



DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 301

[TD 9988]

RIN 1545-BQ63

Elective Payment of Applicable Credits

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations concerning the election under the Inflation Reduction Act of 2022 to treat the amount of certain tax credits as a payment of Federal income tax. The regulations describe rules for the elective payment of these credit amounts in a taxable year, including definitions and special rules applicable to partnerships and S corporations and regarding repayment of excessive payments. In addition, the regulations describe rules related to a required IRS pre-filing registration process. These regulations affect tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and, in the case of three of these credits, certain taxpayers eligible to elect the elective payment of credit amounts in a taxable year.

DATES: *Effective date:* These regulations are effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

Applicability date: For dates of applicability, see §§1.6417-1(q), 1.6417-2(f), 1.6417-3(f), 1.6417-4(f), 1.6417-5(d), 1.6417-6(e), 301.6241-1(b)(1), and 301.6241-7(k)(3).

FOR FURTHER INFORMATION CONTACT: Concerning these final regulations,

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SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations that amend the Income Tax Regulations (26 CFR part 1) and the Procedure and Administration Regulations (26 CFR part 301) to implement the statutory provisions of section 6417 of the Internal Revenue Code (Code), as enacted by section 13801(a) of Public Law 117-169, 136 Stat. 1818, 2003 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA).

I. Overview of Section 6417

An applicable entity that meets all the requirements of section 6417 is permitted to make an election under section 6417 with respect to any applicable credit determined with respect to the applicable entity for the taxable year (elective payment election). If an applicable entity makes an elective payment election, the applicable entity is treated as making a payment against Federal income taxes imposed by subtitle A of the Code (subtitle A) for the taxable year with respect to which such credit was determined that is equal to the amount of such credit (elective payment amount). An election under section 6417 must be made at such time and in such manner as provided by the Secretary of the Treasury or her delegate (Secretary).

Section 6417(b) defines the term “applicable credit” to mean each of the following 12 credits:

(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, 2012 (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)(3)¹ (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

¹ The reference was intended to be to section 45W(d)(2). See General Explanation of Tax Legislation Enacted in the 117th Congress, JCS-1-23 (December 21, 2023) at 282. Thus, the final regulations refer to section 45W(d)(2).

Code (section 48E credit).

As described in part II of this Background, section 6417(d) defines an “applicable entity” and provides generally applicable rules for making elective payment elections. Section 6417(e) through (h) provide special rules applicable under section 6417 that are described in part II of this Background. As described in parts III and IV of this Background, section 6417(c), (d)(1)(B) through (D), and (d)(3) also contain special rules allowing a taxpayer, including for this purpose a partnership or S corporation, that is not an applicable entity (electing taxpayer) to elect to be treated as an applicable entity for the limited purpose of making an elective payment election under section 6417, but only with respect to section 45Q credits, section 45V credits, and section 45X credits. Part V of this Background describes Notice 2022-50, 2022-43 I.R.B. 325, which, in part, requested feedback from the public on potential issues with respect to the elective payment election provisions under section 6417. Part VI of this Background describes proposed regulations (REG-101607-23) and temporary regulations (TD 9975) issued under section 6417.

II. Applicable Entities and General Elective Payment Election Rules

Section 6417(d)(1)(A) defines the term “applicable entity” to mean:

- (1) Any organization exempt from tax imposed by subtitle A;
- (2) Any State or political subdivision thereof;
- (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.

Section 6417(d)(2) provides that, in the case of any applicable entity that makes

the election described in section 6417(a), any applicable credit amount is determined (1) without regard to section 50(b)(3) and (4)(A)(i) of the Code (that is, restrictions on property used by tax-exempt organizations and governmental units), and (2) by treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity.

Section 6417(d)(3)(A)(i) provides rules regarding the due date for making any elective payment election. In the case of any government (such as a State, the District of Columbia, an Indian tribal government, any U.S. territory) or any political subdivision, agency or instrumentality of the foregoing described in section 6417(d)(1) and for which no return is required under section 6011 or 6033(a) of the Code, any election under section 6417(a) cannot be made later than the date as is determined appropriate by the Secretary. In any other case, any election under section 6417(a) cannot be made later than the due date (including extensions of time) for the tax return for the taxable year for which the election is made, but in no event earlier than 180 days after the date of the enactment of section 6417 (that is, in no event earlier than 180 days after August 16, 2022, which is February 13, 2023).

Section 6417(d)(3)(A)(ii) provides that any election under section 6417(a), once made, is irrevocable, and applies (except as otherwise provided in section 6417(d)(3)) with respect to any credit for the taxable year for which the election is made.

Section 6417(d)(3)(B) provides that, in the case of section 45 credits, any election under section 6417(a): (1) applies separately with respect to each qualified facility; (2) must be made for the taxable year in which such qualified facility is originally placed in service; and (3) applies to such taxable year and to any subsequent taxable year that is within the 10-year credit period described in section 45(a)(2)(A)(ii) with respect to such qualified facility.

Section 6417(d)(3)(C) provides that, in the case of section 45Q credits, any

election under section 6417(a): (1) applies separately with respect to the carbon capture equipment originally placed in service by the applicable entity during a taxable year; and (2) applies to such taxable year and to any subsequent taxable year that is within the 12-year credit period described in section 45Q(a)(3)(A) or (4)(A) with respect to such equipment. Section 6417(d)(3)(C)(i)(II)(aa), (d)(3)(C)(ii), and (d)(3)(C)(iii) provides special rules for a taxpayer making the election to be treated as an applicable entity for purposes of section 6417 with respect to a section 45Q credit (see part III of this Background).

Section 6417(d)(3)(D) provides that, in the case of section 45V credits, any election under section 6417(a): (1) applies separately with respect to each qualified clean hydrogen production facility; (2) must be made for the taxable year in which such facility is placed in service (or within the 1-year period subsequent to the date of enactment of section 6417 in the case of facilities placed in service before December 31, 2022); and (3) applies to the taxable year and all subsequent taxable years with respect to such facility. Section 6417(d)(3)(D)(i)(III)(aa), (ii), and (iii) provide special rules for a taxpayer making the election to be treated as an applicable entity for purposes of section 6417 with respect to the 45V credit (see part III of this Background).

Section 6417(d)(3)(E) provides that, in the case of section 45Y credits, any election under section 6417(a): (1) applies separately with respect to each qualified facility; (2) must be made for the taxable year in which such facility is placed in service; and (3) applies to such taxable year and to any subsequent taxable year that is within the 10-year credit period described in section 45Y(b)(1)(B) with respect to such facility.

Section 6417(d)(4) provides rules regarding when the elective payment is treated as made. Section 6417(d)(4)(A) provides that, in the case of any government or political subdivision described in section 6417(d)(1), and for which no return is required under section 6011 or 6033(a), the payment described in section 6417(a) is treated as

made on the later of the date that a return would be due under section 6033(a) if such government or subdivision were described in section 6033 or the date on which such government or subdivision submits a claim for credit or refund (at such time and in such manner as the Secretary provides). Section 6417(d)(4)(B) provides that, in any other case, the payment described in section 6417(a) is treated as made on the later of the due date (determined without regard to extensions) of the return of tax for the taxable year or the date on which such return is filed with the IRS.

Section 6417(d)(5) provides that, as a condition of, and prior to, any amount being treated as a payment that is made by an applicable entity under section 6417(a), the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6417.

Section 6417(d)(6) provides rules relating to excessive payments. In the case of any amount treated as a payment that is made by the applicable entity under section 6417(a), or the amount of the payment made pursuant to section 6417(c), that is determined to constitute an excessive payment, the tax imposed on such entity by chapter 1 of the Code (chapter 1), regardless of whether such entity would otherwise be subject to chapter 1 tax, for the taxable year in which such determination is made is increased by an amount equal to the sum of (1) the amount of such excessive payment, plus (2) an amount equal to 20 percent of such excessive payment. The increase equal to 20 percent of the excessive payment does not apply if the applicable entity can demonstrate that the excessive payment resulted from reasonable cause.

An excessive payment is defined as, with respect to a facility or property for which an election is made under section 6417 for any taxable year, an amount equal to the excess of (1) the amount treated as a payment that is made by the applicable entity under section 6417(a), or the amount of the payment made pursuant to section 6417(c),

with respect to such facility or property for such taxable year, over (2) the amount of the credit that, without application of section 6417, would be otherwise allowable (as determined pursuant to section 6417(d)(2) and without regard to section 38(c)) with respect to such facility or property for such taxable year.

Section 6417(e) provides a denial of double benefit rule providing that, in the case of an applicable entity making an election under section 6417 with respect to an applicable credit, such credit is reduced to zero and, for any other purpose under the Code, is deemed to have been allowed to such entity for such taxable year.

Section 6417(f) provides a special rule relating to any territory² of the United States with a mirror code tax system (as defined in section 24(k) of the Code). Under this rule, section 6417 will not be treated as part of the income tax laws of the United States for purposes of determining the income tax law of any such U.S. territory unless such U.S. territory elects to have section 6417 be so treated. Currently, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands have mirror code tax systems.

Section 6417(g) provides basis reduction and recapture rules. It states that, except as otherwise provided in section 6417(c)(2)(A),³ rules similar to the rules of section 50 apply for purposes of section 6417.

Section 6417(h) authorizes the Secretary to issue regulations or other guidance as may be necessary to carry out the purposes of section 6417, including guidance to ensure that the amount of the payment or deemed payment made under section 6417 is commensurate with the amount of the credit that would be otherwise allowable (determined without regard to section 38(c)).

² Section 6417(f) uses the term “possession,” but the proposed regulations and these final regulations use the alternative term “territory.”

³ There is no section 6417(c)(2)(A) and the Treasury Department and the IRS believe Congress intended to refer instead to section 6417(d)(2)(A). See General Explanation of Tax Legislation Enacted in the 117th Congress, JCS-1-23 (December 21, 2023) at 284. Thus, the proposed and final regulations refer to section 6417(d)(2)(A).

III. Special Rules Relating to Electing Taxpayers Making An Election Under Section 6417(d)(1)(B), (C), or (D)

A taxpayer other than an applicable entity under section 6417(d)(1)(A) (electing taxpayer) may make an election to be treated as an applicable entity for the limited purpose of making an elective payment election with respect to a section 45V credit, a section 45Q credit, or a section 45X credit under section 6417(d)(1)(B), (C), or (D), respectively. An electing taxpayer may make an elective payment election under section 6417(d)(1)(B), (C), or (D) at such time and in such manner as the Secretary provides (but no election may be made with respect to any taxable year beginning after December 31, 2032). The special rules for such an election are described in parts III.A, III.B, and III.C of this Background.

A. Electing taxpayers making an election with respect to section 45V credits

Section 6417(d)(1)(B) allows an electing taxpayer to make an elective payment election for any taxable year in which such taxpayer has placed in service a qualified clean hydrogen production facility (as defined in section 45V(c)(3)), but only with respect to a section 45V credit determined in such year with respect to the electing taxpayer. Pursuant to section 6417(d)(3)(D)(i)(III), such electing taxpayer is treated as having made such election for the taxable year with respect to which the election is made and each of the four subsequent taxable years ending before January 1, 2033. Under section 6417(d)(3)(D)(iii), an electing taxpayer may elect to revoke the application of such election, but any such election to revoke, if made, applies to the applicable year specified in such election (but not any prior taxable year) and each subsequent taxable year within the 5-year period and cannot be revoked.

Section 6417(d)(3)(D)(ii) prohibits an electing taxpayer from making a transfer election under section 6418(a) of the Code with respect to a section 45V credit for any year for which the electing taxpayer's election under section 6417(d)(1)(B) is in effect.

B. Electing taxpayers making an election with respect to section 45Q credits

Section 6417(d)(1)(C) allows an electing taxpayer to make an elective payment election for any taxable year in which the electing taxpayer has, after December 31, 2022, placed in service carbon capture equipment at a qualified facility (as defined in section 45Q(d)), but only with respect to a section 45Q credit determined in such year with respect to such taxpayer. Pursuant to section 6417(d)(3)(C)(i)(II)(aa), such electing taxpayer is treated as having made such election for the taxable year with respect to which the election is made and each of the four subsequent taxable years ending before January 1, 2033. Under section 6417(d)(3)(C)(iii), an electing taxpayer may elect to revoke the application of such election, but any such election to revoke, if made, applies to the applicable year specified in such election (but not any prior taxable year) and each subsequent taxable year within the 5-year period and cannot be revoked.

Section 6417(d)(3)(C)(ii) prohibits an electing taxpayer from making a transfer election under section 6418(a) with respect to a section 45Q credit for any year for which the electing taxpayer's election under section 6417(d)(1)(C) is in effect.

C. Electing taxpayers making an election with respect to section 45X credits

Section 6417(d)(1)(D) allows an electing taxpayer to make an elective payment election for any taxable year in which the electing taxpayer has, after December 31, 2022, produced eligible components (as defined in section 45X(c)(1)), but only with respect to a section 45X credit determined in such year with respect to such taxpayer. Pursuant to section 6417(d)(1)(D)(ii)(I), such electing taxpayer is treated as having made such election for the taxable year with respect to which the election is made and each of the four subsequent taxable years ending before January 1, 2033. Under section 6417(d)(1)(D)(ii)(II), an electing taxpayer may elect to revoke the application of such election, but any such election to revoke, if made, applies to the applicable year specified in such election (but not any prior taxable year) and each subsequent taxable year remaining within the 5-year period and cannot be revoked.

Section 6417(d)(1)(D)(iii) prohibits an electing taxpayer from making a transfer election under section 6418(a) with respect to a section 45X credit for any year for which the electing taxpayer's election under section 6417(d)(1)(D) is in effect.

IV. Section 6417 Rules for Partnerships and S corporations

Section 6417(c) provides special rules for partnerships and S corporations that hold directly (as determined for Federal tax purposes) a facility or property for which an applicable credit is determined. Section 6417(c)(1) provides that, in the case of any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation, any elective payment election must be made by such partnership or S corporation in the manner provided by the Secretary. If a partnership or S corporation makes an elective payment election with respect to any applicable credit, (1) a payment is made to such partnership or S corporation equal to the applicable credit amount; (2) section 6417(e) is applied with respect to the applicable credit before determining any partner's distributive share, or S corporation shareholder's pro rata share, of such applicable credit; (3) any applicable credit amount with respect to which the election in section 6417(a) is made is treated as tax exempt income for purposes of sections 705 and 1366 of the Code; and (4) a partner's distributive share of such tax exempt income is based on such partner's distributive share of the otherwise applicable credit for each taxable year (an S corporation shareholder's share of tax exempt income is based on the shareholder's pro rata share).

Section 6417(c)(2) provides that, in the case of any facility or property held directly by a partnership or S corporation, no election by any partner or shareholder is allowed under section 6417(a) with respect to any applicable credit determined with respect to such facility or property.

V. Notice 2022-50

On October 24, 2022, the Department of the Treasury (Treasury Department)

and the IRS published Notice 2022-50, 2022-43 I.R.B. 325, to, among other things, request feedback from the public on potential issues with respect to the elective payment election provisions under section 6417 that may require guidance.

Stakeholders submitted more than 200 comments in response to Notice 2022-50.

Feedback in those comments informed the development of the proposed regulations and is described in the preamble to the proposed regulations as appropriate.

VI. Proposed and Temporary Regulations

On June 21, 2023, the Treasury Department and the IRS published proposed regulations under section 6417 (REG-101607-23) in the *Federal Register* (88 FR 40528) to provide guidance on elective payment elections (proposed regulations).

Those proposed regulations included proposed §1.6417-5, which contained proposed rules identical to the temporary regulations at §1.6417-5T. Those temporary regulations also were published on June 21, 2023, in the *Federal Register* (88 FR 40093) to provide guidance on the mandatory information and registration requirements for elective payment elections. The provisions of the proposed regulations are explained in greater detail in the preamble to the proposed regulations.

Summary of Comments and Explanation of Revisions

This Summary of Comments and Explanation of Revisions summarizes the proposed regulations and all the substantive comments submitted in response to the proposed regulations. The Treasury Department and the IRS received 151 written comments in response to the proposed regulations. The comments are available for public inspection at www.regulations.gov or upon request. A hearing was conducted in person and telephonically on August 21, 2023, during which 10 presenters provided comments. After full consideration of the comments received, these final regulations adopt the proposed regulations with modifications in response to the comments described in this Summary of Comments and Explanation of Revisions.

Comments merely summarizing the proposed regulations, recommending statutory revisions to section 6417 or other statutes, or addressing issues that are outside the scope of this rulemaking, such as the calculation of applicable credits (including any bonus credit amounts) or recommended changes to IRS forms, are beyond the scope of these regulations and are not adopted.

I. General Rules and Definitions

A. Applicable entities

Section 6417(d)(1) defines applicable entity. Proposed §1.6417-1(c) clarified the statutory definition of applicable entity pursuant to the Secretary's authority under section 6417(h) to issue regulations necessary to carry out the purposes of section 6417. Commenters addressed several aspects of the proposed definitions, as described in this Part I.A of the Summary of Comments and Explanation of Revisions.

1. Any Organization Exempt from the Tax Imposed by Subtitle A

Section 6417(d)(1)(A)(i) defines "applicable entity" as including any organization exempt from the tax imposed by subtitle A. The proposed regulations would have clarified that "any organization exempt from the tax imposed by subtitle A" meant (1) any organization exempt from the tax imposed by subtitle A by reason of section 501(a) of the Code and (2) any organization exempt from the tax imposed by subtitle A because it is the government of any U.S. territory or a political subdivision thereof.

A few commenters asked that Puerto Rico-registered nonprofits (those with Puerto Rico 1101.01 nonprofit status) be allowed to file for elective payment of renewable energy tax credits without having to acquire section 501(c)(3) status. As the preamble to the proposed regulations noted, stakeholders had previously responded to Notice 2022-50 by asking whether an entity classified as a nonprofit under State law but that does not have Federal tax-exempt status would be described in section 6417(d)(1)(A). The preamble to the proposed regulations stated that such an entity

would not be described in section 6417(d)(1)(A) because it is not exempt from the tax imposed by subtitle A (but that some of these entities might meet the requirements of another type of applicable entity, such as a State instrumentality, and might be an applicable entity on those grounds). This same answer applies to a Puerto Rico-registered nonprofit that does not have section 501(c)(3) status.

Multiple commenters urged that homeowners' associations described in section 528 of the Code be considered applicable entities under section 6417(d)(1)(A) because they are "exempt from the tax imposed by subtitle A" by their statutory language. Two of these commenters noted that other sections within subchapter F of chapter 1 have similar statutory language, and one of these commenters thus requested that the final regulations be modified to include all organizations considered exempt from income taxes pursuant to subchapter F of chapter 1. In response, these final regulations adopt this comment and define "any organization exempt from the tax imposed by subtitle A" to include organizations exempt from the tax imposed by subtitle A by reason of subchapter F of chapter 1. Thus, under these final regulations, any organization described in sections 501 through 530 of the Code that meets the requirements to be recognized as exempt from tax under those sections is an applicable entity eligible to make an elective payment election.

No commenters opposed the inclusion of the government of any U.S. territory or a political subdivision thereof in this definition; thus, these final regulations adopt this definition as proposed. However, several commenters recommended that the final regulations provide an exception to the general rule in section 50(b)(1) for territorial applicable entities making elections under section 6417 for investment tax credits, advocating that such a rule would provide better parity with domestic applicable entities making such elections and would advance the IRA's purpose by improving access to clean energy investment tax credits in U.S. territories.

Since before the IRA, investment tax credits, vehicle-related credits, and energy efficiency incentives have included restrictions with respect to property located or used in U.S. territories by reference to section 50(b)(1). Section 50(b)(1) provides that “no [investment tax] credit shall be determined . . . with respect to any property which is used predominantly outside the United States”⁴ unless section 168(g)(4) applies (which provides an exception for any property that is owned by a domestic corporation or by a United States citizen other than a citizen entitled to the benefits of section 931 or 933 of the Code, and that is used predominantly in a possession of the United States by such a corporation or such a citizen, or by a corporation created or organized in, or under the law of, a possession of the United States). The IRA did not amend these provisions; instead, the IRA specifically referenced 50(b)(1) in section 30C, incorporated section 50(b)(1) into section 45W, and did not exclude section 48, 48C, or 48E from the application of section 50(b)(1). Furthermore, section 6417(d)(2) provides special rules that enable tax-exempt and government entities to benefit from section 30C, 45W, 48, 48C, and 48E because it provides that applicable credits are determined without regard to sections 50(b)(3) and (4)(A)(i). However, there is no provision lifting the territory-related restrictions of section 50(b)(1). Without specific language in section 6417 or in the underlying applicable credits addressing section 50(b)(1), or other compelling evidence of congressional intent, a special rule turning off the application of section 50(b)(1) is not supported by the Code. Therefore, these final regulations do not adopt this recommendation.

One commenter asked for a process under which the Puerto Rico Department of Treasury (or any other agency designed by the Governor of Puerto Rico) is designated to receive, process, and/or administer elections for elective payments from applicable

⁴ Under section 7701(a)(9) of the Code, “[t]he term ‘United States’ when used in a geographical sense includes only the States and the District of Columbia.”

entities and instrumentalities of Puerto Rico, similar to the process for disbursements of Coronavirus Relief Funds under the Coronavirus Aid, Relief, and Economic Security Act, Public Law 116-136, 134 Stat. 281 (March 27, 2020). The Treasury Department and the IRS have determined that creating the suggested process is inappropriate for elective payment elections because section 6417 involves the filing of a tax return with the IRS. Accordingly, these final regulations do not adopt this comment.

2. Any State or Political Subdivision Thereof

Section 6417(d)(1)(A)(ii) defines “applicable entity” to include any State or political subdivision thereof. The proposed regulations would have clarified that this includes the District of Columbia. No comments addressed this definition, so these final regulations adopt the definition as proposed.

3. Indian Tribal Governments

Section 6417(d)(1)(A)(iv) states that an applicable entity includes an Indian tribal government (as defined in section 30D(g)(9)). To provide Indian tribal governments parity with State governments, proposed §1.6417-1(c)(3) would have included subdivisions of Indian tribal governments in this definition. Proposed §1.6417-1(k) defined the term Indian tribal government as the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the most recent list published by the Department of the Interior in the *Federal Register* pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131). Although no comments were received that directly addressed the definition of an Indian tribal government provided in proposed §1.6417-1(c)(3), these final regulations clarify the proposed definition by specifying that the most recent list published by the Department of the Interior in the *Federal Register* is the one prior to the date on which a relevant elective payment election is made. (Comments regarding

Tribal entities other than Indian tribal governments are discussed elsewhere in this Summary of Comments and Explanation of Revisions.)

4. Alaska Native Corporations

Section 6417(d)(1)(A)(v) provides that any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)) (ANC) is an applicable entity. The proposed regulations would have adopted this definition. The proposed regulations requested comments regarding the definition in proposed §1.6417-1(c)(4) and whether additional guidance is necessary regarding consolidated groups with ANC common parents. The Treasury Department and the IRS did not receive comments related to this definition, but these final regulations adopt the proposed regulation and broaden it to apply to consolidated groups with any applicable entity as a common parent, as described in part I.B.5. of this Summary of Comments and Explanation of Revisions.

5. Rural Electric Cooperatives

Section 6417(d)(1)(A)(vi) provides that any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas is an applicable entity. The proposed regulations did not elaborate on this definition but requested comments on whether further clarification of the definition in proposed §1.6417-1(c)(6) is necessary.

A few commenters addressed this definition. Some of these commenters stated that “clarity would be better achieved” if the Treasury Department and the IRS would refer to tax-exempt electric cooperatives as applicable entities described in 501(c)(12) and taxable electric cooperatives as applicable entities described in section 1381(a)(2)(C) of the Code. One of these commenters stated that an electric cooperative may be described in section 45(e)(2)(A)(iii) as a not-for-profit electric utility that had or has received a loan or loan guarantee under the Rural Electrification Act of

1936. Another commenter asked that the final regulations also allow a “pre-1962” rural electric cooperative under section 1381(a)(2)(C) to be eligible to make an elective payment election. Another commenter asked that the final regulations clarify that rural electric cooperatives that file either Form 1120, *U.S. Corporation Income Tax Return*, or Form 990, *Return of Organization Exempt from Income Tax*, be eligible to make an elective payment election.

The Treasury Department and the IRS have concluded that rural electric cooperatives as described in section 6417(d)(1)(A)(vi) include rural electric cooperatives that do not meet the requirements under section 501(c)(12), as cooperatives that meet the requirements under section 501(c)(12) are already considered tax-exempt entities in section 6417(d)(1)(A)(i). To avoid rendering section 6417(d)(1)(A)(vi) superfluous, it is necessary to include taxable (nonexempt) rural electric cooperatives in section 6417(d)(1)(A)(vi). Taxable (nonexempt) rural electric cooperatives are described in section 1381(a)(2)(C) as “any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas.” Thus, these final regulations under §1.6417-1(c)(6) clarify that section 6417(d)(1)(A)(vi) means “any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas as described in section 1381(a)(2)(C) of the Code.” These final regulations do not include “any electric cooperative described in section 45(e)(2)(A)(iii)” in the definition because such section does not exist in the Code, and the Treasury Department and the IRS are unsure what cooperatives the commenter is referencing.

One commenter recommended that the final regulations clarify that local, publicly owned utilities (for example, water and electric) and electric cooperatives (other than rural) are eligible entities under section 6417(d)(1)(A)(vi), stating that the proposed definition aligns with Congressional intent and that there are more than 2,800 public

owned utilities and cooperatives in operation combined serving millions of customers across the United States. Because section 6417(d)(1)(A)(vi) requires that a cooperative be engaged in furnishing electric energy to persons “in rural areas,” these final regulations do not include these entities in the definition of rural electric cooperative. However, it is possible that publicly owned utilities and non-profit co-ops could qualify as applicable entities under other definitions described in these rules, such as if they are considered agencies or instrumentalities of a State, local, territorial, or Tribal government.

Multiple commenters asked that the final regulations expand rural electric cooperatives to cover workers cooperatives that install solar panels. These commenters also requested clarification as to how to determine an organization is (1) operating on a cooperative basis; (2) furnishing electricity; and (3) furnishing electricity in a rural area. The commenters generally suggest adopting existing rules under subchapter T of chapter 1 of the Code (subchapter T).

These final regulations do not adopt a specific rule covering workers cooperatives that install solar panels because the revision to the definition of rural electric cooperatives in the final regulations is sufficient to clarify the meaning of the term. As these final regulations include any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas as described in section 1381(a)(2)(C), it is the law that applies to those corporations that will apply in making the determination with respect to any respective corporation.

With respect to operating on a cooperative basis, a summary of the taxation of nonexempt rural electric cooperatives may be helpful in explaining the key principles. The rules for tax treatment of most nonexempt cooperatives and their patrons were codified with the enactment of subchapter T as part of the Revenue Act of 1962. Public Law No. 87-834 (H.R. 10650). However, section 1381(a)(2)(C) states that subchapter T

is not applicable to an organization engaged in furnishing electric energy (or providing telephone service) to persons in rural areas. According to the Senate Finance Committee Report accompanying the 1962 Act, the intent of Congress was that nonexempt rural electric cooperatives would continue to be treated as under “present law” as of 1962. While subchapter T does not expressly control the taxation of nonexempt rural electric cooperatives, its foundations rest upon pre-1962 cooperative tax law. As a result, there are certain basic parallels between the tax treatment of nonexempt utility (electric and telephone) cooperatives and treatment of other cooperative organizations under subchapter T. Therefore, to extent that subchapter T reflects cooperative taxation as it existed prior to 1962, it is instructive in resolving certain issues facing rural electric cooperatives. This is because Congress stated that, in enacting subchapter T, it was merely codifying the long common law history of cooperative taxation (with the exception of ensuring at least one annual level of tax at the cooperative or patron level. See S. Rep. No. 1881, 87th Cong., 1st Sess. 113 (1962)). Arguably, the case law post-enactment is merely a continuation and refinement of the pre-enactment common law.

Perhaps the most succinct definition of the term “cooperative” for Federal income tax purposes was provided by the U.S. Tax Court in *Puget Sound Plywood, Inc. v. Commissioner*, 44 T.C. 305 (1965), *acq.* 1966-1 C.B. 3:

Under the cooperative association form or organization . . . , the worker-members of the association supply their own capital at their own risk; select their own management and supply their own direction for the enterprise, through worker meetings conducted on a democratic basis; and then themselves receive the fruits of their cooperative endeavors, through allocations of the same among themselves as coworkers, in proportion to the amounts of their active participation in the cooperative undertaking.

The Tax Court went on to describe three guiding principles at the core of economic cooperative theory as, *id.* at 308:

(1) Subordination of capital, both as regards control over the cooperative undertaking, and as regards the ownership of the pecuniary benefits arising

therefrom; (2) democratic control by the worker-members themselves; and, (3) the vesting in and allocation among the worker-members of all fruits and increases arising from their cooperative endeavor (i.e., the excess of operating revenues over the costs incurred in generating those revenues), in proportion to the worker-members active participation in the cooperative endeavor.

The mechanism by which rural electric cooperatives achieve operation at cost is the patronage dividend (or capital credit). The payment of patronage dividends (and operation at cost) is critical to achieving cooperative status as defined by *Puget Sound*, so any organization must analyze this issue to determine whether it is operating on a cooperative basis.

The comments related to the definition of “furnishing” electricity for purposes of section 6417(d)(1)(A)(vi) varied. For example, some commenters suggested using the language in §1.1381-1(b)(4) as the standard, and some suggested the term should not be limited to generating and transmitting electricity. One commenter suggested that a percentage of rural nameplate capacity be applied for purposes of the definition of “furnishing” electricity, while another commenter stated that a more than de minimis standard should be used to meet furnishing requirements. Consistent with the determination that section 6417(d)(1)(A)(vi) will cover rural electric cooperatives described in section 1381(a)(2)(C), the Treasury Department and the IRS conclude that “furnishing” electricity under section 6417(d)(1)(A)(vi) should be interpreted in the same manner as the language in §1.1381-1(b)(4), which provides “[a]ny organization which is engaged in generating, transmitting, or otherwise furnishing electric energy.” The purpose of this language in §1.1381-1(b)(4) is to identify rural electric cooperatives described in section 1381(a)(2)(C). Using a similar interpretation for purposes of section 6417 means that a cooperative furnishing electric energy under §1.1381-1(b)(4) would meet this portion of the definition. Such a cooperative would not be subject to subchapter T as a result of section 1381(a)(2)(C), assuming the electricity is provided to rural areas.

With respect to this conclusion, the Treasury Department and the IRS note that some of the commenters identified themselves as cooperatives subject to the provisions of subchapter T. The definition of applicable entity in section 6417(d)(1)(A)(vi) would not include a cooperative that is subject to subchapter T, as a cooperative cannot be both subject to subchapter T and excepted from subchapter T. Further, the definition of furnishing in §1.1381-1(b)(4), and thus for purposes of section 6417, does not include the activity of installation of energy equipment (such as the installation of solar panels), as that alone is not the generation or other furnishing of electricity. Thus, organizations evaluating whether their operations include furnishing electricity for purposes of section 6417 should take this into account.

Consistent with including rural electric cooperatives described in section 1381(a)(2)(C) and the use of §1.1381-1(b)(4) to determine whether a cooperative is “furnishing” electricity, the Treasury Department and the IRS reach a similar conclusion with respect to defining “rural” for purposes of section 6417 by reference to §1.1381-1(b)(4). Section 1.1381-1(b)(4) provides that the term rural area has the meaning assigned to [it] in section 5 of the Rural Electrification Act of 1936, as amended (7 U.S.C. 924). Currently 7 U.S.C. 924(b) provides that the term ‘rural area’ is deemed to mean any area of the United States not included within the boundaries of any incorporated or unincorporated city, village, or borough having a population in excess of 5,000 inhabitants.

6. Tennessee Valley Authority

Section 6417(d)(1)(A)(iii) states that the Tennessee Valley Authority is an applicable entity. The proposed regulations would have adopted this definition. No commenters addressed this definition, so these final regulations adopt the definition as proposed.

