BLUEGREEN ALLIANCE

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

BlueGreen Alliance
Brennen Cain, Senior Policy Advisor
1020 19th St., NW | Washington, DC 20036
202.706.6916
bcain@bluegreenalliance.org

Date: August 14, 2023

Docket: IRS-2023-0029

BlueGreen Alliance Response to Proposed IRS Regulations (Section 6417 Elective Payment of Applicable Credits (REG-101607-23))

The BlueGreen Alliance unites America's labor unions and environmental organizations to solve today's environmental challenges in ways that create and maintain quality jobs and build a stronger, fairer economy. Our partnership is firm in its belief that Americans don't have to choose between a good job and a clean environment—we can and must have both. The clean energy tax credits extended and strengthened in the Inflation Reduction Act, and the accessibility of those credits for tax-exempt institutions through elective pay, will accelerate and broaden deployment of clean energy, especially by non-profit and public entities. We commend the Department of Treasury for effectively advancing guidance to clarify these entities' ability to access the clean energy tax credits. This opportunity will help drive down emissions, create high quality, union jobs, and more equitably distribute clean energy investment to serve the public interest. We appreciate the opportunity to respond to the proposed IRS Regulations on Elective Pay to ensure the maximum uptake of these uncapped credits. These credits will support U.S. climate and equity goals and will create good jobs that are built into the tax credits through incentives for using high-road labor standards.

***

Our comments on the proposed rule center on the following four topics: 1) technical support for low-income and energy communities; 2) domestic content; 3) ITC eligibility for U.S. territories; and 4) pre-filing registration processes. Our recommendations on these topics are intended to ensure that the historic opportunity of direct pay is fully optimized and accessible to those who need it the most.

Prioritize Technical Support for Low-Income and Energy Communities

Clean energy tax credits are a federal investment that should benefit disadvantaged communities. The whole-of-government Justice40 (J40) Initiative calls for a minimum of 40% of all benefits of climate and clean energy federal investments to go to communities that are marginalized, underserved, and overburdened by pollution. A federal government program falls within the scope of the Justice40 initiative if it includes investments that can benefit these communities in the following areas: (1) climate change, 2) clean energy and energy efficiency, 3) clean transit, 4) affordable and sustainable housing, 5) training and workforce development, 6) the remediation and reduction of legacy pollution, and 7) development of critical clean water infrastructure.[1] The tax credits eligible for elective payment will support a range of clean energy projects and should be aligned with J40 to benefit low-income and energy communities.

One way that the IRS can implement J40 is by expediting the processing of direct pay tax returns for those who qualify for the low-income bonus credit in section 48(e) or 48E(h), or the energy communities bonus credit in section 45, 45Y, 48 or 48E. While direct pay is a transformative opportunity for tax-exempt institutions, it will require intentionality to ensure access for those who need it most. A stated objective of the proposed rule is that for eligible entities "a refund of any overpayment of taxes…will increase the amount of cash available to those entities, thereby reducing the amount of financing needed for clean energy projects."[2] However, because the direct payment will be received *after* a clean energy project goes into service, it will still require a school district, for example, to acquire and manage alternative financing that likely spans a year or more from start of construction, through when the project is placed in service, until the district is reimbursed. The difference of a few months can mean thousands of dollars of interest accumulating for already cash-strapped entities. Reimbursements for low-income and energy communities should be prioritized and processed as quickly as possible. Additionally, the language around timing of when eligible entities can expect payment should be explained as clearly and simply as possible both in the guidance and during the pre-registration process.

Overall, tax-exempt entities in low-income and energy communities need extra support throughout this new process from pre-registration to submitting tax returns. These entities are new to this process and typically do not have the resources or experience that private developers have. Therefore, support for public or nonprofit entities in these communities to take advantage of direct pay and the clean energy tax credits should include any technical assistance needed to obtain a pre-registration number or to meet domestic content requirements in order to qualify for direct pay. Additionally, direct pay reimbursements should be prioritized and processed at the earliest possible date for public and nonprofit entities in low-income and energy communities. Lastly, because these tax credits are newly available for these entities, the entities generally should not be subject to penalties for an incorrect tax return so long as the return was filed in good faith.

