified facilities into a "single project" that would obtain a single registration number, or that consolidated filings be available for multiple small projects. The definition of applicable credit property in section 6417 is based on the relevant rules for the twelve underlying applicable credits that are eligible for Elective Pay. As a result, changes to the definition of particular properties under the underlying Code sections are outside the scope of the final regulations on Elective Pay. If such underlying Code section allows grouping to determine a qualified property, then grouping for purposes of a registration number is permitted. In other words, the Elective Pay mechanism is applicable to entirely separate tax credit projects with

unique requirements. Note that for certain credits, the pre-filing registration portal allows applicable credit property information to be uploaded by way of a spreadsheet file. Publication 5884, *Inflation Reduction Act (IRA) and CHIPS Act of 2022 (CHIPS) Pre-Filing Registration Tool User Guide and Instructions* contains additional information. Relatedly, if the definition of an underlying Code section does not allow grouping, then each applicable credit property must be registered separately

Broadband Access: Since the registration numbers and tracking of projects will be conducted through an online portal managed by IRS, commenters requested that Treasury ensure that any issues with broadband connectivity or other issues arising with access to the online portal do not outright exclude or make Tribes ineligible to claim the applicable credits.

Federal Response: Treasury acknowledges that some Tribes lack consistent and reliable broadband access, and that the registration process is an exclusively online system. Treasury commits to working as needed with Tribes that lack access to broadband to address avenues to participate in the Section 6417 elective pay process.

Pre-filing deadline: A commenter noted that the proposed regulations are ambiguous as to whether the pre-filing process would have a deadline for submissions. To the extent that a deadline exists, they expressed that it is unreasonable to expect Tribes to complete a pre-filing process by the end of calendar year 2023 or early 2024 for projects that are not expected to be placed into service until 2025. They expressed that Tribes are focused on the daily operations of their government and programs and have limited staff. They will have to hire additional staff or consultants to comply with the administrative burdens created by short filing deadlines. This takes planning, time, and resources, and they asked that the pre-filing process not have limited time constraints.

One Tribe, in contrast, asked that Treasury establish a pre-filing deadline, but allow for extensions and amendments. The Tribe requested that a registration number be guaranteed in time to file the required tax return. They also noted that it is unclear what upfront work the IRS will undertake prior to issuing a registration number and how long this process will take.

Federal Response: The final regulations do not provide for a deadline for a pre-filing registration submission, nor do they provide a timeframe for how long the pre-filing registration process is expected to take because such timeframe and procedures may be modified over time as the IRS and taxpayers gain experience with it. Treasury recommends that taxpayers, including Tribes, consult Publication 5884, which as of January 2024 stated the IRS recommends taxpayers register as soon as reasonably practicable during the tax year, and at least 120 days prior to when the organization or entity plans to file its tax return. Publication 5884 contains additional information about what upfront work the IRS will undertake prior to issuing a registration number.

With respect to the question about a project that will be placed in service in 2025, a pre-filing registration cannot be submitted until the project is placed in service in 2025.

IRS Review Time During Pre-Filing Registration: Commenters expressed that the pre-filing process will need to account for how long it will take the IRS to review the submitted information and issue a registration number. One Tribe expressed that:

> For example, an applicable entity may place a clean energy project into service earlier than expected. If that happens towards the end of a tax year and the applicable entity wants to try and make an elective payment election for that tax year, the regulations should have some clear timeframes as to whether that is doable or not and/or extensions for such scenarios. Put another way, is it reasonable for an applicable entity to expect to quickly receive a registration number and be able to make an elective payment election with only two weeks left before the due date to file a tax return for that year? The regulations should take such scenarios into account. For example, if the IRS is committing to take 2-3 weeks to review information and issue a registration number, then that should be set forth in the regulations so that applicable entities can take such timeframes into account.

Federal Response: Please see previous Federal Response. In addition, Publication 5884 states that the IRS will work to issue a registration number even if the registration submission is made close in time before the registrant's filing deadline. However, in such cases, the registrant should anticipate that the tax return on which the elective payment or transfer election is made may undergo heightened scrutiny to mitigate the risk of fraud and duplication that pre-filing registration is intended to address before a payment is issued. The Treasury Department and the IRS also note that an elective payment election can be made on any return filed on or before the due date for filing the tax return (including extensions), and that §1.6417-2(b)(3)(i) contains a special rule providing an automatic paperless six-month extension for entities that are not otherwise able to request an automatic six-month extension.