7. An Agency or Instrumentality of Certain Applicable Entities

Proposed §1.6417-1(c)(7) would have clarified that an agency or instrumentality of (1) any U.S. territory or a political subdivision thereof; (2) any State, the District of Columbia, or political subdivision thereof; or (3) an Indian tribal government or a subdivision thereof is also an applicable entity eligible to make an elective payment election. The proposed regulations requested comments on this approach to defining applicable entities and on whether further guidance is necessary. Commenters addressed both the scope of the definition and whether it should be expanded to include Federal agencies and instrumentalities.

i. Scope of the definition of “agency” and “instrumentality”

Several commenters asked for additional clarity on the definition of agencies and instrumentalities, such as whether joint powers authorities, housing authorities, transit authorities, air authorities, publicly owned utilities, or tax-exempt entities in the water sector are included (and one commenter requested a similar clarification pertaining to political subdivisions). Various commenters mentioned application of Rev. Rul. 57-128, 1957-1 C.B. 311, while two of these commenters asked how the facts and circumstances analysis in the revenue ruling would apply to their specific facts. One commenter requested a rule stating that whether an entity is an agency or an instrumentality is determined based on (or at least influenced by) State or local law. Finally, one commenter asked that the final regulations allow tribes to determine what is an agency or instrumentality of an Indian tribal government.

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 these 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 this rulemaking.

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).

One commenter asked that an instrumentality be eligible to make an elective payment election with respect to its assets that are operated and maintained by a private partner under a public-private partnership. While it is not clear what kind of entity the commenter means by "public-private partnership," if the arrangement is treated as a partnership for Federal tax purposes, then the partnership would not be an

applicable entity listed in section 6417(d)(1)(A). See part I.B.4 of this Summary of Comments and Explanation of Revisions.

ii. Federal agencies and instrumentalities

Several commenters asked that the final regulations include Federal agencies and instrumentalities within the definition of applicable entity. Commenters specifically mentioned the United States Postal Service, Federal hydropower agencies, Federal Power Marketing Administrations (PMAs), the Army Corps of Engineers, and the Bureau of Reclamation.

One commenter stated that the proposed regulations did not provide a justification for why Federal agencies or instrumentalities were not included. This commenter did, however, note that, absent statutory authorization to the contrary, agency-collected user fees and charges already must be deposited in the Treasury General Fund. Several commenters suggested that the cross-reference in section 6417(b)(6) – the provision setting out the list of applicable credits – to section 168(h)(2)(A)(i) should be read to provide Federal agencies and instrumentalities with the ability to make an elective payment election for at least section 45W credits. Similarly, one commenter asked that PMAs be able to apply, file, and receive all elective payments under section 6417 on behalf of the power generating agencies of regional Federal power programs. This commenter stated that PMAs serve as the Federal entities responsible for facilitating the funding of and ensuring repayment for the regional power program, both expensed annual maintenance and capital improvements, and that it would be beneficial to eliminate unnecessary overlap, confusion, and administrative burdens to efficiently use elective payments for applicable projects. Section 6417(a)(1), however, authorizes an election of an applicable credit only by an applicable entity under section 6417(d)(1)(A). Although the Treasury Department and the IRS solicited comments on the issue, no commenter addressed how appropriations

issues raised by including Federal agencies and instrumentalities (beyond the Tennessee Valley Authority, which is specifically listed in the statute) or PMAs within the definition of applicable entities could or should be resolved. The Treasury Department and the IRS have thus retained the proposed approach and have not extended the definition of applicable entities to those additional entities in these final regulations.

8. Electing Taxpayers

Certain taxpayers that are not listed in section 6417(d)(1)(A) or described in the preceding paragraphs may nevertheless make an election to be treated as an applicable entity with respect to applicable credit property giving rise to a section 45Q credit, section 45V credit, or section 45X credit, as described more fully in part III of this Summary of Comments and Explanation of Revisions. Proposed §1.6417-1(g) would have defined an “electing taxpayer” as any taxpayer that is not an applicable entity, but makes an election in accordance with proposed §§1.6417-2(b), 1.6417-3, and, if applicable, 1.6417-4, to be treated as an applicable entity for a taxable year with respect to applicable credits determined with respect to an applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7). No commenters addressed this definition; thus, these final regulations adopt the definition as proposed.

B. Entities related to an applicable entity or an electing taxpayer

Proposed §1.6417-2(a) would have provided rules for elective payment elections made by entities related to applicable entities or electing taxpayers. Commenters addressed several of these proposed rules.

1. Disregarded Entities

Proposed §1.6417-1(f) defined “disregarded entity” as an entity that is disregarded as an entity separate from its owner for Federal income tax purposes. Proposed §1.6417-2(a)(1)(ii) would have provided that, if an applicable entity or electing taxpayer is the owner (directly or indirectly) of a disregarded entity that directly holds an

applicable credit property, the applicable entity may make an elective payment election for applicable credits determined with respect to the applicable credit property held directly by the disregarded entity.

Several commenters asked that the final regulations clarify whether Tribal corporations formed under section 17 of the Indian Reorganization Act of 1934 are considered applicable entities. In response, these 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 is disregarded as an entity separate from its owner for purposes of section 6417.

One commenter asked that the final regulations treat an applicable entity that is the sole shareholder of an S corporation as eligible to make an elective payment election for all applicable credits determined with respect to applicable property held by the S corporation, in the same manner as an applicable entity that is the owner of a disregarded entity would be eligible to make an elective payment election for all applicable credits determined with respect to applicable credit property held by the disregarded entity. Another commenter asked that any entity wholly owned by an applicable entity be treated as an applicable entity. This commenter anticipated that many applicable entities will want to create special purpose entities to own their tax credit eligible projects, but that the classification of such entities as an applicable entity can be uncertain. As an example, the commenter suggested that a city that would normally issue bonds through an industrial development authority that is treated as an agency or instrumentality of the city may want the industrial development authority to

create a wholly-owned corporation or limited liability company to be the owner of the project. The commenter stated that it may be difficult to determine whether such wholly-owned entity of an industrial development authority would also be treated as an agency or instrumentality since it is based on a facts and circumstances analysis. Moreover, under §301.7701-2(b)(6), the commenter pointed out that a limited liability company that is wholly owned by an agency or instrumentality of a State or local governmental unit may be treated as a separate corporation and, therefore, may not be treated as a disregarded entity. In sum, the commenter stated that it saw no policy reason why an entity wholly owned by an applicable entity should not be treated as an applicable entity.

The Treasury Department and the IRS have determined that special rules disregarding an entity's Federal tax status for purposes of section 6417(d)(1)(A) are not appropriate. Section 6417(d)(1)(A) is specific as to the types of entities afforded applicable entity status. Any regarded entity that has a Federal tax status separate from its owner(s) and is not separately listed in section 6417(d)(1)(A) cannot be treated as an applicable entity. This is consistent with the rule for taxable C corporations discussed in part I.B.2 of this Summary of Comments and Explanation of Revisions.

2. Taxable C Corporations

The proposed regulations would have provided that, because a taxable C corporation is an entity separate from its owner, proposed §1.6417-1(c)(1) would not include a C corporation that is not itself an applicable entity described in proposed §1.6417-1(c)(1) as an applicable entity, even if its owner is an applicable entity described in proposed §1.6417-1(c)(1). However, an electing taxpayer may include a taxable C corporation (including a member of a consolidated group). These final regulations adopt §1.6417-1(c)(1) as proposed.

3. Undivided Ownership Interests

Proposed §1.6417-2(a)(1)(iii) would have provided that, if an applicable entity is a

co-owner in an applicable credit property through an arrangement properly treated as a tenancy-in-common (TIC) for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code to be excluded from the application of subchapter K of chapter 1 (subchapter K), then the applicable entity's undivided ownership share of the applicable credit property will be treated as a separate applicable credit property owned by such applicable entity, and the applicable entity may make an elective payment election for the applicable credits determined with respect to such applicable credit property. Commenters addressed TICs, valid section 761(a) elections, and joint ownership under section 48E.

i. Tenancies in common and organizations that have made a valid election under section 761(a)

Several commenters asked for additional guidance and examples illustrating how an applicable entity's undivided ownership share of applicable credit property is determined in the context of renewable energy projects such as wind and solar projects, clean hydrogen projects, and electric vehicle infrastructure. These comments are beyond the scope of these final regulations. The ownership share of a party to a transaction will be determined based upon the agreement of the parties and other relevant facts and circumstances.

Several commenters stated that the mechanisms for co-ownership allowed under the proposed regulations are in common practice today and would allow applicable entities to join with other entities in developing applicable credit properties without precluding elective payment election choices by project participants. However, other commenters stated that TICs and joint operating agreements (JOAs) that have validly elected out of subchapter K are not commonly used in the renewable energy marketplace (even by private entities) and can deprive participants of limited liability. These commenters stated that these arrangements may be less familiar to applicable entities as compared to traditional partnership structures used between public and

private entities for the development of clean energy projects. Commenters also opined that applicable entities may not be sufficiently resourced to navigate these newer commercial law relationships and would be disadvantaged compared to non-applicable entities, who can avail themselves of partnership structures in the form of limited partnerships or limited liability companies, which provide most members with limited liability for State law purposes.

Commenters asked for clear guidance and clarifications as to how a renewable energy project could meet the requirements for electing out of subchapter K. For example, one commenter asked how §1.761-2(a) could be applicable in the context of a jointly operated renewable energy project. Section 1.761-2(a) provides, in relevant part, that an unincorporated organization the members of which are able to compute their income without the necessity of computing partnership taxable income, and that is not an organization classifiable as an association, may be excluded from the application of subchapter K if the organization is availed of (1) for investment purposes only and not for the active conduct of a business, or (2) for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted. Specifically, the commenter stated that it is unclear how parties jointly operating a renewable energy project can do so without conducting a business selling services or property produced (that is, selling electricity).⁵

Another commenter asked for clarity on what a delegation of authority under §1.761-2(a)(3)(iii) would cover for a JOA of applicable credit property that produces electricity. Section 1.761-2(a)(3)(iii) provides, in relevant part, that a participant to a JOA may delegate authority to sell its share of any property produced or extracted, but

⁵ The commenter also raised Rev. Proc. 2002-22, 2002-1 CB 733 (specifying the conditions under which the IRS will consider a request for a private letter ruling that an undivided fractional interest in rental real property is not an interest in a business entity), and noted that: “if the parties to a joint venture combine capital or services with the intent of conducting a business or enterprise and of sharing the profits and losses from the venture, a partnership (or other business entity) is created.”

not for a period in excess of the minimum needs of the industry, and in no event for more than one year. This commenter also asked for examples of compliant JOAs that would allow electricity generated through the joint ownership of applicable credit property to be sold pursuant to a power purchase agreement.

Commenters also requested guidance permitting a single entity or taxpayer to handle the administrative affairs and day-to-day management activities of operating an applicable credit property on behalf of the other joint owners without impacting the owners' ability to be properly excluded from the application of subchapter K. One commenter stated that it would be useful to illustrate a range of JOAs likely to result in exclusion from the application of subchapter K and suggested that key elements of such fact patterns might include: an agreement to share revenues in proportion with the co-owners' respective ownership interests; an agreement to share revenues out of proportion with the co-owners' respective ownership interests; an agreement in which rights to dispose of property or take other significant actions are reserved to a subset of the co-owners; and/or an agreement to receive debt financing based on the anticipation of funds expected to result from an elective payment election in a case in which the lender is not a co-owner.

A commenter stated that it would also be helpful to clarify the application of §1.761-2(a)(3)(iii) to co-ownership ventures in cases in which co-owners generate and sell power as a collective rather than on their separate accounts, or alternatively if the collective entity sells power to each of the participating co-owners and then those co-owners sell power to third parties on their own accounts but the collective may sell some other services or property incidental to the activity for which the credit is determined. This commenter highlighted that, in California and some other States, local government agencies often pool resources under a Joint Powers Authority (JPA). The commenter asked that guidance clarify the conditions under which a JPA could be

treated as an organization that has made a valid election under section 761(a) of the Code to be excluded from the application of subchapter K, including if the JPA is a separate legal entity and sells power under its own account.

One commenter stated that existing guidance allowing for clean energy arrangements to validly elect out of subchapter K, including through the use of TIC structures, is limited and should be updated. This commenter stated that a partnership is defined in the Code and in the Treasury Regulations under sections 761 and 7701, but the distinction between an arrangement treated as a partnership for Federal tax purposes and one that has validly elected out of subchapter K, including a valid TIC, is not well defined in the energy generation context. The commenter pointed out that pre-IRA partnership guidance, including guidance allowing for the use of tax-equity partnership structures, is widely used as a basis for structuring projects within the renewable industry and is well understood. However, existing guidance for arrangements in the energy generation context that will not be treated as a partnership for Federal tax purposes is limited and outdated. The commenter urged the Treasury Department and the IRS to provide clear, updated, and timely guidance on clean energy arrangements that would not be treated as partnerships for Federal tax purposes.

The Treasury Department and the IRS agree that additional guidance is needed on joint ownership arrangements of applicable credit property that produce electricity that can be excluded from the application of subchapter K. As a result, the Treasury Department and the IRS have proposed regulations in the Proposed Rules section of this edition of the *Federal Register* that would add certain exceptions to the requirements contained in the regulations under section 761(a) and provide an example. These exceptions generally would allow any applicable entity described in section 6417(d)(1)(A) and §1.6417-1(c) that jointly owns applicable credit property that produces electricity to (1) own its interests through an entity (other than an entity

required to be treated as a corporation under the Code) and (2) delegate its authority to an agent to sell its share of the electricity produced from such applicable credit property for a period of more than 1 year, provided that the delegation authority to the agent is not for more than 1 year. See *Election to Exclude Certain Unincorporated Organizations Owned by Applicable Entities from the Application of Subchapter K*, REG-101552-24, in the Proposed Rules section of this edition of the *Federal Register*.

ii. Applying the undivided ownership interests rule to qualified property

One commenter requested some clarifying edits to address how proposed §1.6417-2(a)(1)(iii), the rule for undivided ownership interests, would operate with respect to a section 48E credit. This commenter noted that proposed §1.6417-1(e)(12) defines “applicable credit property” for purposes of section 48E as “a qualified facility described in section 48E(b)(3);” however, section 48E(b) allows a section 48E credit to be claimed only with respect to a qualified investment in a qualified facility. The commenter asked for clarification on what part of the qualified investment is owned by such joint tenant, and suggested adding language to the final regulations to clarify that an applicable entity should be able to claim applicable credits with respect to the applicable credit property in proportion to its share of qualified property.

The Treasury Department and the IRS agree with the commenter that a section 48E credit is determined, in part, based on an applicable entity’s qualified investment with respect to a qualified facility, but do not believe that further language is needed because this concept is already covered in the language under proposed §1.6417-2(a)(1)(iii), which provides that an applicable entity will be treated as owning a separate applicable credit property equal to its undivided ownership share. An applicable entity’s undivided ownership share is determined under Federal income tax ownership principles and is outside the scope of these final regulations. Thus, these final regulations do not adopt the commenter’s suggestion.

4. Partnerships

The proposed regulations would have provided that partnerships and S corporations are not applicable entities described in section 6417(d)(1)(A), but requested comments on whether any entity described in section 6417(d)(1)(A)(i) through (vi) or proposed §1.6417-1(c) could include an entity organized as a partnership or S corporation for Federal tax purposes. No commenter stated that an entity described in section 6417(d)(1)(A)(i) through (vi) or proposed §1.6417-1(c) could include an entity organized as a partnership or S corporation for Federal tax purposes. Therefore, these final regulations adopt the rule as proposed.

Under the proposed regulations and these final regulations, a partnership or an S corporation is eligible to make the elective payment election only with respect to a section 45V credit, section 45Q credit, and section 45X credit (assuming all the other requirements to make the election with respect to these credits are met). This rule applies no matter how many of the partners or shareholders are applicable entities described in section 6417(d)(1)(A) and §1.6417-1(c), including if all of the partners or shareholders are applicable entities described in section 6417(d)(1)(A) and §1.6417-1(c). However, as the proposed regulations noted, because section 6418(f)(2) defines “eligible taxpayer” for purposes of transfer eligibility as “any taxpayer which is not described in section 6417(d)(1)(A)” (and thus not in proposed §1.6417-1(c)), such a partnership or S corporation would be an eligible taxpayer described in section 6418(f)(2) and may be eligible to transfer eligible credits.⁶

A number of commenters requested that the final regulations allow applicable entities to make elective payment elections through an entity treated as a partnership

⁶ The Treasury Department and the IRS acknowledge that section 6418 does not contain a provision parallel to section 6417(d)(2) providing that section 50(b)(3) and (4)(A)(i) do not apply to limit the determination of a credit in section 6417. Thus, section 50(b)(3) and (4)(A)(i) may limit eligible investment tax credits determined with respect to a partnership or S corporation with applicable entity partners or shareholders for purposes of section 6418.

for Federal tax purposes, either if all the partners in the partnership are applicable entities described in section 6417(d)(1)(A) or if at least one partner in the partnership is an applicable entity described in section 6417(d)(1)(A). Commenters advocating for including partnerships composed entirely of applicable entities as an applicable entity stated that such a rule would help cover capital needs, diversify risk, and fill gaps in expertise between applicable entities. Commenters advocating for mixed partnerships (that is, partnerships consisting of both applicable entities and entities that are not applicable entities) said that not allowing applicable entities to make elective payment elections for applicable credit property held through mixed partnerships would reduce economic incentives to invest in clean energy, undermining the objectives of the IRA. Several commenters stated that applicable entities lack the required resources to engage in green energy projects themselves and asked that the final regulations permit a partnership to make an elective payment election with respect to the portion of the underlying credits allocable to an applicable entity. A few commenters stated that structures eligible to elect out of subchapter K have numerous requirements and complexities that limit their usefulness. One commenter recommended that the final regulations either (1) allow a partnership to make an elective payment election on one hundred percent of the credits so long as the partnership is majority owned by an applicable entity, or (2) allow a partnership with majority applicable entity ownership to make an elective payment election on the portion of credits allocable to such applicable entities.

Based on the language in section 6417(c)(1) that treats a partnership as the owner of any applicable credit property held directly by the partnership and requires a partnership to make any elective payment election with respect to such property, these final regulations retain the proposed regulations' entity view of partnerships under section 6417(c)(1). Because an entity described in section 6417(d)(1)(A)(i) through (vi)

or proposed §1.6417-1(c) does not include an entity treated as a partnership for Federal tax purposes (or as an S corporation), these final regulations do not adopt commenters' suggestions and do not allow entities treated as partnerships for Federal tax purposes (or S corporations) to make elective payment elections, except with respect to a section 45V credit, section 45Q credit, and section 45X credit. However, these restrictions do not apply to entities, whether comprised of only applicable entities or comprised of a mix of applicable and non-applicable entities, that have made a valid election out of subchapter K under section 761(a), including through the exception for certain joint ownership arrangements of applicable credit property identified in the proposed regulations under section 761 described in part I.B.3.i of this Summary of Comments and Explanation of Revisions.

A few commenters asked that taxable entities be permitted to serve as an administrative member or manager of a State law entity to which an applicable entity owns all of the other interests without creating a partnership for Federal tax purposes, provided that such taxable entities do not receive distributive shares of partnership items or partnership distributions. These final regulations do not attempt to establish any additional criteria by which a taxpayer can provide administrative or managerial services for an applicable entity without creating a partnership between the taxpayers for Federal tax purposes. However, as previously described, the Treasury Department and the IRS are simultaneously issuing proposed regulations under section 761 in the Proposed Rules section of this edition of the *Federal Register* that provide additional guidance for certain renewable energy arrangements that can validly elect out of subchapter K.

Multiple commenters asked that the final regulations provide further clarity on Tribal entities and allow co-ownership of projects. A few commenters asked that the final regulations allow Tribal Energy Development Organizations (TEDOs), or other

wholly owned Tribal enterprises, to be applicable entities regardless of how they are chartered. Some commenters asked that the final regulations allow tribes to form special purpose vehicles under an LLC structure to jointly own renewable energy projects and employ the distributive share rules for allocating the "applicable credit" to each LLC member, regardless of the tax status of that member. Commenters also asked that inter-governmental partnerships, whether formed under State law such as JPAs, or formed under Tribal law as inter-tribal consortiums, should be eligible to make an elective payment election.

While it is possible that in certain cases a Tribal law entity (including a TEDO) and/or inter-governmental partnership could be an applicable entity, such a determination is outside the scope of these final regulations. However, 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.

Commenters also stated that, if the Treasury Department and the IRS allow for section 6417 elections to be made on behalf of applicable entity partners, the final regulations should make conforming clarifications, including clarifying that the "applicable credit" that is reduced to zero under section 6417(e) is only the portion of the credit for which a section 6417 election has been made and clarifying the distributive share rules. Because these final regulations do not allow section 6417 elections to be made on behalf of applicable entity partners, these final regulations do not adopt the suggested conforming changes.

5. Consolidated Groups

Proposed §1.6417-2(a)(1)(v) would have provided that, for members of a consolidated group (as defined in §1.1502-1) the common parent of which is an Alaska

Native Corporation, any member that is an electing taxpayer may make an elective payment election with respect to applicable credits determined with respect to the member. Proposed §1.6417-2(a)(2)(vi) would have provided the same rule with respect to electing taxpayers. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members). The proposed regulations would also have provided that a member of a consolidated group is required to complete pre-filing registration as a condition of, and prior to, making an elective payment election.

The preamble to the proposed regulations stated that an ANC may be the common parent of a consolidated group of corporations (ANC-parented group) and noted that some stakeholders had inquired whether non-ANC members of an ANC-parented group may separately make an elective payment election with respect to a section 45V credit, section 45Q credit, or section 45X credit determined with respect to such member. In response, the preamble to the proposed regulations stated that a non-ANC member of an ANC-parented group may qualify as an electing taxpayer eligible to make elections under section 6417(d)(1)(B), (C), or (D), based on its own corporate status. See §1.1502-80(a). As with any other electing taxpayer, a non-ANC member of an ANC-parented group would be required to complete pre-filing registration (as would be required under proposed §1.6417-5) and must make its elective payment election under section 6417(d)(1)(B), (C), or (D) with respect to an applicable section 45V credit, section 45Q credit, or section 45X credit determined with respect to the member. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

The preamble to the proposed regulations requested comments (1) regarding the definition in proposed §1.6417-1(c)(4) and whether additional guidance is necessary regarding consolidated groups with ANC common parents; (2) whether additional guidance is necessary to address any uncertainty that may exist regarding the

application of section 6417 in the context of a consolidated group with members that are cooperatives subject to the rules of subchapter T of chapter 1; and (3) regarding the application of section 6417 to consolidated groups with electing taxpayers (for example, whether special rules are necessary for consolidated groups to apply the “denial of double benefit” rule under proposed §1.6417-2(e)(2)).

No commenter addressed these issues relating to ANCs. However, the Treasury Department and the IRS have determined that the text of proposed §1.6417-2(a)(1)(v), which referred to consolidated groups “of which an Alaska Native Corporation is the common parent,” was too limiting and should apply to any consolidated group with an applicable entity parent. Therefore, these final regulations expand the definition by removing the specific reference to Alaska Native Corporations in §1.6417-2(a)(1)(v) and broaden the rule to apply to any consolidated group of which an applicable entity is the common parent.

A few commenters requested confirmation that the “entity-specific” rules of section 6417 apply to an elective payment election made by a partnership that has as its only partners two or more members of the same consolidated group and suggested an example confirming the treatment. The commenters wanted confirmation that the election would be made by the partnership, as required by section 6417(c)(1) and proposed §1.6417-4(a), rather than by the partnership’s members, as provided in proposed §1.6417-2(a)(2)(vi). The Treasury Department and the IRS agree that any entity treated as a partnership for Federal tax purposes, and not any of its partners (regardless of the identity or Federal tax status of the partners), would make an elective payment election with respect to section 45Q credits, section 45V credits, or section 45X credits pursuant to section 6417(c)(1) and §1.6417-4(a), but disagree that an example illustrating this point is needed.

6. Pooled Investment Vehicles

The proposed regulations did not provide a special rule for employee plans that are subject to the Employee Retirement Income Security Act of 1974 (ERISA) if they choose to invest through pooled investment vehicles, whether the vehicles are organized as partnerships or otherwise. One commenter stated that ERISA plans typically make investments through pooled investment vehicles, which often are organized as limited partnerships or LLCs, and take minority interests in them in order to avoid subjecting the vehicles to fiduciary, prohibited transaction, and other rules under ERISA's "plan asset" rules. The commenter believed that, if pooled investment vehicles are not considered to be applicable entities, then employee plans generally cannot benefit from elective payment elections under section 6417 with respect to some or all of the applicable credits listed in section 6417(b). The commenter suggested that ERISA plan fiduciaries might choose not to invest in applicable credit activities at all. The commenter requested that the final regulations provide a mechanism by which ERISA plan investors indirectly investing through pooled investment vehicles can make an elective payment election.

The Treasury Department and the IRS understand the commenter's concern that ERISA plans may be discouraged from investing in certain entities engaged in applicable credit activities under the proposed regulations. Other applicable entities have similar concerns that investments in certain entities engaged in applicable credit activities under the proposed regulations will not be investments in applicable entities. While there are rules outside of these final regulations that may impact how ERISA plans make investments, there is no indication in section 6417 that ERISA plans can or should be subject to rules different than those that apply to other applicable entities. Thus, these final regulations do not provide a special rule for ERISA plans investing in pooled investment vehicles that would allow ERISA plans to be eligible to make an elective payment election if investing through a partnership structure.

II. Rules for Making Elective Payment Elections

A. In general

Proposed §1.6417-2 would have provided general rules for an applicable entity or electing taxpayer to make an elective payment election under section 6417 with respect to any applicable credit determined with respect to such entity. Commenters addressed many aspects of these proposed rules, which are discussed in this part II of the Summary of Comments and Explanation of Revisions. These final regulations adopt the rules as proposed, with the modifications described in this part II.

B. Manner of making the election

Section 6417(a) provides that the elective payment election is made “at such time and in such manner as the Secretary may provide,” and proposed §1.6417-2(b) would have provided the particular requirements for properly and timely making the election.

1. Return Requirements

Proposed §1.6417-2(b)(1)(i) would have provided that an applicable entity makes an elective payment election on the applicable entity’s or electing taxpayer’s annual tax return, as defined in proposed §1.6417-1(b), in the manner prescribed by the IRS in guidance, along with any required completed source credit form(s) with respect to the applicable credit property, a completed Form 3800, *General Business Credit* (or its successor), and any additional information, including supporting calculations, required in instructions to the relevant forms.

To avoid any confusion about how the elective payment election should be made, proposed §1.6417-1(b) would have defined “annual tax return,” for purposes of the section 6417 regulations, as follows: (1) for any taxpayer normally required to file an annual tax return with the IRS, such annual return (including the Form 1065, *U.S. Return of Partnership Income*, for partnerships and the Form 990-T, *Exempt*

Organization Business Income Tax Return (and proxy tax under section 6033(e)), for organizations with unrelated business income tax or a proxy tax under section 6033(e)); (2) for any taxpayer that is not normally required to file an annual tax return with the IRS (such as taxpayers located in the U.S. territories), the return they would be required to file if they were located in the United States, or, if no such return is required (such as for a State; the District of Columbia; or local or Indian tribal governments), the Form 990-T; and (3) for taxpayers filing a return for a taxable year of less than 12 months (short year), the short year tax return. These final regulations make minor, nonsubstantive edits to the definition in the proposed regulations to avoid using the phrase annual tax return in defining the term.

Several commenters requested that the IRS use a new or different form than Form 990-T or revise certain forms (including Forms 990, 990-T, 1120, 3468, 3800, 8038-CP, and 8911). Several commenters also requested a detailed list of the documents required to complete the filing process, information on how to complete required forms, or reduced information requirements for filers who had previously not been required to file any returns with the IRS.

The Treasury Department and the IRS recognize 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. The Treasury Department and IRS are committed to developing educational and outreach tools 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 these final regulations to address comments related to individual forms or the kind of documentation that may be required to complete those forms. Thus, these final regulations adopt the rules as proposed.

Several commenters requested confirmation that, for those taxpayers that

normally file the Form 1120 with the IRS, the Form 1120 can be used to make the elective payment election. The Treasury Department and the IRS confirm that this is the intent of the language in §1.6417-1(b)(1), which states “[f]or any taxpayer normally required to file an annual tax return with the IRS, such annual return,” and have added the Form 1120, as well as other examples of annual tax forms, to the parenthetical.

Other commenters requested that the elective payment election could be made on the Form 1120-W. As the Form 1120-W is not an annual income tax return, these final regulations do not adopt that suggestion.

2. Original Return Requirements

Proposed §1.6417-2(b)(1)(ii) would have provided that an elective payment election must be made on an original return (including any revisions on a superseding return) filed not later than the due date (including extensions of time) for the original return for the taxable year for which the applicable credit is determined. The proposed regulations stated that no elective payment election may be made “or revised” on an amended return or by filing an administrative adjustment request (AAR) under section 6227 of the Code. The proposed regulations also did not provide for relief under §301.9100-1 through 301.9100-3 (9100 relief) for an elective payment election that is not timely filed.

Multiple commenters asked that an elective payment election be permitted on an amended return or AAR and/or that a taxpayer be permitted an extension of time under the 9100 relief procedures to make a late election. Commenters stated that not allowing a late election is an unreasonable result for new market entrants and creates significant barriers for entities with limited resources. Some commenters recommended that applicable entities should be allowed to make the elective payment election on late returns and also be able to claim a six-month automatic extension of time to file the election under §301.9100-2(b). Commenters requested that the final regulations

provide some form of relief for taxpayers that acted in good faith and made a reasonable effort in complying, particularly for new filers who may not have had a prior filing obligation. Commenters further suggested that providing additional time to make an election would increase market participation and promote equity.

In response to these comments, these final regulations remove the words “or revised” in §1.6417-2(b)(1)(ii) and provide “[n]o elective payment election may be made for the first time on an amended return, withdrawn on an amended return, or made or withdrawn by filing an administrative adjustment request under section 6227, although a numerical error with respect to a properly claimed elective payment election may be corrected on an amended return or by filing an administrative adjustment request under section 6227 if necessary.” This clarification is intended to address situations in which a taxpayer intended to make an elective payment election but made a reporting error with respect to an element of a valid election (for example, miscalculating the amount of the credit on the original return or making a typographical error in the process of inputting a registration number), and to allow the taxpayer to correct any errors that would result in a disallowance of the election or to correct an excessive payment before an excessive payment determination is made by the IRS. Consistently, it is appropriate to allow taxpayers to correct errors that would result in a larger payment than indicated on the original return as long as such larger amount is accurate. This provision cannot be used to revoke an election or to make an election for the first time on an amended return. In addition, the taxpayer’s original return, which must be signed under penalties of perjury, must contain all of the information, including a registration number, required by these final regulations. To properly correct an error on an amended return or AAR, a taxpayer must have made an error in the information included on the original return such that there is a substantive item to correct; a taxpayer cannot correct a blank item or an item that is described as being “available upon request.”

These final regulations also modify the proposed regulations to permit an extension of time under §301.9100-2(b) to allow for an automatic six-month extension of time from the due date of the return (excluding extensions) to make the election prescribed in section 6417(d)(3), which provides relief for applicable entities or electing taxpayers who have a filing obligation and file by the due date of the return. The elective payment election is a statutory election because its due date is prescribed by statute. As such, the section 9100 relief procedures apply only insofar as the late election is being filed pursuant to §301.9100-2(b), which requires that the taxpayer timely filed its return for the year the election should have been made. Relief under this provision applies only to taxpayers that have not received an extension of time to file a return after the original due date. Taxpayers eligible for this relief must take corrective action under §301.9100-2(c) within the six-month extension period and follow the procedural requirements of §301.9100-2(d).

A few commenters requested clarification on superseding returns. One commenter stated that the proposed regulations appeared ambiguous regarding whether a return filed after the original due date, but within the automatic extension period, is considered a superseding return. This commenter recommended clarifying that this would be considered a superseding return.

