



**[4830-01-p]**

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Parts 1 and 301**

**[REG-101607-23]**

**RIN 1545-BQ63**

**Section 6417 Elective Payment of Applicable Credits**

**AGENCY:** Internal Revenue Service (IRS), Treasury.

**ACTION:** Notice of proposed rulemaking and notice of public hearing.

**SUMMARY:** This document contains proposed 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 proposed 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 proposed regulations describe rules related to an IRS pre-filing registration process that would be required. These proposed 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. This document also provides notice of a public hearing on the proposed regulations.

**DATES:** Written or electronic comments must be received by August 14, 2023. The public hearing on these proposed regulations is scheduled to be held on August 21, 2023, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by August 14, 2023. If no outlines are received by

August 14, 2023, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. ET on August 17, 2023. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the hearing must be received by August 16, 2023.

**ADDRESSES:** Stakeholders are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG-101607-23) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted, whether electronically or on paper, to the IRS's public docket. Send paper submissions to: CC:PA:LPD:PR (REG-101607-23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, Jeremy Milton at (202) 317-5665 and James Holmes at (202) 317-5114 (not toll-free numbers); concerning submissions of comments or the public hearing, Vivian Hayes at (202) 317-6901 (not a toll-free number) or by email to [publichearings@irs.gov](mailto:publichearings@irs.gov) (preferred).

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Section 6417 was added to the Internal Revenue Code (Code) on August 16, 2022, by section 13801(a) of Public Law 117-169, 136 Stat. 1818, 2003, commonly referred to as the Inflation Reduction Act of 2022 (IRA). Section 6417 allows “applicable entities” (including tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, and rural electric cooperatives) to make an election to treat an applicable credit determined with

respect to such entity as making a payment against the tax imposed by subtitle A of the Code (subtitle A), for the taxable year with respect to which such credit was determined, equal to the amount of such credit. Section 6417 also allows certain taxpayers to elect to be treated as applicable entities for limited purposes, as described in part III of this background section. Section 6417 also provides special rules relating to partnerships and S corporations and directs the Secretary of the Treasury or her delegate (Secretary) to provide rules for making elections under section 6417 and to require information or registration necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6417. Section 13801(g) of the IRA provides that section 6417 applies to taxable years beginning after December 31, 2022. This document contains proposed regulations that would amend the Income Tax Regulations (26 CFR part 1) and the Procedure and Administration Regulations (part 301) to implement the statutory provisions of section 6417.

In the Rules and Regulations section of this issue of the ***Federal Register***, the Treasury Department and the IRS are issuing temporary regulations under §1.6417-5T that implement the pre-filing registration process described in proposed §1.6417-5 of the proposed regulations. The temporary regulations require applicable entities that want to elect the elective payment of applicable credit amounts to register with the IRS through an IRS electronic portal in advance of the applicable entity filing the return on which the election under section 6417 is made.

#### I. Overview of Section 6417

Section 6417(a) provides that, in the case of an applicable entity that makes an elective payment election under section 6417 with respect to any applicable credit determined with respect to the applicable entity for the taxable year, the applicable entity is treated as making a payment against the tax imposed by subtitle A, that is, Federal income taxes, 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.

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)<sup>1</sup> (section 45W credit);

(7) The credit for advanced manufacturing production under section 45X(a) of the Code (section 45X credit);

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<sup>1</sup> The reference should be to 45W(d)(2). This has been corrected in the proposed regulations.

(8) The clean electricity production credit determined under section 45Y(a) of the Code (section 45Y credit);

(9) The clean fuel production credit determined under section 45Z(a) of the Code (section 45Z credit);

(10) The energy credit determined under section 48 of the Code (section 48 credit);

(11) The qualifying advanced energy project credit determined under section 48C of the Code (section 48C credit); and

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

As described in part II of this Background section, section 6417(d) defines an “applicable entity” and provides generally applicable rules for making elective payment elections. Sections 6417(e) through (h) provide special rules applicable under section 6417 that are described in part II of this Background section. As described in parts III and IV of this Background section, section 6417(c), (d)(1)(B), (C), and (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 section 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.

## 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 agency or instrumentality of the foregoing), or political subdivision, described in section 6417(d)(1) and for which no Federal income tax return is required under sections 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 the 45Q credit (see part III of this Background section).

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), (d)(3)(D)(ii), and (d)(3)(D)(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).

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 section 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 territory<sup>2</sup> 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,

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<sup>2</sup> Section 6417(f) uses the term “possession,” but this proposed regulation uses the alternative term “territory.”

except as otherwise provided in section 6417(d)(2)(A),<sup>3</sup> 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)).

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

A taxpayer other than an applicable entity under section 6417(d)(1)(A) may make an 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 election allows the electing taxpayer to be treated as an applicable entity for the limited purpose of making an elective payment election under section 6417 with respect to a section 45V credit, a section 45Q credit, or a section 45X credit, respectively. The special rules for such an election are described in paragraphs III.A, III.B, and III.C of this background section.

#### 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.

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<sup>3</sup> Section 6417(g) actually states “subsection (c)(2)(A),” but there is no section 6417(c)(2)(A); thus, the proposed regulations correct the reference to state“(d)(2)(A).”

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) 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 income 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 such 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 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. Over 200 comment letters were received in response to Notice 2022-50. Based in part on the feedback received, the Treasury Department and the IRS are issuing these proposed regulations regarding the elective payment election provisions under section 6417. The major areas with respect to which public stakeholders provided letters are discussed in the following Explanation of Provisions.

### **Explanation of Provisions**

#### I. General Rules and Definitions

##### A. Applicable entity

Section 6417(d)(1) defines "applicable entity" as (1) any organization exempt from the 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)), (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. Proposed §1.6417-1(c) would clarify these statutory definitions pursuant to the Secretary's authority under section 6417(h) to issue regulations necessary to carry out the purposes of section 6417, as discussed below.

1. Any organization exempt from the tax imposed by subtitle A

Stakeholders asked for clarification on the scope of the phrase "any organization exempt from the tax imposed by subtitle A" for purposes of determining whether a taxpayer is an applicable entity. Entities may be exempt from tax or have their income exempt from tax under various authorities. For example, an organization could be exempt from taxation by section 501(a) of the Code or by other provisions of the Code. An organization could also have its income excluded from taxation by section 115.

The Treasury Department and the IRS propose to define the term "any organization exempt from the tax imposed by subtitle A" to include all organizations exempt from the tax imposed by subtitle A by section 501(a) of the Code, commonly referred to as "tax-exempt organizations."