C. Question C – What other questions or comments, if any, do Tribal governments have regarding any of the remaining regulations in the NPRM?

Federal grants and tax credit reductions: Some commenters requested that Tribes be able to leverage federal grants with applicable tax credits under elective pay. Other commenters requested that limitations on federal grants not apply when the Tribe uses state grants, local utility incentives, or philanthropic contributions for capital to construct renewable energy projects. They requested that Treasury clarify that only federal grants, and not non-federal grants, will be considered in the determination of the reduced tax credit (i.e., reductions down to 100% of the project cost). This would also simplify timing issues around non-federal incentives and rebates, which may pay out over several years, and could create harmful delays in elective pay rebates, or overly complicate the reporting and calculations.

Federal Response: The final regulations do not prohibit a Tribe from being able to leverage Federal grants for purposes of Section 6417, but as the comment notes, the proposed regulations would have limited excess benefits conferred by certain grants and forgivable loans. Treasury considered the comment by a Tribe that only Federal grants should be considered in applying the

excess benefit rule, but declined to adopt the recommendation because all restricted tax exempt amounts should be treated the same way, as any could lead to an excess benefit.[4]

Parity between grant treatment for taxable and non-taxable entities on tax credits: Commenters requested that Treasury treat applicable entities similar to taxable entities with respect to the treatment of federal grants. They expressed that their understanding is that taxable entities could receive more favorable treatment – and excessive federal benefits – than applicable entities under the proposed regulations. For example, using a 2 MW solar project for a Tribal housing project that costs $10 million to construct, and assuming the project receives a $5 million grant and qualifies for the maximum possible tax credits equal to 70%, Tribes explained that their understanding is that the Treasury rule would result in the following inequitable results between a Tribe and a taxable entity:

	Taxable Entity	Tribe
Total Cost	$10 million	$10 million
Grant Amount	$ 5 million	$ 5 million
Net Grant (after tax)	$ 3.750 million (assumes 25% tax rate)	$ 5 million
Tax Credit Earned	$ 7 million	$ 7 million
Net Tax Credit	$ 7 million	$ 5 million
Net Federal Benefit	$ 750,000	$ 0

Commenters expressed that this example shows that the taxable entity receives an excess federal benefit that the Tribe does not receive. They requested that the final regulations prevent this outcome.

[4] The final regulations adopt this special rule for investment credit property acquired with amounts, including income from certain grants and forgivable loans, that are exempt from taxation under Subtitle A. This special rule states that for purposes of Section 6417, such tax exempt amounts that are used to purchase, construct, reconstruct, erect, or otherwise acquire an applicable credit property described in sections 30C, 45W, 48, 48C, or 48E (so-called "investment-related credit property") are included in basis for purposes of computing the applicable credit amount. determined with respect to the investment-related credit property, regardless of whether basis is required to be reduced (in whole or in part) by such amounts under general tax principles. Without this rule, applicable entities that use tax exempt amounts to purchase, construct, reconstruct, erect, or otherwise acquire investment-related credit property may not be able to take full advantage of investment-related tax credits with respect to such property because general tax principles may require applicable entities to reduce the basis in such property, for general business credit purposes, by the amount paid for with tax exempt amounts. This special rule, however, confers excess tax benefits under general tax principles applicable to taxable entities.
The final regulations adopt the "no excess benefit" rule under §1.6417-2(c)(3), which provides that if an applicable entity receives tax exempt amounts to acquire investment-related credit property (the "restricted tax exempt amount"), and any restricted tax exempt amounts plus the applicable credit otherwise determined with respect to that investment-related credit property exceeds the cost of the investment-related credit property, then the amount of the applicable credit is reduced by the excess. This only applies to tax exempt amounts that are conditioned on being used for the specific purpose of acquiring the investment credit property and does not apply to other tax exempt amounts. The final regulations attempt to clarify the no excess benefit rule by providing an example that unrestricted funds do not implicate the no excess benefit rule.