Neither the Code nor regulations define a superseding return, but administrative IRS guidance provides that a superseding return is a return filed subsequent to the originally-filed return but before the due date for filing the return (including extensions). For example, if an applicable entity subject to an automatic 6-month extension files an original return on the due date (excluding extensions) and then files a subsequent return within the automatic extension period, the subsequent return would generally be considered a superseding return. Unlike a superseding return, an amended return is a return filed after the taxpayer filed an original return and after the due date for filing the

return (including extensions).

One commenter stated that the reference to a superseding return seems to be an acknowledgment that some taxpayers will use a provisional tax return filed on the due date (before extensions) to hasten the election process. This commenter asked whether, if a taxpayer files a provisional return on March 15, 2024, and files a superseding return on September 15, 2024, the taxpayer would be treated as making payment against tax under section 6417(d)(4) on March 15, 2024. The Treasury Department and the IRS note that the designation “provisional” return has no basis in the Code or regulations and accordingly, such returns are not treated differently by the IRS upon filing. Taxpayers are reminded that a tax return is signed under penalties of perjury that the return is true, correct, and complete. If an original return is filed on March 15, 2024, and contains a valid elective payment election, the taxpayer is treated as making a payment against tax on that day. A superseding return could increase or reduce the amount of the net elective payment election. If the amount is increased, the additional elective payment is treated as paid on the date the superseding return was filed. Taxpayers should be aware that filing a superseding return could result in a delay in processing the additional elective payment amount. If the net elective payment amount is reduced because of the superseding return, the taxpayer could be subject to interest and, if the taxpayer fails to pay the difference with the superseding return, penalties.

3. Pre-filing Registration Requirements

Proposed §1.6417-2(b)(2) would have specified that pre-filing registration (as is required under §1.6417-5T and would be required under proposed §1.6417-5) is a condition of any amount being treated as a payment that is made by an applicable entity under section 6417(a). The proposed regulations stated that an elective payment election will not be effective with respect to applicable credits determined with respect to

an applicable credit property unless the applicable entity or electing taxpayer receives a valid registration number for the applicable credit property and provides the registration number for each applicable credit property on its Form 3800 (or its successor) attached to the tax return, in accordance with guidance. These final regulations clarify in §1.6417-2(b)(2) that a valid registration number must also be included on any required completed source credit form(s) with respect to the applicable credit property. Additional information about the pre-filing registration process is described in part V of this Summary of Comments and Explanation of Revisions.

4. Due Date Requirements

Section 6417(d)(3)(A)(i) provides that any election under section 6417(a) must be made not later than (1) in the case of any government, or political subdivision, described in section 6417(d)(1) and for which no return is required under section 6011 or 6033(a), such date as is determined appropriate by the Secretary, or (2) in any other case, the due date (including extensions of time) for the return of tax for the taxable year for which the election is made, but in no event earlier than 180 days after the date of the enactment of section 6417 (February 13, 2023). Section 6417 is applicable to taxable years beginning after December 31, 2022.

Proposed §1.6417-2(b)(3) would have implemented this provision as follows. In the case of any taxpayer for which no income tax return is required under section 6011 or 6033(a) of the Code (such as a governmental entity), the elective payment election must be made no later than the due date (including an extension of time) for the original return that would be due under section 6033(a) if such applicable entity were described in that section. Under section 6072(e) of the Code, that date is the 15th day of the fifth month after the taxable year determined by section 441 of the Code. Subject to the issuance of guidance that specifies the manner in which an entity for which no Federal income tax return is required under section 6011 or 6033(a) of the Code could request

an extension of time to file, the proposed regulations would have provided that an automatic paperless six-month extension from the original due date is deemed to be allowed.

In the case of any taxpayer that is not normally required to file an annual tax return with the IRS (such as those located in the U.S. territories), the proposed regulations would have provided that the elective payment election must be made no later than the due date (including extensions of time) that would apply if the taxpayer was located in the United States (such as the 15th day of the fourth month after the end of the year for individuals filing Form 1040 or for corporations filing Form 1120). For example, an individual in a U.S. territory would be required to make the elective payment election on or before the 15th day of April following the close of the calendar year, or, if the individual filed an extension, on or before the 15th day of October following the close of the calendar year.

The proposed regulations would have provided that, in any other case, the elective payment election must be made no later than the due date (including extensions of time) for the original return for the taxable year for which the election is made, but in no event earlier than February 13, 2023.

Commenters did not address the second or third provisions, and they are adopted without change. However, with respect to the first provision, these final regulations simplify the provision in proposed §1.6417-2(b)(3), which stated that an elective payment election must be made no later than, “[i]n the case of any taxpayer for which no Federal income tax return is required under section 6011 or 6033(a) of the Code, the due date (including an extension of time) for the original return that would be due under section 6033(a) if such applicable entity were described in that section. Under section 6072(e), that date is the 15th day of the fifth month after the taxable year determined by section 441 of the Code,” to simply provide that an elective payment

election must be made no later than, “[i]n the case of any taxpayer for which no Federal income tax return is required under sections 6011 or no Federal return is required under 6033(a) of the Code [], the 15th day of the fifth month after the taxable year.”

Commenters asked that the final regulations clarify the determination of taxable year for an entity that does not have a filing requirement under section 6011 or 6033(a), stating that the reference to “the taxable year determined by section 441 of the Code” is confusing and that the Code provides latitude to taxpayers in determining their applicable taxable year (including calendar year, fiscal year, and short years as applicable). Commenters gave the example of an applicable entity that is filing Form 990-T for the sole reason of making an elective payment election for an applicable credit. If the applicable entity uses a fiscal year beginning July 1 and ending June 30, placed in service a project for which an applicable credit was determined during the first six months of 2023, and used its fiscal year for purposes of establishing a taxable year, then the applicable entity would be ineligible to make an elective payment election for such project because the fiscal year during which the project was placed in service began on July 1, 2022, which is a fiscal year beginning before December 31, 2022. Commenters noted that similarly situated taxpayers who file their returns on a calendar year basis would be eligible to make an elective payment election. Commenters requested that they be allowed to choose a calendar taxable year for purposes of making an elective payment election, or, alternatively, that they be permitted to file using a short year beginning January 1, 2023, and ending on the date of their next fiscal year.

These final regulations delete the reference to section 441 and clarify that, for purposes of section 6417, an applicable entity that is not required to file a Federal income tax return pursuant to section 6011 or Federal return pursuant to section 6033(a) (such as a State; the District of Columbia; an Indian tribal government; any U.S.

territory; a political subdivision of a State, the District of Columbia, or a U.S. territory, or a subdivision of an Indian tribal government; certain agencies or instrumentalities of a State, the District of Columbia, an Indian tribal government, or a U.S. territory; or a taxpayer excluded from filing pursuant to section 6033(a)(3)), but is filing solely to make an elective payment election, may choose whether to file its first Form 990-T (and thus adopt a taxable year for purposes of section 6417) based upon a calendar or fiscal year, provided that such entity maintains adequate book and records, including a reconciliation of any difference between its regular books of account and its chosen taxable year, to support making an elective payment election on the basis of its chosen taxable year. This should allow an applicable entity that is not required to file a Federal income tax return pursuant to section 6011 or Federal return pursuant to section 6033, but has placed in service an applicable credit property in 2023, to file Form 990-T based on a calendar year and make an elective payment election with respect to the applicable credit property regardless of when the property was placed in service during 2023.

These final regulations continue to provide, consistent with the proposed regulations, that, subject to issuance of guidance that specifies the manner in which an entity for which no Federal income tax return is required under section 6011 or no Federal return is required under section 6033(a) could request an extension of time to file and make the elective payment election, an automatic paperless six-month extension from the 15th day of the fifth month after the taxable year is deemed to be allowed.

The Treasury Department and the IRS note that a taxpayer that has filed a Federal income tax return under section 6011 or a Federal return under section 6033(a) with the IRS must continue to use that taxable year unless the taxpayer requests a change of annual accounting period pursuant to section 442 of the Code.

5. Irrevocability Requirement

Proposed §1.6417-2(b)(4) would have provided that any election under section 6417(a), once made, is irrevocable and applies with respect to any applicable credit for the taxable year for which the election is made.

Under section 6417, the election period applies for a period of years with respect to certain applicable credits. Specifically, for a section 45 credit or section 45Y credit, the election applies to the 10-year period beginning on the date the facility was originally placed in service. For a section 45Q credit, the election applies to the 12-year period beginning on the date the equipment was originally placed in service. For a section 45V credit, the election applies to all subsequent taxable years with respect to the facility.

Electing taxpayers make the election for one five-year period per applicable credit property, but are allowed one revocation per applicable credit property, as provided in section 6417(d)(1)(D), (d)(3)(C), and (d)(3)(D), and would have been provided in proposed §1.6417-3 (as described in part III of this Explanation of Provisions).

No commenters addressed the irrevocability rule, and these final regulations adopt the rule without change.

6. No Partial Elections

Proposed §1.6417-2(b)(5) would have provided that an elective payment election applies to the entire amount of applicable credit(s) determined with respect to each applicable credit property that was properly registered for the taxable year, resulting in an elective payment amount that is the entire amount of applicable credit(s) determined with respect to the applicable entity or electing taxpayer for a taxable year. As a result, the proposed regulations would require that an applicable entity make an elective payment election for the entire amount of the credit determined with respect to each applicable credit property.

A few commenters advocated for allowing partial elections, stating that this flexibility would be helpful. The Treasury Department and the IRS note that the statute and the proposed regulations already provide considerable flexibility because taxpayers can register none, some, or all of their applicable credit properties. Further, as opposed to section 6418(a), which allows an eligible taxpayer to elect to transfer all (or any portion specified in the election) of an eligible credit, section 6417(a) provides that an applicable entity making an election is treated as making a payment against the income tax “equal to the amount of” the applicable credit, which does not provide the flexibility to make an election equal to a portion of the applicable credit. Thus, these final regulations adopt the proposed regulations without change.

C. Determination of applicable credit

Proposed §1.6417-2(c) would have provided three rules relating to the determination of any applicable credit: (1) special rules for tax-exempt organizations and government entities; (2) a special rule for investment-related credit property acquired with income that is exempt from taxation under subtitle A; and (3) a rule that credits must be determined with respect to the applicable entity or electing taxpayer.

1. Special Rules for Tax-exempt Organizations and Government Entities

In accordance with section 6417(d)(2), proposed §1.6417-2(c)(1) would have provided that, in the case of any applicable entity that makes the election described in section 6417(a), any applicable credit is determined (1) without regard to the restrictions regarding use of property by tax-exempt organizations and government entities found in sections 50(b)(3) and (4)(A)(i); and (2) by treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity.

Proposed §1.6417-2(c)(2) would have elaborated on the effect of the “trade or business” rule in section 6417(d)(2) and proposed §1.6417-2(c)(1)(ii). Proposed §1.6417-2(c)(2)(i) would have allowed tax-exempt and government entities to take

advantage of applicable credits even outside of the unrelated business taxable income context (provided other requirements are met) by allowing the entity to treat an item of property as if it is of a character subject to an allowance of depreciation (such as under sections 30C and 45W); to produce items “in the ordinary course of a trade or business of the taxpayer” (such as in sections 45V and 45X); and to state that an item of property is one for which depreciation (or amortization in lieu of depreciation) is allowable (such as in sections 48, 48C, and 48E). No commenter addressed this rule, but these final regulations made nonsubstantive edits to this proposed version.

Proposed §1.6417-2(c)(2)(ii) would have allowed the entity to apply the capitalization and accelerated depreciation rules (such as sections 167, 168, 263 and 263A of the Code) that apply to determining the basis and the depreciation allowance for property used in a trade or business. One commenter asked whether applicable entities can use section 266 of the Code to capitalize carrying charges. In response, these final regulations add section 266 to the list of capitalization and accelerated depreciation rules that applicable entities can use in §1.6417-2(c)(2)(ii).

Proposed §1.6417-2(c)(2)(iii) would have made 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, and the passive activity rules under section 469 of the Code that apply to all applicable credits. 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). For section 469 to apply to applicable credits for which an elective payment election is

made, the applicable entity or electing taxpayer would need to be described in section 469(a)(2) (that is, an individual, estate or trust, a closely held C corporation, or a personal service corporation). Thus, for any applicable entity or electing taxpayer for which section 49 or 469 generally applies, those limitations apply with respect to the determination of applicable credits for purposes under section 6417.

The proposed regulations requested comments on whether any additional clarification is needed regarding the application of sections 49 and 469 to applicable entities or electing taxpayers determining the amount of an applicable credit. Two commenters asked that the final regulations clarify that section 49 does not apply to limit credits available to tribes or Tribal entities that use direct loan or Federal loan guarantee programs. The Treasury Department and the IRS note 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). Both of these determinations are dependent on the facts and circumstances and are outside of the scope of these final regulations.

Proposed §1.6417-2(c)(2)(iv) would have stated that the trade or business rule does not create any presumption that the trade or business is related (or unrelated) to a tax-exempt entity's exempt purpose. One commenter asked whether nonprofits will owe tax on Solar Renewable Energy Credits (SREC) sales and how selling the SRECs upfront versus selling them over time might change the result. This comment is outside the scope of these final regulations. Another commenter asked that the final regulations provide that income from applicable credit property does not give rise to unrelated business income tax (UBIT). Whether income from applicable credit property gives rise to UBIT is a fact-intensive inquiry under sections 511 through 514 of the Code and it is outside the scope of these final regulations. As these comments do not require

revisions to the proposed rule, these final regulations adopt the §1.6417-2(c)(2)(iv) as proposed.

In addition, these final regulations clarify that the trade or business rule subjects the applicable entity to the credit limitation that applies when there is an excess benefit, as described in part II.C.2 of this Summary of Comments and Explanation of Revisions. See §1.6417-2(c)(2)(v) and (c)(3)(ii).

2. Special Rule for Investment-related Credit Property Acquired with Amounts, Including Income from Certain Grants and Forgivable Loans, that are Exempt from Taxation Under Subtitle A

Proposed §1.6417-2(c)(3) would have provided a 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 (tax exempt amounts) and would have expanded the rule to “investment-related tax credits” (that is, to other credits that are determined as a percentage of a property’s basis).

The special rule stated that, for purposes of section 6417, any tax exempt amounts used to purchase, construct, reconstruct, erect, or otherwise acquire an applicable credit property described in sections 30C, 45W, 48, 48C, or 48E (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, by not reducing basis for tax-exempt amounts for purposes of

computing the applicable credit amount, conferred excess tax benefits under general tax principles applicable to taxable entities. The proposed regulations contained a “no excess benefit” rule in proposed §1.6417-2(c)(3) to give effect to the requirement in section 6417(d)(2)(B) that the investment-related credit property be treated as used in a trade or business of an applicable entity (and thus subject to general tax principles that apply to taxable entities). The proposed no excess benefit rule would have reduced the applicable credit amount with respect to “restricted tax exempt amounts,” which taxable entities are generally not entitled to include in the basis of corresponding investment-related credit property under general tax principles, if the sum of such restricted tax-exempt amounts plus the applicable credit exceeded the cost of the applicable credit property. Specifically, proposed §1.6417-2(c)(3) would have provided that, if an applicable entity receives tax exempt amounts for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property (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 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. This no excess benefit rule was a subset of the special rule for investment credit property acquired with tax exempt amounts in that it applied only to restricted tax exempt amounts; in other words, it only applied to tax exempt amounts that are conditioned on being used for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment credit property and did not apply to other tax exempt amounts. Proposed §1.6417-2(c)(5) contained three examples illustrating these rules.

One commenter strongly supported the special rule for investment-related credit

property acquired with income that is exempt from taxation as reasonable and necessary, stating that it (1) places applicable entities on similar footing as taxable entities with respect to impacts on basis, (2) makes funding count equally for investment tax credits (that are determined as a percentage of basis) and production tax credits (which are not tied to basis), and (3) is consistent with the purposes in section 6417. Several other commenters expressed appreciation for this “stackability” feature of the proposed regulations.

However, some commenters did not support the no excess benefit part of the rule, stating that section 6417 does not contain any limitation on determining the amount of an elective payment for an applicable credit if the applicable entity has received grants or forgivable loans not subject to Federal income tax. These commenters opined that not only does section 6417 not authorize promulgation of such a rule, but the proposed rule is inconsistent with the intent of section 6417, which, in the commenters’ view, is generally to permit applicable entities to receive an elective payment of an applicable credit in an amount otherwise allowable under the Code.

These final regulations generally adopt the proposed special rule for investment-related credit property acquired with amounts, including income from certain grants and forgivable loans, that are exempt from taxation, with modifications discussed in this Part II.C.2 of the Summary of Comments and Explanation of Provisions section. First, these final regulations seek to clarify that the no excess benefit rule is a subset of the general rule by separating the special rule into two parts: (1) an “amounts included in basis” rule (allowing tax exempt amounts to count toward basis) and (2) a “no excess benefit from restricted tax exempt amounts” rule (not allowing restricted tax exempt amounts plus the amount of the credit to exceed the cost of the investment-related credit property).

With respect to the second part of the rule, the Treasury Department and the IRS conclude that section 6417(d)(2)(B) effectively places a limitation on determining the

amount of an applicable credit by treating the property as being used in a trade or business of an applicable entity, which otherwise subjects the investment-related credit property and the applicable credit to general tax principles that apply to taxable entities. Taxable entities that receive restricted tax exempt amounts are generally required to reduce their basis in the corresponding investment-related credit property under general tax principles, which would limit the amount of the applicable credit. While the no excess benefit rule does not go so far as to require basis in investment-related credit property to be reduced by the restricted tax exempt amount, it limits the applicable credit so that an applicable entity that receives a restricted tax exempt amount does not receive more than the cost of the investment-related credit property financed without those non-taxable funds. 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 still give effect to section 6417(d)(2)(B) but not accomplish the goals of the IRA as well as the no excess benefit rule does.

However, these final regulations clarify the no excess benefit rule in several ways. These final regulations provide that the determination of whether a tax exempt grant is made for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property is made at the time the grant is awarded to the applicable entity. (If only a portion of a tax exempt amount is restricted and another portion is unrestricted, then only the restricted tax exempt amount is considered for purposes of this rule.)

Similarly, these final regulations clarify how to treat a grant that is awarded after investment-related credit property is purchased, constructed, reconstructed, erected, or otherwise acquired. One commenter requested clarification of whether the excessive payment addition to tax may apply if an applicable entity received a Federal grant after

the elective payment election submission. Although the comment was unclear, it appears that the commenter was asking whether a grant received after the acquisition of investment-related credit property might be considered a “restricted tax exempt amount” that could affect the amount of the applicable credit claimed on the annual return. Similarly, two commenters asked that applicable entities be allowed to self-identify during the pre-filing registration process or the elective payment election process, or both, if they are preparing to apply for a Federal grant that could potentially impact their elective payment amount. These commenters stated that an entity could then amend its return based on whether the grant was received to better determine if the entity should receive the full elective payment amount or be required to recalculate the elective payment amount so as not incur an addition to tax due to a possible excessive payment in subsequent taxable years.

A grant awarded after acquisition of the property is generally not a restricted tax exempt amount because a restricted tax exempt amount is one made for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property and, in the commenters’ examples, the applicable entity would already have acquired the investment-related credit property before receiving the grant funds. However, to avoid allowing taxpayers to circumvent the no excess benefit rule by acquiring applicable credit property in cases in which the receipt of the grant is assured if an application is made and the applicable entity only needs to finance the purchase until the money is received, these final regulations provide that a grant awarded after acquisition of the property is a restricted tax exempt amount if approval of the grant was perfunctory and the amount of the grant was virtually assured at the time of application.

Commenters asked whether the credit reduction applies to a loan that is not a forgivable loan or to a taxable loan. The Treasury Department and the IRS clarify that

loans that need to be repaid are not tax exempt amounts and, thus, will not be restricted tax exempt amounts for purposes of this rule. Commenters also asked about the timing of the credit reduction and whether there is any potential tax credit recapture if a loan for a project that was not intended to be forgivable is later forgiven by the lender. In response, these final regulations add a sentence clarifying that the determination of whether a loan is made for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property, and whether forgiveness of that loan is contingent upon the specific purpose being satisfied, is made at the time the loan is approved.

Several commenters did not appear to understand that the no excess benefit rule is a subset of the special rule for investment-related credit property because it applies only to restricted tax-exempt amounts. For example, one commenter opined that, if an applicable entity's general revenue (from charitable donations) is not taxable and does not reduce the credit amount, then the concern of an excessive benefit for specific grants is unfounded. Multiple commenters expressed confusion by the definitions in the rule, asking for further definition (or a safe harbor) of "restricted tax exempt amount" or for a definition of "unrestricted funds." Restricted gifts are distinguishable from unrestricted gifts because of the restrictions donors place on the use of the funds. In response to these comments, however, these final regulations add a sentence to the end of §1.6417-2(c)(3)(ii) stating that the no excess benefit rule does not apply if the tax exempt amount is not received for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring a property eligible for an investment-related credit. This sentence includes two examples of a tax exempt amount that is not considered to be a restricted tax exempt amount: (1) a tax exempt amount from the organization's general funds and (2) a tax exempt amount the use of which is not restricted to the purpose of purchasing, constructing, reconstructing, erecting, or

otherwise acquiring an investment-related credit property (such as purchasing an electric vehicle) and could be used for any of several different applicable credit properties (such as purchasing an electric vehicle or purchasing solar panels) or can be put to other purposes (such as purchasing an electric vehicle or making a building more energy efficient). In addition, these final regulations add an example with unrestricted funds to clarify that unrestricted funds do not implicate the no excess benefit rule.

One commenter thought that the no excess benefit rule is administratively impractical and will lead certain applicable entities and their donors to structure donations as unrestricted grants (with an unenforceable expectation that the grant will still be used to fund the energy property). The commenter stated that this lack of a legally enforceable obligation by donors will lead to more opportunities for the misuse of funds and further frustrate Congressional intent to encourage applicable entities to actually build and operate energy property. The Treasury Department and the IRS recognize that unrestricted funds are not impacted by the no excess benefit rule; thus, taxpayers could structure around the no excess benefit rule by requesting unrestricted funds rather than restricted ones. However, these final regulations maintain the decision that, when a restricted tax exempt amount plus a general business credit exceeds the cost of the applicable credit property that was purchased with the restricted tax exempt amount, then the no excess benefit rule is reasonable and necessary, gives effect to section 6417(d)(2)(B), and is consistent with general tax principles.

In response to the commenters asking that applicable entities be allowed to self-identify if they are preparing to apply for a Federal grant that could potentially impact their elective payment amount, as provided in part V of this Summary of Comments and Explanation of Revisions, §1.6417-5(b)(5)(vii)(E) provides that an applicable entity must provide information on the source of funds the taxpayer used to acquire the property as part of the pre-filing registration process if the applicable credit property is an

investment-related credit property. However, the reporting of an actual credit amount is done on the annual tax return. In addition, if an applicable entity makes a valid elective payment election but later determines the amount was calculated incorrectly, these final regulations provide the opportunity to file an amended return or AAR to make the appropriate adjustments to the elective payment amount. See part II.B.2 of this Summary of Comments and Explanation of Revisions. As described in part VI of this Summary of Comments and Explanation of Revisions, these final regulations clarify that, if an applicable entity or electing taxpayer amends its tax return or files an AAR to properly adjust an excessive elective payment amount before the IRS opens an examination, then the excessive payment provisions of section 6417(d)(6) and §1.6417-6(a) would not apply.

A commenter recommended that the final regulations limit or eliminate the proposed rule that tax-exempt funds raised to pay for the cost of a system must be subtracted from the installed system cost before calculating the value of the investment tax credit. The commenter's summary of the proposed rule is not accurate. The excess benefit determination is made after the investment tax credit is calculated and reduces the amount of the calculated credit only to the extent that an excess benefit was created by any restricted tax exempt amounts used to fund the purchase.

One commenter asked how the credit reduction relates to tax-exempt bond financing (which, for certain credits, results in a reduction of the credit amount). The Treasury Department and the IRS confirm that the no excess benefit rule applies after application of any rule, such as sections 45(b)(3), 45Q(f)(8), 45V(d)(3), 45Y(g)(8), 48(a)(4), and 48E(d)(2), that relates to the determination of the underlying applicable credit.

A few commenters said that only Federal grants should be considered in applying the no excess benefit rule. The Treasury Department and the IRS have

concluded that all restricted tax exempt amounts should be treated the same way, as any could lead to an excess benefit.

Two commenters stated that an applicable credit property financed with “recoverable grants” should not result in the reduction of the applicable credit, stating that recoverable grants are similar to loans although some nonprofits and schools cannot enter into loan agreements. These final regulations do not adopt this comment because, without knowing the conditions upon which the grant proceeds are returned to the grantor, it is not possible to conclude whether such amounts would be considered restricted tax exempt amounts. For example, if a grantor requires return of the grant proceeds to the extent of an excess benefit created, the proceeds required to be repaid would likely not be considered a restricted tax exempt amount for purposes of §1.6417-2(c)(3), as those amounts are more similar to debt repayment.

One commenter asked that the final regulations provide more specific information about “other amounts generally exempt from taxation under subtitle A,” stating that all revenues earned by section 501(c) entities that are not subject to the unrelated business income provisions of sections 511 through 514 are generally exempt from tax. The commenter noted that Examples 2 and 3 in the proposed regulations contained an exempt organization’s own unrestricted funds, which the commenter presumed was from income exempt from taxation under subtitle A. The Treasury Department and the IRS agree that the types of income mentioned by the commenter are examples of income “that is exempt from taxation under subtitle A” that are intended to be included in basis for purposes of computing the applicable credit amount determined with respect to the applicable credit property, regardless of whether basis is required to be reduced (in whole or in part) by such amounts under general tax principles. However, the Treasury Department and the IRS have identified that certain governmental entities, including Indian tribal governments, may have income that is excluded from Federal

income taxation rather than exempt from taxation under subtitle A. The intent of the special rule was to have all of this income count towards the basis of investment-related credit property. Thus, these final regulations add “or otherwise excluded from taxation” to the text of §1.6417-2(c)(3).

A commenter asked how the special rule works if grant or loan proceeds are paid directly to the contractor building the property, providing an example in which (1) another entity helped cover the cost of the applicable credit property for the applicable entity by paying a vendor directly, and (2) the remaining funds were provided by a lender to the applicable entity, with the lender providing the proceeds of the loan directly to the vendor. The commenter asked whether these arrangements would affect the cost basis for determining the credit amount, which could then impact the applicable entity’s ability to make an elective payment election. These final regulations do not address this question since it requires analysis of the details surrounding the contractual arrangements (for example, the terms of the gift and the terms of the loan), as the results depend on the underlying facts.

One commenter asked whether there are any restrictions on the use of elective payment amounts once they are received by the applicable entity; for example, whether they can be used to repay grant match requirements or to pay off debt used specifically to purchase applicable credit property. Section 6417 imposes no restriction on the use an applicable entity makes of the elective payment amount after it has been paid to the entity (although the entity bears the risk that any excessive payments are subject to repayment plus a 20-percent tax).

3. Credits Must be Determined with Respect to the Applicable Entity or Electing Taxpayer

Proposed §1.6417-2(c)(4) would have stated that any credit for which an election is made under section 6417(a) must have been “determined with respect to” the applicable entity or electing taxpayer, meaning that the applicable entity or electing

taxpayer must own the underlying eligible credit property or, in the case of section 45X, conduct the activities giving rise to the underlying eligible credit.⁷ This proposed rule, which is consistent with the proposed regulations under section 6418, would prohibit an applicable entity or electing taxpayer from making an election under section 6417(a) for credits transferred pursuant to section 6418, transferred pursuant to section 45Q(f)(3), acquired by a lessee from a lessor by means of an election to pass through the credit to a lessee under former section 48(d) (pursuant to section 50(d)(5)), owned by a third party, or otherwise not determined directly with respect to the applicable entity or electing taxpayer, which the proposed regulations labeled “chaining.”

The preamble to the proposed regulations noted several potential obstacles to permitting chaining, but requested comments on any limited situations in which exceptions to this proposed rule may be appropriate because they are consistent with the text, design, and intent of the IRA, while also ensuring that such exceptions are not subject to fraud or abuse.

i. Credits transferred pursuant to section 6418

One commenter agreed with the proposed rule, stating that chaining will likely create practical and administrative challenges and make the applicable credits more vulnerable to fraud and abuse. However, multiple commenters stated that chaining is consistent with the text, design, and intent of the IRA and requested that it be allowed. Some commenters advocated for enacting a limited exception tailored to certain situations or limited to certain types of taxpayers, such as (1) a taxpayer whose receipt of credits is directly tied to the taxpayer’s involvement in the manufacturing process and its contractual agreements with third-party producers under section 45X, if not considered a producer under section 45X; (2) public-private partnership arrangements

⁷ The section 45X credit requires that the taxpayer produce eligible components. Thus, an applicable entity or electing taxpayer must produce eligible components to claim the credit.

under which a governmental entity or nonprofit entity can be treated as the owner of the project while receiving private capital from the private, for-profit partner to finance the project; (3) governmental entities and unrelated section 501(c)(3) entities on whose premises the project is located; (4) green banks and other public financing entities; (5) governmental agencies; (6) public power systems that entered into a long-term power purchase agreement with respect to the electricity to be produced at a qualifying facility; (7) entities conducting the activity that do not own the applicable credit property; (8) a transferor and transferee that are joint tenants or partners in a partnership completing a single return, or cross-referencing returns, in which the transfer and elective payment elections are made concurrently on the due date of the return (or later filing date under a valid extension); or (9) in cases in which an ERISA plan, entity holding plan assets, or an entity in which an ERISA plan or entity holding plan assets is the primary equity holder, the transferee would not own more than 50 percent of the seller, the transferee does the same due diligence required of all transferees, the transferee pays a minimum of 90 percent of the face value of the credit in cash, and, if the purchasing ERISA plan has an indirect interest in the proceeds of the sale, it is not permitted to buy more than the commensurate share of the proceeds it would have received if the seller had elected to sell the tax credit to another person or entity with no relationship to the seller. One commenter asked that any rule prohibiting chaining be limited to potentially abusive situations in which a principal purpose of the structure is to avoid the transfer election rules or otherwise allow taxpayers that are not applicable entities to make elective payment elections.

After considering comments, the Treasury Department and the IRS have determined that sections 6417 and 6418, read together, are most straightforwardly understood as creating two separate, mutually exclusive regimes regarding credit monetization. While the Treasury Department and the IRS acknowledge that no

specific language in section 6417 or 6418 directly prohibits chaining, not permitting chaining allows for more straightforward application of the statute as a whole. This interpretation reads “determined with respect to” in both sections 6417 and 6418 to require the entity to own the underlying applicable credit property with respect to which the applicable credit is determined and conduct the activities giving rise to the applicable credit or, in the case of section 45X, for which ownership of applicable credit property is not required, to be considered (under the section 45X regulations) the taxpayer with respect to which the section 45X credit is determined.

The Treasury Department and the IRS also remain concerned about the administrability of chaining and the scope for fraud and abuse. The Treasury Department and the IRS considered commenters’ suggestions on how chaining might be limited to certain types of taxpayers or certain situations. While there may be ways in which limiting chaining to certain types of entities or those performing certain activities could potentially reduce risks of fraud and abuse, the Treasury Department and the IRS have concluded, based on the comments, statutory text, and available information, that the IRS would face substantial challenges in attempting to distinguish those types of taxpayers or situations from other applicable entities or other situations. For example, the existing pre-filing registration process and portal, a key anti-fraud and anti-abuse feature specifically authorized by sections 6417 and 6418, are not capable of administering such distinctions as, for example, the proposed requisite relationships between the parties, many of which would require assessments of particular circumstances or other fact-dependent inquiries. The Treasury Department and the IRS have not determined how the proposed distinctions or criteria could be sufficiently verified in an administratively reasonable manner during the pre-filing registration process. Thus, based on available information, the Treasury Department and the IRS could not conclude that any chaining rule could be limited in the manner taxpayers

proposed.