Several stakeholders requested clarification that tax-exempt entities in the U.S. territories are eligible to make an election under section 6417. Under these proposed regulations, such entities would be considered organizations exempt from the tax imposed by subtitle A as long as they are exempt from taxation by section 501(a) and as long as they meet the requirements to claim an applicable credit (such as being an appropriate owner of an investment credit property under sections 50(b)(1)(B) and 168(g)(4)(G)).<sup>4</sup>

Stakeholders also asked whether an entity classified as a nonprofit under State law but that does not have Federal tax-exempt status would be described in section

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<sup>4</sup> Section 50(b)(1) provides that no investment tax credit can be determined with respect to property used predominantly outside of the United States, but section 50(b)(1)(B) provides an exception for property described in section 168(g)(4). In the case of entities, section 168(g)(4)(G) describes property which is owned by a domestic corporation and which is used predominantly in a U.S. territory by such a corporation, or by a corporation created or organized in, or under the law of, a U.S. territory.

6417(d)(1)(A). 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 (unless it met the requirements of another type of applicable entity discussed below, such as a state instrumentality).

Stakeholders also specifically sought clarification as to whether governments of U.S. territories would be treated as applicable entities, based on their unique status and the importance of their energy security. These stakeholders noted that the renewable energy credits generally may be claimed for activities in the U.S. territories provided the underlying requirements are met, including the specific ownership requirements for investment tax credits.<sup>5</sup> In response, the proposed regulations would interpret the term “organization exempt from the tax imposed by subtitle A” as used in section 6417(d)(1)(A) to include the governments of the U.S. territories. Since section 115(2) excludes the income accruing to the government of any territory of the United States, or any political subdivision thereof, from gross income, it effectively exempts these governments from the tax imposed by subtitle A. In addition, these governments may properly be viewed as organizations.<sup>6</sup> Accordingly, proposed §1.6417-1(c)(1)(ii) would provide that the government of any U.S. territory, or a political subdivision thereof, is an applicable entity for purposes of section 6417 or provisions of law referencing section 6417(d)(1)(A).

The Treasury Department and the IRS request comments on this definition of any organization exempt from the tax imposed by subtitle A, including as to whether the term should encompass the United States, federal agencies, or other organizations beyond those listed in these proposed rules.

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<sup>5</sup> See footnote 2.

<sup>6</sup> The Code and the regulations under 26 CFR part 1 occasionally refer to governmental entities as organizations. For example, section 509(a)(1) refers to “an organization described in section 170(b)(1)(A),” which includes a governmental unit described in sections 170(b)(1)(A)(v) and 170(c)(1). See corresponding rules in §1.170A-9(a) and (e).

## 2. Any State or political subdivision thereof

Section 6417(d)(1)(A)(ii) states that “any State or political subdivision thereof” is an applicable entity for purposes of section 6417.

The Treasury Department and the IRS note that section 7701(a)(10) provides that the term “State” must be construed to include the District of Columbia where such construction is necessary to carry out provisions of Title 26, and thus propose that the definition of State would include the District of Columbia. The Treasury Department and the IRS request comments on whether additional clarification is needed.

## 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 include subdivisions of Indian tribal governments in this definition.

Section 30D(g)(9) provides that “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 list published most recently as of the date of enactment of this subsection pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131). Thus, proposed §1.6417-1(k) would incorporate this definition into the 6417 regulations. See Rev. Proc. 2008-55, 2008-39 I.R.B. 768 (generally providing that an Indian tribal entity that appears on the most recent list published by the Department of the Interior in the *Federal Register* pursuant to the requirements of the List Act is designated an Indian tribal government for purposes of section 7701(a)(40)).

The Treasury Department and the IRS request comments regarding the definitions in proposed §1.6417-1(c)(3) and (k), including as to whether any further



clarification would be warranted. The Treasury Department and the IRS further request comments on whether the proposed definitions encompass the entity structures that Indian tribal governments employ in activities that would give rise to elective payments, including entities with partial Indian tribal government ownership.

#### 4. Alaska Native Corporations

Section 6417(d)(1)(A)(v) provides that an applicable entity for purposes of section 6417(a) includes “any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)).” A “Native Corporation” is defined in 43 U.S.C. 1602(m) to mean “any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation,” which are organized under the laws of the State of Alaska. Although 43 U.S.C. 1606(d) provides that a Regional Corporation is incorporated to conduct business for profit, each of a Village Corporation, Urban Corporation, and Group Corporation may be organized as a business for profit or nonprofit corporation to hold rights and assets for Native villages, urban communities of Natives, or members of a Native group.

A few stakeholders requested that a Settlement Trust (within the meaning of 43 U.S.C. 1602(t)) that is established by an Alaska Native Corporation (ANC) for the benefit of its shareholders also be treated as an applicable entity. The stakeholders stated that an ANC is a separate legal entity that is required to be a C corporation for Federal income tax purposes, and as such, it is an entity different from the Settlement Trust established by the ANC. However, the beneficiaries of the ANC Settlement Trust are typically the same Native individuals as the shareholders of the ANC. The stakeholders thus asked that an ANC Settlement Trust be added as an applicable entity in cases in which the Settlement Trust is directly affiliated with an applicable ANC.

Unlike the case of the statutory definitions of “Indian Tribal government,” the statutory definition of ANC is not ambiguous. Accordingly, the proposed regulations

would not treat Settlement Trusts as ANCs. However, Settlement Trusts could themselves be applicable entities not based on their relationship with an ANC if they qualified for exempt status under section 501(a) and applied for and received a determination letter from the IRS recognizing any such tax-exempt status.

Separately, an ANC may be the common parent of a consolidated group of corporations (ANC-parented group) that, in many ways, is treated similarly to a single taxpayer for Federal income tax purposes by the consolidated return regulations (§§1.1502-1, et seq.). For example, the members of a consolidated group report their consolidated taxable income on a single Federal income tax return that the common parent files with the IRS as the agent for the group under §1.1502-77. In this regard, some stakeholders have inquired whether non-ANC members of an ANC-parented group may separately make an elective payment election with respect to a section 45V credit, a section 45Q credit, or section 45X credit determined with respect to such member. The concern appears to be that, by reason of their affiliation with an ANC common parent, the non-ANC members might be prevented from making an election under section 6417(d)(1)(B), (C), or (D).

The proposed regulations would clarify 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 Treasury Department and the IRS request comments regarding the definition

in proposed §1.6417-1(c)(4) and whether additional guidance is necessary regarding consolidated groups with ANC common parents.

#### 5. Tennessee Valley Authority

As per section 6417(d)(1)(A)(iii), the Tennessee Valley Authority would be an applicable entity under proposed §1.6417-1(c)(5).

