

Alert | Energy Project Finance & Development



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Proposed Regulations under Section 6417 Direct Pay for Clean Energy Tax Credits

On June 14, 2023, the IRS released [proposed and temporary regulations](#) and [additional guidance](#) describing rules for applicable taxpayers to benefit from clean energy projects through electing to receive direct payment for the amount of the 12 applicable U.S. federal income tax credits.¹ The proposed and temporary regulations were published to the Federal Register on June 21, 2023.

Section 6417 of the Internal Revenue Code (the Code) allows applicable taxpayers to elect to treat certain credits as a payment against their federal income tax liabilities rather than as a nonrefundable credit. Because the applicable taxpayers generally are subject to U.S. federal income tax in limited circumstances, the credits will be paid out in cash in many instances. The direct pay election is intended to broaden the pool of potential investors able to benefit from renewable energy tax credits and offer an alternative to the traditional tax equity investment structures.

The proposed regulations clarify several issues in the statutory language. This GT Alert summarizes some of the key issues identified and lists the 12 applicable U.S. federal income tax credits for direct payment.

¹ This is distinct from the IRS proposed regulations under Section 6418 regarding transferability of clean energy tax credits, also released June 14. See [GT Alert](#).

Key Issues

Applicable Entity: Applicable entities, which can make the payment election for any applicable credit, include:

1. Any organization exempt from tax (including tax-exempt entities in U.S. territories);
2. Any State or political subdivision thereof (including the District of Columbia, U.S. territories, and any agency or instrumentality of the foregoing);
3. The Tennessee Valley Authority;
4. An Indian tribal government (as defined in section 30D(g)(9) of the Code);
5. Any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m))); or
6. Any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas.

Partnerships and S Corporations: Partnerships and S corporations are not applicable entities regardless of whether their partners or shareholders are applicable entities. Partnerships and S corporations can be electing taxpayers with respect to credits generated under Code Sections 45Q (Carbon Sequestration), 45V (Clean Hydrogen), and 45X (Advanced Manufacturing), discussed below.

In the case of any facility or property held directly by a partnership or S corporation, no payment election by any partner or shareholder—even if such partner or shareholder is an applicable entity—with respect to any applicable credit determined with respect to such facility or property. If, for instance, a tax-exempt entity intended to partner with another person and elect direct pay, the tax-exempt entity could be considered a co-owner of an applicable credit property through an ownership arrangement treated as a tenancy-in-common or pursuant to a joint operating arrangement that has properly elected out of Subchapter K of the Code (which generally governs entities and arrangements classified as partnerships for U.S. federal income tax purposes).

Elective Payment Election: An election is made separately with respect to each facility and for each taxable year during the applicable credit period. An election applies to the entire amount of the credit and generally once it is made the election may not be revoked, subject to the electing taxpayer discussion below.

Eligible Credit Property Ownership/Control: Applicable credits must be determined with respect to an applicable entity or electing taxpayer such that the applicable entity or electing taxpayer must own the underlying eligible credit property. For credits that do not require ownership, the applicable entity or electing taxpayer must conduct the activities that give rise to the underlying eligible credit. Accordingly, the following otherwise applicable credits are not eligible for elective payment election: (i) credits purchased by applicable entities pursuant to Section 6418 of the Code; (ii) an investment tax credit allowable to a lessee under a pass-through lease; and (iii) a credit allowable under Section 45Q of the Code to a person that disposes or uses qualified carbon oxide.

Electing Taxpayer Exceptions: Eligible taxpayers (i.e., taxpayers other than the applicable entities listed above), including partnerships and S corporations, may make an elective payment election for

applicable credits generated under Sections 45Q (Carbon Sequestration), 45V (Clean Hydrogen), and 45X (Advanced Manufacturing) of the Code. These elections are made on the original tax return for the taxable year for which the credit is determined and must be made by the return due date (including extensions). The election is effective for five years and can be revoked, but such revocation cannot be reversed. The elective payment election is available to eligible taxpayers until 2033.

No Double Benefit Permitted with Tax Exempt Funding: If eligible investment-related credit property (i.e., eligible credit property under Code Sections 30C, 45W, 48, 48C, or 48E) is funded with tax-exempt income (e.g., income from certain grants and forgivable loans specific to the credit property), the total amount of the applicable credit plus the tax-exempt amount must not exceed the cost of the investment-related credit property. If the total amount of the applicable credit plus the tax-exempt amount exceeds the cost of the property, the applicable credit amount will be reduced so as to eliminate the excess.

Excessive Payments: Absent reasonable cause, the applicable entity or electing taxpayer is subject to tax and penalty in aggregate equal to 120% of the amount of the excessive credit.

Registration Process: Applicable entities or electing taxpayers must complete a pre-filing registration with the IRS. The registration process includes providing information under penalties of perjury regarding the entity or taxpayer, which tax credits the entity or taxpayer intends to earn, and which projects the entity or taxpayer intends to qualify for the tax credits. Upon completion of the registration process, the IRS will issue the entity taxpayer a separate registration number for each applicable credit property that contributes to an applicable credit. The registration number is valid only for the taxable year for which it is obtained but may be renewed. The registration numbers are used when filing annual tax returns but are not a guarantee the IRS will approve the election.

12 Applicable U.S. Federal Income Tax Credits for Direct Payment

1. So much of the credit for alternative fuel vehicle refueling property allowed under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit);
2. So much of the renewable electricity production credit determined under section 45(a) of the Code as is attributable to qualified facilities that are originally placed in service after December 31, 2022 (section 45 credit);
3. So much of the credit for carbon oxide sequestration determined under section 45Q(a) of the Code as is attributable to carbon capture equipment that is originally placed in service after December 31, 2022 (section 45Q credit);
4. The zero-emission nuclear power production credit determined under section 45U(a) of the Code (section 45U credit);
5. So much of the credit for production of clean hydrogen determined under section 45V(a) of the Code as is attributable to qualified clean hydrogen production facilities that are originally placed in service after December 31, 2022 (section 45V credit);
6. In the case of a “tax-exempt entity” described in section 168(h)(2)(A)(i), (ii), or (iv) of the Code, the credit for qualified commercial vehicles determined under section 45W of the Code by reason of section 45W(d)(2) (section 45W credit);

7. The credit for advanced manufacturing production under section 45X(a) of the Code (section 45X credit);
8. The clean electricity production credit determined under section 45Y(a) of the Code (section 45Y credit);
9. The clean fuel production credit determined under section 45Z(a) of the Code (section 45Z credit);
10. The energy credit determined under section 48 of the Code (section 48 credit);
11. (The qualifying advanced energy project credit determined under section 48C of the Code (section 48C credit); and
12. The clean electricity investment credit determined under section 48E of the Code (section 48E credit).

Authors

This GT Alert was prepared by:

- **Margaret J. Weil** | +1 612.259.9739 | weilm@gtlaw.com
- **Benjamin Almy ‡** | +1 202.530.8321 | ben.almy@gtlaw.com

‡ Admitted to practice in Montana. Not admitted in the District of Columbia. Practice in D.C. supervised by shareholders admitted to practice in D.C. Practice limited to Federal Courts and Agencies.

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