Furthermore, any chaining rule would need ancillary rules to address operational differences between the two statutory provisions and complications that would necessarily arise from chaining. For example, absent ancillary rules to address differences between the two statutes, there would be inconsistencies in the requirements for elective payment elections made by applicable entities for applicable credits that are determined with respect to the applicable entity and elective payment elections made by applicable entities for transferred credits (even if a taxpayer was making both elections for the same type of credit). Transfer elections under section 6418 with respect to credits determined under sections 45, 45Q, 45X, 45V, and 45Y are made on an annual basis, whereas elective payment elections under section 6417 with respect to these credits are made for a multi-year period and are irrevocable. Additionally, transfer elections under section 6418 are permitted to be made for a portion of eligible credits determined with respect to an eligible credit property, whereas section 6417 does not on its face permit partial elections. A partnership making the election under section 6417 must hold the applicable credit property “directly,” language that is not a clear fit for transferred credits. If a chaining rule were permitted, the rules in section 6418 would need to accommodate the election requirements in section 6417, but the Treasury Department and the IRS could not determine, based on comments received and available information, how the differences between elective payment elections and transfer elections could be addressed in an administratively reasonable manner.

Similarly, an applicable entity that is both a transferee under section 6418 and an applicable entity under section 6417 could be subject to both the excessive credit transfer addition to tax under section 6418(g)(2) and the excessive payment addition to tax under section 6417(d)(6). None of the comments addressed how the excessive

credit transfer or excessive payment additions to tax should apply in the case of a chaining rule, including whether there would be authority to avoid application of both additions to tax by the same applicable entity.

Additionally, none of the comments addressed how the basis reduction and recapture rules under sections 6418(g)(3) and 6417(g) would work in the case of a chaining rule, given that transferred credits presumably would need to be treated as “determined with respect to” the applicable entity for purposes of section 6417(g).

A chaining rule would also create administrative challenges with regard to the pre-filing registration process that are separate from the challenge of potentially distinguishing types of entities or situations, and which were not addressed in comments. A facility or property intended to produce credits that would be chained would appear to need to be registered twice – first, under section 6418 as an eligible credit property and second, under section 6417 as an applicable credit property – which would result in two different registration numbers with respect to the same facility or property. Both of these registrations would presumably need to occur after the eligible/applicable credit property was placed in service, but before either taxpayer filed their annual tax return.

Finally, the Treasury Department and the IRS remain concerned that a rule allowing for chaining could increase risks of fraudulent elective payment elections as well as fraudulent transfers of credits (such as transferring credits that have not been earned by the transferor and therefore do not exist), given a range of factors including the limited time before filing season that the IRS would have to verify information as part of the pre-filing registration process, the transferor’s incentives to shift risk to the transferee, and the difficulties of recovering monies once already paid out to applicable entities. Comments received by the Treasury Department and the IRS have not provided information that addresses these concerns.

Thus, these final regulations adopt the rule as proposed. However, the Treasury Department and the IRS will continue to consider potential chaining rules that would address these concerns and be consistent with the statutory framework, as well as the legislative purpose, of sections 6417 and 6418. In particular, the Treasury Department and the IRS will be monitoring uptake and efficiency of the market for transferred credits and whether additional or different approaches may be useful to improve the functioning of the market to ensure that the provisions are functioning consistent with Congress's intent in enacting the IRA. The Treasury Department and the IRS will also be monitoring uptake of the elective payment election, including whether additional or different regulatory approaches may be useful to ensure broad access to the clean energy tax credits consistent with Congress's intent in enacting the IRA. At the same time, the Treasury Department and the IRS will be monitoring the risk of improper payments with respect to sections 6417 and 6418 and will consider additional regulatory or administrative action to reduce such risk as experience is gained with respect to these novel provisions.

ii. Credits allowed pursuant to section 45Q(f)(3)

As described in part II.C.3 of this Summary of Comments and Explanation of Revisions, proposed §1.6417-2(c)(4) would have provided that no election may be made under section 6417(a) for credits transferred pursuant to section 45Q(f)(3).

Multiple commenters opined that section 45Q credits transferred pursuant to section 45Q(f)(3)(B) should be considered "determined with respect to" the transferee. Commenters posited that this is the correct result because those transferees conduct carbon capture activities necessary to give rise to a section 45Q credit, citing the language in proposed §1.6417-2(c)(4) that "[a]n applicable credit is determined with respect to an applicable entity or electing taxpayer in cases where the applicable entity or electing taxpayer owns the underlying eligible credit property or, if ownership is not

required, otherwise conducts the activities giving rise to the underlying eligible credit.” Commenters further stated that performing those carbon capture activities makes them distinguishable from taxpayers that are transferred a credit under section 6418 or an election under section 50(d)(5).

The Treasury Department and the IRS have concluded that a taxpayer that is transferred a section 45Q credit as a result of an election under section 45Q(f)(3) is not the taxpayer with respect to which the section 45Q credit is determined. Under section 45Q(f)(3)(A)(ii), a section 45Q credit is attributable to the person that owns the carbon capture equipment *and* physically or contractually ensures the capture and disposal, utilization, or use as a tertiary injectant of such qualified carbon oxide (emphasis added). Further, under §1.45Q-1(h)(3), it is the taxpayer described in §1.45Q-1(h)(1) to whom the section 45Q credit is attributable (electing taxpayer), that may elect to allow the person that enters into a contract with the electing taxpayer to dispose of the qualified carbon oxide (disposer), utilize the qualified carbon oxide (utilizer), or use the qualified carbon oxide as a tertiary injectant (injector) to claim the credit (credit claimant) (section 45Q(f)(3)(B) election). Contrary to commenters’ assertions, it is not sufficient for a party to only conduct carbon capture activities to be eligible for a section 45Q credit. Further, the requirement of ownership in the section 45Q statute and regulations means the commenters’ argument that the language in §1.6417-2(c)(4) allows a section 45Q credit to be determined with respect to an applicable entity or electing taxpayer when the party “otherwise conducts the activities giving rise to the underlying applicable credit” is misplaced. That language in §1.6417-2(c)(4) applies only in the case of an applicable credit for which ownership of property is not required, which is not the case with respect to a section 45Q credit. Thus, these final regulations clarify in §1.6417-2(c)(4) that the only applicable credit for which ownership is not required is the section 45X credit. While the activities of a contractor may be necessary for a section 45Q

credit to be determined, ultimately, the credit is attributable to and determined by the person that both owns the equipment and physically or contractually ensures the capture and disposal, injection, or utilization of such qualified carbon oxide. Thus, these final regulations adopt the proposed regulations without change on this issue.

Other commenters implied that a section 45Q(f)(3) election is not a transfer, just the attribution of the credit to the claimant. The Treasury Department and the IRS note that the relevant standard under section 6417 for making an elective payment election is that a section 45Q credit must be determined with respect to the applicable entity or electing taxpayer. Thus, while the proposed regulations used the term “transfer,” the result would have remained unchanged if the proposed regulations used the term ‘attributed’ in referring to a party that receives the credit as a result of a section 45Q(f)(3)(B) election. To maintain consistency with §1.45Q-1(h)(3), these final regulations use the word “allowed,” but the result is unchanged from the proposed regulations.

One commenter asked that, in the case of a taxpayer that is registering a single process train for purposes of a section 45Q credit and will make a section 45Q(f)(3)(B) election to allow all or a portion of that credit to disposers/utilizers, the final regulations require information about such election, as well as an acknowledgment by the owner of the single process train that the disposer(s)/utilizer(s) may make a section 6417 election for its portion of section 45Q credit allowed, using the registration number obtained by the owner of the single process train. As described previously, a section 45Q credit that is received as the result of a section 45Q(f)(3)(B) election is not determined with respect to the recipient, and therefore the recipient is ineligible to make a section 6417 election and has no need to complete pre-filing registration.

Commenters stated, citing Rev. Rul. 2021-13, 2021-30 IRB 152, that a taxpayer does not need to own every component of a single process train to claim a section 45Q

credit. The Treasury Department and the IRS agree that guidance under section 45Q does not require a taxpayer to own every component of a single process train and have revised the language under §1.6417-1(e)(3) (defining applicable credit property with respect to the section 45Q credit) accordingly.

- iii. Credits acquired by a lessee from a lessor by means of an election to pass through the credit to a lessee under former section 48(d) (pursuant to section 50(d)(5))

Several commenters stated that tribes cannot monetize their elective payment amounts by making transfer elections under section 6418.⁸ These commenters stated that tribes should thus 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 tax benefits in exchange for contributing capital to the project.

The proposed regulations did not specifically address sale-leaseback transactions under section 50(d)(4), and the Treasury Department and the IRS have determined that adopting an explicit rule with respect to sale-leaseback transactions in these final regulations is not necessary. Such a rule is unnecessary 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.

With respect to inverted leases, the Treasury Department and the IRS

⁸ 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) described in section 6417(d)(1)(A)(iv) and §6417-1(c)(3) and -1(k) would not be eligible to make a transfer election), a Tribal entity that is not described in section 6417(d)(1)(A) would be eligible to make a transfer election under section 6418.

understand 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. There is 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. The Treasury Department and the IRS have concluded that the rationale underlying the proposed rule is correct. Thus, these final regulations adopt the proposed rule without change.

iv. Ownership

Proposed §1.6417-2(c)(4) would have provided that applicable credits must be determined with respect to the applicable entity or electing taxpayer, and further explained that an applicable credit is determined with respect to an applicable entity or electing taxpayer in cases in which the applicable entity or electing taxpayer owns the underlying applicable credit property or, if ownership is not required, otherwise conducts the activities giving rise to the underlying applicable credit. Commenters addressed the ownership aspect of this proposed rule. A commenter asked for clarity on the types of activities that would be required to give rise to the underlying applicable credit and whether, if the electing taxpayer owns the property for which the applicable credit is determined, they are also required to conduct activities giving rise to the underlying applicable credit. This commenter stated that property owners often contract with a

third-party for operations and maintenance. This commenter also asked for clarification on whether property ownership is sufficient to satisfy any other requirements. Lastly, the commenter requested additional information on the types of documentation needed to establish ownership of the property.

It is generally outside of the scope of these final regulations to address the types of activities required to determine the underlying applicable credits. However, to help clarify, these final regulations specify that the applicable entity or electing taxpayer must both own the underlying applicable credit property and conduct the activities giving rise to the applicable credit or, in the case of a section 45X credit for which ownership of applicable credit property is not required, to be considered (under the section 45X regulations) the taxpayer with respect to which the section 45X credit is determined. That is, with respect to all of the applicable credits, with the exception of the section 45X credit, ownership of qualified property is required. It is also true that, in order to be eligible for an applicable credit, it is necessary to first complete activities required by the Code section(s) relevant to the determination of the applicable credit. To the extent that an applicable entity or electing taxpayer contracts with a third party for operation or maintenance of the property, the applicable entity or electing taxpayer must meet the applicable credit requirements for the credit to be determined with respect to such entity or taxpayer. Lastly, with respect to additional information on documentation necessary for establishing ownership, the determination will be made based on the regulations for the particular applicable credit or bonus credit amount as well as Federal income tax principles. Ultimately, the principle incorporated into these final regulations, which is based on language in section 6417(a), is that the applicable credit must have been determined with respect to the applicable entity or electing taxpayer making the elective payment election.

One commenter asked that the final regulations contain a safe harbor for

determining the Federal tax owner of the tax credit eligible project and recommended the safe harbor under section 142(b) of the Code as a model. Section 142(b) requires certain facilities financed with tax-exempt bonds to be owned by a governmental unit. The safe harbor under section 142(b) treats property that is subject to a lease, a management contract, or other similar operating agreement to be treated as owned by the governmental unit under specified conditions. Specifically, the lessee (or manager or operator) must make an irrevocable election not to claim depreciation or an investment credit with respect to the property; the term of the agreement must not exceed 80 percent of the reasonably expected economic life of the property; and the lessee (or manager or operator) must have no option to purchase the property other than at fair market value as of the time the option is exercised. The commenter proposed language for a safe harbor for purposes of section 6417 that included language nearly identical to that under section 142(b) but that also included a requirement that the applicable entity own the property under State or local law. These final regulations do not adopt the commenter's proposal because ownership is determined based on general Federal tax principles, including any requirements applicable to the relevant applicable credit.

D. Denial of double benefit

Section 6417(a) allows an applicable entity or electing taxpayer other than a partnership or S corporation to be treated as making a payment against the tax imposed by subtitle A for the taxable year with respect to which such credit was determined equal to the amount of such credit. Section 6417(c)(1)(A) provides that, for an electing taxpayer that is a partnership or S corporation, the Secretary will make a payment to such partnership or S corporation with respect to a credit determined with respect to applicable credit property held directly by the partnership or S corporation equal to the amount of such credit. Sections 6417(e) and (c)(1)(B) each provide that such credit is

reduced to zero and, for any other purposes of the Code, is deemed to have been allowed to such entity for such taxable year. Section 6417(h) provides that the Secretary must issue guidance necessary to carry out the purposes of section 6417, including guidance to ensure that the amount of the payment (in the case of an electing taxpayer that is a partnership or S corporation) or deemed payment (in the case of all other electing taxpayers and applicable entities) made under section 6417 is commensurate with the amount of the credit that would be otherwise allowable (determined without regard to section 38(c)).

Proposed §1.6417-2(e)(2) and (3) would have addressed the methodology for determining the elective payment election amount and reducing the applicable credit to zero while treating the applicable credit as allowed for the taxable year for all other purposes of the Code with respect to applicable entities and electing taxpayers other than partnerships or S corporations as provided in section 6417(e). The methodology with respect to a payment made to a partnership or S corporation is described in part IV of this Summary of Contents and Explanation of Revisions.

Under the proposed regulations, an applicable entity or electing taxpayer (other than an electing taxpayer that is a partnership or S corporation) making an elective payment election would have applied section 6417(e) by taking the following steps. First, the taxpayer would have computed the amount of the Federal income tax liability (if any) for the taxable year, without regard to the GBC, that is payable on the due date of the return (without regard to extensions), and the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on the amount of tax under section 38. Second, the taxpayer would have computed the allowed amount of GBC carryforwards carried to the taxable year plus the amount of current year GBCs (including current applicable credits) allowed for the taxable year under section 38 (that is, in accordance with all the rules in section 38, including the ordering rules provided in

section 38(d)). Since the election would have been required to be made on an original return, any business credit carrybacks would not have been considered in determining the elective payment amount for the taxable year. Third, the taxpayer would have applied the GBCs allowed for the taxable year as computed in step 2, including those attributable to applicable credits as GBCs, against the tax liability computed in step 1. Fourth, the taxpayer would have identified the amount of any excess or unused current year business credit, as defined under section 39 of the Code, attributable to current year applicable credit(s) for which the applicable entity is making an elective payment election. The amount of such unused applicable credits would have been treated as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credits are determined (rather than having them available for carryback or carryover) (net elective payment amount). Fifth, the taxpayer would have reduced the applicable credits for which an elective payment election is made by the amount (if any) allowed as a GBC under section 38 for the taxable year, as provided in step 3, and by the net elective payment amount (if any) that is treated as a payment against tax, as provided in step 4, which results in the applicable credits being reduced to zero.

Proposed §1.6417-2(e)(3) would have provided, consistent with section 6417(e), that the full amount of the applicable credits for which an elective payment election is made is deemed to have been allowed for all other purposes of the Code, including, but not limited to, the basis reduction and recapture rules imposed by section 50 and calculation of any underpayment of estimated tax under sections 6654 and 6655 of the Code. The proposed regulations gave several examples illustrating these rules.

The proposed regulations requested comments on whether future guidance should expand or clarify the methodology that an applicable entity follows to compute its elective payment amount. The proposed regulations also requested comments on additional Code sections under which it may be necessary to consider the applicable

credit to have been deemed to have been allowed for the taxable year in which an elective payment election is made.

Multiple commenters asked that the final regulations revise or not include the section 38 ordering rule in §1.6417-2(e)(2). Commenters stated that, under the proposed ordering rules, if a taxpayer reaches the section 38(c) limitation using prior year credit carryforwards and current year applicable credits, which may be considered used ahead of some other non-applicable credits based on the section 38(d) ordering rule, then the taxpayer would lose the benefit of treating the applicable credit as a payment because it could have used the non-applicable credits to reach the section 38(c) limitation. Instead of receiving the benefits of treating the applicable credit as a payment, the taxpayer could be required to carry otherwise usable non-applicable credit GBCs back or forward to other taxable years. These commenters suggested that the elective payment amount should not be reduced if a taxpayer has non-applicable credits that can be used to reduce tax liability to the section 38(c) limitation. A commenter thought specifically that the language in section 6417(e) should not be read as a reference to the GBC ordering rules. The commenter thought that the proposed rule's application of the GBC ordering rules goes beyond merely addressing a double benefit issue and effectively limits the availability of direct payments, contrary to the statutory language in section 6417. The commenter thought that the proper application of section 6417(e) is demonstrated in proposed §1.6417-2(e)(3) – for example, deeming the applicable credit as allowed for purposes of basis reduction, recapture rules, and estimated tax calculations.

The Treasury Department and the IRS note that the fact pattern raised by commenters will have no relevance, and application of the rules in §1.6417-2(e) should be straightforward, for any applicable entities without taxable income to offset or with only applicable credits. However, the Treasury Department and the IRS agree with

commenters that the GBC ordering rules can result in a lowered elective payment amount for other applicable entities and/or electing taxpayers; thus, these final regulations include changes to address that result.

Section 6417(a) provides that the applicable entity will be treated as making a payment against tax equal to the amount of the credit, and section 6417(d)(4) references such payment, as noted by commenters. It is section 6417(e) that creates a bifurcated treatment for purposes of the Code by reducing the credit to zero, but for any other purposes under the Code, deeming the applicable credit to have been allowed to such entity for such taxable year.

In reviewing these provisions, the Treasury Department and the IRS have determined that section 38 is the section of the Code with respect to which applicable credits should be reduced to zero as provided under section 6417(e), other than as explained in this paragraph. As section 38 is the operative provision under which all of the applicable credits would be taken into account and allowed to reduce tax liability, it is reasonable to read the no double benefit rule in section 6417(e) to reduce the applicable credits to zero for purposes of section 38. This prevents a direct double benefit that could be achieved from claiming the credits. However, preventing such a double benefit does not require reducing the applicable credit to zero for purposes of section 38 to the extent an applicable credit is needed to reduce tax liability up to the section 38(c) limitation. In addition, reducing an applicable credit to zero in such situations would unnecessarily disadvantage an applicable entity or electing taxpayer filing on extension by preventing them from claiming the applicable credit as a current year GBC. This is because, to the extent applied as a credit, the applicable credit will reduce tax liability as of the due date of the return, while the elective payment amount is not treated as being made until the later of the due date of the return or the date of filing. See section 6417(d)(4). Treating the entire applicable credit as zero in the case

of an applicable entity or electing taxpayer filing on extension could result in more tax due on the due date of the return and, if not paid, would result in the applicable entity or electing taxpayer owing interest and could result in penalties assessed against the taxpayer.

The proposed rules accounted for this situation, and as noted by a commenter, helped mitigate any potential estimated tax penalties if amounts owed were not paid by the due date. No commenters objected to this aspect of the proposed rule. Thus, the Treasury Department and the IRS conclude that these final regulations should treat the applicable credit as a credit for section 38 in the limited situation that the applicable credit is needed to reduce tax liability up to the section 38(c) limitation. It is also noted that, for an applicable entity or electing taxpayer that is filing and making an election by the due date of their return, there should be no difference in outcome between treating an applicable credit resulting in an elective payment as reduced to \$0 for section 38, or as a credit that reduces tax liability up to the section 38(c) limitation and a payment beyond the section 38(c) limitation.

Based on these conclusions, the Treasury Department and the IRS have revised the rules and examples in proposed §1.6417-2(e) and have added a new example. Under these final regulations, there is still a description of steps for an applicable entity or electing taxpayer to complete, but there is a change in the ordering of the steps and in the calculation of the net elective payment amount. The net elective payment amount, consistent with the proposed regulations, is the amount of an applicable credit that is treated as a payment against the tax imposed by subtitle A. In these final regulations, the net elective payment amount is equal to the lesser of (1) the aggregate of all applicable credits or (2) the total GBC (including applicable credits) over the total GBC allowed against tax liability (determined with regard to section 38(c)). Under these final regulations, an applicable entity or electing taxpayer will calculate the net elective

payment amount prior to applying the ordering rules of section 38(d). These revisions allow an applicable entity or electing taxpayer that has other non-applicable credit GBCs to lower tax liability to the section 38(c) limitation using the non-applicable credit GBCs without impact from applicable credits. But the revisions also require a taxpayer to use an applicable credit as a current year GBC to the extent that it is necessary to reduce tax liability up to the limitation under section 38(c). In all other situations, the applicable credit will be zero for purposes of section 38 and the applicable credit will be considered a payment of tax on the later of the due date of the return or filing (as prescribed by section 6417(d)(4)).

In sum, these revisions to proposed §1.6417-2(e) and the examples ensure two outcomes. First, consistent with commenters' recommendations, these final regulations ensure that taxpayers making an elective payment election will not have to delay using non-applicable GBCs because of an applicable credit. Second, consistent with the proposed rule, these final regulations allow a taxpayer to benefit from a reduction in tax liability as of the due date of the return by treating an applicable credit as a credit for purposes of section 38, up to the section 38(c) limitation.

One commenter urged that the final regulations revise proposed §1.6417-2(e)(3) to treat the entire elective payment amount as a payment against tax for purposes of the calculations under section 59A of the Code, relating to the tax on base erosion of taxpayers with substantial gross receipts (also known as the base erosion anti-abuse tax or BEAT), so that the amount (regardless of any portion included in the GBC calculation) of a section 45X credit for which an elective payment election is made is treated as zero for purposes of section 59A. In contrast with the analysis earlier for section 38, the Treasury Department and the IRS conclude that treatment of an applicable credit for purposes of BEAT falls within the portion of section 6417(e) that provides, "for any other purposes under this title [26]," the applicable credit is deemed to

have been allowed to such entity for such taxable year. In contrast to section 38, BEAT is not a provision pursuant to which the applicable credits would be directly claimed, and treatment of the elective payment amount as suggested by the commenter would conflict with the language in section 6417(e). Further, since section 6417(e) provides that applicable credits are treated as credits for any other purposes of the Code, the applicable credits are not analogous to other credits that are considered pre-payments of tax and for which the BEAT regulations have an exception. See §1.59A-5(b)(3)(i)(C) (providing that regular tax liability is not reduced for “[a]ny credits allowed under sections 33, 37, and 53” of the Code. Section 33 credits are related to withholding of tax at the source with respect to payments to foreign corporations and nonresident aliens. Section 37 is a credit for the overpayment of taxes. Section 53 relates to a credit for alternative minimum tax paid in a prior year). Thus, these final regulations adopt the rule in §1.6417-2(e)(3) as proposed.

Another commenter requested clarification on apparent ambiguities in proposed §1.6417-2(e)(2)(ii) and (iii). As the revisions in these final regulations removed the text that the commenter thought was unclear, it is not necessary to address these comments in these final regulations.

Although no commenters specifically raised the application of potential penalties under section 6651 in the context of the proposed denial of double benefit rule, these final regulations modify §1.6417-2(e)(3) to clarify that a taxpayer may also be subject to a penalty under section 6651(a)(2) of the Code relating to the taxpayer’s failure to timely pay tax if a return is filed after the original due date.

E. Timing of payment

Section 6417(d)(4) provides that the payment described in section 6417(a) is treated as made on (1) in the case of any government, or political subdivision, described in section 6417(d)(1) and for which no return is required under section 6011 or 6033(a),

the later of the date that a return would be due under section 6033(a) if such government or subdivision were described in that section or the date on which such government or subdivision submits a claim for credit or refund (at such time and in such manner as the Secretary provides), and (2) in any other case, the later of the due date (determined without regard to extensions) of the return of tax for the taxable year or the date on which such return is filed. Proposed §1.6417-2(d) generally follows the statutory provision. Commenters addressed many aspects of this rule.

1. Processing the Elective Payment

Several commenters asked that the final regulations specify a timeframe within which an applicable entity will receive an elective payment amount. These commenters stated that having certainty on the time it will take to receive payments is important for purposes of securing needed financing or other funding while they are waiting to receive their elective payment amounts. One commenter stated that, if the IRS takes several months to process the payments, an organization may default on its loan payment(s). A few commenters speculated that an elective payment amount could be delayed for many months after filing, given slow processing times by the IRS. One commenter asked that the IRS impose a process similar to Form 4466, *Corporation Application for Quick Refund of Overpayment of Estimated Tax*, which requires the IRS to process a tax refund within 45 days from the date it is filed, for elective payment amounts. Another commenter suggested that the final regulations require written notice to applicable entities if the IRS will not meet the timeline, with an explanation and a date payment can be expected. Several commenters requested that the time between when the payments can be claimed and the time of payment be as short as possible, as delays can increase an organization's costs.

The Treasury Department and the IRS 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.

2. Number of Payments

One commenter asked whether the elective payment amount would be provided in one lump sum or in multiple payments. The statute and these final regulations contemplate one return containing the elective payment election, and one payment to the taxpayer, per taxable year. The only exception to this rule is if a taxpayer's superseding or amended return increases the applicable credit amount reflected on the original return, as described in part II.B.2 of this Summary of Comments and Explanation of Revisions.

3. Accelerated Payments

Several commenters asked that payments be provided to applicable entities before the time the statute provides; for example, that applicable entities be allowed to submit elective payment elections as soon as qualified energy properties are placed into service; that the IRS provide a pre-payment of the tax credit of some percentage (for example 20 to 50 percent) based on the "pre-filing record" (and that pre-filing occur at the beginning of construction); or that "third-party attestations" or Treasury verification of initial pre-filing information could support the distribution of cash refunds at that time (which does not preclude the possibility of later audits). Because section 6417(d)(4) provides the date the payment described in section 6417(a) is treated as made on, which must occur prior to the IRS providing the payment, the Treasury Department and the IRS have determined it is not possible to provide for accelerated payments,

including in the scenarios advocated by commenters. Thus, these final regulations do not adopt these comments.

4. Payments Against Estimated Tax

In response to several stakeholder responses to Notice 2022-50 asking whether an applicable entity could treat an applicable credit arising during a quarter as a payment against quarterly estimated tax (assuming such an amount was due), the proposed regulations stated that no special rule was needed because taxpayers can determine, based on their projected tax liability, the correct amount of estimated tax to pay in order to avoid a section 6654 or section 6655 estimated tax penalty at the end of the year.

In response to the proposed regulations, multiple commenters continued to advocate that applicable credits be able to be used against estimated tax payments or stated that the Treasury Department and the IRS should allow for quarterly elections and payments even though the elective payment is not deemed to occur until the later of the due date or filing date of the applicable tax return. Some commenters stated that allowing properly determined credits to be used against quarterly estimated tax payments could more efficiently provide taxpayers with the funds to make and sustain investments, that a delay in realizing the value of the credits would increase pressure on cash flows and working capital, and that the inability to offset quarterly estimated tax liability with an applicable credit is inconsistent with the purpose of section 6417. Commenters opined that the Treasury Department and the IRS could allow eligible taxpayers to make and receive quarterly elections and payments, align quarterly elections with quarterly returns, and replicate the quarterly excise tax reporting mechanism similar to rules under sections 6426 and 6427 of the Code, allowing eligible entities to claim payments every quarter. One commenter recommended that applicable entities be permitted to include applicable credits within the calculation of

estimated tax for Form 4466. Another commenter suggested the Treasury Department and the IRS could exercise its authority under section 6655(j) to promulgate regulations impacting estimated tax penalties.

The distinction between estimated tax installments (which are the obligation of the taxpayer to calculate) versus an end of year estimated tax penalty (that may result if the taxpayer's calculations are not correct and/or if the taxpayer's annual tax liability is not paid on the due date for the return, including a "payment" that is made through an elective payment election) appeared to confuse several commenters. For example, one commenter stated that proposed §1.6417-2(e)(3) could be interpreted to permit a taxpayer to calculate their estimated tax installments and any underpayment by considering properly determined refundable credits in making quarterly estimated tax payments, even though the elective payment amount is not deemed to be made until the later of the due date or filing date of the applicable tax return.

Some commenters asked for clarifications to proposed §1.6417-2(e)(4), Example 5, which describes a situation in which an electing taxpayer filed its tax return on a timely filed extension after the due date of the return (without extensions). Example 5 in the proposed regulations would have provided:

"[e]ven though W did not owe tax after applying the net elective payment amount against its net tax liability, W may be subject to the section 6655 penalty for failure to pay estimated income tax. The net elective payment is not an estimated tax installment, rather, it is treated as a payment made at the filing of the return."

Commenters asked that the applicable credits be considered to have been estimated tax payments, resulting in no tax liability at the end of the year or, at a minimum, that final regulations waive estimated tax penalties related to an elective payment election. In other words, commenters requested that the elective payment election amount may be applied both as a reduction to any quarterly estimated tax payments (without penalty) and to offset any taxes that are reported on the taxpayer's

income tax return for any taxable year in which those elections are in effect.

These final regulations do not adopt these suggestions. 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. Taxpayers can adequately determine whether their quarterly estimated payments are sufficient to avoid estimated income tax penalties based on their projected income and by considering any expected, properly determined applicable credit. For the same reasons, applicable credits may not be included to calculate estimated tax for Form 4466, which, under section 6425(a)(1) of the Code must be filed after the close of a corporation's taxable year, on or before the 15th day of the fourth month following the close of such taxable year, and prior to the filing of the corporation's return for such taxable year. Comments requesting the promulgation of regulations under section 6655 are outside the scope of these final regulations. For the sake of clarity, however, these final regulations modify Example 5 under §1.6417-2(e)(4) to better reflect the conclusion that a taxpayer that files its return after the due date for filing (excluding extensions) may also be subject to a penalty under section 6651(a)(2) for the failure to timely pay tax, even if it did not owe tax after applying the net elective payment amount against its net tax liability.

Some commenters requested clarification on whether the elective payment amount under section 6417(a) is subject to the same treatment as estimated payments against income taxes under §301.6402-4; as a refund other than estimated taxes; as a refundable tax credit; or as some other form of special payment. Commenters also stated that, if the elective payment amount is treated as a refund, the final regulations

should clarify what specific refund procedures under the Code apply.

These final regulations do not adopt a specific rule related to these comments. As previously described, section 6417(d)(4) expressly states the timing of when the payment is treated as made. Therefore, the payment under section 6417 is distinguishable from both an estimated payment made during the taxable year and a refundable credit. A refundable credit reduces tax liability as of the original due date of a return, while a payment of tax relates to a tax liability after application of credits and is treated as occurring on the date the payment is made.

One commenter requested clarification that, under proposed §1.6417-2(e)(2), an elective payment election does not override accounting for section 45X credits within the normal GBC limitation under section 38, even if an elective payment election is made. The commenter asked that the “net elective payment amount” should only be the excess over the amount allowable in the section 38 calculation. The commenter stated that this net elective payment is then treated as a payment against tax for the year but that, given the examples provided in the proposed regulations, their interpretation was that any amount utilized as part of the section 38 limitation is allowed to offset estimated taxes during the taxable year; whereas the net elective payment amount is not allowed as a reduction to estimated taxes as it is deemed paid on the date the return is filed. The revisions to proposed §1.6417-2(e)(2) in these final regulations, including the definition of net elective payment amount and the examples in §1.6417-2(e)(4), are intended to clarify that any amount utilized as part of the section 38 limitation is allowed to reduce tax liability for purposes of determining any underpayment of estimated tax; whereas the net elective payment amount is not treated as reducing tax liability as it is deemed paid on the later of the due date of filing the return or the date the return is filed.