#### 6. Rural Electrical Co-ops

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

Stakeholders asked that any payment under section 6417(a) not be considered income for purposes of the 85-percent income test under section 501(c)(12) for electric cooperatives. Because the section 6417(a) election results in a credit being treated as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credit was determined, any such payment that results in a refund being issued by the IRS to an electric cooperative under section 6417(a) will not affect the application of the 85-percent income test determined with respect to the electric cooperative.

The Treasury Department and the IRS request comments on 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.

#### 7. Agencies and instrumentalities

Based on feedback from stakeholders, the Treasury Department and the IRS believe that, in many instances, States, Indian tribal governments, U.S. territories, or

political subdivisions thereof are likely to make investments or engage in activities that qualify for applicable credits through their agencies and instrumentalities. Multiple stakeholders requested that State and local government agencies and instrumentalities be included as applicable entities under a variety of theories, including cross-references to sections 50(b)(4)(A)(i) and 168(h)(2)(A)(i) in section 6417, the fact that the income of an instrumentality is generally excluded from tax by section 115 of the Code, and the authority provided by section 6417(h) to issue regulations necessary to carry out the purposes of section 6417. In particular, stakeholders stated that the term "Indian tribal government" should be defined to include, in part, economic subdivisions of a tribe (such as a utility, housing authority, energy division or authority, or other enterprise) regardless of how the entity is formed (whether by Federal, Tribal or State law).

It would be administratively burdensome, both for stakeholders and for the IRS, to determine what is part of a State, Indian tribal government, U.S. territory, or political subdivision, on the one hand, and what is an agency or instrumentality thereof on the other hand.<sup>7</sup> For example, stakeholders expressed uncertainty about whether certain entities, such as school districts, public utility districts, and special purpose entities established by governments (such as joint action agencies, economic development corporations, and joint powers authorities) would qualify as political subdivisions or would be viewed as agencies or instrumentalities. Stakeholders also noted that the status of such entities as political subdivisions may turn on differences in state law, such as whether a school district has taxing authority.

In addition, different States may structure ownership of relevant property differently (for example, a school district or the county of the school district may own the electric school buses), and it would be inequitable for entities to be eligible or ineligible

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<sup>7</sup> The definitions of political subdivision under §1.103-1(b) and of instrumentality under Rev. Rul. 57-128, 1957-1 C.B. 311, are frequently cited for Federal tax purposes.

for elective payment on the basis of such differences in ownership structures. Furthermore, if agencies and instrumentalities were not specifically listed as applicable entities, States and political subdivisions may decide to create new entities or reorganize the administration of their activities to perform applicable credit eligible activities directly, which would be administratively burdensome without a commensurate public benefit. For these reasons, and to promote uniform treatment throughout the United States, proposed §1.6417-1(c)(7) would provide that applicable entities include any agency or instrumentality of any State, the District of Columbia, Indian tribal government, U.S. territory, or political subdivision thereof.

The Treasury Department and the IRS request comments on this approach to defining applicable entities and on whether further guidance is necessary.

#### 8. Electing taxpayers

Certain taxpayers may make an election to be treated as an applicable entity with respect to applicable credit property giving rise to the section 45Q credit, section 45V credit, or section 45X credit, as described in part III of this Explanation of Provisions. Proposed §1.6417-1(g) defines 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). Section 7701(a)(14) defines a “taxpayer” as any person subject to any internal revenue tax, including income taxes, employment taxes, and excise taxes.

Members of a consolidated group that is not an ANC-parented group also may make an election to be treated as an applicable entity with respect to the section 45Q credit, section 45V credit, or section 45X credit. A member of the consolidated 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 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 Treasury Department and the IRS request comments regarding the application of section 6417 to consolidated groups with electing taxpayers (for example, whether special rules are necessary for consolidated groups under proposed §1.6417-2(e)(2) (the *denial of double benefit* rule).

## B. Entities formed by an applicable entity or by an electing taxpayer

### 1. Disregarded entities

Several stakeholders asked whether an entity disregarded as separate from its owner (disregarded entity) is described in section 6417(d)(1)(A) if its owner is described in section 6417(d)(1)(A). Since a disregarded entity is disregarded for Federal income tax purposes and its attributes are attributed to the owner regarded for Federal income tax purposes, the disregarded entity's activities would be attributed to the owner and the owner could claim the credit as long as the owner is described in section 6417(d)(1)(A). This would also include property that an electing taxpayer that is a partnership or S corporation holds through a disregarded entity or multiple disregarded entities, including tiers of multiple disregarded entities owned through chains of ownership. Thus, proposed §§1.6417-2(a)(1)(ii) and -2(a)(2)(iv) would provide 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.

### 2. Taxable C corporations

Stakeholders also asked whether an entity described in section 6417(d)(1)(A) could create an entity that is a taxable C corporation to perform the applicable credit

activity and still qualify for the section 6417 election. 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), 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).

### 3. Undivided ownership interests

Stakeholders also asked whether entities such as unincorporated joint ventures could provide applicable entities access to earning applicable credits available for an elective payment election, including by partnering with other applicable entities or with for-profit entities. Proposed §1.6417-2(a)(1)(iii) would provide that, if an applicable entity is a co-owner of an applicable credit property through an ownership arrangement treated as a tenancy-in-common or pursuant to a joint operating arrangement that has properly elected out of subchapter K of chapter 1 of the Code (subchapter K) under section 761, then each owner is considered to own an undivided interest in or share of the underlying applicable credit property and thus, any applicable credits are determined separately with respect to each owner. As a result, an applicable entity may make an elective payment election under section 6417(a) in the manner provided in paragraph (b) with respect to its share of the applicable credits determined with respect to its undivided ownership interest in or share of the underlying applicable credit property.

### 4. Partnerships

Many stakeholders questioned whether a partnership that contains partners described in section 6417(d)(1)(A) could make an elective payment election under section 6417 with respect to those partners, pointing to the “determined with respect to such entity” language in section 6417(a). Stakeholders stated that clarity around the

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.

The Treasury Department and the IRS believe that the better interpretation of the “determined with respect to such entity” language in section 6417(a), as well as the rules in sections 6417(c), is to apply entity-specific rules under section 6417. Section 6417(c) refers to a credit determined with respect to any facility or property “held directly by a partnership or S corporation,” meaning that the partnership or S corporation, not its owners, is the relevant entity for these purposes. Additionally, section 6417(c) provides that the partnership or S corporation, not the partners or shareholders, makes the section 6417 election. Furthermore, 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.