Domestic Content

We strongly support the strategic use of demand levers (e.g., domestic content policies) and supply-side investments (e.g., the 45X and 48C tax credits authorized by the Inflation Reduction Act) to boost U.S. manufacturing of clean technologies. Expanded domestic manufacturing of clean energy components affords the opportunity to build the clean economy on a foundation of good jobs, clean manufacturing, a reliable industrial base, and greater equity. Done right, onshoring of clean energy manufacturing can help to:

- Link climate action with the creation of high-paying manufacturing jobs;
- Reverse the economic and racial inequality exacerbated by manufacturing job losses;
- Counter forced labor and other human rights violations that plague several overseas clean energy supply chains;
- Support clean domestic manufacturing of the aluminum, steel, and cement that go into solar, wind, and other clean technologies rather than relying on emissions-intensive production overseas;
- Build reliable supply chains for clean energy rather than exposing our climate goals to shipping bottlenecks and geopolitical conflict; and
- Foster global competition in clean technology manufacturing to keep driving down costs, rather than pinning our climate goals on trust that increasingly monopolistic producers abroad will maintain low prices.

We also strongly support efforts to ensure that public and nonprofit entities are widely able to access direct pay to fully take advantage of the clean energy tax credits. The direct pay provisions offer an opportunity for institutions that serve our communities – public schools, hospitals, local and state governments, Tribes, community organizations, rural electric cooperatives, houses of worship, and more – to be full participants in expanding access to clean energy. The benefits of broad access to direct pay are significant for reducing climate pollution, supporting clean air, creating good jobs, expanding energy democracy, and cutting energy costs for institutions that serve the public.

To meet the twin goals of ensuring broad public and nonprofit access to direct pay while also building stronger, fairer, and cleaner U.S. supply chains for clean energy, we offer the following recommendations:

1. **Offer a clear and accessible process for public and nonprofit entities**: So far, neither the interim guidance for the domestic content bonus credit[3] nor the elective pay guidance[4] has specified the domestic content rules that will apply to public and nonprofit entities seeking access to the full value of clean energy tax credits eligible for direct pay. Entities such as public schools, local governments, and nonprofits need a clear process so they can tailor purchasing decisions to domestic content requirements and boost certainty that clean energy projects can be brought to fruition. As part of this process, Treasury should create an opportunity for public and nonprofit entities to request a free advance determination of their adherence to domestic content requirements so that they can make any necessary revisions to purchasing plans in time to meet the requirements and qualify for direct pay. In addition, Treasury should offer public and nonprofit entities technical assistance for identifying and utilizing domestic supply chains that can help them meet the domestic content requirements prior to submitting tax forms. Treasury should dedicate additional resources to maintain a list of domestic suppliers and create dedicated technical assistance for entities to receive advanced determination.

2. **Offer targeted, transparent, time-limited waivers for non-availability and cost:** For any production tax credit or investment tax credit project that starts construction after 2023, direct pay subsidies will be reduced or eliminated unless the project meets domestic content requirements. The Inflation Reduction Act directs the Treasury to provide exceptions to these requirements for circumstances in which U.S.-made components of sufficient quality or quantity are not reasonably available, or compliance with the requirements would increase construction costs by more than 25%. These commonsense "non-availability" and "unreasonable cost" waivers help ensure that projects can proceed without delay and should be made available to public and nonprofit entities seeking to take advantage of direct pay. These waivers should prioritize targeting specific components that meet the threshold for non-availability, rather than being so general as to cover manufactured products that actually meet availability criteria.

   Such a targeted approach will help ensure broad access to direct pay while maintaining a demand pull for U.S.-made components that can be readily obtained. Any resulting waiver determinations should be made available to the public, as such transparency helps to identify the biggest U.S. clean energy supply chain gaps while sending a clear market signal to manufacturers that seek to fill those gaps by expanding production. Finally, such waivers should be limited to a certain time period, after which a review process, open to broad stakeholder input, should determine whether the product still meets the criteria for non-availability or unreasonable cost. This time-bound feature is particularly important given that the Inflation Reduction Act's supply-side investments in clean energy manufacturing (e.g., the 45X manufacturing tax credit) are expected to significantly lower the cost of U.S.-made clean energy components while increasing their availability.[5]