The proposed regulations addressed the interaction between the timing rule in

section 6417(d)(4) and the denial of double benefit rule in section 6417(e). In considering the comments in relation to timing of the payment, it is clear from section 6417(d)(4) that the payment is considered made at the later of the due date of filing the tax return or the actual filing. Further, rather than as suggested by most commenters, it is this timing rule and not the rules in proposed §1.6417-2(e)(2) and (3) (regarding ordering and use of the applicable credit) that creates the commenters' issue related to penalties for underpayment of estimated taxes. For example, if a taxpayer with a tax liability was solely relying on the elective payment amount to cover the tax liability, such taxpayer could receive a payment related to the applicable credit but could still incur an estimated tax penalty because section 6417(d)(4) explicitly states that the payment of tax occurs on the date on which such return is filed. These final regulations do revise proposed §1.6417-2(e)(2), but the revisions continue to allow taxpayers the beneficial approach of the proposed regulations in this respect. Under the revisions, if any of the applicable credits for which the election is being made are needed to reach the limitation under section 38(c), then those credits are treated as reducing tax liability as of the due date of the return (excluding extensions). As one commenter stated, while the proposed rule does not eliminate the potential for an estimated tax penalty, the approach can mitigate the potential penalty by minimizing the amount of tax due on the return. The same result is achieved in these final regulations. While commenters are suggesting it is possible to allow a payment as having been made at various times of the year, these comments contradict the timing of payment language in section 6417(d)(4). Thus, these final regulations do not adopt comments that suggested revisions to the rules in proposed §1.6417-2(e), but make clarifications in the examples that illustrate the application of those rules.

5. Partnership Elections

Proposed §1.6417-4(c) would provide rules for a partnership or S corporation

that makes an election under section 6417(a) and proposed §1.6417-2(b) in accordance with the special rules for partnerships and S corporation under section 6417(c)(1)(A) through (D). One commenter opined that the proposed regulations seem to allow a corporation making an elective payment election for section 45X credits determined during the year to reduce quarterly estimated taxes by including credits in its general business credit computation up to the section 38(c) limitation. However, the commenter thought this was not the case for section 45X credits earned through a partnership, as the election and payment are made at the partnership level. The commenter thought that, in the absence of quarterly elections and payments, the final regulations should provide a mechanism for corporate partners to reduce quarterly estimated taxes for applicable credits determined with respect to applicable credit property held through partnerships that will make elective payment elections; otherwise, the commenter thought it would be penalizing taxpayers that operate their businesses through partnerships, for example, as joint ventures.

The Treasury Department and the IRS note that the treatment of partners of a partnership (or shareholders of an S corporation) is different from the treatment of an applicable entity or electing taxpayer directly making the elective payment election. This is a result of the special rules for partnerships in section 6417(c)(1) that require an elective payment election for applicable credits determined with respect to any applicable credit property held directly by a partnership to be made by the partnership. An elective payment election made by a partnership is not reduced by the Federal tax liabilities of its partners. Instead, it is only reduced by any partnership level Federal tax liability. If partners were allowed to reduce their quarterly estimated taxes for applicable credits determined with respect to applicable credit property held by a partnership for which the partnership makes an elective payment election, then the amount of the elective payment made to the partnership should be reduced by the partners'

corresponding quarterly estimated tax liabilities. Otherwise, the partners would receive a windfall because the same applicable credits would be used to both reduce the partners' estimated tax payments and generate an elective payment to the partnership. Section 6417(c)(1) does not allow for such a mechanism. Instead, section 6417(c)(1)(C) provides that, if a partnership makes an elective payment election, any elective payment amount is treated as tax exempt income for purposes of section 705 and a partner's distributive share of such tax exempt income is equal to such partner's distributive share of the otherwise applicable credit for each taxable year as determined under §1.704-1(b)(4)(ii). As the elective payment election results in an applicable credit being treated as tax exempt income rather than as a credit, it is inappropriate to adopt a rule allowing the partners to treat the same amount as a credit for estimated tax purposes. Thus, these final regulations do not adopt the commenter's recommendation of a rule allowing corporate (or any other) partners to reduce quarterly estimated taxes for applicable credits determined with respect to applicable credit property held through partnerships that make elective payment elections.

6. Appeal and Litigation Rights

Several commenters asked whether the procedural guidelines outlined in subtitle F of the Code are applicable to elective payment elections in scenarios involving an audit or rejection by the IRS. These commenters opined that, because section 6417 treats an elective payment election as akin to an income tax payment, the procedures outlined in subtitle F of the Code should apply, and further, that the overpayment interest provisions of sections 6611 and 6621 should apply based on the payment dates described in section 6417(d)(4)(B) and in the proposed regulations. The Treasury Department and the IRS note that section 6417 is located in chapter 65 of the Code, which relates to Abatements, Credits, and Refunds, which is in turn located under subtitle F of the Code. Accordingly, subtitle F of the Code, which include provisions

relating to overpayment interest, applies to elective payment elections under section 6417.

Commenters requested that the final regulations confirm an applicable entity or electing taxpayer's right to appeal an adverse determination by the IRS with respect to a determination regarding an elective payment election, and that deficiency procedures (including the right to petition the U.S. Tax Court) are applicable. An applicable entity or electing taxpayer may challenge an adverse determination by the IRS with respect to an elective payment election if the denial of such election creates a tax deficiency, for which deficiency procedures apply, including the right to petition the U.S. Tax Court. For example, if an applicable entity or electing taxpayer claimed an elective payment amount for applicable credits that were subsequently disallowed by the IRS, then the applicable entity or electing taxpayer could protest the disallowance before the IRS Independent Office of Appeals (Appeals) and ultimately petition the U.S. Tax Court, if desired or appropriate.

Another commenter suggested that the IRS should be required to share with the taxpayer the reasons why the IRS has denied a credit. The Treasury Department and the IRS intend for disallowances of an applicable credit under section 6417 to function the same as disallowances by the IRS for other credits or deductions. In such situations, a taxpayer will be provided the basis for the disallowance. Accordingly, this comment is not adopted.

One commenter stated that the proposed regulations designated the elective payment election as a "special enforcement matter" for purposes of the centralized partnership audit regime⁹ pursuant to section 6241(11) of the Code but provided no information about what audit rules apply in lieu of those partnership audit rules or why special enforcement is required to make an elective payment election. Under section

⁹ Subchapter C of chapter 63 of the Code as amended by the Bipartisan Budget Act of 2015 (BBA).

6241(11), in the case of partnership-related items involving special enforcement matters, the Secretary may prescribe regulations providing that the centralized partnership audit regime (or any portion thereof) does not apply to such items and that such items are subject to special rules as the Secretary determines to be necessary for the effective and efficient enforcement of the Code. The Treasury Department and the IRS have determined that applying the special enforcement rules to the elective pay election is appropriate in order to prevent payments for invalid credits and avoid the need for audits at that stage. The IRS uses the special enforcement rule to make an adjustment upon the determination of an ineffective election instead of following the audit procedures of the centralized partnership audit regime. This special enforcement rule only applies to adjustments to the elective payment election and payment; any other adjustments that may be required later in time remain subject to the centralized partnership audit regime.

Another commenter stated that it would be helpful to specify what, if any, audit process would apply to tax-exempt or governmental entities that do not normally file tax returns or pay taxes. This commenter stated that the pre-registration certification process will go a long way toward preventing fraud associated with these projects and thus recommended that the Treasury Department and the IRS identify a category of smaller projects that could be excluded from, or subjected to, a simplified audit process. The Treasury Department and the IRS expect that tax-exempt or governmental entities that do not ordinarily file tax returns or pay tax would be subject to the same examination process and procedures as other entities that have historically had a filing obligation. Any changes to such procedures, including a simplified audit process, are outside the scope of these final regulations, but may be considered in future guidance.

III. Elective Payment Election by Electing Taxpayers

Section 6417(d)(1)(B) through (D) provides that an electing taxpayer (that is, a

person other than an applicable entity described in section 6417(d)(1)(A)) that, with respect to any taxable year, places in service applicable credit property that qualifies for a section 45V credit or a section 45Q credit, or, with respect to any taxable year in which such taxpayer has, after December 31, 2022, produced eligible components (as defined in section 45X(c)(1)), respectively, may elect to be treated as an applicable entity for purposes of section 6417 for such taxable year, but only with respect to the aforementioned applicable credit property and only with respect to a section 45V credit, section 45Q credit, or section 45X credit, respectively.

The special rules for electing taxpayers are found in section 6417(d)(1) and (3). Proposed §1.6417-3 would have combined these rules for clarity, and these final regulations adopt proposed §1.6417-3 with minor changes noted in this part III of the Summary of Comments and Explanation of Revisions.

Proposed §1.6417-3(b), (c), and (d) would have provided the specific rules regarding the election under section 6417(d)(1)(B) through (D). Proposed §1.6417-3(e) would have provided the rules relating to the election for electing taxpayers. As described in part IV of this Summary of Comments and Explanation of Revisions, proposed §1.6417-4 would have provided additional rules for electing taxpayers that are partnerships or S corporations.

A. Qualified clean hydrogen production facility (section 45V)

Proposed §1.6417-3(b) would have provided that an electing taxpayer that has placed in service a qualified clean hydrogen production facility, as defined in section 45V(c)(3), during the taxable year may make an elective payment election for such taxable year (or by August 16, 2023, in the case of facilities placed in service before December 31, 2022), but only with respect to the qualified clean hydrogen production facility, only with respect to a section 45V credit, and only if the pre-filing registration process required by §1.6417-5T was properly completed. An electing taxpayer that

elects to treat qualified property that is part of a specified clean hydrogen production facility as energy property under section 48(a)(15) would not be able to make an elective payment election with respect to such facility. No commenter addressed this provision, and these final regulations adopt it without change.

B. Carbon oxide sequestration (section 45Q)

Proposed §1.6417-3(c) would have provided that an electing taxpayer that has, after December 31, 2022, placed in service a single process train described in §1.45Q-2(c)(3) at a qualified facility (as defined in section 45Q(d)) during the taxable year may make an elective payment election for such taxable year, but only with respect to the single process train, only with respect to a section 45Q credit, and only if the pre-filing registration process required by §1.6417-5T was properly completed.

One commenter asked about registering multiple process trains that are part of a single facility under section 45Q. The IRS will consider ways outside of these final regulations to make the pre-filing registration process more streamlined for entities doing multiple registrations. Therefore, these final regulations adopt this provision without change.

C. Advanced manufacturing credit (section 45X)

Section 6417(d)(1)(D) provides that an electing taxpayer can make an election with respect to any taxable year in which such taxpayer has, after December 31, 2022, produced eligible components (as defined in section 45X(c)(1)), and section 6417(d)(1)(D)(ii)(I) provides that the elective payment election applies to each of the four succeeding taxable years ending before January 1, 2033. Proposed §1.6417-2(a)(3)(v) and -3(d) would have clarified that an electing taxpayer that produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at an applicable credit property described in §1.6417-1(e)(7) (in other words, a facility that produces eligible components, as described in guidance under sections 48C and 45X)

during the taxable year (whether the facility existed on or before, or after, December 31, 2022) may make an elective payment election for such taxable year, but only with respect to the facility at which the eligible components are produced by the electing taxpayer in that year, only with respect to a section 45X credit, and only if the pre-filing registration process required by §1.6417-5T was properly completed.

Commenters asked for clarifications regarding section 45X facilities (such as how to designate different parts as different facilities). These comments are outside the scope of these final regulations; thus, these final regulations adopt this provision without change.

D. Electing taxpayer making an elective payment election

Proposed §1.6417-3(e) would have provided rules on how the electing taxpayer makes the elective payment election, as further described in this section.

1. In General

Proposed §1.6417-3(e)(1) would have provided that, if an electing taxpayer makes an elective payment election under proposed §1.6417-2(b) with respect to any taxable year in which the electing taxpayer places in service a qualified clean hydrogen production facility for which a section 45V credit is determined, places in service a single process train at a qualified facility for which a section 45Q credit is determined, or produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at a facility, respectively, the electing taxpayer will be treated as an applicable entity for purposes of making an elective payment election for such taxable year and during the election period described in proposed §1.6417-3(e)(3), but only with respect to the applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7), respectively, that is the subject of the election. The taxpayer would be required to otherwise meet all requirements to earn the credit in the electing year and in each succeeding year during the election period described in proposed §1.6417-3(e)(3).

No commenter addressed this rule, and these final regulations adopt this provision without change.

2. Election is Per Applicable Credit Property

Proposed §1.6417-3(e)(2) would have provided that the election must be made separately for each applicable credit property, which is, respectively, a qualified clean hydrogen production facility placed in service for which a section 45V credit is determined, a single process train placed in service at a qualified facility for which a section 45Q credit is determined, or a facility in which eligible components are produced for which a section 45X credit is determined. An electing taxpayer may only make one election with respect to any specific applicable credit property.

A few commenters requested that the final regulations clarify whether it is possible to make a second 5-year elective payment election for the same applicable credit property, opining that section 6417 does not preclude a second 5-year election and that the language in proposed §1.6417-2(b)(4)(iii) is ambiguous. The Treasury Department and the IRS have determined that it is more consistent with the statute to allow only one election per specific applicable credit property; thus, these final regulations continue to unambiguously provide that it is not possible to make an elective payment election for the same applicable credit property for a second 5-year period and §1.6417-2(b)(4)(iii) is adopted without change.

One commenter asked whether a change in ownership during the 5-year period would continue the 5-year period. Although the comment was unclear, presumably, the commenter preferred the 5-year period to continue rather than beginning a new 5-year period or ending the old 5-year period. The Treasury Department and the IRS note that proposed §1.6417-5(c)(4) would have provided that, if a facility previously registered for an elective payment election undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer

identification number (EIN) than the owner who obtained the original registration, the original owner would be required to amend the original registration to disassociate its EIN from the credit property and the new owner would be required to submit an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered credit property. This provision was intended to provide that the previous 5-year period would continue despite the change in ownership. This is because it would be inappropriate to start a new 5-year period with respect to the same applicable credit property, while at the same time undesirable to cut short a 5-year period that had not yet ended. These final regulations add a sentence to clarify this point.

3. Election Period

i. In general

Pursuant to section 6417(d)(1)(D)(ii)(I), (d)(3)(C)(i)(II)(aa), and (d)(3)(D)(i)(III)(aa), proposed §1.6417-3(e)(3)(i) would have provided that the elective payment election generally would apply for an election period consisting of the taxable year in which the election is made and each of the four succeeding taxable years that end before January 1, 2033. Proposed §1.6417-3(e)(3)(i) also would have provided that the election period cannot be less than a taxable year but may be made for a taxable period of less than 12 months within the meaning of section 443 of the Code.

Several commenters thought the five-year period should start on the date equipment is placed in service and run for 60 months; for example, using an "annualization principle." Commenters stated that, unless the qualified facility or carbon capture equipment is placed in service on the first day of an electing taxpayer's taxable year, the elective payment amount would not be commensurate with the credit that would be otherwise allowable under section 45Q(a)(3) and (4). Commenters stated that this could incentivize taxpayers to delay placing projects in service until the first day of

the following taxable year so as to make an elective payment election for the amount of applicable credit allowed for a full year, but that incentivizing such a delay is counterintuitive and seems misaligned with the original intent for permitting elective payment elections.

The Treasury Department and the IRS agree that such a result may seem counterintuitive but note that any other rule would be inconsistent with the statute. For section 45V credits, the elective payment election is made for the taxable year the equipment or facility is placed in service (or by August 16, 2023, in the case of facilities placed in service before December 31, 2022) and the four succeeding taxable years with respect to such facility which end before January 1, 2033.¹⁰ For section 45Q credits, the elective payment election is made for the taxable year in which such taxpayer has, after December 31, 2022, placed in service carbon capture equipment at a qualified facility (as defined in section 45Q(d)), and the four subsequent taxable years with respect to such equipment which end before January 1, 2033.¹¹ Because the statute is unambiguous with respect to which taxable years qualify for the election after an applicable credit property is placed in service, these final regulations adopt proposed §1.6417-3(e)(3)(i) without change.

One commenter suggested that a taxpayer should be able to file a short year tax return ending on the 60th month so that the taxpayer can make a transfer election under section 6418 for the remainder of the taxpayer's taxable year following the 60th month. The Treasury Department and the IRS note that the rules for short year tax returns are found in section 443 and the regulations thereunder. Among other things, adopting a short year if the taxpayer is still in existence would require approval by the IRS. Because the rules for short year returns are outside the scope of these final regulations,

¹⁰ See section 6417(d)(1)(B), 6417(d)(3)(D)(i)(II), and 6417(d)(3)(D)(i)(III)(aa).

¹¹ See section 6417(d)(1)(C) and 6417(d)(3)(C)(i)(II)(aa).

these final regulations do not adopt a special rule in response to the comment.

ii. Revocation

Proposed §1.6417-3(e)(3)(ii) would have provided that an electing taxpayer may, during a subsequent year of the election period, revoke the elective payment election with respect to an applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7) in accordance with forms and instructions. Any such revocation, if made, applies to the taxable year in which the revocation is made (which cannot be less than a taxable year but may be made for a taxable period of less than 12 months within the meaning of section 443 of the Code) and each subsequent taxable year within the election period. Any such revocation may not be subsequently revoked.

One commenter requested clarification that an elective payment election remains in effect even if an electing taxpayer does not make an election in a particular year, as long as the taxpayer does not affirmatively revoke the election. As a clarification, unless otherwise provided in forms and instructions, the act of not making an elective payment election during the election period is not itself a revocation of the election. Thus, for example, if an electing taxpayer makes an elective payment election in years 1 and 2 but fails to make the election in year 3, then the electing taxpayer is still eligible to make the election in years 4 and 5 if the electing taxpayer so desires. However, the Treasury Department and the IRS note that, as described in part III.4 of this Summary of Comments and Explanation of Revisions, the electing taxpayer is ineligible to make a transfer election under section 6418 while the section 6417 election period is still in effect.

4. No Transfer Election Under Section 6418(a) Permitted While an Elective Payment Election is in Effect

Pursuant to section 6417(d)(1)(D)(iii) (section 45X credit), (d)(3)(C)(ii) (section 45Q credit), and (d)(3)(D)(ii) (section 45V credit), proposed §1.6417-3(e)(4) would have provided that an electing taxpayer could not make a transfer election under section

6418(a) with respect to any applicable credit under proposed §1.6417-1(d)(3), (5), or (7) determined with respect to applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7) during the election period for that applicable credit property.

However, if the election period is no longer in effect with respect to an applicable credit property, any credit determined with respect to such applicable credit property could be transferred pursuant to a transfer election under section 6418(a), as long as the taxpayer meets the requirements of section 6418 and the section 6418 regulations.

One commenter requested that the final regulations clarify that electing taxpayers described in section 6417(d)(1)(B) may make a section 6417 elective payment election for up to five years and then make a section 6418 transfer election for the remainder of the 12-year credit period provided for under section 45Q. The Treasury Department and the IRS agree that this is permitted as long as the electing taxpayer complies with the requirements of sections 45Q, 6417, and 6418, and the respective regulations thereunder, but concluded that no clarification in these final regulations is necessary.

This commenter also requested clarification that electing taxpayers may forgo the elective payment election under section 6417 altogether and elect to transfer credits under section 6418 for the entire 12-year credit period provided for under section 45Q. The Treasury Department and the IRS agree that an electing taxpayer that does not elect to be treated as an applicable entity with respect to applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7), respectively, is not subject to the rules of section 6417, and may make a section 6418 election for a credit determined with respect to the electing taxpayer under section 45Q, 45V, or 45X as long as the taxpayer meets the requirements of those sections and the respective regulations thereunder.

IV. Elective Payment Election for Partnerships and S Corporations

Section 6417(c)(1) provides that, in the case of any applicable credit determined

with respect to any applicable credit property held directly by a partnership or S corporation, any election under section 6417(a) is made by such partnership or S corporation. Section 6417(c)(1)(A) through (D) describes the treatment of an elective payment election made by a partnership or S corporation, and proposed §1.6417-4 would have provided additional rules for electing taxpayers that are partnerships or S corporations.

Proposed §1.6417-4(a) would have provided that, if an applicable credit is determined with respect to applicable credit property owned by a partnership or S corporation, the elective payment election must be made by the partnership or S corporation. Proposed §1.6417-4(b) would have provided that, if an elective payment election is made with respect to applicable credit property pursuant to section 45Q, 45V, or 45X, such partnership or S corporation would be treated as an applicable entity for purposes of making such elective payment election. Proposed §1.6417-4(c)(1) would have provided that, if such partnership or S corporation makes an elective payment election: (1) the IRS will make a payment to such partnership or S corporation in the amount of the credit determined; (2) before determining a partner's distributive share or shareholder's pro rata share of any applicable credit, the applicable credit is reduced to zero; (3) any amount received with respect to such elective payment election is treated as tax exempt income; (4) a partner's distributive share of such tax-exempt income is equal to such partner's distributive share of the otherwise applicable credit; and (5) such tax exempt income is treated as received or accrued, including for purposes of sections 705 and 1366, as of the date the applicable credit is determined. Proposed §1.6417-4(c)(2) would have provided that if a partnership (upper-tier partnership) receives from a lower tier partnership an allocation of tax exempt income pursuant to section 6417, the upper-tier partnership must determine its partners' distributive shares of such tax exempt income in proportion to the partners' distributive shares of the otherwise

applicable credit. Proposed §1.6417-4(c)(3) would have provided that such tax exempt income is treated as arising from an investment activity rather than the conduct of a trade or business and is therefore not treated as income from a passive activity under section 469. Proposed §1.6417-4(d) would have provided that a partnership or S corporation must compute the amount of the applicable credit allowable as if an elective payment election were not made and without regard to the limitations in sections 38(b) and (c) and 469 because those provisions apply at the partner or S corporation shareholder level. Additionally, because the only applicable credits with respect to which a partnership or S corporation may make an elective payment election are not investment credits under section 46, proposed §1.6417-4(d) would have provided that sections 49 and 50 do not apply to limit the amount of the applicable credits. Because there were no comments related to the provisions described in this paragraph, the proposed regulations are adopted without change in these final regulations.

In connection with the implementation of section 6417, the proposed regulations would have added a sentence to §301.6241-1(a)(6)(iii) (regarding items or amounts with respect to a BBA Partnership) to provide that any chapter 1 tax that is the liability of the BBA Partnership is an item with respect to the BBA Partnership, regardless of whether that chapter 1 tax is required to be reflected or shown on the partnership return or required to be maintained in the BBA Partnership's books and records. The Treasury Department and the IRS did not receive any comments related to this change under §301.6241-1; consequently, the proposed rule is adopted without change in these final regulations.

V. Pre-filing Registration Requirements

Section 6417(d)(5) provides that as a condition of, and prior to, any amount being treated as a payment that is made by the taxpayer under section 6417(a) or any payment being made pursuant to section 6417(c), the Secretary may require such

information or registration as the Secretary deems necessary or appropriate for purposes of preventing duplication, fraud, improper payments, or excessive payments. Proposed §1.6417-5 would have addressed these requirements by adding a pre-filing registration process, and §1.6417-5T (TD 9975), issued contemporaneously, put those rules into effect for taxable years ending on or after June 21, 2023. Because these final regulations obsolete the temporary regulations, this part V discusses the proposed regulations rather than the temporary regulations, which are identical in content.

Proposed §1.6417-5(a)-(d) would have provided the mandatory pre-filing registration process that, except as provided in guidance, an applicable entity or electing taxpayer would be required to complete as a condition of, and prior to (1) any amount being treated as a payment against the tax imposed by subtitle A that is made by an applicable entity or electing taxpayer (other than a partnership or S corporation) under proposed §1.6417-2(a)(1)(i) or (a)(2)(i); or (2) any amount being paid to a partnership or S corporation pursuant to proposed §1.6417-2(a)(2)(ii).

Proposed §1.6417-5(a) would have provided an overview of the pre-filing registration process. Proposed §1.6417-5(b) would have included the pre-filing registration requirements, including: (1) manner of pre-filing registration; (2) pre-filing registration and election for members of a consolidated group; (3) timing of pre-filing registration; (4) that each applicable credit property must have its own registration number; and (5) information required to complete the pre-filing registration process. Proposed §1.6417-5(c) would have provided rules related to the registration number, including: (1) general rules; (2) that the registration number is valid for only one taxable year; (3) renewing registration numbers; (4) amendment of previously submitted registration information if a change occurs before the registration number is used; and (5) that the registration number is required to be reported on the return for the taxable year of the elective payment election. Proposed §1.6417-5(d) would have provided that

the section applies to taxable years ending on or after date of publication of the final rule.

Some commenters stated the proposed rules related to pre-filing registration were too cumbersome. For example, commenters noted that local governments have significantly limited resources and may, in some cases, require robust technical assistance or otherwise abandon these projects altogether. One suggestion was to create a streamlined pre-filing registration process for projects that are less complex. Another was that the IRS establish a minimum credit threshold to relieve some applicants who are planning to claim lower credit amounts from the pre-filing registration requirements.

The Treasury Department and the IRS understand commenters' concerns about the need for resources to complete the pre-filing registration process; however, pre-filing registration is necessary to help meet the government's compelling interest to prevent fraud and duplication while also allowing for a more efficient processing and payment upon filing of the return. The information requested is also information that an applicable entity should have available after having engaged in an activity for which an applicable credit is determined. Further, for entities engaging in fewer projects, the pre-filing registration process will be less complex. For example, an applicable entity with one applicable credit property for which an applicable credit is determined during the taxable year will have a more streamlined registration process than will an applicable entity with multiple applicable credit properties for which multiple applicable credits are determined during the taxable year. Finally, the IRS is committed to ongoing efforts to provide guidance to help applicable entities understand how to qualify for the underlying credits, the pre-filing registration requirements, and the elective payment election process, and these efforts should address the commenters' concerns. Thus, the Treasury Department and the IRS have concluded that these final regulations should

adopt the pre-filing registration process as proposed.

Multiple commenters asked how long the pre-filing registration process is expected to take and what a taxpayer should do if the IRS does not timely issue a registration number. Because the timeframe and procedures of the pre-filing registration process may be modified over time as both the IRS and taxpayers gain experience with it, these final regulations do not contain any such timeframe or procedure. Instead, the Treasury Department and the IRS recommend that taxpayers with these sorts of questions consult the current version of Publication 5884, *Inflation Reduction Act (IRA) and CHIPS Act of 2022 (CHIPS) Pre-Filing Registration Tool User Guide and Instructions*, for the latest guidance on the pre-filing registration process. As of February 2024, Publication 5884 states:

Even though registration is not possible prior to the beginning of the tax year in which the credit will be earned, the IRS recommends that taxpayers register as soon as reasonably practicable during the tax year. The current recommendation is to submit the pre-filing registration at least 120 days prior to when the organization or entity plans to file its tax return. This should allow time for IRS review, and for the taxpayer to respond, if the IRS requires additional information before issuing the registration numbers.

One commenter recommended a safe harbor if the pre-filing registration was completed by the registrant within a certain time period prior to filing. These final regulations do not adopt this suggestion because the timing of the submission is only one factor; the quality and accuracy of information of the provided information is also a factor. Further, as the IRS and taxpayers gain experience with the pre-filing registration portal, the timing of processing submissions may change, making any proposed safe harbor period obsolete.

One commenter recommended that the final regulations provide that an election could be made prior to receiving a registration number if the applicable entity or electing taxpayer completed the pre-filing registration process but had not yet received a registration number, suggesting that an amended return could be filed upon receipt of

the registration number. These final regulations continue to provide that an applicable entity or electing taxpayer that does not obtain a registration number or report the registration number on its annual tax return with respect to an otherwise applicable credit property is ineligible to receive any elective payment amount with respect to the amount of any credit determined with respect to that applicable credit property.

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), 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, and that these final regulations provide late election relief for certain taxpayers, assuming the taxpayer has not received an extension of time to file a return, the taxpayer's original return is timely filed, and the 9100 relief requirements are met. See parts II.B.2 and II.B.4 of this Summary of Comments and Explanation of Revisions.

A few commenters asked about the scope of pre-filing registration review and whether taxpayers can appeal any denials of registration numbers. Section 7803(e)(3) of the Code provides that it is the function of Appeals to resolve Federal tax controversies without litigation. Decisions made by the IRS relating to the denial, suspension, or revocation of a registration number are not Federal tax controversies within the meaning of section 7803(e)(3) because registration is too attenuated and

separate from any tax liability of the applicable entity or electing taxpayer. Publication 5884 describes the IRS review, and opportunity for taxpayers to respond with additional information, of pre-filing registration submissions. In cases in which a pre-filing registration submission is incomplete, the IRS will attempt to contact the registrant using the information provided to indicate deficiencies with the registration prior to making a determination. However, once the IRS determines that a registration number should not be given, the registrant may not appeal the denial unless the IRS and Appeals agree that such review is available and the IRS provides the time and manner for such review.

A few commenters suggested that pre-filing registration include a “pre-approval process” or “pre-approval certification” that ensures that applicable entities would be able to make elective payment elections for their projects. A few of these commenters sought the distribution of cash refunds earlier than the filing of a return; for example, when a project is placed in service or when pre-filing registration is complete, perhaps by allowing for third-party attestations or verification of initial pre-filing information. One commenter asked that the process of obtaining a registration number provide as much assurance as possible for applicants that they are indeed eligible for the applicable credit for which they intend to make an elective payment election, opining that the pre-filing registration portal should function as a checklist, so an applicant should have reasonable assurance that it will be eligible for the applicable credits if the information it provides is accurate. This commenter stated that, similar to pre-qualifying for a mortgage loan before purchasing a home, those who receive registration numbers should reasonably be able to expect to receive an elective payment, barring any significant changes in project design or entity status.

The pre-filing registration process is not a guarantee that a project will qualify for an applicable credit for 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. Compliance with the underlying credit requirements is reported and verified in additional detail on the annual tax return, and, as those requirements are provided in Code sections outside of section 6417, are largely outside the scope of these final regulations. Further, section 6417(d)(4) provides that the payment is treated as being made by the applicable entity on the later of the due date for the return or the date the return is actually filed, so the statute does not permit the IRS to make any payments earlier than such dates. Thus, these final regulations do not adopt the commenters' suggestions.

One commenter asked that the portal allow users to track where they are in the approval process and allow for a transparent and expedited appeals process if the clean energy project is deemed ineligible for a registration number. While outside the scope of these final regulations, the Treasury Department and the IRS note that the pre-filing registration portal does allow users to track where they are in the approval process. See Publication 5884.

Proposed §1.6417-5(b)(5)(vii)(D) would have required that, to complete the pre-filing registration process, registrants must provide information as to the beginning of construction date and the placed in service date of the applicable credit property. A few commenters requested that entities be able to complete pre-filing registration prior to property being placed in service, such as for residential or small commercial systems or for Alaska Native villages and other Tribal entities. Another commenter requested that the final regulations require registration more than 60 days before construction starts for prevailing wage and apprenticeship (PWA) purposes. The Treasury Department 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. The Treasury Department and the IRS have also determined that it is not necessary to require registration prior to construction for PWA purposes. Thus, these final regulations adopt proposed §1.6417-5(b)(5)(vii)(D) without change.

Multiple commenters asked that the final regulations allow the option to group multiple qualified facilities as a “single project” that would obtain a single registration number, or that consolidated filings be available for multiple small projects.

Commenters asked that the final regulations apply Section 4.04 of Notice 2013-29, 2012-20 I.R.B. 1085, which provides that multiple qualified facilities may be treated as a single project for the “beginning of construction” purposes, provided the facilities share certain characteristics, such as common ownership, contiguous location, common PPA, or common permits. A commenter suggested having a “Master Registration Agreement” to allow issuing a single registration number as a single master project instead of a “thousand or more” registration numbers which would burden the applicable entity as well as the IRS.

The definition of applicable credit property in section 6417 is based on the relevant rules for the underlying applicable credit, and changes to the definition of particular properties under the underlying Code sections is outside the scope of this rulemaking. If such underlying Code section allows grouping to determine a qualified property, then grouping for purposes of a registration number is permitted. If such definition does not allow grouping, then each applicable credit property must be registered separately; however, for some applicable credits, the pre-filing registration portal allows applicable credit property information to be uploaded by way of a

spreadsheet file (bulk upload). See Publication 5884.

One commenter asked that the text of §1.6417-5 be amended to specifically include the words “restricted tax exempt amounts.” These final regulations do not adopt this suggestion because the term “the source of funds the taxpayer used to acquire the property” found in §1.6417-5 includes restricted tax exempt amounts (as described in Section II.C.3 of this Summary of Comments and Explanation of Revisions) and may also include information about other sources of funding that the IRS has determined is necessary for tax administration.