Thus, proposed §1.6417-2(a)(1)(iv) would provide that partnerships and S corporations are not applicable entities described in section 6417(d)(1)(A) and proposed §1.6417-1(c). This proposed rule would apply no matter how many of the partners or shareholders are described in section 6417(d)(1)(A) and proposed §1.6417-1(c), including if all partners or shareholders are described in section 6417(d)(1)(A) and proposed §1.6417-1(c). However, because section 6418(f)(2) defines “eligible taxpayer” as any taxpayer that is not described in section 6417(d)(1)(A) (and thus not in proposed §1.6417-1(c)), such a partnership would be an eligible taxpayer described in section 6418(f)(2).

In addition, as described in part I.B.3. of this Explanation of Provision, an



applicable entity may engage with other entities, including with for-profit partners, in an ownership arrangement that has properly elected out of subchapter K and make an elective payment election under section 6417(a) with respect to its share of the applicable credits determined with respect to its share of the underlying applicable credit property. This type of arrangement provides some flexibility for tax-exempt and government entities to participate in section 6417 with other entities. The Treasury Department and the IRS request comments on whether any additional rules are needed. Comments are also requested regarding whether any entity described in section 6417(d)(1)(A)(i)-(vi) or proposed §1.6417-1(c) could include an entity organized as a partnership for Federal tax purposes.

As described in part IV of this Explanation of Provisions, an electing taxpayer may include a partnership or S corporation.

### C. Applicable credit

Section 6417(b) lists the applicable credits for which a section 6417(a) election is available. Proposed §1.6417-1(d) lists those credits, with minor changes to account for erroneous cross-references in the statute.

Stakeholders asked for clarification on the scope of the credit for qualified commercial vehicles. Section 6417(b)(6) states that the term “applicable credit” includes the credit for qualified commercial vehicles determined under section 45W by reason of subsection (d)(2)<sup>8</sup> thereof, “in the case of a tax-exempt entity described in clause (i), (ii), or (iv) of section 168(h)(2)(A).” In order to qualify for elective pay for the section 45W credit, an entity would need to be both be an applicable entity, as defined in proposed §1.6417-1(c), and a tax-exempt entity described in clause (i), (ii), or (iv) of section 168(h)(2)(A) (in other words, an organization exempt from the tax imposed by

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<sup>8</sup> While section 6417(b)(6) refers to section 45W(d)(3), the reference should be to section 45W(d)(2). This has been corrected in the proposed regulations

subtitle A by reason of section 501(a) of the Code; a State, the District of Columbia, a political subdivision thereof, or any agency or instrumentality of any of the foregoing; a U.S. territory, a political subdivision thereof, or any agency or instrumentality of any of the foregoing; or an Indian tribal government, a subdivision thereof, or any agency or instrumentality of any of the foregoing), and would also need to otherwise qualify for the section 45W credit.

One stakeholder asked whether the elective payment election applies to both the applicable credit and any eligible bonus credit amounts. The amount of applicable credit is determined, in part, under the Code by including any eligible bonus credit amounts. The entire amount of any applicable credit is eligible under the Code for the elective payment election, assuming all the relevant requirements are met.

Several stakeholders asked whether the applicable entity could treat the applicable credits arising during a quarter as a payment against quarterly estimated tax (assuming such an amount was due). These proposed regulations do not contain a special rule 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.

Because registration must be made with respect to each facility or property giving rise to an applicable credit, proposed §1.6417-1(e) defines “applicable credit property” for purposes of each of the applicable credits, and the section 6417 regulations use the term “applicable credit property” throughout for clarity.

#### D. Definitions pertaining to the election

Proposed §1.6417-1(i) would provide that the “elective payment election” is the election provided in proposed §1.6417-2(b). Proposed §1.6417-1(h) would provide that the “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 would be equal to the sum of (1) the amount (if any) of the current year applicable credit(s) allowed as a general business credit (GBC) under section 38 for the taxable year, and (2) the amount (if any) of unused current year applicable credits which 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. With respect to an electing taxpayer that is a partnership or an S corporation, the term “elective payment amount” would mean the sum of the applicable credit(s) for which the partnership or S corporation makes an elective payment election and results in a payment to such partnership or S corporation equal to the amount of such credit(s) (unless the partnership or S corporation owes a Federal tax liability, in which case the payment may be reduced by such tax liability).

#### E. Guidance

Interpretations and procedures pertaining to section 6417 and the section 6417 regulations may be issued through guidance, as appropriate. Proposed §1.6417-1(j) would define “guidance” for purposes of these regulations as 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.

#### F. Annual Tax Return

To avoid any confusion about where the elective payment election should be made, proposed §1.6417-1(b) would define “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 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 State, District of Columbia, local, or Indian tribal governmental entities), the Form 990-T; and (3) for short tax year filers, the short year tax return. For example, an individual in a U.S. territory would file a Form 1040, "U.S. Individual Income Tax Return," a corporation in a U.S. territory would file a Form 1120, "U.S. Corporation Income Tax Return," and the U.S. territory itself would file Form 990-T, "Exempt Organization Business Income Tax Return (and proxy tax under section 6033(e))." Similarly, a tax-exempt entity would file the Form 990-T even if not otherwise required to file the Form 990-T.

## II. Rules for Making Elective Payment Elections

### A. In general

Proposed §1.6417-2 would provide general rules for an applicable entity or electing taxpayer to make an elective payment election under section 6417 in accordance with the rules of proposed §1.6417-2(b) with respect to any applicable credit determined with respect to such entity.

Proposed §1.6417-2(a)(1) would provide the rules for applicable entities making elective payment elections. An applicable entity that makes an elective payment election in the manner described in Part II.B. of this Explanation of Provisions would 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 was determined, in the amount of such credit as determined under the rules discussed in Part II.C. of this Explanation of Provisions. Proposed §1.6417-2(d)(1) would provide that the payment described in proposed §1.6417-2(a)(1) is treated as made (1) in the case of an entity for which no return is required under sections 6011 or 6033(a), on the later of the date that a return would be due under section 6033(a) (determined without regard to extensions)

if such entity were described in that section, or the date on which such entity submits a claim for credit or refund, and (2) in any other case, 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.

Special rules are provided in proposed §1.6417-2(a)(1)(ii) through (v) that would apply for applicable entities if the election is made for applicable credit property held by a disregarded entity; if the applicable entity is a co-owner in an applicable credit property through an ownership arrangement properly treated as a tenancy-in-common, or pursuant to a joint operating arrangement that has properly elected out of subchapter K under section 761; and for members of a consolidated group of which an Alaska Native Corporation is the common parent.