3. **Do not issue general waivers:** Some agencies have recently used general waivers to undercut domestic content requirements for certain federally funded programs. Unlike non-availability or cost waivers, general waivers offer no justification for waiving domestic content rules that aim to support stronger, cleaner, and fairer U.S. supply chains. It is difficult to distinguish a coherent rationale for a policy that offers zero

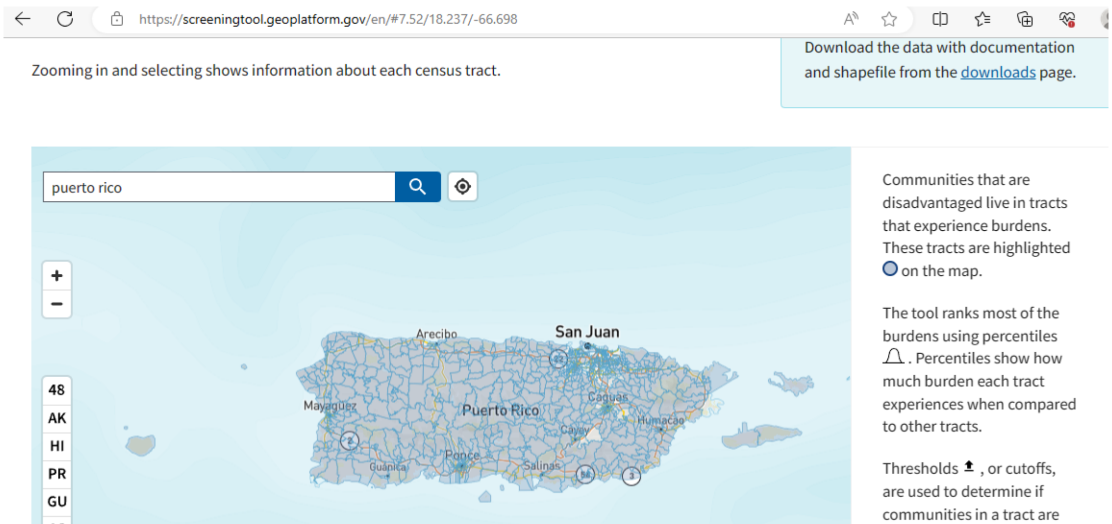
rationale. General waivers send no actionable market signals and instead simply circumvent established policy. To uphold existing laws and the public interest in onshoring clean energy manufacturing, Treasury should eschew general waivers related to the domestic content rules for direct pay. Instead, Treasury should ask eligible entities to use non-availability and cost waivers where appropriate, as outlined above.

ITC Eligibility for U.S. Territories

The proposed guidance states that governments of U.S. territories (including their political subdivisions and agencies and instrumentalities) are eligible for production credits in sections 45, 45Q, 45U, 45V, 45X, 45Y and 45Z of the Internal Revenue Code. However, section 50(b)(1) generally disallows the investment-related credits in sections 30C, 45W, 48, 48C and 48E for projects outside the fifty states or the District of Columbia unless the property is owned entirely by U.S. domestic corporations and citizens. Puerto Rican citizens are not considered U.S. citizens for this purpose. Thus, property used in the territories and owned by a territory government, or an entity created in or organized under the laws of a U.S. territory generally is not eligible for the investment-related credits.

We urge the Treasury to exercise its regulatory authority under section 6417 to maximize the availability of direct-pay, investment-related credits under sections 30C, 45W, 48, 48C and 48E for projects in the U.S. territories. For example, the preamble to the proposed regulations appears to indicate that a U.S. nonprofit corporation that is exempt from taxation under section 501(a) is eligible for direct-pay, investment-related credits for eligible property that it owns and that is used in a U.S. territory either by it or by a corporation created in the U.S. territory. We request confirmation from the Treasury that this treatment applies even if the U.S. nonprofit corporation is established by a U.S. territory government or a political subdivision thereof or any agency or instrumentality of a U.S. territory government or political subdivision thereof.[6] U.S. territories, often islands in tropical areas, are most at risk from climate change due to rising sea levels, increased frequency of natural disasters and extreme heat.[7] Ensuring access to the investment-related credits for U.S. territories will increase the availability of clean energy for climate change mitigation and adaptation. Access to the investment credits in sections 48 and