One commenter asked that applicable entities and electing taxpayers be required to state during pre-filing registration whether they intend to qualify for the prevailing wage and apprenticeship bonus amount. These final regulations do not adopt this comment because the pre-filing registration process is primarily intended to verify that the applicant is an applicable entity and that the registered property is an applicable credit property. Calculation of the credit amount (including qualifying for any bonus amounts that would increase the base credit amount) is done on the annual return. However, the Treasury Department and the IRS will monitor the pre-filing registration process to determine whether requesting additional information is needed to prevent duplication, fraud, improper payments, or excessive payments under section 6417.

One commenter asked that the final regulations allow an applicable entity to use a certificate, permit, or evidence of ownership, rather than all three, during pre-filing registration, especially since applicable entities are required to maintain books and records supporting the underlying credit. Proposed §1.6417-5(b)(5)(vii)(C) would have required an applicable entity or electing taxpayer to provide information related to applicable credit properties, including “any” supporting documentation relating to the construction or acquisition of the applicable credit property. The Treasury Department and the IRS did not intend for proposed §1.6417-5(b)(5)(vii)(C) to require all supporting

documentation to be provided during the pre-filing registration process. Rather, the intent was to require information sufficient to verify the applicable credit property. In response to the comment, these final regulations remove the word “any” from the provision so that it now reads “[s]upporting documentation relating to the construction or acquisition of 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 February 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.

One commenter recommended that the Treasury Department and the IRS consider authorizing users to renew their registrations on an annual basis rather than submit entirely new registrations each year. Several commenters stated that renewal of registration numbers should not be required because an annual renewal is a significant burden on taxpayers and may disincentivize taxpayers from undertaking a production tax credit project. A few commenters stated that renewal should not be required if the project is extended or delayed from going into operation or if there is no change in the relevant facts with respect to the facility, and one of these commenters requested that registration numbers be valid for multiple years for public projects that are more likely to be delayed. Several commenters suggested that, if no factual information required for

the pre-filing registration process has changed, then the registration portal should provide an expedited or streamlined process such as a “short form.”

Proposed §1.6417-5(c)(3) provided, and these final regulations also 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.” Thus, any changes to the pre-filing registration process to make it be more streamlined for renewals will be addressed 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.

A commenter asked whether two unrelated taxpayers who own separate applicable credit properties (for example, a single process train under section 45Q and a qualified facility as defined in section 45Z(d)(4)), could each complete the preregistration process so long as such taxpayers ultimately make an elective payment election or a transfer election under section 6418 in accordance with the qualification rules. The commenter added it did not expect that both taxpayers would be able to claim their respective tax credits in the same taxable year. The commenter seems to misunderstand that pre-filing registration and elective payment elections are made on the basis of individual applicable credit properties, so to the extent there are two applicable credit properties, separate registration numbers are required. A registration number can only be obtained by the entity who owns the underlying applicable credit property and conducts the activities giving rise to the credit or, in the case of section 45X (under which ownership of applicable credit property is not required), be considered (under the section 45X regulations) the taxpayer with respect to which the section 45X credit is determined. Further, a registration number is valid only for the taxable year for which it is obtained.

A few commenters recommended that tax professionals be allowed to apply for

registration numbers for their clients. The Treasury Department and the IRS note that the proposed regulations would not have restricted a taxpayer from authorizing a representative to apply for a registration number on behalf of the taxpayer, and these final regulations similarly do not do so. See Publication 5884, which provides that a person who wishes to access Energy Credits Online on behalf of a taxpayer must authorize an IRS Energy Credits Online account by selecting "Start Authorization." These final regulations modify §1.6417-5(c)(5) to clarify that a valid registration number is one that was assigned to the particular taxpayer during the pre-registration process.

A commenter requested clarification that persons completing pre-filing registration documentation on behalf of applicable entities do not, by virtue of such activity, become "tax return preparers." The determination of whether a person is a tax return preparer, as defined under section 7701(a)(36), is based on facts and circumstances that are outside of the scope of these final regulations.

VI. Special Rules

Section 6417(d)(6) provides rules relating to excessive payment, and section 6417(g) provides rules relating to basis reduction and recapture. Proposed §1.6417-6 would have implemented these provisions.

A. Excessive payments

Pursuant to section 6417(d)(6), proposed §1.6417-6(a) would have provided that the IRS may determine that an amount treated as a payment made by an applicable entity under proposed §1.6417-2(a)(1)(i) or an electing taxpayer under proposed §1.6417-2(a)(2)(i), or the amount of the payment made to a partnership electing taxpayer pursuant to proposed §1.6417-2(a)(2)(ii), constitutes an excessive payment. Proposed §1.6417-6(a) would have provided that, in the case of an excessive payment determined by the IRS, the amount of chapter 1 tax imposed on the applicable entity or electing taxpayer for the taxable year in which the excessive payment determination is

made is increased by an amount equal to the sum of (1) the amount of such excessive payment, plus (2) an amount equal to 20 percent of such excessive payment (additional 20 percent tax). This would be the case even if the applicable entity or electing taxpayer is otherwise not subject to chapter 1 tax. If the additional 20 percent tax is applicable, it would apply in addition to any penalties, additions to tax, or other amounts applicable under the Code. The additional 20 percent tax amount would not apply if the applicable entity or electing taxpayer demonstrates to the satisfaction of the IRS that the excessive payment resulted from reasonable cause. The preamble to the proposed regulations stated that the Treasury Department and the IRS anticipated that existing standards of reasonable cause would inform the determination by the IRS of whether reasonable cause has been demonstrated for this purpose.

Proposed §1.6417-6(a)(3) would have defined “excessive payment” as an amount equal to the excess of (1) the amount treated as a payment under proposed §1.6417-2(a)(1)(i) or proposed §1.6417-2(a)(2)(i), or the amount of the payment made pursuant to proposed §1.6417-2(a)(2)(ii), with respect to such facility or property for such taxable year, over (2) the amount of the credit that, without application of section 6417, would be otherwise allowable (as described in parts II.C and II. D. or part IV of this Summary of Comments and Explanation of Revisions and without regard to section 38(c)) under the Code with respect to such facility or property for such taxable year.

Commenters asked for “regulatory relief” from the excessive payment rules, and whether appeals rights, deficiency procedures, and the right to petition the Tax Court apply to excessive payment determinations by the IRS. Any excessive payment determination will be made by the IRS under established examination procedures and these final regulations do not except any taxpayers or any calculations from this process.

Several commenters sought clarification of the definition and application of

reasonable cause, including requesting additional factors or examples (such as the absence of fraud, reliance on a project labor agreement, excessive payments that stem from labor standards noncompliance, or the misallocation of general versus earmarked funding). Multiple commenters asked that reasonable cause be interpreted broadly to include a taxpayer's "reasonable effort" or "good faith." Another commenter recommended the final regulations include a rebuttable presumption that applicable entities have reasonable cause because they lack internal resources, tax expertise, and experience in the initial period of elective payment implementation. Commenters also asked for guidance on reasonable cause and the PWA bonus amount. The Treasury Department and the IRS recognize that taxpayers operating under certain tax rules for the first time will desire certainty. However, reasonable cause standards are already well-established under case law and administrative and regulatory authorities. For example, a taxpayer that receives an excessive payment may assert defenses that are commonly raised by taxpayers in other situations in which the IRS has asserted an addition to tax. Section 1.6664-4, for example, provides guidance related to reasonable cause in the context of accuracy-related penalties under section 6662. Comments regarding reasonable cause standards as they relate to specific provisions concerning increased credit or deduction amounts available for taxpayers satisfying PWA requirements are outside the scope of these final regulations. Thus, these final regulations continue to provide that existing standards and authorities for determining reasonable cause apply for purposes of the additional 20 percent tax amount, and do not adopt commenters' suggestions to create new, special rules for certain types of entities or for purposes of section 6417.

As described in part II.C.2 of this Summary of Comments and Explanation of Revisions, commenters requested that the final regulations clarify whether a taxpayer could amend its return to adjust the elective payment amount and avoid incurring the

excessive payment addition to tax. These final regulations clarify that, if an applicable entity or electing taxpayer amends its tax return or files an AAR before the IRS opens an examination, and the amended return or AAR adjusts the elective payment amount to the amount properly determined with respect to the applicable entity or electing taxpayer, then the excessive payment provisions of section 6417(d)(6) and §1.6417-6(a) would not apply.

B. Basis reduction and recapture

Section 6417(g) provides basis reduction and recapture rules. It states that, except as otherwise provided in section 6417(d)(2)(A), rules similar to the rules of section 50 apply for purposes of section 6417. (Section 6417(g) erroneously refers to section 6417(c)(2)(A), a provision that does not exist, and it is evident that such reference was intended to be to section 6417(d)(2)(A). That error is accounted for in these final regulations.) Proposed §1.6417-6(b) would have provided these rules.

One commenter addressed basis reduction, requesting that the basis reduction under section 50(c)(3) not apply to a taxable electric cooperative that is an applicable entity under the statute. The commenter stated that electric cooperatives seldom dispose of or sell any significant assets; instead, they typically retire the assets once they are no longer used and useful in providing electric service. The commenter also stated that taxable electric cooperatives typically have little to no tax liability and utilize longer straight-line methods of tax depreciation; as a result, there is no increase in tax that may result from reduced depreciation deductions.

The Treasury Department and the IRS note that most applicable entities listed in section 6417(d)(1)(A) have little or no tax liability and have concluded that, as section 6417(g) states that rules “similar to” the rules of section 50 apply for purposes of section 6417 and there does not appear to be any valid reason to treat a taxable rural electric cooperative differently from other applicable entities with respect to this rule, these final

regulations should not adopt this suggestion.

A commenter asked that the final regulations include an exception to the recapture rules for certain sales by applicable entities, for example, a sale to a party that would (1) be a more suitable operator and (2) be able to monetize tax depreciation (unlike applicable entities in most circumstances). The Treasury Department and the IRS have determined that allowing such exceptions would be too far of a departure from the general rules of section 50, as section 6417(g) provides that rules similar to section 50 apply. Section 50(a) provides that if, during any taxable year, investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the taxpayer, before the close of the recapture period (which is five years after the property is placed in service), then the tax under chapter 1 for such taxable year is increased by the recapture percentage. To provide an exception for sales to a party that the seller determines to be a more suitable operator, or because the buyer would be able to take a depreciation deduction, would severely limit the application and congressional purpose of section 50. Thus, these final regulations do not adopt this comment.

VII. Comments that are Outside the Scope of These Final Regulations

Several commenters noted typos or corrections to the proposed regulations, which were generally corrected in these final regulations. In addition, several categories of comments were outside the scope of these final regulations but are generally summarized below.

A. Requests to streamline or simplify the process

In addition to general requests to streamline the pre-filing registration process, a few commenters asked that the IRS prioritize support for low-income and disadvantaged communities, and several commenters requested that their particular entity be eligible for a simplified process. One commenter requested that the final

regulations eliminate the tax return requirement for governmental entities that do not have a Federal tax obligation, and another commenter requested a “waiver process.” The Treasury Department and the IRS acknowledge the potential for complexity for applicable entities and electing taxpayers seeking to make elective payment elections, especially for taxpayers who have not historically had a return-filing obligation, and have sought to balance taxpayer compliance burdens with the need to ensure payments are being correctly made to applicable entities and electing taxpayers. The proposed regulations specifically requested comments on methods to reduce paperwork burden or burdens on small entities. While these final regulations do not adopt comments recommending a streamlined process for certain taxpayers, including comments suggesting the removal of a return-filing requirement, the Treasury Department and the IRS will continue to monitor the elective payment process to determine whether there are areas in which more efficiencies can be created.

B. Requests for plain language guidance or other assistance

Multiple commenters asked for additional help in accessing applicable credits, including developing and delivering a far-reaching awareness campaign; providing a webinar or workshop to provide clear guidance and clarification to some of the issues raised; providing IRS staff to answer questions via email, telephone, or in-person outreach or via a taxpayer customer service portal and ensuring this support is culturally appropriate and language-accessible; publishing straightforward materials (for example, a checklist of necessary steps) to claim credits; publishing templates, filing manuals, sample forms, and documentation examples; providing clear examples of timelines, including for entities with different tax filing years; providing regular updates on when these credits will expire; testing approaches with early potential users and using feedback to adjust as necessary; collaborating with other agencies; leveraging community partnerships; and expanding efforts to proactively consult communities with

the greatest barriers to access, among other things.

The Treasury Department and the IRS acknowledge the learning curve many taxpayers will face in registering for and making elective payment elections for applicable credits and intend to provide as much additional assistance as possible to taxpayers. The Treasury Department and the IRS are endeavoring to provide as much plain language guidance as possible to taxpayers to expand access and uptake of applicable credits. As previously discussed, the Treasury Department and the IRS will monitor the pre-filing registration and filing processes and have already embarked on many of these recommendations. For example, as of the publication of these final regulations, the Treasury Department and the IRS have conducted webinars; issued FAQs; published information on IRS.gov¹² on how taxpayers can complete the pre-filing registration process; and have held “office hours” with taxpayers offering assistance with the pre-filing registration process.

One commenter recommended creation of a simple online “elective payment amount estimator” tool that would estimate (without guarantees) the elective payment amount and the timing of key actions (for example, when to register and file, when receipt of payment is estimated) that could aid taxpayers considering the making of an elective payment election. Such a tool, according to the commenter, would facilitate bridge financing by assisting, for example, school construction authorities or green banks by estimating future elective payment amounts. It is not possible for the IRS to estimate the elective payment amount 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).

C. Tax exempt bonds

¹² For additional information, see <https://www.irs.gov/credits-deductions/elective-pay-and-transferability>.

The proposed regulations did not contain any rules specifically addressing the use of tax-exempt bond financing. However, multiple commenters had questions about the interplay between tax-exempt bonds and section 6417. These questions generally are outside of the scope of these final regulations because the use of proceeds of tax-exempt bonds under section 103 may impact the amount of a particular applicable credit in the underlying Code sections (such as sections 45 and 48), and such reduction in the credit amount occurs before the application of section 6417 and independently from the application of section 6417.

One commenter requested that the final regulations clarify that the amount received pursuant to an elective payment election is not treated as “proceeds” of a tax-exempt bond issue, which would be subject to use and investment limits under the tax-exempt bond rules. This commenter stated that, if the payment were treated as proceeds of a bond issue, the use of tax-exempt bond financing could ruin the economics of the deal. The Treasury Department and the IRS confirm that section 6417(a) provides that the applicable credit is treated as a payment against the tax imposed by subtitle A and, therefore, the amount received as an elective payment is not proceeds of a tax-exempt bond issue.

Multiple commenters addressed the reduction to the section 45 credit required by section 45(b)(3) (section 45(b)(3) credit reduction) for the use of tax-exempt bond proceeds and its interaction with section 6417(a). One commenter requested clarification that the section 45(b)(3) credit reduction is not required if parties use tax-exempt bridge financing for credit property and retire it before the facility is placed in service. One commenter recommended that project owners be granted permission to use the tax-exempt bond allocation rules (that is, the allocation rules for purposes of determining a bond’s tax-exempt status) to determine the percentage of tax-exempt bond financing utilized and calculate any reduction necessary if energy credits are

utilized. One commenter stated that calculation of the credit reduction percentage should be permitted to occur when the tax-exempt bonds are structured, sold, or issued, because unless additional funds are added to the project, a final allocation of tax-exempt bond proceeds to expenditures under §1.148-6 should not result in a change in the amounts of tax-exempt bond proceeds and other funds for purposes of calculating the credit reduction percentage. One commenter requested examples for local governments or municipal utilities of how the section 45(b)(3) credit reduction affects elective payment amounts. One commenter requested confirmation that the cost determination necessary to calculate the extent of any section 45(b)(3) credit reduction with respect to a production tax credit facility should be based on criteria and guidance developed in the context of investment tax credits. One commenter stated that the allocation of tax-exempt bond proceeds for purposes of the section 45(b)(3) credit reduction to property that is qualified or non-qualified for a credit within a larger facility that includes both types of property should not impact the application of the bond rules under §1.141-6 relating to private business use. This commenter also stated there should be no requirement that the allocations under section 45(b)(3) and §1.141-6 be consistent with regards to floating allocations of sources of funding to uses. One commenter recommended that the final regulations treat tax-exempt bond proceeds as automatically allocated to any portions of the overall facility that are not part of the "qualified facility" (as that term is used in section 45(b)(3)).

The rules for the allocation of tax-exempt bond proceeds for purposes of the credit reduction fraction under section 45(b)(3) and §1.148-6(d) are generally outside the scope of these final regulations. Section 1.148-6(d) provides that an issuer must account for the allocation of proceeds to expenditures not later than 18 months after the later of the date the expenditure is paid or the date the project, if any, that is financed by the issue is placed in service. Further, the allocation must be made in any event by the

date 60 days after the fifth anniversary of the issue date or the date 60 days after the retirement of the issue.

One commenter requested that, if the rules for allocation of tax-exempt bond proceeds to expenditures under §1.148-6 are applied to credit reduction for tax-exempt bond financing under section 45(b)(3), the final regulations should provide an automatic extension to file a superseding return to reflect changes with regards to tax-exempt financing, or issue other guidance to accommodate this situation. As discussed in part II.B.2 of this Summary of Comments and Explanation of Revisions, these final regulations allow an applicable entity or electing taxpayer that has made an elective payment election on an original return to file a superseding return if permissible, or to amend their return or file an AAR to the extent the amount of the applicable credit is later determined to need adjustment.

Commenters asked that excessive payment provisions not apply if allocations of tax-exempt bond proceeds to expenditures under §1.148-6 occur after a project is placed in service. As described in part IV.A of this Summary of Comments and Explanation of Revisions, excessive payment provisions may apply if the amount the applicable entity treats as a payment under section 6417(a) (including the allocations of tax-exempt bond expenditures) is greater than the amount of the credit that, without application of section 6417, would be otherwise allowable (as determined pursuant to section 6417(d)(2) and without regard to section 38(c)). However, as described in part VI.A of this Summary of Comments and Explanation of Revisions, if a taxpayer amends their return or files an AAR before the IRS opens an examination, then the 20-percent addition to tax does not apply.

One commenter requested guidance that the rules under section 50(c) regarding the reduction of basis (section 50(c) basis reduction rules) and the recapture of credits will not cause tax-exempt bond proceeds to be deallocated from project costs. The

section 50(c) basis reduction rules are outside of the scope of these final regulations. The Treasury Department and the IRS clarify that the section 50(c) basis reduction rules apply to the credit that is determined, but any effect on the allocation or deallocation of tax-exempt bond proceeds occurs outside of these final regulations.

A few commenters asked whether refundable credits pledged as security or used to pay debt service for a bond issue results in a Federal guarantee of the bonds per section 149 of the Code. The Treasury Department and the IRS confirm that a pledge of the refundable credits as security for, or the use of the refundable credits to pay debt service on, the bonds *by itself* does not result in a Federal guarantee of the bonds.

One commenter wanted confirmation that the existing allocation and accounting rules in §1.141-6 apply with respect to the credit reduction for tax-exempt bond financing under section 45(b)(3), whereas another commenter requested that the regulations under section 141 be “modernized” in light of the enactment of section 6417. Regulations under section 141 are outside of the scope of these final regulations.

Commenters requested that the reduction for restricted tax exempt amounts considered in the special rule for investment-related credit property acquired with tax exempt income in proposed §1.6417-2(c)(3) be calculated after the 15 percent credit reduction under section 45(b)(3) related to tax-exempt financing is made. The Treasury Department and the IRS confirm that the rule in §1.6417-2(c)(3) applies after application of any reduction under section 45(b)(3) because determination of the underlying credit amount occurs before the amount is possibly adjusted by section 6417 and the regulations thereunder.

Commenters requested confirmation that the 15-percent credit reduction under section 45(b)(3) for the use of tax-exempt financing is applied separately and independently to each co-tenant's undivided interest in cases in which applicable credit property is held as a TIC or JOA. The Treasury Department and the IRS can confirm

that each co-tenant's undivided interest is an undivided ownership share of the applicable credit property and will be treated as a separate applicable credit property owned by such applicable entity under §1.6417-2(a)(1)(iii). Thus, it will be necessary for each owner to determine whether its undivided ownership share is subject to the reduction under section 45(b)(3).

D. Comments about other Code provisions

Multiple commenters asked about the application of other Code provisions. For example, commenters asked for guidance on the underlying credits or bonus provisions such as the energy communities bonus amount, the prevailing wage and apprenticeship bonus amounts, and the domestic content bonus amount and for domestic content waivers. Commenters asked that the placed in service requirements be clarified or relaxed in various ways. Commenters requested guidance under section 30C, including a map or searchable address database that clearly shows eligible census tracts. Commenters also asked for guidance under sections 45U, 45V, and 48; asked whether the 5 MW maximum threshold for projects qualifying for the Low-Income Bonus to the ITC applies to individual sites or interconnection points; asked what is allowed in the cost basis of the project (e.g., infrastructure costs and soft costs); asked for guidance on the "clean electricity ITC and PTC;" and asked for clarifications regarding 45X facilities (how to designate different parts as different facilities). Commenters asked what methods tax-exempt entities could use to monetize depreciation deductions and that applicable entities should be able to make elective payment elections with respect to section 179D deductions. All of these comments are outside the scope of this rulemaking, which addresses only sections 6417 and 6241.

E. Comments about provisions outside the Internal Revenue Code.

Multiple commenters asked for guidance on provisions that are not a part of the Code. For example, commenters requested (1) guidance on how a city could protect

itself from liability without losing the ability to make an elective payment election because of the per se corporation rule; (2) guidance on how an applicable entity could obtain funding related to payments it expects to receive from making an elective payment election; (3) clarification on whether applicable credits are treated as “proceeds... from any other activities of the Corporation” under 16 U.S.C. 831y; (4) guidance on whether refunds greater than \$5 million will require review by the Joint Committee on Taxation; (5) confirmation that for a partnership (i) with a tax-exempt electric cooperative as a partner, and (ii) that elects under section 761 to be excluded from the application of subchapter K, the basis of the allocable share of property to the tax exempt electric cooperative is determined both by tax law plus any other costs incurred by the tax exempt electric cooperative using book accounting in accordance with generally acceptable accounting principles (GAAP) that are properly capitalizable,¹³ and (6) guidance on whether a municipal utility that builds a qualifying bioenergy project and seeks the tax incentive could also consider implementing an eRINs program with the renewable energy produced, and if so, whether this impacts the tax incentive in any way, or causes a reduction in the incentive. All of these comments are outside the scope of this rulemaking.

Effect on Other Documents

The temporary regulations are removed **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].**

Special Analyses

I. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations

¹³ The commenter stated that tax-exempt electric cooperatives, as tax-exempt entities, use book accounting based on GAAP and Uniform Systems of Account such as provided by the Rural Utilities Service, and stated that it would be helpful to know that, while their initial basis in a partnership asset may have been determined on a tax basis, cost subsequent to the election under section 761 to be excluded from the application of subchapter K that are properly capitalizable under GAAP are also properly includible in the cost basis of a qualifying asset for Federal income tax purposes.

under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6(b) of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (PRA) generally requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in these final regulations contain reporting and recordkeeping requirements. The recordkeeping requirements mentioned within these final regulations are considered general tax records under Section 1.6001-1(e). These records are required for the IRS to validate that taxpayers have met the regulatory requirements and are entitled to make an elective payment election. For PRA purposes, general tax records are already approved by OMB under 1545-0047 for tax-exempt organizations and government entities; 1545-0074 for individuals; and under 1545-0123 for business entities.

These final regulations also mention reporting requirements related to making elections as detailed in §§1.6417-2 and 1.6417-3 and calculating the claim amounts as detailed in §§1.6417-2 and 1.6417-4. These elections will be made by taxpayers on Forms 990-T, 1040, 1120-S, 1065, and 1120; and credit calculations will be made on Form 3800 and supporting forms. These forms are approved under 1545-0047 for tax-exempt organizations and governmental entities; 1545-0074 for individuals; and 1545-0123 for business entities.

These final regulations also mention recapture procedures as detailed in

§1.6417-6. These recaptures are performed using Form 4255. This form is approved under 1545-0047 for tax-exempt organizations and governmental entities; 1545-0074 for individuals; and 1545-0123 for business entities. These final regulations are not changing or creating new collection requirements not already approved by OMB.

These final regulations mention a requirement to register with the IRS to be able to elect payments as detailed in §1.6417-5. The pre-filing registration portal is approved under 1545-2310 for all filers.

The IRS solicited feedback on the collection requirements for reporting, recordkeeping, and pre-filing registration. Although no public comments received by the IRS were directed specifically at the PRA or on the collection requirements, several commenters generally expressed concerns about the burdens associated with the documentation requirements contained in the proposed regulations. As described in the relevant portions of this preamble, the Treasury Department and the IRS believe that the documentation requirements are necessary to administer the elective payment election under section 6417.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present a final regulatory flexibility analysis (FRFA) of the final regulations. The Treasury Department and the IRS have not determined whether these final regulations will likely have a significant economic impact on a substantial number of small entities. This determination requires further study. Because there is a

possibility of significant economic impact on a substantial number of small entities, a FRFA is provided in these final regulations.

Pursuant to section 7805(f) of the Code, this notice of final rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

1. Need for and Objectives of the Rule

These final regulations provide greater clarity to taxpayers that intend to take advantage of the credit monetization mechanism in section 6417. It provides needed definitions, the time and manner to make the election, and information about the pre-filing registration process, among other items. The Treasury Department and the IRS intend and expect that giving taxpayers guidance that allows them to use section 6417 will beneficially impact various industries, delivering benefits across the economy, and reduce economy-wide greenhouse gas emissions.

In particular, section 6417 allows applicable entities to treat an applicable credit as a payment against Federal income taxes and defines applicable entities to include many entities that may not have any tax liability. Allowing entities without sufficient Federal income tax liability to use a business tax credit to instead make an election to receive a refund of any overpayment of taxes created by the elective payment election will increase the incentive for taxpayers to invest in clean energy projects that give rise to applicable credits because it will increase the amount of cash available to those entities, thereby reducing the amount of financing needed for clean energy projects.

2. Significant Issues Raised by Public Comments in Response to the IRFA

There were no comments filed that specifically addressed the Proposed Rules and policies presented in the IRFA. Additionally, no comments were filed by the Chief Counsel of Advocacy of the Small Business Administration.

3. Affected Small Entities

The RFA directs agencies to provide a description of, and if feasible, an estimate of, the number of small entities that may be affected by the final regulations, if adopted. The Small Business Administration's Office of Advocacy estimates in its 2023 Frequently Asked Questions that 99.9 percent of American businesses meet its definition of a small business. The applicability of these final regulations does not depend on the size of the business, as defined by the Small Business Administration. As described more fully in the preamble to these final regulations and in this FRFA, section 6417 and these final regulations may affect a variety of different entities across several different industries as there are 12 different applicable credits for which an elective payment election may be made. Further, the elective payment election for 3 of the applicable credits may be made both by applicable entities and by taxpayers other than applicable entities. Although there is uncertainty as to the exact number of small businesses within this group, the current estimated number of respondents to these final rules is 20,000 taxpayers, as described in the Paperwork Reduction Act section of the preamble.

The Treasury Department and the IRS expect to receive more information on the impact on small businesses once taxpayers start to make the elective payment election using the guidance and procedures provided in these final regulations.

4. Impact of the Rules

These final regulations provide rules for how taxpayers can take advantage of the section 6417 credit monetization regime. Taxpayers that elect to take advantage of section 6417 will have administrative costs related to reading and understanding the rules as well as recordkeeping and reporting requirements because of the pre-filing registration and tax return requirements. The costs will vary across different-sized entities and across the type of project(s) in which such entities are engaged.

The pre-filing registration process requires a taxpayer to register itself as

intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits. This process must be completed to receive a registration number for each applicable credit property with respect to which the applicable taxpayer intends to make an elective payment election. To make the elective payment election and claim the credit, the taxpayer must file an annual tax return. The reporting and recordkeeping requirements for that return would be required for any taxpayer that is claiming a general business credit, regardless of whether the taxpayer was making an elective payment election under section 6417.

Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of the preamble.

5. Alternatives Considered

The Treasury Department and the IRS considered alternatives to the final regulations. For example, in adopting the pre-filing registration requirements, the Treasury Department and the IRS considered whether such information could be obtained at the filing of the relevant annual tax return. However, the Treasury Department and the IRS decided that such an option would increase the opportunity for duplication, fraud, improper payments, or excessive payments under section 6417 as well as potentially delaying payments to qualifying taxpayers. Section 6417(d)(5) specifically authorizes the IRS to require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6417 as a condition of, and prior to, any amount being treated as a payment that is made by an applicable entity under section 6417. As described in the preamble to these final regulations, these final rules

carry out that Congressional intent as pre-filing registration allows for the IRS to verify certain information in a timely manner and then process the annual tax return with minimal delays. Having a distinction between applicable entities or electing taxpayers that are small businesses versus others making an elective payment election would create a scenario in which a subset of taxpayers seeking to make an elective payment election would not have been verified or received registration numbers, potentially delaying payment not only to them but to other taxpayers seeking to use section 6417.

Additionally, in considering how taxpayers should claim the credits and make the elective payment election, the Treasury Department and the IRS considered creating an election system outside of the tax return filing system. However, it was determined that such a process would not be an efficient use of resources, especially given the statutory due date to make an election, which is the return filing date for the taxpayers with a filing obligation (which would include small business taxpayers). The Treasury Department and the IRS decided that the most efficient and reliable method is to use the existing method for claiming business tax credits; that is, the filing of the annual tax return. To create a different method for small businesses making an elective payment election than for a small business claiming the credit (or a larger business making an elective payment election or claiming the credit) would create an additional burden for both small businesses and the IRS, without any commensurate benefit.

The Treasury Department and the IRS solicited comments on the requirements in the proposed regulations, including specifically whether there are less burdensome alternatives that do not increase the risk of duplication, fraud, improper payments, or excessive payments under section 6417. The comments received in response to this request have been discussed in the preceding paragraphs.

6. Duplicative, Overlapping, or Conflicting Federal Rules

These final regulations do not duplicate, overlap, or conflict with any relevant

Federal rules. As discussed above, these final regulations merely provide procedures and definitions to allow taxpayers to take advantage of the ability to make an elective payment election. The Treasury Department and the IRS solicited input from interested members of the public about identifying and avoiding overlapping, duplicative, or conflicting requirements. No comments were received in response to this request.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Indian tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). These final regulations do not include any Federal mandate that may result in expenditures by State, local, or Indian tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. These final regulations do not have federalism implications and do not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

VI. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) prohibits an agency from publishing any rule that has Tribal implications if the rule either imposes substantial, direct compliance costs on Indian tribal governments, and is not required by statute, or preempts Tribal law, unless the agency

meets the consultation and funding requirements of section 5 of the Executive Order. These final regulations do not have substantial direct effects on one or more federally recognized Indian tribes and do not impose substantial direct compliance costs on Indian tribal governments within the meaning of the Executive Order.

Nevertheless, on July 17, 2023, the Treasury Department and the IRS held a consultation with Tribal leaders requesting assistance in addressing questions related to the proposed rules published on June 21, 2023, which informed the development of these final regulations.

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 et seq.), the Office of Information and Regulatory Affairs designated this rule as a major rule as defined by 5 U.S.C. 804(2).

Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at www.irs.gov.

Drafting Information

The principal authors of these final regulations are Jeremy Milton and James Holmes, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes,

Penalties, Reporting and recordkeeping requirements.

Amendments to the Regulations

Accordingly, the Treasury Department and the IRS amend 26 CFR parts 1 and 301 as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Sections 1.6417-0 through 1.6417-6 also issued under 26 U.S.C. 6417(h).

* * * * *

Par. 2. Sections 1.6417-0 through 1.6417-6 are added to read as follows:

Sec.

* * * * *

1.6417-0 Table of contents.

1.6417-1 Elective payment of applicable credits.

1.6417-2 Rules for making elective payment elections.

1.6417-3 Special rules for electing taxpayers.

1.6417-4 Elective payment election for electing taxpayers that are partnerships or S corporations.

1.6417-5 Additional information and registration.

1.6417-6 Special rules.

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§1.6417-0 Table of contents.

This section lists the table of contents for §§1.6417-1 through 1.6417-6.

§1.6417-1 Elective payment election of applicable credits.

(a) In general.

(b) Annual Tax Return.