As discussed in Part I.B.4 of this Explanation of Provisions, partnerships and S corporations would not be applicable entities described in proposed §1.6417-1(c)(1), and thus would not be eligible to make an elective payment election unless the partnership or S corporation is an electing taxpayer.

Proposed §1.6417-2(a)(2) would provide the rules for electing taxpayers making an elective payment election. An electing taxpayer other than a partnership or an S corporation that has made an elective payment election in accordance with proposed §§1.6417-3 and §1.6417-2(b) would be treated as making a payment against the Federal income taxes imposed by subtitle A for the taxable year with respect to which the applicable credit is determined in the amount determined under proposed §1.6417-2(c). Proposed §1.6417-2(d)(1) would provide that the payment described in proposed §1.6417-2(a)(2) is treated as made at the same time as made by an applicable entity. However, in the case of an electing taxpayer that is a partnership or S corporation that has made an elective payment election in accordance with proposed §§1.6417-3, 1.6417-4, and 1.6417-2(b), the IRS will make a payment to such partnership or

S corporation equal to the amount of such credit determined under proposed §§1.6417-2(b) and 1.6417-4(d)(3) (unless the partnership or S corporation owes any Federal income tax liability, in which case the payment may be reduced by such tax liability).

Proposed §1.6417-2(a)(2) also provides special rules for electing taxpayers that would apply if the election is made for applicable credit property held by a disregarded entity; if the applicable entity is a co-owner in an applicable credit property through an ownership arrangement properly treated as a tenancy-in-common, or pursuant to a joint operating arrangement that has properly elected out of subchapter K under section 761; and for members of a consolidated group.

Proposed §1.6417-2(a)(3)(i)-(iv) would address the special rules with regard to the election for credits under section 45, 45V, 45Q, or 45Y, as provided in section 6417(d)(3). However, the special rules in section 6417(d)(3) that relate to electing taxpayers are set forth in proposed §1.6417-3, for clarity.

Consistent with the special rule for electing taxpayers that may elect to be treated as an applicable entity for purposes of section 6417 for up to five years with respect to a facility placed in service that produces eligible components (as defined in section 45X(c)(1)), proposed §1.6417-2(a)(3)(v) would clarify that a section 45X election is made, for purposes of section 6417, with respect to a 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 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 provide those rules. First, proposed §1.6417-2(b)(1) provides that an applicable entity or electing taxpayer would make an elective payment election on the applicable

entity's or electing taxpayer's 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 to the relevant forms.

Proposed §1.6417-2(b)(1)(iv) would provide that an elective payment election may only 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 or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There also would be no relief available under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations (26 CFR part 301) for an elective payment election that is not timely filed.

Second, proposed §1.6417-2(b)(2) would specify that pre-filing registration (as 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). 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 received a valid registration number for the applicable credit property and provided the registration number for each applicable credit property on its Form 3800 (or its successor) attached to the tax return in accordance with guidance.

Third, proposed §1.6417-2(b)(3) would provide the due date for the election under section 6417(a). In the case of any entity for which no Federal income tax return is required under sections 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), that date is the 15th day of the fifth month after the taxable year determined by section 441 of the Code. 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 6033(a) of the Code could request an extension of time to file, 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 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 filling Form 1040 or for corporations filling 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 they filed an extension, on or before the 15th day of October following the close of the calendar year.

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.

Fourth, proposed §1.6417-2(b)(4) would provide 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 the 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 the section 45Q credit, the election applies to the 12-year period



beginning on the date the equipment was originally placed in service. For the 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) and (d)(3)(C) and (D), and would be provided in proposed §1.6417-3 (as described in part III of this Explanation of Provisions).

Fifth, proposed §1.6417-2(b)(5) would provide 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.

#### C. Determination of Applicable Credit

Proposed §1.6417-2(c) would provide three rules relating to the determination of any applicable credit.

##### 1. Special rules for tax-exempt organizations and government entities

In accordance with section 6417(d)(2), proposed §1.6417-2(c)(1) would provide 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) elaborates on the effect of the “trade or business” rule in section 6417(d)(2) and proposed §1.6417-2(c)(1)(ii). First, the rule would allow 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).

Second, the rule allows the entity to apply the capitalization and accelerated depreciation rules (such as sections 167, 168, 263 and 263A) that apply to determining the basis and the depreciation allowance for property used in a trade or business.

Third, the rule makes applicable general limitations on the use of credits by those persons engaged in the conduct of a trade or business, such as section 49 in the context of investment tax credits, and section 469 for all applicable credits. For section 49 to apply for purposes of section 6417, the property must be placed in service by an applicable entity or electing taxpayer described in section 465(a)(1) (that is, an individual or a C corporation with respect to which the stock ownership requirements of section 542(a)(2) are met). For section 469 to apply for purposes of section 6417, 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 sections apply with respect to the determination of applicable credits under section 6417. The Treasury Department and the IRS request 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.

Lastly, the rule does not create any presumption that the trade or business is related (or unrelated) to a tax-exempt entity’s exempt purpose.

2. Special rule for investment-related credit property acquired with income, including income from certain grants and forgivable loans, that is exempt from

## taxation under subtitle A

Multiple stakeholders asked that regulations clarify whether an applicable entity that funded the purchase of an investment credit property with income, including income from certain grants and forgivable loans, that is exempt from taxation under subtitle A (Tax-Exempt Amounts<sup>9</sup>) can include those amounts in the basis of the property for purposes of calculating the amount of the investment tax credit. Stakeholders also noted that in some cases the full cost of the investment credit property can be paid through Tax-Exempt Amounts.

Generally, the basis of property is the cost of such property. See section 1012 of the Code. However, for a taxable entity, cost basis in property may need to be reduced if Tax-Exempt Amounts are used for the purpose of purchasing, constructing, or otherwise acquiring such property. See for example, sections 118(a) and 362(c)(2) of the Code. However, grants and forgivable loans received by taxable entities are generally taxable, and thus generally do not result in a reduction in basis. See generally section 61 of the Code.