48E for energy storage and microgrid controllers is especially important. For Puerto Rico in particular, the most populous of U.S. territories, these technologies are essential to their climate and energy justice strategies. The availability of the 10% or 20% environmental justice bonus credit in sections 48(e) and 48E(h) is also critical. According to the Climate and Economic Justice Screening Tool, the majority of the island of Puerto Rico is considered low-income (see image below). Additionally, the section 30C credit for EV charging infrastructure is a much-needed tool for developing clean energy infrastructure in the territories.[8]



(Note: all census tracts highlighted in gray are considered disadvantaged.)

Streamline Pre-Registration

We encourage the IRS to streamline the pre-registration process, to the extent possible, to allow for stakeholders to minimize the paperwork burden and staff time required. This is particularly important for tax-exempt entities that are often public-serving institutions with limited staff capacity, especially in low-wealth communities. The process for pre-filing requires eligible entities to "obtain a registration number for each applicable credit property with respect to which an applicable credit will be determined". The IRS has estimated that pre-filing requirements will take an average of 6+ hours per clean energy project.[9] In real terms, a school district or large hospital or college campus managing multiple clean energy projects will have to budget significant staff time. Even a school with a single clean energy project may be deterred if the pre-filing process is onerous. The pre-registration portal should allow a single user or entity to manage numerous pre-registrations and, where applicable, eliminate any duplicative data input.

Additionally, the process of obtaining a pre-registration number should provide as much assurance as possible for applicants that they are indeed eligible for direct pay. The proposed rule states that "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."[10] Nevertheless, the portal should function as a checklist so that an applicant has reasonable assurance that it will be eligible for the credits if the information it provides on the portal is accurate. Similar to pre-qualifying for a mortgage loan before purchasing a home, those who receive pre-registration numbers should reasonably be able to expect to receive direct payment barring any significant changes in project design or tax-exempt status. This assurance is essential, otherwise there will be schools or hospitals in low-wealth communities, for example, that invest time and money into a clean energy project only to find out that the project does not qualify for a refund from the IRS. The pre-registration portal should also 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.

Conclusion

We commend the Administration and the Department of Treasury's efforts to swiftly implement the clean energy tax provisions of the Inflation Reduction Act. Direct pay creates unprecedented opportunity for historically excluded entities to access these generous clean energy credits. It is imperative that the details surrounding that access are clarified and explicit for all public and nonprofit entities. We look forward to working with Treasury and the Internal Revenue Service to address the necessary points above in order to ensure all eligible entities can draw down the clean energy tax credits.

Citations:

[1] Biden administration, Justice40. Available online: https://www.whitehouse.gov/environmentaljustice/justice40/
[2] IRS, Proposed Rule: Section 6417 Elective Payment of Applicable Credits. Available online: Regulations.gov
[3] https://www.bluegreenalliance.org/wp-content/uploads/2023/07/July-2023-BGA-Domestic-Content-User-Guide-vFINAL.pdf
[4] BlueGreen Alliance, Available online: https://www.bluegreenalliance.org/wp-content/uploads/2023/07/Making-Clean-Energy-Tax-Credits-Deliver-for-the-Public-vFINAL.pdf
[5] BlueGreen Alliance, Available online: https://www.bluegreenalliance.org/resources/the-new-math-for-wind-and-solar-manufacturing-supports-good-jobs-and-u-s-manufacturing/
[6] See also Center for American Progress, Available online: Maximizing the Benefits of Direct Pay for Clean Energy Tax Credits - Center for American Progress.
[7] Wall Street Journal, Why U.S. Territories are Most Vulnerable to Climate change. Available online: Why U.S. Territories Are Most Vulnerable to Climate Change - WSJ
[8] See Center for American Progress, Available online: Maximizing the Benefits of Direct Pay for Clean Energy Tax Credits - Center for American Progress.
[9] IRS, Pre-Filing Registration Requirements for Certain Tax Credit Elections. Available online: 2023-12797.pdf (govinfo.gov)
[10] IRS, Proposed Rule: Section 6417 Elective Payment of Applicable Credits. Available online:
Regulations.gov