(c) Applicable entity.

(d) Applicable credit.

(e) Applicable credit property.

(f) Disregarded entity.

(g) Electing taxpayer.

(h) Elective payment amount.

- (i) Elective payment election.
- (j) Guidance.
- (k) Indian tribal government.
- (l) Partnership.
- (m) S corporation.
- (n) Section 6417 regulations.
- (o) Statutory references.
- (p) U.S. territory.
- (q) Applicability date.

§1.6417-2 Rules for making elective payment elections.

- (a) Elective payment elections.
- (b) Manner of making election.
- (c) Determination of applicable credit.
- (d) Timing of payment.
- (e) Denial of double benefit.
- (f) Applicability date.

§1.6417-3 Special rules for electing taxpayers.

- (a) In general.
- (b) Elections with respect to the credit for production of clean hydrogen.
- (c) Election with respect to the credit for carbon oxide sequestration.
- (d) Election with respect to the advanced manufacturing production credit.
- (e) Election for electing taxpayers.
- (f) Applicability date.

§1.6417-4 Elective payment election for electing taxpayers that are partnerships or S corporations.

- (a) In general.
- (b) Elections.
- (c) Effect of election.
- (d) Determination of amount of the credit.
- (e) Partnerships subject to subchapter C of chapter 63.
- (f) Applicability date.

§1.6417-5 Additional information and registration.

- (a) Pre-filing registration and election.
- (b) Pre-filing registration requirements.
- (c) Registration number.
- (d) Applicability date.

§1.6417-6 Special rules.

- (a) Excessive payment.
- (b) Basis reduction and recapture.
- (c) Mirror code territories.
- (d) Partnerships subject to subchapter C of chapter 63 of the Code.
- (e) Applicability date.

§1.6417-1 Elective payment election of applicable credits.

- (a) *In general.* An applicable entity may make an elective payment election with

respect to any applicable credit determined with respect to such applicable entity in accordance with section 6417 of the Code and the section 6417 regulations.

Paragraphs (b) through (p) of this section provide definitions applicable to the section 6417 regulations. See §1.6417-2 for rules and procedures under which all elective payment elections must be made, rules for determining the amount and the timing of payments, and statutory rules denying double benefits. See §1.6417-3 for special rules pertaining to electing taxpayers. See §1.6417-4 for special rules pertaining to electing taxpayers that are partnerships or S corporations. See §1.6417-5 for pre-filing registration requirements and other information required to make any elective payment election effective. See §1.6417-6 for special rules related to excessive payments, basis reduction and recapture, any U.S. territory with a mirror code tax system, and payments made to partnerships subject to subchapter C of chapter 63 of the Code.

(b) *Annual tax return.* The term *annual tax return* means the following returns (and for each, any successor return)—

(1) For any taxpayer normally required to file a tax return with the IRS on an annual basis, such return (including the Form 1040 for individuals; the Form 1120 for corporations, certain rural electric cooperatives, and certain agencies and instrumentalities; the Form 1120-S for S corporations; the Form 1065 for partnerships; and the Form 990-T for organizations subject to tax imposed by section 511 of the Code or a proxy tax under section 6033(e) or that are required to file a Form 990 pursuant to section 6033(a));

(2) For any taxpayer that is not normally required to file a tax return with the IRS on an annual basis (such as taxpayers located in the U.S. territories), the return they would be required to file if they were located in the United States, or, if no such return is required (such as for governmental entities), the Form 990-T; and

(3) For taxpayers filing a return for a taxable year of less than 12 months (short

year), the short year tax return.

(c) *Applicable entity.* The term *applicable entity* means--

(1) Any organization exempt from the tax imposed by subtitle A of the Code--

(i) By reason of subchapter F of chapter 1 of subtitle A; or

(ii) Because it is the government of any U.S. territory or a political subdivision thereof;

(2) Any State, the District of Columbia, or political subdivision thereof;

(3) An Indian Tribal government or a subdivision thereof;

(4) Any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(m));

(5) The Tennessee Valley Authority;

(6) Any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas as described in section 1381(a)(2)(C) of the Code; and

(7) An agency or instrumentality of any applicable entity described in paragraph (c)(1)(ii) or (c)(2) or (3) of this section.

(d) *Applicable credit.* The term *applicable credit* means each of the following:

(1) So much of the credit for alternative fuel vehicle refueling property determined 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, 2012 (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 determined 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).

(12) The clean electricity investment credit determined under section 48E of the Code (section 48E credit).

(e) *Applicable credit property.* The term *applicable credit property* means each of the following units of property with respect to which the amount of an applicable credit is determined:

(1) In the case of a section 30C credit, a *qualified alternative fuel vehicle refueling property* described in section 30C(c).

(2) In the case of a section 45 credit, a *qualified facility* described in section 45(d).

(3) In the case of a section 45Q credit, a component of carbon capture equipment within a *single process train* described in §1.45Q-2(c)(3).

(4) In the case of a section 45U credit, a *qualified nuclear power facility* described in section 45U(b)(1).

(5) In the case of a section 45V credit, a *qualified clean hydrogen production facility* described in section 45V(c)(3).

(6) In the case of a section 45W credit, a *qualified commercial clean vehicle* described in section 45W(c).

(7) In the case of a section 45X credit, a facility that produces eligible components, as described in guidance under sections 48C and 45X.

(8) In the case of a section 45Y credit, a *qualified facility* described in section 45Y(b)(1).

(9) In the case of a section 45Z credit, a *qualified facility* described in section 45Z(d)(4).

(10) *Section 48 credit property--(i) In general.* In the case of a section 48 credit and except as provided in paragraph (d)(10)(ii) of this section, an *energy property* described in section 48.

(ii) *Pre-filing registration and elections.* At the option of an applicable entity or electing taxpayer, and to the extent consistently applied for purposes of the pre-filing registration requirements of §1.6417-5 and the elective payment election requirements of §§1.6417-2 through 1.6417-4, an *energy project* as described in section 48(a)(9)(A)(ii) and defined in guidance.

(11) In the case of a section 48C credit, an *eligible property* described in section 48C(c)(2).

(12) In the case of a section 48E credit, a *qualified facility* described in section 48E(b)(3) or, in the case of a section 48E credit relating to a qualified investment with respect to energy storage technology, an *energy storage technology* described in section 48E(c)(2).

(f) *Disregarded entity*. The term *disregarded entity* means an entity that is disregarded as an entity separate from its owner for Federal income tax purposes under §§301.7701-1 through 301.7701-3 of this chapter. 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 is disregarded as an entity separate from its owner for purposes of section 6417.

(g) *Electing taxpayer*. The term *electing taxpayer* means any taxpayer that is not an applicable entity described in paragraph (c) of this section but makes an election in accordance with §§1.6417-2(b), 1.6417-3, and, if applicable, 1.6417-4, to be treated as an applicable entity for a taxable year with respect to applicable credits determined with respect to an applicable credit property described in paragraph (e)(3), (5), or (7) of this section.

(h) *Elective payment amount--(1) In general*. The term *elective payment amount* means, with respect to an applicable entity or an electing taxpayer that is not a partnership or an S corporation, the applicable credit(s) for which an applicable entity or electing taxpayer makes an elective payment election to be treated as making a payment against the tax imposed by subtitle A for the taxable year, which is equal to the sum of--

(i) The amount (if any) of the current year applicable credit(s) allowed as a general business credit under section 38 for the taxable year, as provided in §1.6417-

2(e)(2)(iii), and

(ii) The amount (if any) of unused current year applicable credits that would otherwise be carried back or carried forward from the unused credit year under section 39 and that are treated as a payment against tax, as provided in §1.6417-2(e)(2)(iv).

(2) *Elective payment amount with respect to partnerships and S corporations.*

With respect to an electing taxpayer that is a partnership or an S corporation, the term *elective payment amount* means the sum of the applicable credit(s) for which the partnership or S corporation makes an elective payment election and that results in a payment to such partnership or S corporation equal to the amount of such credit(s) (unless the partnership owes a Federal tax liability, in which case the payment may be reduced by such tax liability).

(i) *Elective payment election.* The term *elective payment election* means an election made in accordance with §1.6417-2(b) for applicable credit(s) determined with respect to an applicable entity or electing taxpayer.

(j) *Guidance.* The term *guidance* means guidance published in the *Federal Register* or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the IRS.gov website. See §§601.601 and 601.602 of this chapter.

(k) *Indian Tribal government.* The term *Indian Tribal government* means the recognized governing body of any Indian or Alaska Native Tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the most recent list published by the Department of the Interior in the *Federal Register* pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131) prior to the date on which a relevant elective payment election is made.

(l) *Partnership.* The term *partnership* has the meaning provided in section 761 of

the Code.

(m) *S corporation*. The term *S corporation* has the meaning provided in section 1361(a)(1) of the Code.

(n) *Section 6417 regulations*. The term *section 6417 regulations* means §§1.6417-1 through 1.6417-6.

(o) *Statutory references--(1) Chapter 1*. The term *chapter 1* means chapter 1 of the Code.

(2) *Code*. The term *Code* means the Internal Revenue Code.

(3) *Subchapter K*. The term *subchapter K* means subchapter K of chapter 1.

(4) *Subtitle A*. The term *subtitle A* means subtitle A of the Code.

(p) *U.S. territory*. The term *U.S. territory* means the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(q) *Applicability date*. This section applies to taxable years ending on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. For taxable years ending before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, taxpayers, however, may choose to apply the rules of §§1.6417-1 through 1.6417-4 and 1.6417-6, provided the taxpayers apply the rules in their entirety and in a consistent manner.

§1.6417-2 Rules for making elective payment elections.

(a) *Elective payment elections--(1) Elections by applicable entities--(i) In general*. An applicable entity that makes an elective payment election in the manner provided in paragraph (b) of this section will be treated as making a payment against the Federal income taxes imposed by subtitle A for the taxable year with respect to which an applicable credit is determined in the amount determined under paragraph (c) of this section.

(ii) *Disregarded entities.* If an applicable entity is the owner (directly or indirectly) of a disregarded entity that directly holds an applicable credit property, the applicable entity may make an elective payment election in the manner provided in paragraph (b) of this section for applicable credits determined with respect to the applicable credit property held directly by the disregarded entity.

(iii) *Undivided ownership interests.* If an applicable entity is a co-owner in an applicable credit property through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code to be excluded from the application of subchapter K of the Code, then the applicable entity's undivided ownership share of the applicable credit property will be treated as a separate applicable credit property owned by such applicable entity, and the applicable entity may make an elective payment election in the manner provided in paragraph (b) of this section for the applicable credits determined with respect to such applicable credit property.

(iv) *Partnerships and S corporations not applicable entities.* Partnerships and S corporations are not applicable entities described in §1.6417-1(c), and thus are not eligible to make any election under paragraph (b) of this section, unless the partnership or S corporation is an electing taxpayer. This is the case no matter how many of the partners of a partnership are described in §1.6417-1(c), including if all of a partnership's partners are so described.

(v) *Members of a consolidated group of which an applicable entity is the common parent.* In the case of a consolidated group (as defined in §1.1502-1) the common parent of which is an applicable entity, any member that is an electing taxpayer may make an elective payment election with respect to applicable credits determined with respect to the member. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

(2) Electing taxpayers--(i) Electing taxpayers that are not partnerships or S corporations. An electing taxpayer other than a partnership or an S corporation that has made an elective payment election in accordance with §1.6417-3 and paragraph (b) of this section will be treated as making a payment against the Federal income taxes imposed by subtitle A of the Code for the taxable year with respect to which the applicable credit is determined, in the amount determined under paragraph (c) of this section.

(ii) Electing taxpayers that are partnerships or S corporations. In the case of an electing taxpayer that is a partnership or S corporation that has made an elective payment election in accordance with §§1.6417-3 and 1.6417-4 and paragraph (b) of this section, the Internal Revenue Service will make a payment to such partnership or S corporation equal to the amount of such credit determined under paragraph (c) of this section and §1.6417-4(d) (unless the partnership owes any Federal income tax liability, in which case the payment may be reduced by such tax liability).

(iii) Partners and S corporation shareholders prohibited from making any elective payment election. Under section 6417(c)(1) of the Code, any elective payment election with respect to applicable credit property held directly by a partnership or S corporation must be made by the partnership or S corporation. As provided under section 6417(c)(2), no partner in a partnership, or shareholder of an S corporation, may make an elective payment election with respect to any applicable credit determined with respect to such applicable credit property.

(iv) Disregarded entities. If an electing taxpayer is the owner (directly or indirectly) of a disregarded entity that directly holds any applicable credit property, the electing taxpayer may make an elective payment election in the manner provided in paragraph (b) of this section for applicable credits determined with respect to the applicable credit property held directly by the disregarded entity.

(v) *Undivided ownership interests.* If an electing taxpayer is a co-owner in an applicable credit property through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) to be excluded from the application of subchapter K of the Code, then the electing taxpayer's undivided ownership interest in or share of the applicable credit property will be treated as a separate applicable credit property owned by such electing taxpayer, and the electing taxpayer may make an elective payment election in the manner provided in paragraph (b) of this section for the applicable credits determined with respect to such applicable credit property.

(vi) *Members of a consolidated group.* A member of a consolidated group may make an elective payment election with respect to applicable credits determined with respect to the member. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

(3) *Special rules for certain credits—(i) Renewable electricity production credit.* Any election under this paragraph (a) with respect to a section 45 credit—

(A) Applies separately with respect to each qualified facility;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such qualified facility is originally placed in service; and

(C) Applies to such taxable year and to any subsequent taxable year that is within the period described in section 45(a)(2)(A)(ii) with respect to such qualified facility.

(ii) *Credit for carbon oxide sequestration.* Except as provided in §1.6417-3(c), which provides a special rule for electing taxpayers, any election under this paragraph (a) with respect to a section 45Q credit--

(A) Applies separately with respect to the carbon capture equipment originally placed in service by the applicable entity during a taxable year;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such carbon capture equipment is originally placed in service; and

(C) Applies to such taxable year and to any subsequent taxable year that is within the period described in section 45Q(3)(A) or (4)(A) with respect to such equipment.

(iii) *Credit for production of clean hydrogen.* Except as provided in §1.6417-3(b), which provides a special rule for electing taxpayers, any election under this paragraph (a) with respect to a section 45V credit--

(A) Applies separately with respect to each qualified clean hydrogen production facility;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such facility is placed in service (or within the 1-year period after August 16, 2022, for facilities placed in service before December 31, 2022); and

(C) Applies to such taxable year and all subsequent taxable years with respect to such facility.

(iv) *Clean electricity production credit.* Any elective payment election with respect to a section 45Y credit--

(A) Applies separately with respect to each qualified facility;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such facility is placed in service; and

(C) Applies to such taxable year and to any subsequent taxable year that is within the period described in section 45Y(b)(1)(B) with respect to such facility.

(v) *Advanced manufacturing production credit.* Any elective payment election with respect to a section 45X credit applies separately with respect to each facility (whether the facility existed on or before, or after, December 31, 2022) at which a taxpayer produces, after December 31, 2022, eligible components (as defined in section

45X(c)(1)) during the taxable year.

(b) *Manner of making election--(1) In general--(i) Election is made on the annual tax return.* An elective payment election is made on the annual tax return, as defined in §1.6417-1(b), in the manner prescribed by the IRS in guidance, along with any required completed source credit form(s) with respect to the applicable credit property, a completed Form 3800, *General Business Credit*, (or its successor), and any additional information, including supporting calculations, required in instructions.

(ii) *Election must be made on original return.* An election must be made on an original return (including any revisions on a superseding return) filed not later than the due date (including extensions of time) for the original return for the taxable year for which the applicable credit is determined. No elective payment election may be made for the first time on an amended return, withdrawn on an amended return, or made or withdrawn by filing an administrative adjustment request under section 6227 of the Code. A numerical error with respect to a properly claimed elective payment election may be corrected on an amended return or by filing an administrative adjustment request under section 6227 if necessary; however, the applicable entity or electing taxpayer's original return, which must be signed under penalties of perjury, must contain all of the information, including a registration number, required by these final regulations. To properly correct an error on an amended return or administrative adjustment request under section 6227, an applicable entity or electing taxpayer must have made an error in the information included on the original return such that there is a substantive item to correct; an applicable entity or electing taxpayer may not correct a blank item or an item that is described as being "available upon request." There is no relief available under §301.9100-1 or §301.9100-3 of this chapter for an elective payment election that is not timely filed; however, relief under §301.9100-2(b) may apply if the applicable entity or electing taxpayer has not received an extension of time

to file a return after the original due date, has timely filed a return, takes corrective action under §301.9100-2(c) within the six-month extension period, and meets the procedural requirements outlined in §301.9100-2(d).

(2) *Pre-filing registration required.* Pre-filing registration in accordance with §1.6417-5 is a condition for making an elective payment election. An elective payment election will not be effective with respect to credits determined with respect to an applicable credit property unless the applicable entity or electing taxpayer received a valid registration number for the applicable credit property in accordance with §1.6417-5(c) and provided the registration number for each applicable credit property on its Form 3800 (or its successor), and on any required completed source form(s) with respect to the applicable credit property, attached to the tax return, in accordance with guidance.

(3) *Due date for making the election.* To be effective, an elective payment election must be made no later than:

(i) In the case of any taxpayer for which no Federal income tax return is required under sections 6011 or no Federal return is required under 6033(a) of the Code (such as a State; the District of Columbia; an Indian Tribal government; any U.S. territory; a political subdivision of a State, the District of Columbia, or a U.S. territory, or a subdivision of an Indian Tribal government; certain agencies or instrumentalities of a State, the District of Columbia, an Indian Tribal government, or a U.S. territory; or a taxpayer excluded from filing pursuant to section 6033(a)(3)), the 15th day of the fifth month after the end of the taxable year. For purposes of section 6417, an applicable entity that is not required to file a Federal income tax return pursuant to sections 6011 or a Federal return pursuant to 6033(a), but is filing solely to make an elective payment election, may choose whether to file its first return (and thus adopt a taxable year for purposes of section 6417) based upon a calendar or fiscal year, provided that such entity maintains adequate book and records, including a reconciliation of any difference

between its regular books of account and its chosen taxable year, to support making an elective payment election on the basis of its chosen taxable year. Subject to issuance of guidance that specifies the manner in which an entity for which no Federal income tax return is required under sections 6011 or no Federal return is required pursuant to 6033(a) could request an extension of time to file and make the elective payment election, an automatic paperless six-month extension from the 15th day of the fifth month after the end of the taxable year is deemed to be allowed.

(ii) In the case of any taxpayer located in a U.S. territory, the due date (including extensions of time) that would apply if the taxpayer were located in the United States.

(iii) In any other case, the due date (including extensions of time) for the original return for the taxable year for which the election is made, but in no event earlier than February 13, 2023.

(4) *Election is not revocable*—(i) *In general*. Except as provided in paragraphs (b)(4)(ii) and (iii) of this section, any elective payment election, once made, is irrevocable and applies with respect to any applicable credit for the taxable year for which the election is made.

(ii) *Election lasts for a period of years for certain credits*. For applicable entities making elective payment elections with respect to section 45 credits described in §1.6417-1(d)(2) or section 45Y credits described in §1.6417-1(d)(8), the election applies to each taxable year in the 10-year period provided in section 45(a)(2)(A)(ii) or 45Y(b)(1)(B), respectively, beginning on the date the facility was originally placed in service. For applicable entities making elective payment elections with respect to section 45Q credits described in §1.6417-1(d)(3), the election applies to each taxable year in the 12-year period provided in section 45Q(a)(3)(A) or (4)(A) beginning on the date the carbon capture equipment was originally placed in service. For applicable entities making elective payment elections with respect to section 45V credits described

in §1.6417-1(d)(5), the election applies to the taxable year in which the qualified clean hydrogen production facility was originally placed in service and all subsequent taxable years.

(iii) *Electing taxpayers.* For electing taxpayers who make an elective payment election, the election applies for one five-year period per applicable credit property, but such election may be revoked once per applicable credit property, as provided in §1.6417-3.

(5) *Scope of election.* An elective payment election applies to the entire amount of applicable credit(s) determined with respect to each applicable credit property that was properly registered for the taxable year, resulting in an elective payment amount that is the entire amount of applicable credit(s) determined with respect to the applicable entity or electing taxpayer for a taxable year.

(c) *Determination of applicable credit--(1) In general.* In the case of any applicable entity making an elective payment election, any applicable credit is determined--

(i) Without regard to section 50(b)(3) and (4)(A)(i) of the Code, and

(ii) By treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity.

(2) *Effect of trade or business rule.* The trade or business rule in paragraph (c)(1)(ii) of this section--

(i) Allows the applicable entity to treat an item of property as if it is: of a character subject to an allowance of depreciation (such as under sections 30C and 45W); one for which depreciation (or amortization in lieu of depreciation) is allowable (such as in sections 48, 48C, and 48E); and used to produce items in the ordinary course of a trade or business of the taxpayer (such as in sections 45V and 45X);

(ii) Allows the applicable entity to apply the capitalization and accelerated

depreciation rules (such as sections 167, 168, 263, 263A, and 266 of the Code) that apply to determining the basis and the depreciation allowance for property used in a trade or business;

(iii) Makes applicable those credit limitations generally applicable to persons engaged in the conduct of a trade or business, such as section 49 of the Code in the context of investment tax credits and section 469 of the Code for all applicable credits;

(iv) Does not create any presumption that the trade or business is related (or unrelated) to a tax-exempt entity's exempt purpose; and

(v) Subjects the applicable entity to the credit limitation in paragraph (c)(3)(ii) of this section.

(3) *Special rule for investment-related credit property acquired with amounts, including income from certain grants and forgivable loans, that are exempt from taxation--(i) Amounts included in basis.* Subject to paragraph (c)(3)(ii) of this section, for purposes of section 6417, amounts that are exempt from taxation under subtitle A or otherwise excluded from taxation (such as income from certain grants and forgivable loans), and used to purchase, construct, reconstruct, erect, or otherwise acquire an applicable credit property described in section 30C, 45W, 48, 48C, or 48E (investment-related credit property) are included in basis for purposes of computing the applicable credit amount determined with respect to the applicable credit property, regardless of whether basis is required to be reduced (in whole or in part) by such amounts under general tax principles.

(ii) *No excess benefit from restricted tax exempt amounts.* 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 amount) 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. The determination of whether a tax exempt grant is made for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property is made at the time the grant is awarded to the applicable entity. A tax exempt grant awarded after the investment-related credit property is purchased, constructed, reconstructed, erected, or otherwise acquired is generally not a restricted tax exempt amount unless approval of the grant was perfunctory and the amount of the grant was virtually assured at the time of application. The determination of whether a loan is made for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property and whether forgiveness of that loan is dependent on satisfying that specific purpose is made at the time the loan is approved. This paragraph does not apply if a tax exempt amount is not received for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring a property eligible for an investment-related credit; for example, if the tax exempt amount is from the organization's general funds or if such amount's use is not restricted to the purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property (such as purchasing an electric vehicle) and could be used for any of several different applicable credit properties (such as purchasing an electric vehicle or purchasing solar panels) or can be put to other purposes (such as purchasing an electric vehicle or making a building more energy efficient).

(4) *Credits must be determined with respect to the applicable entity or electing taxpayer.* Any credits for which an elective payment election is made must have been

determined with respect to the applicable entity or electing taxpayer. An applicable credit is determined with respect to an applicable entity or electing taxpayer if the applicable entity or electing taxpayer owns the underlying applicable credit property and conducts the activities giving rise to the credit or, in the case of section 45X (under which ownership of applicable credit property is not required), to be considered (under the section 45X regulations) the taxpayer with respect to which the section 45X credit is determined. Thus, no election may be made under this section for any credits transferred pursuant to section 6418, allowed pursuant to section 45Q(f)(3), acquired by a lessee from a lessor by means of an election to pass through the credit to a lessee under former section 48(d) (pursuant to section 50(d)(5)), owned by a third party, or otherwise not determined with respect to the applicable entity or electing taxpayer.

(5) *Examples.* The following examples illustrate the rules of this paragraph (c).

(i) *Example 1.* School district A receives a tax exempt grant in the amount of \$400,000 from the Environmental Protection Agency to purchase electric school bus B. The grant is a restricted tax exempt amount described in paragraph (c)(3)(ii) of this section. A purchases B for \$400,000. Pursuant to paragraph (c)(3)(i) of this section, A's basis in B is \$400,000. B qualifies for the maximum section 45W credit, \$40,000. However, because the amount of the restricted tax exempt grant plus the amount of the section 45W credit exceeds the cost of B, the no excess benefit rule found in paragraph (c)(3)(ii) of this section applies. A's section 45W credit is reduced by the amount necessary so that the total amount of the section 45W credit plus the restricted tax exempt amount equals the cost of B. A's section 45W credit is therefore reduced by \$40,000 to zero.

(ii) *Example 2.* Assume the same facts as in paragraph (c)(5)(i) of this section (*Example 1*), except that the grant is in the amount of \$300,000. This grant is still a restricted tax exempt amount described in paragraph (c)(3)(ii) of this section. A purchases B using the grant and \$100,000 of A's unrestricted funds. A's basis in B is still \$400,000 and A's section 45W credit is \$40,000. Since the amount of the restricted tax exempt amount plus the amount of the section 45W credit (\$340,000) is less than the cost of B, A's 45W credit under section 6417(b)(6) is not subject to the no excess benefit rule found in paragraph (c)(3)(ii) of this section.

(iii) *Example 3.* Public charity B receives a \$60,000 grant from a private foundation to build energy property, P, a qualified investment credit property that costs \$80,000. The \$60,000 grant is a restricted tax exempt amount described in paragraph (c)(3)(ii) of this section. B uses \$20,000 of its own funds plus the \$60,000 grant to build P. Pursuant to paragraph (c)(3)(i) of this section, B's basis in P is \$80,000. Assume that, based upon acquisition cost, B can earn a section 48 investment credit (with bonus credit amounts) of \$40,000 (50% of basis). However, because the amount of the

restricted tax exempt amount (\$60,000) plus the section 48 credit (\$40,000) exceeds P's cost by \$20,000, the no excess benefit rule found in paragraph (c)(3)(ii) of this section applies to reduce B's section 48 applicable credit by \$20,000 so that the total amount of the section 48 investment credit plus the restricted tax exempt amount equals the cost of P.

(iv) *Example 4.* The U.S. Department of Housing and Urban Development annually provides Capital Funds to Public Housing Agencies (PHAs) for the development, financing, and modernization of public housing developments and for management improvements. Public Housing Authority H uses its annual allotment of Capital Funds to purchase rooftop solar panels for its property and to pay for the related equipment and labor to install the panels. These purchases are considered among the list of eligible uses, but are not the exclusive uses, of H's Capital Funds. Although the Capital Funds are exempt from taxation under subtitle A and used to purchase, construct, reconstruct, erect, or otherwise acquire an investment-related credit property, pursuant to paragraph (c)(3)(i) of this section, they are included in basis for purposes of computing the applicable credit amount determined with respect to the applicable credit property. In addition, because the Capital Funds were not given for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property, they are not considered restricted tax exempt amounts and the no excess benefit rule found in paragraph (c)(3)(ii) of this section does not apply.

(v) *Example 5.* Taxpayer Q is engaged in the business of capturing carbon oxide. Q properly elects to be treated as an applicable entity with respect to the section 45Q credit determined with respect to single process trains A, B, and C for 2024. In the same year, Q also purchases section 45Q credits under section 6418 from an unrelated taxpayer and has section 45Q credits allowed to itself pursuant to section 45Q(f)(3). Q can make an elective payment election only with respect to section 45Q applicable credits determined with respect to A, B, and C. Q cannot make an elective payment election with respect to any credits transferred to Q pursuant to section 6418 or allowed to Q pursuant to section 45Q(f)(3).

(d) *Timing of payment.* Except as provided in §1.6417-4(d) (relating to payments to partnerships and S corporations), the elective payment amount will be treated as made--

(1) In the case of any taxpayer for which no Federal income tax return is required under section 6011 or no Federal return is required under 6033(a), on the later of—

(i) The date that is the 15th day of the fifth month after the end of the taxable year, or

(ii) The date on which such taxpayer submits a claim for credit or refund in accordance with paragraph (b) of this section.

(2) In any other case, on the later of—

(i) The due date (determined without regard to extensions) of the return for the taxable year, or

(ii) The date on which such return is filed.

(e) *Denial of double benefit--(1) In general.* Under section 6417(e), in the case of an applicable entity or electing taxpayer making an elective payment election with respect to an applicable credit, such credit is reduced to zero and is, for any other purposes of the Code, deemed to have been allowed as a credit to such entity or taxpayer for such taxable year. Paragraph (e)(2) and (3) of this section explain the application of the section 6417(e) denial of double benefit rule to an applicable entity or electing taxpayer (other than a partnership or S corporation). The application of section 6417(e) for an electing taxpayer that is a partnership or S corporation is provided in §1.6417-4(c)(1)(ii).

(2) *Application of the denial of double benefit rule.* An applicable entity or electing taxpayer (other than an electing taxpayer that is a partnership or S corporation) making an elective payment election applies section 6417(e) by taking the following steps:

(i) Compute the amount of the Federal income tax liability (if any) for the taxable year, without regard to the general business credit allowed by section 38 of the Code (GBC), that is payable on the due date of the return (without regard to extensions), and the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on amount of tax under section 38.

(ii) Compute the allowed amount of GBC carryforwards carried to the taxable year under section 38(a)(1) plus the amount of current year GBCs (including current applicable credits) for the taxable year under section 38(a)(2) and (b). Because the election is made on an original return for the taxable year for which the applicable credit is determined, any business credit carrybacks are not considered in determining the

elective payment amount for the taxable year.

(iii) Calculate the net elective payment amount for all applicable credits, which equals the lesser of the sum of all applicable credits for which an elective payment election is made or the excess (if any, otherwise the excess is zero) of the total GBC credits described in paragraph (e)(2)(ii) of this section over the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on amount of tax under section 38 computed in paragraph (e)(2)(i) of this section. Treat the net elective payment amount of all applicable credits for which an elective payment election is made as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credits are determined.

(iv) Excluding the net elective payment amount determined under paragraph (e)(2)(iii) of this section, but including any applicable credits that are not part of the net elective payment amount, compute the allowed amount of GBC carryforwards carried to the taxable year plus the amount of current year GBCs allowed for the taxable year under section 38 (including, for clarity purposes, the ordering rules in section 38(d)). Apply these GBCs against the tax liability computed in paragraph (e)(2)(i) of this section.

(v) Reduce the applicable credits for which an elective payment election is made by the net elective payment amount, as provided in paragraph (e)(2)(iii) of this section, and by the amount (if any) allowed as a GBC under section 38 for the taxable year, as provided in paragraph (e)(2)(iv) of this section, which results in the applicable credits being reduced to zero.

(3) *Use of applicable credit for other purposes.* The full amount of the applicable credits for which an elective payment election is made is deemed to have been allowed for all other purposes of the Code, including, but not limited to, the basis reduction and recapture rules imposed by section 50 and calculation of tax, calculation of the amount

of any underpayment of estimated tax under sections 6654 and 6655 of the Code, and the addition to tax for the failure to pay under section 6651(a)(2) of the Code (if any).

(4) *Examples.* The following examples illustrate the rules of this paragraph (e).

(i) *Example 1.* U is a tax-exempt university that is not a trust subject to section 469 and is described in section 501(c)(3). U's fiscal year runs from July 1 to June 30. U places in service P, energy property eligible for a section 48 credit, in June 2024. P is an asset used in connection with its unrelated business. U completes the pre-filing registration in accordance with §1.6417-5 as an applicable entity that has placed P into service and intends to make an elective payment election with respect to section 48 credits determined with respect to P. U timely files its 2024 Form 990-T on November 15, 2024. On its return, U properly determines that it has \$500,000 of Unrelated Business Income Tax (UBIT) under section 512. On its Form 3800 attached to its return, U calculates its limitation of GBC under section 38(c) (simplified) is \$375,000 (paragraph (e)(2)(i) of this section). U attaches Form 3468 to claim a section 48 credit of \$100,000 with respect to P (its GBC for the taxable year) (paragraph (e)(2)(ii) of this section). Under paragraph (e)(2)(iii) of this section, the net elective payment amount is \$0, so the section 48 credit is considered a credit that reduces U's UBIT liability to \$400,000 under paragraph (e)(2)(iv) of this section. U pays its \$400,000 tax liability on November 15, 2024. Under paragraph (e)(2)(v) of this section, the \$100,000 of section 48 credit is reduced by the \$100,000 of applicable credits claimed as GBCs for the taxable year, which results in the applicable credits being reduced to zero. However, the \$100,000 of current year section 48 credit is deemed to have been allowed to U for 2024 for all other purposes of the Code (paragraph (e)(3) of this section).