For tax-exempt and government entities, for which grants, forgivable loans, and other amounts are generally exempt from taxation under subtitle A, the treatment of such Tax-Exempt Amounts with respect to basis in property is less clear. Because these entities may acquire investment credit properties eligible for the section 6417(a) election, in whole or in part, with Tax-Exempt Amounts, if such amounts were not included in the basis of the investment credit property (that is, they resulted in a reduction in the basis of the investment credit property), the applicable entity may have little or no basis with respect to which to calculate the credit, which would frustrate Congressional intent to provide the section 6417(a) election for investment credit

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<sup>9</sup> For this purpose, “Tax-Exempt Amounts” do not include the proceeds of loans, which are not included in income as long as they need to be repaid.

properties owned by such entities. However, as stakeholders noted, allowing an elective payment for an applicable tax credit when the investment credit property was fully purchased with Tax-Exempt Amounts subject to donor restrictions for that purpose would result in an aggregate benefit to the applicable entity in excess of the cost of the property. As a result, a few stakeholders suggested that local, State, and Federal government grants received as Tax-Exempt Amounts by applicable entities specifically for acquisition of investment credit property should not be included in the basis of such property for purposes of calculating the applicable credit for the elective payment under section 6417.

Proposed §1.6417-2(c)(3) would provide a special rule for investment credit property acquired with Tax-Exempt Amounts and would expand the rule to other credits that are determined on the basis of property. The rule states that, for purposes of 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 other provisions of the Code.

However, to prevent an excessive benefit, proposed §1.6417-2(c)(3) would provide that, if an applicable entity receives Tax Exempt Amounts for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment credit property (Restricted Tax Exempt Amount), and the Restricted Tax-Exempt Amount 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 Amount equals the cost

of investment credit property.

Proposed §1.6417-2(c)(5) contains three examples illustrating these rules.

3. Credits must be determined with respect to the applicable entity or electing taxpayer

Multiple stakeholders asked that regulations clarify whether applicable entities may “chain” an election under section 6417(a) for credits obtained from other sources. For example, stakeholders questioned whether an applicable entity may make an elective payment election under section 6417(a) with respect to purchased credits under section 6418(a) or credits allowable to the applicable entity because of an election under section 45Q(f)(3)(B) or former section 48(d) (pursuant to section 50(d)(5)). Stakeholders also asked whether an applicable entity may make an elective payment election in the case of a third-party ownership arrangement, such as an energy project owned by a for-profit developer but developed by a government entity.

The Treasury Department and the IRS propose that such chaining will not be permissible and seek further comment on the issue. Proposed §1.6417-2(c)(4) would state that any credits 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 owns the underlying eligible credit property or, if ownership is not required, otherwise conducts the activities giving rise to the underlying eligible credit.<sup>10</sup> This proposed rule, which is consistent with the proposed regulations under section 6418, would mean that no election may be made under section 6417(a) for credits purchased 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

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<sup>10</sup> 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.

applicable entity or electing taxpayer.

Stakeholders noted several administrative and practical reasons why making an elective payment election with respect to credits transferred under section 6418 would present challenges. For example, stakeholders noted that businesses electing to be treated as applicable entities with respect to applicable credit property giving rise to section 45V, 45Q, or 45X credits must do so in the taxable year in which such taxpayer has placed in service such property, and the election generally lasts through the following four taxable years, whereas the duration of the section 6418 transfer election is limited to the tax year. In addition, any credit determined with respect to an electing taxpayer that is a partnership or S corporation must be determined with respect to only applicable credit property held directly by the partnership or S corporation. Allowing a partnership or S corporation to make an elective payment election with respect to transferred credits would conflict with this rule. Furthermore, the elective payment election under section 6417 with respect to a section 45 credit or section 45Q credit only applies to applicable credit property that is originally placed in service after December 31, 2022, and the elective payment election under section 6417 with respect to a section 45V credit only applies to clean hydrogen attributable to applicable credit property that is originally placed in service after December 31, 2012, whereas there are no such restrictions under section 6418. In addition, stakeholders contended that section 6417(d)(3)(ii)'s requirement that a section 6417(a) election be "irrevocable" would seem to prohibit an applicable entity from making a section 6417(a) election with respect to any transferred credit for which the 6417(a) election spans more than one year (such as credits determined under sections 45, 45Q, 45V, 45Y, and, for electing taxpayers only, under section 45X), because elections to transfer all or a portion of eligible credits under section 6418(a) are annual and the transferee does not own the property or engage in the activities that originally gave rise to the eligible

credits. Finally, stakeholders noted that a transferee may purchase only a portion of a credit determined with respect to an eligible credit property pursuant to section 6418(a), which they argued is inconsistent with the requirement under section 6417(a) that the elective payment election be with respect to the entire applicable credit determined with respect to applicable credit property for a taxable year.

These administrative and practical reasons have informed the proposed conclusion of the Treasury Department and the IRS that sections 6417 and 6418 are best interpreted to not allow an applicable entity under section 6417 to make an elective payment election for a transferred credit under section 6418. Furthermore, the pre-filing registration process contemplated by section 6417(d)(5) and by section 6418(g)(1) is not currently designed to allow an applicable entity purchasing eligible credits under section 6418 to make an elective payment election under section 6417.

Other stakeholders have suggested that the Code may allow a transferee taxpayer under section 6418 to make an elective payment election under section 6417 for a transferred credit because section 6418(a) provides that “the transferee taxpayer specified in such election (and not the eligible taxpayer) shall be treated as the taxpayer for purposes of this title with respect to such credit.” These stakeholders argue the transferee taxpayer steps into the shoes of the eligible taxpayer transferring the credit, such that a transferee taxpayer may be viewed as the taxpayer earning the credit for purposes of section 6417 and therefore is able to make an elective payment election with respect to such credit. They further noted that section 6417 does not expressly prohibit an applicable entity from making an elective payment election with respect to a transferred credit and that allowing applicable entities to make an elective payment election with respect to a transferred credit may further the policy goals of the IRA by expanding the financing methods available to renewable energy projects.

The Treasury Department and the IRS agree with stakeholders who noted that

there is no restriction on who can be a transferee under section 6418, other than that the transferee cannot be related (within the meaning of section 267(b) or 707(b)(1) of the Code) to the eligible taxpayer transferring the credit. Thus, an applicable entity could be transferred credits under 6418, at least to offset any Federal income tax liability. However, the statute does not address whether an applicable entity can make an elective payment election under section 6417 with respect to transferred credits. Based on the reasons previously discussed in this part II.C.3. of this Explanation of Provisions, the Treasury Department and the IRS believe that a transferred credit is not properly interpreted as an applicable credit that is “determined with respect to” an applicable entity or electing taxpayer under section 6417(a) because the credit is not determined with respect to underlying applicable credit property owned by the applicable entity or electing taxpayer, or, if ownership is not required, activities otherwise conducted by the applicable entity or electing taxpayer. Section 6418(a) and the proposed regulations under section 6418 provide that a transferred credit is determined with respect to the eligible taxpayer transferring the credit. Although the transferee taxpayer uses the credit, the proposed regulations under section 6418 provide that the transferee taxpayer is not considered to have owned an interest in the underlying eligible credit property or have otherwise conducted any of the activities that give rise to the credit.