Federal Response: The final regulations do not address the situation described in the comment that involves the taxable entity. Treasury, in consultation with the Department of Energy, does not believe that it would be a common fact pattern for a taxable entity to receive a Federal grant of 50% of the total cost of a project for which it also receives a tax credit with all potential bonuses, and Treasury is unaware of specific circumstances where that would be the case. In typical situations, the type of disparity raised by the comment would not exist.

The final regulations maintain the no excess benefit rule that Treasury and IRS had proposed with certain clarifications. Under that rule, if an applicable entity receives a grant, forgivable loan, or other income exempt from taxation under subtitle A or otherwise excluded from taxation (tax exempt income) for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property (restricted tax exempt amount), and the sum of any restricted tax exempt amounts plus the applicable credit otherwise determined with respect to that investment-related credit property exceeds the cost of the investment-related credit property, then the amount of the applicable credit is reduced so that the total amount of applicable credit plus the amount of any restricted tax exempt amounts equals the cost of investment-related credit property.

As explained in the preamble to the final regulations, the alternative to the no excess benefit rule would be to disallow restricted tax-exempt amounts from counting toward the basis in investment-related credit property (a more severe limitation), which would not accomplish the goals of the IRA as well as the no excess benefit rule does.

Form 990: Commenters requested that Treasury develop a new tax form specific to Tribal governments for elective pay because using the Form 990-T will be very confusing for many Tribes, especially when only 2-3 lines of the form (other than entity name and information) will need to be completed. For example, Line G of Form 990-T has no option for a "government," and many Tribes would find it offensive and confusing to have to check a box declaring it a corporation, trust or college/university. Commenters expressed concern that their elective payments will be delayed if they do not complete the form completely, even if information is not relevant. Commenters expressed that the better approach would be for the IRS to develop a new form specific to governments and their subdivisions, agencies and instrumentalities. This could be a Form 990-GV or Form 990-GO, and it would only ask for the information necessary from the government/applicable entity to create a file within the IRS system tying that government/applicable entity to the pre-filing registration number associated with each applicable credit property.

A commenter asked if the IRS portal, rather than form 990-T, could be used for Tribal elective pay filing. If a specific form is not developed for Tribes, the commenter requested that there be a Tribal section on the Form 990T just for elective pay and further expressed that the only financial information that Tribe should have to disclose is their annual audits that they submit to the Single Audit Clearinghouse.

Other commenters noted that Section 1(F) of the NPRM provides examples for territorial governments in the instances they would be required to file a Form 990-T or Form 1040, but no examples are provided for Tribes. Since Tribes do not have experience filing these types of

forms, commenters requested additional guidance and technical assistance to ensure that Tribes are able to appropriately meet the requirements of obtaining applicable tax credits within deadlines. Relatedly, Tribes expressed that they need the ability to correct any forms that may have been mistakenly filled out because the Form 990-T was not designed for Tribes and they might write "not-applicable" and have concerns that this will impact the acceptance of the form.

Other commenters requested that Treasury allow Tribes to use a single form, such as Form 3468, to make the election and claim the credit. They further requested that Treasury not require any additional information than what is already required to file Form 3468.

Federal Response: Treasury acknowledges the adjustment many taxpayers, and especially Tribes, will face in registering for and making elective payment elections for applicable credits and intend to provide as much additional assistance as possible. Treasury recognizes that some taxpayers may not have experience or a historical filing obligation and will consider providing simplified instructions or the need for a new form in future years. Treasury is committed to developing educational and outreach tools with the IRS to assist Tribes, government entities, their instrumentalities and exempt organizations to complete the forms required solely to make an elective payment election. It is outside of the scope of the section 6417 final regulations to address comments related to individual forms or the kind of documentation that may be required to complete those forms. Thus, the section 6417 final regulations adopt the rules as proposed.

Time-Frame for Award of Tax Credit: Commenters requested that Treasury provide Tribes with confirmation that the elective payment of an applicable credit will be awarded during the taxable year that the project or facility is placed into service. They requested that this confirmation include an estimate of the amount of the applicable clean energy tax credit(s) a Tribe will receive once they file for elective payment of the applicable credit(s). This would assist Tribes in their efforts to seek or attract additional financing and capital for project or facility completion, as well as indicate whether they should leverage additional federal funds to complete the clean energy project and claim the applicable tax credit(s).

