



CREATING GOOD JOBS, A CLEAN ENVIRONMENT, AND A FAIR AND THRIVING ECONOMY

Internal Revenue Service  
CC:PA:LPD:PR (Notice 2022-50)  
Room 5203  
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The Honorable Lily Batchelder  
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RE: IRS Notice 2022-50  
Request for Comments on elective Payments of Applicable Credits and Transfer of  
Certain Credits

On behalf of the BlueGreen Alliance (BGA), a coalition of the nation's largest labor unions and environmental organizations, we thank the Secretary and the Internal Revenue Service for soliciting input on the Inflation Reduction Act, with specific regard to the clean energy tax credits under your administration. These credits, properly implemented, and their associated benefits will catalyze equitable growth of the clean energy economy. However, Section 6417 of the Internal Revenue Code (IRC) leaves some ambiguity about the breadth of public entities that could qualify as “applicable entities” for direct payments.

The IRC bars investment tax credits on projects owned by tax-exempt and government entities in sections 50(b)(3) and (4)(A). The Inflation Reduction Act turned off these sections to allow tax-exempt and state and local government entities to qualify for direct payments for tax credits on projects they own. The problem is that the phrasing in the IRA left unclear whether the restrictions have been turned off for “instrumentalities” of state and local governments. Public school systems, state universities, community colleges, and certain public power utilities are “instrumentalities” rather than state and local government entities directly.

Public schools, state colleges, public universities, public hospitals, and public power utilities are very interested in reducing carbon emissions through the utilization of

clean energy tax credits. Further, many state universities and other instrumentalities produce their own power and could benefit greatly from the investment or production tax credits. It is critical to ensure these entities can benefit from direct-pay subsidies in the Inflation Reduction Act.

Under the Inflation Reduction Act, “applicable entities” that own certain clean energy projects are eligible to receive direct-pay subsidies from the Treasury Department. IRC section 6417(d)(1)(A) defines “applicable entity” to include, among other entities, (1) “any State or political subdivision thereof” and (2) “any organization exempt from the tax imposed by subtitle A” of the IRC.

Under this definition, it is clear that a state, county, city, town or other local government is an “applicable entity.” It is also clear that a private, not-for-profit college, healthcare organization or other entity that qualifies for tax-exemption under section 501(c)(3) is an “applicable entity” because it is an organization exempt from the tax imposed by subtitle A.

On the other hand, state and local governments often establish separate entities, or “instrumentalities,” to perform educational, healthcare or other governmental functions. For example, many state universities, community colleges and public hospitals are instrumentalities of state or local governments.

In determining whether an entity is an instrumentality of a state or political subdivision, the IRS considers the following factors listed in Revenue Ruling 57-128: (1) whether it is used for a governmental purpose and performs a governmental function; (2) whether it performs its function 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) whether express or implied statutory or other authority is necessary or exists for the creation and use of the organization; and (6) the degree of financial autonomy and the source of its operating funds.

IRS guidance distinguishes a “political subdivision” of a state from an “instrumentality” of a state. Treasury Regulations Section 1.103-1 defines a “political subdivision” as any division of a state or local governmental unit that is a municipal corporation or that has been delegated the right to exercise part of the sovereign power of the unit. Revenue Ruling 77-164 states that an entity generally must possess a substantial amount of at least one of the sovereign powers (taxation, eminent domain and police power) to constitute a political subdivision.

Some state colleges and universities and public hospitals that are instrumentalities of a state or local government have obtained tax-exempt status under section 501(c)(3). Such 501(c)(3) entities are clearly “applicable entities” eligible to receive direct-pay subsidies.

On the other hand, many such public colleges, universities and hospitals are not 501(c)(3) organizations. These entities typically rely on section 115 for their income to be excluded from tax. Section 115 provides that gross income does not include income (1) derived from the exercise of any essential governmental function and (2) accruing to a state or any political subdivision thereof.

Section 6417(d)(1)(A) is unclear as to whether an instrumentality of a state or local government that relies on section 115 is an “applicable entity” eligible to receive direct-pay subsidies. Such an entity is not a “State or political subdivision thereof” under IRS guidance. In addition, it is not clear whether such an entity is “an organization exempt from the tax imposed by subtitle A.”

Nevertheless, we believe Congress intended to include instrumentalities of state or local governments within the definition of “applicable entity.” There does not appear to be any policy or other reason to exclude instrumentalities. Indeed, excluding them would mean that many public universities, colleges, hospitals, public power utilities, and other organizations would be precluded from accessing subsidies needed to transition to clean energy resources. Such an interpretation would frustrate the purposes of the legislation and would result in inconsistent treatment of similarly-situated taxpayers.

Accordingly, we strongly encourage the Treasury Department and the IRS to issue guidance clarifying that an instrumentality of a state or political subdivision thereof is an “applicable entity” within the meaning of section 6417(d)(1)(A).

Thank you,

Jason Walsh  
Executive Director  
BlueGreen Alliance