The Treasury Department and the IRS seek comments on limited situations where exceptions to this proposed rule may be appropriate because it is consistent with the text, design, and intent of the IRA, while also ensuring that such exceptions are not subject to fraud or abuse. Stakeholders could consider appropriate limitations such as (1) the type of applicable entity that may be allowed to make an elective payment election with respect to credits transferred under section 6418, such as a government entity; (2) the involvement of the transferee taxpayer in the project’s development;



(3) the level of due diligence conducted by the transferee taxpayer regarding whether the project qualifies for the applicable credit and any bonus credits and whether the amount of transferred credits was properly determined with respect to the eligible taxpayer transferring the credit; (4) the fact that the transferee taxpayer is paying close to the face value of the credit (and what minimum percentage of face value should be required); and (5) there are no other special financial arrangements between the parties. Stakeholders should address legal considerations, as well as practical and administrative challenges, to any such exception to the proposed rule.

#### 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 6417(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 address the methodology for

determining the amount of the elective payment election, reducing the elective payment election amount to zero, and treating the applicable credit as a credit 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. The methodology with respect to a payment made to a partnership or S corporation is provided in proposed §1.6417-4(c), as described in part IV of this Explanation of Provisions.

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. First, the taxpayer would compute 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 amount of tax under section 38. Second, the taxpayer would compute 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 be required to be made on an original return, any business credit carrybacks would not be considered when determining the elective payment amount for the taxable year. Third, the taxpayer would apply 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 identify the amount of any excess or unused current year business credit, as defined under section 39, 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 be 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 reduce 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.

The proposed regulations would provide, 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 would give several examples illustrating these rules.

The Treasury Department and the IRS request comments on whether future guidance should expand or clarify the methodology that an applicable entity follows to compute the amount of its elective payment. Comments are also requested 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.

### III. Elective Payment Election by Electing Taxpayers

Section 6417(d)(1)(B), (C), and (D) provides that a taxpayer that is not an applicable entity described in section 6417(d)(1)(A) and that, with respect to any taxable year, places in service applicable credit property that qualifies for the section 45V credit or the 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 applicable credit

property and only with respect to the credit under section 45V(a), 45Q(a), or 45X(a), respectively. Proposed §1.6417-1(g) would define such a taxpayer as an “electing taxpayer.”

The special rules for electing taxpayers are found in section 6417(d)(1) and (d)(3). Proposed §1.6417-3 would combine these rules for clarity.

Proposed §1.6417-3(b), (c), and (d) would provide the specific rules regarding the election under section 6417(d)(1)(B), (C), or (D). Proposed §1.6417-3(e) would provide the rules relating to the election for electing taxpayers. Proposed §1.6417-4 would provide additional rules for electing taxpayers that are partnerships or S corporations.

Proposed §1.6417-3(b) would provide 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 the section 45V credit, and only if the pre-filing registration process that would be required by proposed §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) would not be able to make an elective payment election with respect to such facility.

Proposed §1.6417-3(c) would provide 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 the section 45Q credit, and only if the pre-filing registration process that would be required by proposed §1.6417-5 was properly

completed.

Proposed §1.6417-2(a)(3)(v) and -3(d) would provide that an electing taxpayer that produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at a facility during the taxable year 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 section 45X credit, and only if the pre-filing registration process that would be required by proposed §1.6417-5 was properly completed.

Proposed §1.6417-3(e) would provide rules on how the electing taxpayer makes the elective payment election. First, 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).

Second, the election would 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. Only one election may be made with respect to any specific applicable credit property.

Third, 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 subsequent taxable years that end before January 1, 2033. The election period would not be able to 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.

However, 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.

An electing taxpayer would not be able to 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 would be able to 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.

#### IV. Elective Payment Election for Partnerships and S corporations

##### A. Overview

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. These proposed regulations would clarify that partnerships or S corporations are not applicable entities described in section 6417(d)(1)(A); thus, any partnership or S corporation making an elective payment election must be an electing taxpayer, and as such, the only applicable credits with respect to which the partnership or S corporation can make an elective payment election are a section 45V credit, a section 45Q credit, and a section 45X credit.

If a partnership or S corporation makes an election under section 6417(a) and proposed §1.6417-2(b), the special rules of section 6417(c)(1)(A) through (D) apply. In that regard, proposed §1.6417-4(c) would provide that (1) the IRS will make a payment to such partnership or S corporation equal to the amount of such credit; (2) before determining any partner's distributive share, or shareholder's pro rata share, of such credit, such credit is reduced to zero and is, for any other purposes under this title, deemed to have been allowed solely to such entity (and not allocated by such entity, or otherwise allowed, to any partner or shareholder) for such taxable year (for example, if a partnership pays a Federal tax liability to the IRS in a year for which an elective payment election is made and cash is received, it treats the payment to the IRS as if it paid the liability with the same amount of underlying credit for which the elective payment election is made); (3) any amount with respect to which the election under section 6417(a) is made is treated as tax exempt income for purposes of sections 705 and 1366; and (4) 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). The tax exempt income would be taken into account by the partnership or S corporation at the same time as the underlying credit would have been taken into account by the partnership or S corporation absent an

elective payment election. The proposed regulations provide an example illustrating this rule. Because it is the applicable credits, and not the tax exempt income, that arise from the conduct of the trade or business, the proposed regulations would treat the tax exempt income resulting from an elective payment election by a partnership or an S corporation 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). As such, the tax exempt income would not be treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

As requested by stakeholders, the Treasury Department and the IRS clarify here that there are no restrictions imposed under section 6417 or the section 6417 regulations on how a partnership or S corporation that receives a payment from the IRS pursuant to an elective payment election may use the cash payments in its operations (including on when it makes distributions to its partners or shareholders).

Section 6417(h) requires that the Secretary issue regulations or other guidance to ensure that the amount of the payment to a partnership or S corporation is commensurate with the amount of the credit that would otherwise be allowable (without regard to section 38(c)). Therefore, proposed §1.6417-4(d)(1) would provide that, in determining the applicable credit amount that will result in a payment to a partnership or S corporation, the partnership or S corporation must compute the amount of the applicable credit allowable (without regard to section 38(c)) as if an elective payment election were not made. Because a partnership or S corporation is not subject to section 469 (that is, section 469 applies at the partner or shareholder level), the amount of an applicable credit determined with respect to an applicable credit property held directly by a partnership or S corporation is not subject to limitation by section 469. In addition, because the credits to which a partnership or S corporation may make the elective payment election (that is, section 45V, 45Q, and 45X) are not investment tax



credits under section 46, sections 49 and 50 do not apply to limit the amount of the credits.