Relatedly, commenters requested that Treasury and IRS allow Tribes to file for elective payment, and issue payments to Tribes, on a rolling basis as soon as these projects are placed in service, rather than waiting up to 12-14 months until the end of the Tribe's fiscal year. Prompt filings and payments will accelerate projects for Tribes and other governments.

Federal Response: The final regulations decline to specify a particular time within which an elective payment election will be processed. Several factors, including the volume of returns on which elective payment elections are made and whether any particular return contains complete and accurate information, will affect processing time. However, as the preamble to the proposed and temporary regulations stated, the pre-filing registration is intended to allow the IRS to verify certain information about a taxpayer in a timely manner while mitigating the risk of fraud or improper payments and then process the annual tax return with minimal delays. Similarly, the final regulations do not provide for a confirmation or estimate of the amount of applicable credit or the ability to make an elective payment election on a rolling or periodic basis. Section 6417(d)(4) generally requires a single payment and clearly states the timing of when the payment is treated as made, which is, at the earliest, the return due date (determined without regard to

extensions). In that sense, payments made under section 6417 are no different than other kinds of payments a taxpayer may make as part of filing a timely return (excluding extensions) or making a payment with a timely filed application for extension.

Allowing Tribal Documents to Comply with Requirements: Commenters noted that proposed §1.6417-5(b)(5)(vii) requires information relating to the construction or acquisition of the applicable credit property, which may include government permits to operate the applicable property, certifications, evidence of ownership that ties to a land deed, lease, or other documented right to use and access any land or facility upon which the applicable credit property is constructed or housed. Tribes explained that Tribal Lands are held in trust by the Department of Interior (Interior) which means that obtaining copies of deeds or Land Title Status Reports from Interior can sometimes take more than a year.

Additionally, Tribes may need to obtain approval from Interior regarding easements and rights-of-way on tribal trust lands, such approval typically requires review and approval from several agencies, including, among other things, an appraisal and environmental analysis. Documentation of these rights can also take a long time to receive from the federal government. As a result, commenters requested that IRS accept reasonable forms of documentation from Tribes, including Tribal resolutions and certifications because obtaining documentation from the federal government may be difficult to obtain.

Federal Response: The section 6417 final regulations do not address the exact documentation required by the pre-filing registration portal. An applicable entity must provide information related to applicable credit properties, including supporting documentation relating to the construction or acquisition of the applicable credit property. If it is not possible for a Tribe to provide certain documentation, it is likely that other information will be sufficient to verify the applicable credit property.

The documentation to support the existence of valid applicable credit property will vary by the credit being claimed. The pre-filing registration portal and Publication 5884 list, for each credit, a description of the types of documents that will facilitate processing of the pre-filing registration. A registrant does not need to provide all information that may be available; in fact, in January 2024, Publication 5884 states:

> If detailed project plans or contractual agreements are the best support that the taxpayer is engaging in activities or making tax credit investments that qualify the registrant to claim a credit, the registrant should submit an extract of the document showing the name of the taxpayer, date of purchase and identifying information such as serial numbers, rather than the entire document.

However, to the extent the information provided is insufficient for purposes of the pre-filing registration process, the IRS may request further information. See Publication 5884.

D. Other feedback:[5]

Federal loan and guarantee programs: Commenters requested that Treasury clarify that 26 U.S. Code § 49 does not apply to limit elective pay when Tribes utilize direct loan or federal loan guarantee programs. Tribes requested that the Department of Agriculture's Rural Utilities Service, the Department of Energy Tribal Energy Loan Guarantee Program, the Department of the Interior BIA Loan Guarantee Program, among others, should not be considered non-recourse non-qualified financings for purposes of calculating the applicable tax credit.[6]

Federal Response: The final regulations make limitations on the use of credits generally applicable to persons engaged in the conduct of a trade or business applicable to the making of an elective payment election under section 6417, such as the at-risk rules of section 49 of the Code in the context of investment credits determined under sections 48, 48C, and 48E. For section 49 to apply to investment tax credits for which an elective payment election is made, the property must be placed in service by an applicable entity or electing taxpayer described in section 465(a)(1) of the Code (for example, an individual or a C corporation with respect to which the stock ownership requirements of section 542(a)(2) of the Code are met).

