RETC WORKING GROUP™
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Internal Revenue Service
CC:PA:LPD:PR (REG-101607-23)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Additional Guidance on Elective Payment of Applicable Credits

To Whom it May Concern:

On behalf of the members of the Novogradac Renewable Energy Working Group (the RE Working Group), we appreciate the opportunity to comment on the Notice of Proposed Rulemaking, Additional Guidance on Elective Payment of Applicable Credits (the Notice). The RE Working Group was founded to identify and address technical and administrative issues that arise around the Inflation Reduction Act (IRA) of 2022. The group counts among its members attorneys, investors, syndicators, lenders, for-profit and nonprofit developers, sponsors, consultants, and other renewable energy professionals interested in working together to coalesce around solutions to technical renewable energy issues and make the renewable energy tax credit programs more efficient in providing benefits.

Attached please find the RE Working Group's comments including requests for guidance and recommendations regarding the Notice. Our comments are meant to provide the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) with information needed to help guide their decisions as they make plans to implement the IRA's energy provisions.

Please do not hesitate to contact us if you have any questions regarding our comments or if we can be of further assistance. We would be happy to discuss our comments in further detail. Thank you in advance for your time and consideration.

Yours very truly,

Novogradac & Company LLP

By

Alvin Lee, Partner

Attachment: RE Working Group Comments on Notice of Proposed Rulemaking, Additional Guidance on Elective Payment of Applicable Credits

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Notice of Proposed Rulemaking, Additional Guidance Elective Payment of Applicable Credits
Novogradac Renewable Energy Working Group

1. Tax Exempt Bond Financing

We respectfully request additional guidance on Section 45(b)(3) regarding the use of tax-exempt bond proceeds and examples of how the final regulations will be applied to elective payments.

Section 45(b)(3) states that the credit amount for any taxable year is reduced by an amount equal to the credit amount multiplied by a fraction. The numerator is the sum of tax-exempt bond proceeds used in that year and all prior years for the qualified facility. The denominator is the total cost for the qualified facility for that year and all prior years. If this fraction is greater than 15%, the percentage to be used for the reduction is 15% (i.e., the reduction in any year will not be more than 15%).

Under Section 1.148-6, tax-exempt bond proceeds can be treated as spent using any consistently applied accounting method, which include: direct tracing of proceeds to expenditures (where was each dollar actually spent), bond proceeds are spent first before other sources of funding, all sources of funding are spent on a first-in first-out method, or a ratable method where each expenditure is treated as ratably paid from each source (Treas. Reg. 1.148-6(d)(1)). As a result, for tax-exempt bond rule purposes, specific tracing is not required to determine when proceeds were spent or how proceeds were spent.

Section 1.148-6 also states that a final determination of how tax-exempt bond proceeds were spent doesn't need to be made until 18 months after the later of the date the expenditure is actually paid or the project is placed in service (and in any event not more than 5 years and 60 days after the date of issuance of the bonds). This means, if a project is funded from various sources, including tax-exempt bond proceeds, a final reconciliation of which sources were used for what expenditures doesn't need to be made until, roughly, the project is done.

Section 1.141-6 is a special regulation that addresses annual allocation of tax-exempt bond proceeds and other funding sources to "bad" project uses ("Bad" in this context means costs involving private business use property - property that in some circumstances is not allowed to be paid from bond proceeds.). Under this special regulation, if tax-exempt bond proceeds and other funding sources finance a project, and if the project in a particular year has "bad" uses, the other funding sources (and not bond proceeds) are deemed allocated to the bad uses. In other words, the other funding sources and bond proceeds constantly "float" within the project depending on how much bad use there is, and the other funding sources soak up the bad use. Floating can occur even if a final reconciliation of how and where bond proceeds under Section 1.148-6 has occurred. In other words, the final allocation under 1.148-6 does not prevent floating of proceeds and other sources even at a later time. This effectively means, at any point in time, bond proceeds may float around the project.

For purposes of the credit reduction requirement of Section 45(b)(3), we request Treasury consider the following:

Certainty when the bonds are issued:
The taxpayer should be able to calculate the credit reduction percentage by the time the bonds are issued. The taxpayer should not have to recalculate the credit reduction percentage each year (unless new tax-exempt bond proceeds or other funding sources are added to the project in subsequent years, or the total cost of the project changes, of course). Recalculating the credit reduction percentage annually could become an administrative headache and introduce budgeting uncertainties.

Automatic distribution of proceeds:
For purposes of Section 45(b)(3), tax exempt bond proceeds should be treated 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)). This means, if the overall facility has portions that qualify for tax credits (i.e., the qualified facility) and portions that don't qualify for tax credits (i.e., the non-qualified facility), the non-

qualified facility should be treated as first funded by tax-exempt bond proceeds and distribute as much of the tax-exempt bond proceeds as possible. To the extent tax-exempt proceeds are left over, those excess tax-exempt proceeds are treated as funding the qualified facility, and only those excess proceeds should be factored into the credit reduction calculation.

Precedent for distribution of the tax-exempt proceeds before other funding sources is in Section 1.141-6.

Precedent for treating proceeds as allocated to costs, even if such allocation does not reflect a direct tracing method, is in Section 1.148-6. In other words, the proposal would deem the proceeds allocated, even if the proceeds and the other funding sources are commingled and there is no way to match expenditures on a direct tracing basis.