(ii) *Example 2.* Assume the same facts as in paragraph (e)(4)(i) of this section (*Example 1*), except that U has \$80,000 of Unrelated Business Income Tax (UBIT) under section 512 and calculates its limitation of GBC under section 38(c) (simplified) is \$60,000 (paragraph (e)(2)(i) of this section). Under paragraph (e)(2)(iii) of this section, the net elective payment amount is \$40,000 (lesser of \$100,000 applicable section 48 credit or \$100,000 of total GBC credits described in paragraph (e)(2)(ii) of this section minus \$60,000 of section 38(c) limitation). Under paragraph (e)(2)(iv) of this section, U uses \$60,000 of its \$100,000 of section 48 credit against its tax liability. U reduces its applicable credit by the \$40,000 net elective payment amount determined in paragraph (e)(2)(iii) of this section and by the \$60,000 section 48 credit claimed against tax in paragraph (e)(2)(iv) of this section, resulting in the applicable credit being reduced to zero (paragraph (e)(2)(v) of this section). When the IRS processes U's 2024 Form 990-T, the net elective payment amount results in a \$20,000 refund to U (after applying \$20,000 of the \$40,000 net elective payment amount to cover U's tax shown on the return). However, for other purposes of the Code, the \$100,000 section 48 credit is deemed to have been allowed to U for 2024 (paragraph (e)(3) of this section).

(iii) *Example 3.* V is a city located in the United States that never has Federal income tax liability, so paragraph (e)(2)(i) of this section does not apply. V timely completes pre-filing registration in accordance with §1.6417-5 as an applicable entity that will be eligible to make an elective payment election, with regard to its annual accounting period ending in 2024, for the credit determined under section 30C(a) from properties A, B, and C; the credit determined under section 45(a) for facility D; the credit determined under section 45U(a) for facility E; the credit determined under section 45W(a) with respect to vehicles F, G, and H; and the credit determined under section

48(a) with respect to property I and J. V timely files its 2024 Form 990-T. V properly completes and attaches the relevant source credit forms and Form 3800 with registration numbers and all required information in the instructions, properly making the elective payment election for all of the credits, and properly determining that the amount of applicable credits determined with respect to A, B, C, D, E, F, G, H, I, and J is \$500,000 (its GBC for the taxable year) (paragraph (e)(2)(ii) of this section). Under paragraph (e)(2)(iii) of this section, the net elective payment amount is \$500,000. Under paragraph (e)(2)(iii) of this section, the entire \$500,000 net elective payment amount is a payment against the tax imposed by subtitle A for the taxable year with respect to which such credits are determined. When the IRS processes V's 2024 Form 990-T, the net elective payment amount results in a \$500,000 refund to V. V's elective payment amount is reduced by the net elective payment amount, so all applicable credits for 2024 are reduced to zero (paragraph (e)(2)(v) of this section). However, for other purposes of the Code, the \$500,000 of applicable credits are deemed to have been allowed to V for its annual accounting period ending in 2024 (paragraph (e)(3) of this section).

(iv) *Example 4.* W is a business taxpayer engaged in the manufacturing of components, including eligible components as defined in section 45X(c)(1) at facility F. W completes pre-filing registration in accordance with §1.6417-5 stating that it intends to elect to be treated as an applicable entity with respect to eligible components produced at F in 2024. In 2025, W timely files its 2024 return electing to be treated as an applicable entity, calculating its Federal income tax before GBCs of \$125,000 and that its limitation of GBC under section 38(c) (simplified) is \$100,000 (paragraph (e)(2)(i) of this section). W attaches Form 7207 to claim a current section 45X credit of \$50,000 with respect to eligible components produced at F (its applicable credits). W also attaches Form 5884 to claim a current work opportunity tax credit (WOTC) of \$50,000 (WOTC is not an applicable credit). W also has business credit carryforwards of \$25,000, which together with the 45X credit and WOTC results in a total of \$125,000 of GBC for the taxable year (paragraph (e)(2)(ii) of this section). Under paragraph (e)(2)(iii) of this section, the net elective payment amount is \$25,000. Under paragraph (e)(2)(iv) of this section, including using the ordering rules in section 38(d), W is allowed \$25,000 of the carryforwards, \$50,000 of WOTC plus only \$25,000 of section 45X credit against net income tax, as defined under section 38(c)(1)(B). The \$25,000 of unused section 45X credit is the net elective payment amount that results in a \$25,000 payment against tax by W (paragraph (e)(2)(iii) of this section). On its return, W shows net tax liability of \$25,000 (\$125,000 - \$100,000 allowed GBC) and the net elective payment of \$25,000 that W applied to net tax liability, resulting in zero tax owed on the return. Under paragraph (e)(2)(v) of this section, W's applicable credit is reduced by the \$25,000 of the net elective payment amount, as well as by the \$25,000 of section 45X credit claimed as a GBC for the taxable year, resulting in the \$50,000 of applicable credit being reduced to zero. However, for all other purposes of the Code, the \$50,000 of 45X applicable credits are deemed to have been allowed to W for 2024 (paragraph (e)(3) of this section). Even though W did not owe tax after applying the net elective payment amount against its net tax liability, W may be subject to the section 6655 penalty for failure to pay estimated income tax. The net elective payment is not an estimated tax installment, rather, it is treated as a payment made at the filing of the return.

(v) *Example 5.* Assume the same facts as in paragraph (e)(4)(iv) of this section (*Example 4*), except W filed the return on a timely filed extension after the due date of the return (excluding extensions). Even though the net elective payment amount is

sufficient to cover W's tax liability, W may also be subject to the section 6651(a)(2) penalty for failure to pay tax.

(vi) *Example 6.* Assume the same facts as in paragraph (e)(4)(iv) of this section (*Example 4*), except W's activities gave rise to a \$100,000 section 45Q credit and W filed a Form 8933, *Carbon Oxide Sequestration Tax Credit*, instead of a \$50,000 section 45X credit and Form 7207. Assume also that W's activities gave rise to a \$50,000 small employer health insurance credit under section 45R (section 45R credit) and W filed Form 8941, *Credit for Small Employer Health Insurance Premiums*, instead of a \$50,000 WOTC and Form 5884. Under paragraph (e)(2)(iii) of this section, the net elective payment amount is \$75,000. Under paragraph (e)(2)(iv) of this section, including using the ordering rules in section 38(d), W is allowed \$25,000 of the carryforwards, \$25,000 of the section 45Q credit, plus its \$50,000 of section 45R credit against net income tax, as defined under section 38(c)(1)(B). The \$75,000 of unused section 45Q credit that is the net elective payment amount results in a \$75,000 payment against tax by W (paragraph (e)(2)(iii) of this section). On its return, W shows net tax liability of \$25,000 (\$125,000 - \$100,000 allowed GBC) and the net elective payment amount of \$75,000 that W applied to net tax liability, resulting in a refund of \$50,000. Under paragraph (e)(2)(v) of this section, W's applicable credit is reduced by the \$75,000 of the net elective payment amount, as well as by the \$25,000 of section 45Q credit claimed as a GBC for the taxable year, resulting in the \$100,000 of applicable credit being reduced to zero. However, for all other purposes of the Code, the \$100,000 of section 45Q applicable credits are deemed to have been allowed to W for 2024 (paragraph (e)(3) of this section).

(f) *Applicability date.* This section applies to taxable years ending on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. For taxable years ending before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, taxpayers, however, may choose to apply the rules of §§1.6417-1 through 1.6417-4 and 1.6417-6, provided the taxpayers apply the rules in their entirety and in a consistent manner.

§1.6417-3 Special rules for electing taxpayers.

(a) *In general.* This section relates to the election available to electing taxpayers. An electing taxpayer that makes an elective payment election in accordance with this section is treated as an applicable entity for the duration of the election period, but only with respect to the applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7), respectively, that is the subject of the election. See paragraphs (b), (c), and (d) of this section for the specific rules regarding taxpayers making an election under section 6417(d)(1)(B), (C), or (D), respectively. See paragraph (e) of this section for

rules relating to the making the election. See §1.6417-4 for special rules related to electing taxpayers that are partnerships or S corporations.

(b) *Elections with respect to the credit for production of clean hydrogen.* An electing taxpayer that has placed in service applicable credit property described in §1.6417-1(e)(5) (in other words, a qualified clean hydrogen production facility as defined in section 45V(c)(3)) during the taxable year may make an elective payment election for such taxable year (or by August 16, 2023, in the case of facilities placed in service before December 31, 2022), but only with respect to the qualified clean hydrogen production facility, only with respect to the applicable credit described in §1.6417-1(d)(5) (in other words, the section 45V credit), and only if the pre-filing registration required by §1.6417-5 was properly completed. An electing taxpayer that elects to treat qualified property that is part of a specified clean hydrogen production facility as energy property under section 48(a)(15) may not make an elective payment election with respect to such facility.

(c) *Election with respect to the credit for carbon oxide sequestration.* An electing taxpayer that has, after December 31, 2022, placed in service applicable credit property described in §1.6417-1(e)(3) (in other words, a single process train described in §1.45Q-2(c)(3) at a qualified facility (as defined in section 45Q(d)) during the taxable year may make an elective payment election for such taxable year, but only with respect to the single process train, only with respect to the applicable credit described in §1.6417-1(d)(3) (in other words, the section 45Q credit), and only if the pre-filing registration required by §1.6417-5 was properly completed.

(d) *Election with respect to the advanced manufacturing production credit.* An electing taxpayer that produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at an applicable credit property described in §1.6417-1(e)(7) during the taxable year (whether the facility existed on or before, or after,

December 31, 2022) may make an elective payment election for such taxable year, but only with respect to the facility at which the eligible components are produced by the electing taxpayer in that year, only with respect to the applicable credit described in §1.6417-1(d)(7) (in other words, the section 45X credit), and only if the pre-filing registration required by §1.6417-5 was properly completed.

(e) *Election for electing taxpayers--(1) In general.* If an electing taxpayer makes an elective payment election under §1.6417-2(b) with respect to any taxable year in which the electing taxpayer places in service a qualified clean hydrogen production facility for which a section 45V credit is determined, places in service a single process train at a qualified facility for which a section 45Q credit is determined, or produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at a facility, respectively, the electing taxpayer will be treated as an applicable entity for purposes of making an elective payment election for such taxable year and during the election period described in paragraph (e)(3) of this section, but only with respect to the applicable credit property described in §1.6417-1(e)(3), (5), or (7), as applicable, that is the subject of the election. The taxpayer must otherwise meet all requirements to earn the credit in the electing year and in each succeeding year during the election period described in paragraph (e)(3) of this section.

(2) *Election is per applicable credit property.* An elective payment election under §1.6417-2(b) is made separately for each applicable credit property, which is, respectively, a qualified clean hydrogen production facility placed in service for which a section 45V credit is determined, a single process train placed in service at a qualified facility for which a section 45Q credit is determined, or a facility at which eligible components are produced for which a section 45X credit is determined. An electing taxpayer may only make one election with respect to any specific applicable credit property.

(3) *Election period--(i) In general.* Except as provided in paragraph (e)(3)(ii) of this section, if an electing taxpayer makes an elective payment election under §1.6417-2(b) with respect to applicable credit property described in §1.6417-1(e)(3), (5), or (7) for which an applicable credit is determined under §1.6417-1(d)(3), (5), or (7), the election period during which such election applies includes the taxable year for which the election is made and each of the four subsequent taxable years that end before January 1, 2033. The election period cannot be less than a taxable year but may be made for a taxable period of less than 12 months within the meaning of section 443 of the Code.

(ii) *Revocation of election.* An electing taxpayer may, during a subsequent year of the election period described in paragraph (e)(3)(i) of this section, revoke the elective payment election with respect to an applicable credit property described in §1.6417-1(e)(3), (5), or (7), in accordance with forms and instructions. See §601.602 of this chapter. Any such revocation, if made, applies to the taxable year for which the revocation is made (which cannot be less than a taxable year but may be made for a taxable period of less than 12 months as described in section 443 of the Code) and each subsequent taxable year within the election period. Any such revocation may not be subsequently revoked.

(4) *No transfer election under section 6418(a) permitted while an elective payment election is in effect.* No transfer election under section 6418(a) may be made by an electing taxpayer with respect to any applicable credit under §1.6417-1(d)(3), (5), or (7) determined with respect to applicable credit property described in §1.6417-1(e)(3), (5), or (7) during the election period for that applicable credit property. However, if the election period is no longer in effect with respect to an applicable credit property, any credit determined with respect to such applicable credit property can be transferred pursuant to a transfer election under section 6418(a), as long as the

taxpayer meets the requirements of section 6418 and the 6418 regulations.

(f) *Applicability date.* This section applies to taxable years ending on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. For taxable years ending before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, taxpayers, however, may choose to apply the rules of §§1.6417-1 through 1.6417-4 and 1.6417-6, provided the taxpayers apply the rules in their entirety and in a consistent manner.

§1.6417-4 Elective payment election for electing taxpayers that are partnerships or S corporations.

(a) *In general.* In the case of any applicable credit determined with respect to any applicable credit property described in §1.6417-1(e)(3), (5), or (7) that is held directly (or treated as held directly because it is held by a disregarded entity) by an electing taxpayer that is a partnership or S corporation, any elective payment election under §1.6417-2(b) must be made by the partnership or S corporation.

(b) *Elections.* If an electing taxpayer that is a partnership or S corporation makes an elective payment election under §1.6417-2(b) with respect to any taxable year in which the electing taxpayer places in service applicable credit property described in §1.6417-1(e)(3) or (5), or produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at an applicable credit property described in §1.6417-1(e)(7), the electing taxpayer will be treated as an applicable entity for purposes of making an elective payment election for such taxable year and during the election period described in §1.6417-3(e)(3), but only with respect to the applicable credit property described in §1.6417-1(e)(3), (5), or (7), respectively, that is the subject of the election. In addition, the taxpayer must otherwise meet all requirements to earn the credit in the electing year and in each succeeding year during the election period described in §1.6417-3(e)(3).

(c) *Effect of election--(1) In general.* If a partnership or S corporation electing

taxpayer makes an elective payment election, with respect to the section 45V, 45Q, or 45X credit--

(i) The Internal Revenue Service will make a payment to such partnership or S corporation equal to the amount of such credit, determined in accordance with paragraph (d) of this section (unless the partnership or S corporation owes a Federal tax liability, in which case the payment may be reduced by such tax liability);

(ii) Before determining any partner's distributive share, or S corporation shareholder's pro rata share, of such credit, such credit is reduced to zero and is, for any other purposes under the Code, deemed to have been allowed solely to such entity (and not allocated or otherwise allowed to its partners or shareholders) for such taxable year;

(iii) Any amount with respect to which such election is made is treated as tax exempt income for purposes of sections 705 and 1366 of the Code;

(iv) A partner's distributive share of such tax exempt income is equal to such partner's distributive share of the otherwise applicable credit for each taxable year, as determined under §1.704-1(b)(4)(ii);

(v) An S corporation shareholder's pro rata share (as determined under section 1377(a) of the Code) of such tax exempt income for each taxable year (as determined under sections 444 and 1378(b) of the Code) is equal to the S corporation shareholder's pro rata share (as determined under section 1377(a)) of the otherwise applicable credit for each taxable year; and

(vi) Such tax exempt income resulting from such election is treated as received or accrued, including for purposes of sections 705 and 1366, as of the date the applicable credit is determined with respect to the partnership or S corporation. (such as, for investment credit property, the date the property is placed in service).

(2) *Electing partnerships in tiered structures.* If a partnership (upper-tier

partnership) is a direct or indirect partner of a partnership that makes an elective payment election (electing partnership) and directly or indirectly receives an allocation of tax exempt income resulting from the elective payment election made by the electing partnership, the upper-tier partnership must determine its partners' distributive shares of such tax exempt income in proportion to the partners' distributive shares of the otherwise applicable credit as provided in paragraph (c)(1)(iv) of this section.

(3) *Character of tax exempt income.* Tax exempt income resulting from an elective payment election by an S corporation or a partnership is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A) of the Code. As such, the tax exempt income is not treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

(d) *Determination of amount of the credit--(1) In general.* In determining the amount of an applicable credit that will result in a payment under paragraph (c)(1)(i) of this section, the partnership or S corporation must compute the amount of the applicable credit allowable as if an elective payment election were not made. Because a partnership or S corporation is not subject to sections 38(b) and (c) and 469 (that is, those sections apply at the partner or S corporation shareholder level), the amount of applicable credit determined by a partnership or S corporation is not subject to limitation by those sections. In addition, because the only applicable credits with respect to which a partnership or S corporation may make an elective payment election are not investment credits under section 46 of the Code, sections 49 and 50 of the code do not apply to limit the amount of the applicable credits.

(2) *Example.* The rules of this paragraph (d) are illustrated in the following example. A and B each contributed cash to P, a calendar-year partnership, for the purpose of manufacturing clean hydrogen at V, a qualified clean hydrogen facility that meets the definition of section 45V(c)(3). The partnership agreement provides that A and B share equally in all items of income, gain, loss, deduction and credit of P. P completes the pre-filing registration process with respect to the section 45V credit at V

for 2023 in accordance §1.6417-5. P places V in service in 2023. P timely files its 2023 Form 1065 and properly makes the elective payment election in accordance with §§1.6417-2(b), 1.6417-3, and 1.6417-4. On its Form 1065, P properly determined that the amount of the section 45V credit with respect to the clean hydrogen produced at V for 2023 is \$100,000. The IRS processes P's return and makes a \$100,000 payment to P. Before determining A's and B's distributive shares, P reduces the credit to zero. While the \$100,000 section 45V credit is deemed to have been allowed to P for 2023 for any other purpose under this title, the credit is not allocated or otherwise allowed to its partners. The \$100,000 is treated as tax exempt income for purposes of section 705 and is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). P allocates the tax exempt income from the elective payment election proportionately among the partners based on each partner's distributive share of the otherwise eligible section 45V credit as determined under §1.704-1(b)(4)(ii). Under that section, if partnership receipts or expenditures give rise to a credit, the partner's interest in the partnership with respect to such credit is in the same proportion as such partners' distributive shares of such receipt, loss, or deduction. Section 45V credits arise based on the amount of clean hydrogen produced at a facility. Under the partnership agreement, A and B share all items equally. Thus, A and B will each be allocated \$50,000 of tax exempt income for 2023. P will continue to be treated as an applicable entity with respect to V for taxable years 2024-2027 unless P revokes its election in accordance with §1.6417-3(e)(3)(ii). At the end of 2023, A and B increase their respective tax bases in their partnership interest and capital accounts by \$50,000 each (that is, their share of the \$100,000 of tax exempt income).

(e) *Partnerships subject to subchapter C of chapter 63.* For the application of subchapter C of chapter 63 of the Code to section 6417, see §301.6241-7 of this chapter.

(f) *Applicability date.* This section applies to taxable years ending on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. For taxable years ending before **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, taxpayers, however, may choose to apply the rules of §§1.6417-1 through 1.6417-4 and 1.6417-6, provided the taxpayers apply the rules in their entirety and in a consistent manner.

§1.6417-5 Additional information and registration.

(a) *Pre-filing registration and election.* An applicable entity or electing taxpayer is required to satisfy the pre-filing registration requirements in paragraph (b) of this section as a condition of, and prior to, making an elective payment election. An applicable entity or electing taxpayer must use the pre-filing registration process to register itself as

intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits as part of the pre-filing submission (or amended submission). An applicable entity or electing taxpayer that does not obtain a registration number under paragraph (c)(1) of this section or report the registration number on its annual tax return, as defined in §1.6417-1(b), pursuant to paragraph (c)(5) of this section with respect to an otherwise applicable credit property, is ineligible to receive any elective payment amount with respect to the amount of any credit determined with respect to that applicable credit property. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the applicable entity or electing taxpayer is eligible to receive a payment with respect to the applicable credits determined with respect to the applicable credit property.

(b) Pre-filing registration requirements--(1) Manner of pre-filing registration.

Unless otherwise provided in guidance, an applicable entity or electing taxpayer must complete the pre-filing registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein.

(2) Pre-filing registration and election for members of a consolidated group. A member of a consolidated group is required to complete pre-filing registration as a condition of, and prior to, making an elective payment election. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

(3) Timing of pre-filing registration. An applicable entity or electing taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (c) of this section prior to making an elective payment election under §1.6417-2(b) on the applicable entity's or electing taxpayer's annual tax return for the taxable year at issue.

(4) Each applicable credit property must have its own registration number. An

applicable entity or electing taxpayer must obtain a registration number for each applicable credit property with respect to which it intends to make an elective payment election.

(5) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, an applicable entity or electing taxpayer must provide the following information to the IRS to complete the pre-filing registration process:

(i) The applicable entity's or electing taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity.

(ii) Any additional information required by the IRS electronic portal, such as information regarding the taxpayer's exempt status under section 501(a) of the Code; that the applicable entity is a political subdivision of a State, the District of Columbia, or a U.S. territory, or subdivision of an Indian tribal government; or that the applicable entity is an agency or instrumentality of a State, the District of Columbia, an Indian tribal government, or a U.S. territory.

(iii) The taxpayer's taxable year.

(iv) The type of annual tax return(s) normally filed by the applicable entity or electing taxpayer, or that the applicable entity or electing taxpayer does not normally file an annual tax return with the IRS.

(v) The type of applicable credit(s) for which the applicable entity or electing taxpayer intends to make an elective payment election.

(vi) For each applicable credit, each applicable credit property that the applicable entity or electing taxpayer intends to use to determine the credit for which the applicable entity or electing taxpayer intends to make an elective payment election.

(vii) For each applicable credit property listed in paragraph (b)(4)(vi) of this section, any further information required by the IRS electronic portal, such as--

(A) The type of applicable credit property;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the applicable credit property);

(C) Supporting documentation relating to the construction or acquisition of the applicable credit property (such as State, District of Columbia, Indian tribal, U.S. territorial, or local government permits to operate the applicable credit 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; U.S. Coast Guard registration numbers for offshore wind vessels; and the vehicle identification number of an eligible clean vehicle with respect to which a section 45W credit is determined);

(D) The beginning of construction date and the placed in service date of the applicable credit property,

(E) If an investment-related credit property (as defined §1.6417-2(c)(3)), the source of funds the taxpayer used to acquire the property; and

(F) Any other information that the applicable entity or electing taxpayer believes will help the IRS evaluate the registration request.

(viii) The name of a contact person for the applicable entity or electing taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either possess legal authority to bind the applicable entity or electing taxpayer or must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative*.

(ix) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant.

(x) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is

provided in guidance.

(c) *Registration number--(1) In general.* The IRS will review the information provided and will issue a separate registration number for each applicable credit property for which the applicable entity or electing taxpayer provided sufficient verifiable information.

(2) *Registration number is only valid for one taxable year.* A registration number is valid only with respect to the applicable entity or electing taxpayer that obtained the registration number under this section and only for the taxable year for which it is obtained.

(3) *Renewing registration numbers.* If an elective payment election will be made with respect to an applicable credit property for a taxable year after a registration number under this section has been obtained, the applicable entity or electing taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(4) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained but not yet used, an applicable entity or electing taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if the owner of a facility previously registered for an elective payment election for applicable credits determined with respect to that facility and the facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the facility must amend the

original registration to disassociate its EIN from the applicable credit property and the new owner must submit separately an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered applicable credit property. If the change of ownership is with respect to an electing taxpayer, then the 5-year election period will continue despite the change in ownership.

(5) *Registration number is required to be reported on the return for the taxable year of the elective payment election.* The applicable entity or electing taxpayer must include the registration number of the applicable credit property on its annual tax return as provided in §1.6417-2(b) for the taxable year. The IRS will treat an elective payment election as ineffective with respect to an applicable credit determined with respect to an applicable credit property for which the applicable entity or electing taxpayer does not include a valid registration number that was assigned to that particular taxpayer during the pre-registration process on the annual tax return.

(d) *Applicability date.* This section applies to taxable years ending on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

§1.6417-6 Special rules.

(a) *Excessive payment--(1) In general.* In the case of any elective payment amount that the IRS determines constitutes an excessive payment, the tax imposed on such entity by chapter 1, regardless of whether such entity or taxpayer would otherwise be subject to chapter 1 tax, for the taxable year in which such determination is made will be increased by an amount equal to the sum of--

- (i) The amount of such excessive payment, plus
- (ii) An amount equal to 20 percent of such excessive payment.

(2) *Reasonable cause.* The amount described in paragraph (a)(1)(ii) of this section will not apply to an applicable entity or electing taxpayer if the applicable entity

or electing taxpayer demonstrates to the satisfaction of the IRS that the excessive payment resulted from reasonable cause.

(3) *Excessive payment defined.* For purposes of this section, the term *excessive payment* means, with respect to an applicable credit property for which an elective payment election is made under §1.6417-2(b) for any taxable year, an amount equal to the excess of--

(i) The amount treated as a payment under §1.6417-2(a)(1)(i) or (a)(2)(i), or the amount of the payment made pursuant to §1.6417-2(a)(2)(ii), with respect to such applicable credit property for such taxable year, over

(ii) The amount of the credit that, without application of this section, would be otherwise allowable under the Code (as determined pursuant to §1.6417-2(c) and (e) or §1.6417-4(d)(1) and (3), and without regard to the limitation based on tax in section 38(c)) with respect to such applicable credit property for such taxable year. For purposes of this section, the amount of such credit that would be otherwise allowable is the amount claimed on an original or amended return, including any administrative adjustment request under section 6227.

(4) *Example.* This example illustrates the principles of this paragraph (a). B, an instrumentality of State M, places in service in 2023 facility F, which is eligible for the energy credit determined under section 48. B properly completes the pre-filing registration as an applicable entity that will earn the energy credit from F in accordance with §1.6417-5, and receives a registration number for F. B timely files its 2023 Form 990-T, properly providing the registration number for F and otherwise complying with §1.6417-2(b). On its Form 990-T, B calculates that the amount of energy credit determined with respect to F is \$100,000 and that the net elective payment amount is \$100,000. B receives a refund in the amount of \$100,000. In 2025, the IRS determines that the amount of energy credit properly allowable to B in 2023 with respect to F (as determined pursuant to §1.6417-2(c) and (e) and without regard to the limitation based on tax in section 38(c)) was \$60,000. B is unable to show reasonable cause for the difference. The excessive payment amount is \$40,000 (\$100,000 treated as a payment - \$60,000 allowable amount). In 2025, the tax imposed under chapter 1 on B is increased in the amount of \$48,000 (\$40,000 + (20% * \$40,000).)

(b) *Basis reduction and recapture--(1) In general.* Rules similar to the rules of section 50 (without regard to section 50(b)(3) and (4)(A)(i)) apply for purposes of this

section.

(2) *Reporting recapture.* Any reporting of recapture is made on the annual tax return of the applicable entity or electing taxpayer in the manner prescribed by the IRS in any guidance, along with supplemental forms such as Form 4255, *Recapture of Investment Credit*.

(3) *Example.* This example illustrates the principles of this paragraph (b). In December 2023, G, a government entity, places in service P, which is energy property eligible for the energy credit determined under section 48 (section 48 credit). G properly completes the pre-filing registration in accordance with §1.6417-5 as an applicable entity to make an election under section 6417 for 2023. G timely files its 2023 Form 990-T in 2024, properly making the elective payment election in accordance with §1.6417-2 for a section 48 energy credit determined with respect to P. On its Form 990-T, G properly determines that the amount of section 48 credit determined with respect to P is \$100,000 and that its net elective payment amount is \$100,000. The IRS sends G a \$100,000 refund. Pursuant to section 50(c), G reduces its basis in P by \$50,000. In July 2025, P ceases to be investment credit property with respect to G. Because this occurs before the close of the recapture period set forth in section 50, section 50(a)(1)(A) provides that the tax under chapter 1 for 2025 is increased by the recapture percentage of the aggregate decrease in the credits allowed under section 38 for all prior taxable years that would have resulted solely from reducing to zero any credit determined under subpart E of part IV of subchapter A of chapter 1 with respect to such property. Because P ceased to be investment credit property within 2 full years after P was placed in service, section 50(a)(1)(B) provides that the recapture percentage is 80%. G must properly report the recapture event in 2025, paying an \$80,000 tax. Because G is a government entity, G reports the recapture event on a Form 990-T or any Form provided in further guidance, along with supplemental forms such as Form 4255, *Recapture of Investment Credit*. G's basis in P is increased by \$40,000.

(c) *Mirror code territories.* Pursuant to section 6417(f) of the Code, section 6417 and the section 6417 regulations are not treated as part of the income tax laws of the United States for purposes of determining the income tax law of any U.S. territory with a mirror code tax system (as defined in section 24(k) of the Code), unless such U.S. territory elects to have section 6417 and the section 6417 regulations be so treated. The applicable territory tax authority for a U.S. territory determines whether such an election has been made.

(d) *Partnerships subject to subchapter C of chapter 63 of the Code.* See §301.6241-7(j) of this chapter for rules applicable to payments made to partnerships subject to subchapter C of chapter 63 of the Code for a partnership taxable year.

(e) *Applicability date.* This section applies to taxable years ending on or after **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. For taxable years ending before **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, taxpayers, however, may choose to apply the rules of §§1.6417-1 through 1.6417-4 and 1.6417-6, provided the taxpayers apply the rules in their entirety and in a consistent manner.

§1.6417-5T [Removed]

Par. 3. Section 1.6417-5T is removed.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 4. The authority citation for part 301 is amended by revising the entries for §§301.6241-1 and 301.6241-7 to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 301.6241-1 also issued under sections 48D(d), 6241, and 6417.

* * * * *

Section 301.6241-7 also issued under sections 48D(d), 6241, and 6417.

* * * * *

Par. 5. Section 301.6241-1 is amended by:

- a. Adding a sentence after the second sentence in paragraph (a)(6)(iii); and
- b. Adding a sentence to the end of paragraph (b)(1).

The additions read as follows:

§301.6241-1 Definitions.

(a) * * *

(6) * * *

(iii) * * * Notwithstanding the previous two sentences, any tax, penalty, addition to tax, or additional amount imposed on the partnership under chapter 1 is an item or amount with respect to the partnership. * * *

* * * * *

(b) * * *

(1) * * * The third sentence of paragraph (a)(6)(iii) of this section applies to partnership taxable years ending on or after June 21, 2023.

* * * * *

Par. 6. Section 301.6241-7 is amended by:

- a. Redesignating paragraph (j) as paragraph (k);
- b. Adding new paragraph (j);
- c. Revising the first sentence of newly redesignated paragraph (k)(1); and
- d. Adding paragraph (k)(3).

The additions and revisions read as follows:

§301.6241-7 Treatment of special enforcement matters.

* * * * *

(j) *Elections resulting in payments to a partnership.* The IRS may adjust any election that results or could result in a payment to the partnership in lieu of a Federal tax credit or deduction without regard to subchapter C of chapter 63. The IRS may also make determinations, without regard to subchapter C of chapter 63, about the payment itself as well as any partnership-related item relevant to adjusting the election or the payment.

* * * * *

(k) * * *

(1) * * * Except as provided in paragraphs (k)(2) (relating to paragraph (b) of this section) and (k)(3) of this section (relating to paragraph (j) of this section), this

section applies to partnership taxable years ending on or after November 20, 2020. * * *

* * * * *

(3) *Elections resulting in payments to a partnership.* Paragraph (j) of this section applies to taxable years ending on or after June 21, 2023.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

Approved: February 27, 2024.

Aviva Aron-Dine,

Acting Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2024-04604 Filed: 3/5/2024 8:45 am; Publication Date: 3/11/2024]