Thus, for any applicable entity or electing taxpayer for which section 49 generally applies, that limitation applies with respect to the determination of applicable credits for purposes under section 6417. Treasury notes that section 49 generally applies only to individuals and C corporations meeting the stock ownership requirements of section 542(a)(2), and that section 49 reduces the credit base only by the amount of nonqualified nonrecourse financing, as defined in section 49(a)(1)(D)(ii). Tribes are unlikely to meet the stock ownership requirements of section 542(a)(2). That determination, as well as whether the guarantee programs described in the comment meet the nonqualified nonrecourse financing rules of section 49(a)(1)(D)(ii) are dependent on the facts and circumstances and are outside of the scope of the section 6417 final regulations.

Advance Eligibility Determination: A commenter noted that proposed §1.6417-5(a) indicates that completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the applicable entity is eligible to receive a payment with respect to the applicable credit. They recommended that the regulations include a process by which Tribes can obtain an early determination of eligibility to receive a payment with respect to the applicable credits. This request is because Tribes have lacked access to clean and/or reliable energy and these projects are expensive and require outside capital which is a significant challenge for Tribes which disproportionately experience access to capital barriers. Having a process that provides an early determination of eligibility to receive a payment would help Tribes to secure financing and reduce the costs associated with obtaining financing.

Federal Response: In order for a project to qualify for elective payment for an applicable credit, pre-filing registration is necessary but not sufficient. As the comment notes, the pre-filing registration process is not a guarantee that a project will qualify for an applicable credit for

[5] Note: Tribal comments on prevailing wage and apprenticeship are incorporated in the consultation summary on REG-100908-23.
[6] Id.

which an elective payment election may be made, as verification of initial pre-filing information cannot be used by the IRS to confirm compliance with the requirements of an underlying credit. It is not possible for the IRS to estimate the amount of credit at the time of pre-filing because the IRS will not have adequate information, such as eligibility for bonus credit amounts, to make such a calculation, but a taxpayer may be able to estimate the amount of credit by completing a draft Form 3800 and any required completed source form(s).

Continued Consultation: Commenters requested that Treasury and the IRS continue conducting Tribal consultation sessions and to do so for at least the next few years. They expressed that it has been difficult to monitor all the Federal Register Notices on the IRA. The Dear Tribal Leader Letters and dedicated Tribal sections of the IRS and Treasury Department websites have been helpful, but the consultation sessions have been most helpful because it allows Tribes to confirm that they are interpreting the information correctly and to explain the unique circumstances that may only impact Indian Country and of which the federal agency representatives may not be aware, and it further allows Tribes to hear from each other.

Federal Response: Yes, Treasury intends to remain engaged with Tribal governments throughout the implementation of the elective pay process. Further, as mentioned above, Treasury noticed a consultation regarding an NPRM for certain joint ownership arrangements. This NPRM concerns an "Election to Exclude Certain Unincorporated Organizations Owned by Applicable Entities from the Application of Subchapter K" (REG-101552-24)." Additionally, as mentioned in the Section 6417 Final Rule, the Treasury Department and the IRS are actively working on guidance regarding the Federal tax status of Tribal law entities organized and controlled by tribes. The Treasury Department and the IRS will not release final guidance in advance of additional tribal consultation.

Energy communities: Commenters requested that Treasury update its list of energy community census tracts to explicitly include tribal census tracts so that energy projects will have certainty about whether the project is located in a Tribal energy community. Commenters also asked that Treasury treat a Tribe's whole reservation as an energy community if any part of the reservation is designated as an energy community. Further, they requested that any Tribal community that has a brownfield site, as defined under CERCLA, should be designated an energy community.

Federal Response: Treasury's initial guidance addressing the determination of energy community status for certain areas was a notice of intent to propose regulations. We appreciate these requests and are committed to considering them carefully. Treasury will continue to consult with the Tribes as we work toward issuing proposed and final regulations to implement the energy communities bonus.