Impact on the application of the "floating rule" in Section 1.141-6:
The calculation of the credit reduction percentage and the distribution of tax-exempt bond proceeds described above should not be written to impact the application of the bond rules relating to private business use. For example, if the issuer decides to treat the overall facility as a mixed-use project under Section 1.141-6 and float proceeds and non-proceeds (aka equity) throughout the facility from year to year, as allowed for tax-exempt bonds, that determination should not be limited by the proposed distribution of tax-exempt bond proceeds for credit reduction calculation. In other words, there should be no requirement that the allocations in Section 45(b)(3) and Section 1.141-6 be consistent with regards to floating.

Precedent for not requiring consistency between the floating provision of Section 1.141-6 and other tax code sections is in the context of when proceeds are treated as spent under Section 1.148-1. Even though proceeds may float at any time under Section 1.141-6, proceeds are allowed to come to rest for purposes of determining when the proceeds have been spent under Section 1.148-1, whether the reimbursement rules of Section 1.150-2 are met, what the useful life of the financed property is under Section 147(b) and possibly even whether the TEFRA notice and approval requirements under Section 147(f) have been met.

A consistency requirement could result in the impossible administrative burden of constant recalculations. This is because the floating provision of Section 1.141-6 applies automatically and constantly. At any point in time, bond proceeds may be reallocated automatically between private business uses and non-private business uses of the facility.

Impact on the application of the final allocation provision of Section 1.148-6:
The calculation of the credit reduction percentage should be able to occur when the bonds are structured, sold, or issued, taking into account the soaking rule described above. (Again, we don't think we can avoid recalculation if additional tax-exempt proceeds or other funding sources are added later, or the total project cost changes later.) A final allocation of bond proceeds under Section 1.148-6, which may occur up to five years after the bond issuance, should not be treated as changing the allocation of tax-exempt bond proceeds and equity for purposes of calculating the credit reduction percentage.

Precedent for not requiring consistency between the final allocation rule under Section 1.148-6 and other tax code sections is in the context of the floating rule under Section 1.141-6. As already described above, the final allocation rule and the floating rule operate mostly independently in that floating can occur even if a final allocation of proceeds hasn't been made or even if the exact, directly-traced expenditures don't match up with the expenditures treated as financed for purposes of the floating rule.

A consistency requirement could result in the administrative burden of requiring a post-issuance recalculation of the credit reduction percentage. A recalculation would bring with it questions of how to recapture credit amounts that could be considered as having been overpaid or how to make catch-up credit payments if there is a determination that fewer bond proceeds were allocated to the qualified facility.

2. Application to Partnerships and S-Corporations

We respectfully request the Treasury to reconsider the proposed rule §1.6417-2(a)(1)(iv) that partnerships and S corporations are not applicable entities described in Section 6417(d)(1)(A). We noted there is no guidance in Section 6417 that precludes a partnership from being an applicable entity. In addition, other provisions under the Code treat partnerships either as a distinct entity or an aggregate of all its partners treated as having a direct undivided interest in all partnership assets and liabilities (i.e. the entity vs. aggregate method). We propose under the aggregate method, if all or some of the partners meet the definition of an applicable entity described in Section 6417(d)(1)(A), an election can be made by a partnership on behalf of its partners for an applicable credit. We do not believe this is contrary to Section 6417(c) which provides that the partnership or S corporation makes the Section 6417 election in relation to a credit determined with respect to any facility or property held directly by a partnership or S corporation. In this case the partners or shareholders would not make an election consistent with Section 6417(c).

Additionally the Notice provides that because Section 6417 elections are made for a particular applicable credit property, allowing a Section 6417 election for a portion of an applicable credit property would be contrary to Section 6417(a) and, if permitted, would be difficult to administer, particularly in tiered partnership structures. As discussed above, we do not believe this is contrary to Section 6417(a) and do not believe a partnership is precluded from meeting the definition of an applicable entity. In addition, we believe the treatment of allowing a Section 6417 election for a portion of an applicable credit property would not be difficult to administer other than determining the portion of applicable credits for which an election can be made. In addition, accounting for the any partner's distributive share of an applicable credit or tax-exempt income for any amount with respect to which the election is made would be similar to determining the distributive share of partnership income, gain or loss, or other items.

We agree as provided in the Notice that treatment of these partnerships is of particular importance as many applicable entities choose to partner with non-applicable entities in investment and development of credit generating projects, that applicable entities may not have the expertise or resources to own such projects outright, and that the ability to partner is key to their meaningful participation in the energy transition. We believe the ability a partnership to make an election on behalf of an applicable entity partner would align with the intent of the IRA to allow greater access to the benefits of applicable credits that were previously denied to tax-exempt and other applicable entities.

3. Pre-registration and Timing Issues

In recognition of the sensitivity of timing of payments for applicable entities, we recommend the following in connection with administering pre-registration filing requirements and payments:

- Allow for an election to be made on a timely filed return prior to receiving a registration number if the applicable entity or electing taxpayer has completed the pre-filing registration process but has not yet received a registration number. An amended return can be filed upon receipt of a registration number.
- Provide a separate administrative process for payment that would allow for the greatest predictability in timing of payment after an election is made on a timely filed return.
- Allow a process for an applicable entity to file a return or make an election prior to the due date of the return to receive payment or prepayment of the elective payment amount.