## B. BBA partnerships

Many partnerships are subject to the centralized partnership audit regime found in subchapter C of chapter 63 of the Code as amended by the Bipartisan Budget Act of 2015 (BBA).<sup>11</sup> In connection with the implementation of section 6417, the Treasury Department and the IRS identified several areas of the BBA regulations that require updates to administer section 6417 in the case of a partnership subject to the BBA (BBA Partnership). Section 6221 of the Code provides that any adjustment to a partnership-related item with respect to a BBA Partnership, and any tax attributable thereto, is assessed and collected at the partnership-level except to the extent provided under the BBA. The BBA outlines centralized audit procedures which generally must be followed before the IRS can adjust a partnership-related item (as defined in §301.6241-1). In order to implement section 6417, the Treasury Department and the IRS propose updates to the regulations under §§301.6241-1 and 301.6241-7.

### 1. Partnership-related Items

Under §301.6241-1(a)(6)(ii), a partnership-related item is any item or amount that is, with respect to the BBA Partnership, relevant in determining the tax liability of any person under chapter 1. Because the partnership-related item definition is based on relevance to the chapter 1 liability of any person, the liability could belong to the BBA Partnership or its partners. While partnerships do not typically pay chapter 1 tax pursuant to section 701 of the Code, a BBA Partnership is eligible to be an electing taxpayer under section 6417 and is thus subject to the excessive payment rule under

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<sup>11</sup> See section 1101 of the BBA, Public Law 114-74, 129 Stat. 584, 625-638 (2015), as amended by section 411 of the Protecting Americans from Tax Hikes Act of 2015, Public Law 114-113, 129 Stat. 2242, 3121 (2015), and sections 201 through 207 of the Tax Technical Corrections Act of 2018, Public Law 115-141, 132 Stat. 348, 1171-1183 (2018).

section 6417(d)(6), which could result in a chapter 1 tax liability to the BBA Partnership. In addition, if a partnership makes an election under section 6417, the partnership must reduce its applicable credit under section 6417(e), which would impact the amount of credit and tax exempt income that the partners would be allocated, thereby affecting the partners' chapter 1 liability. Because the application of section 6417 may be relevant in determining the chapter 1 liabilities of a BBA Partnership and its partners, any item or amount relevant to section 6417 that is "with respect to the partnership" would be a partnership-related item as defined under §301.6241-1(a)(6)(ii).

Section 301.6241-1(a)(6)(iii) provides that an item or amount is "with respect to the partnership" if the item or amount is shown or reflected, or required to be shown or reflected, on a return of the partnership under section 6031 of the Code or is required to be maintained in the partnership's books and records. Because the definition of a partnership-related item is based on the item's relevance to the chapter 1 tax liability of any person, this definition ensures that the definition of a partnership-related item is not so broad as to include items that are wholly unrelated to a BBA Partnership, such as a partner's unrelated income. While the limitation in this definition works well to ensure partner-level items are not inadvertently swept into the definition of a partnership-related item, this definition may inadvertently exclude a chapter 1 liability of a BBA Partnership if, for instance, the liability is not required to be shown or reflected on the BBA Partnership's return. The BBA Partnership's own chapter 1 tax liability, in contrast with a partner's liability, is undoubtedly "with respect to the partnership" and a partnership-related item.

Accordingly, these proposed regulations propose to add 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.

## 2. Special enforcement rule for the elective payment election

As noted in part IV.B.1. of this Explanation of Provisions, the BBA's centralized partnership audit regime requires the IRS to follow certain procedures before adjusting partnership-related items of a BBA Partnership. Under section 6241(11), in the case of partnership-related items that the Secretary determines involve a special enforcement matter, the Secretary is authorized to prescribe regulations pursuant to which the BBA audit procedures do not apply, and such partnership-related items are subject to special rules (including rules related to assessment and collection) as the Secretary determines necessary for the effective and efficient enforcement of the Code. Section 6241(11)(A). Section 6241(11)(B) provides a list of certain "special enforcement matters," including the failure to comply with information reporting obligations of tiered partnerships, jeopardy assessments of tax in exigent circumstances, and matters involving foreign partners and partnerships. Sections 6241(11)(B)(i), (ii), and (v). Section 6241(11)(B)(vi) also provides a grant of authority to the Secretary for "other matters that the Secretary determines by regulation present special enforcement considerations."

Proposed §1.6417-2(b) would provide that the elective payment election must be made on an original return and that the election may not be made on an amended return or administrative adjustment request. Under the existing BBA regulations, a BBA Partnership's elective payment election under section 6417 is a partnership-related item because the existence of the election is relevant in determining chapter 1 tax and because the election is required to be made on the BBA Partnership's return. Because the elective payment election is a partnership-related item, the only way for the IRS to make an adjustment upon the determination of an ineffective election would be to follow the audit procedures of the centralized partnership audit regime. To prevent

duplication, fraud, improper payments, or excessive payments in an effective manner, the IRS must be able to determine whether a BBA Partnership's elective payment election is ineffective in an expeditious manner. The procedural requirements of the BBA would require the IRS to treat BBA Partnerships that have made an ineffective election payment election differently from other electing taxpayers that are not subject to the centralized partnership audit regime but that are otherwise similarly situated. The Treasury Department and the IRS are proposing that, due to the unique nature of the section 6417 election, which, pursuant to proposed §1.6417-2(d), would result in a payment treated as having been made on the later of the due date of the return or the date the return was filed, the special enforcement matters described in section 6241(11) would apply, and the BBA centralized partnership audit regime should not apply to adjustments with respect to partnership-related items that affect the amount or existence of a payment to the BBA Partnership, or credit or refund of a payment to the BBA Partnership under section 6417. Accordingly, these proposed regulations would add new paragraph (j) to §301.6241-7 to provide that an election by a BBA Partnership under section 6417 can be adjusted outside of the BBA audit rules. These proposed regulations also would redesignate existing paragraph (j) (regarding applicability dates) to a new paragraph (k) and update that paragraph (k) to reflect an applicability date for these proposed regulations.

#### V. Pre-filing Registration Requirements and Additional Information

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.

In general, stakeholders requested additional information about this provision

and requested that the regulations balance the need to prevent fraud and abuse with the burden on taxpayers. Stakeholders recommended that the information required to be provided to the IRS should be provided in a manner that facilitates automated procedures to help catch potential fraud, discourages abusive or otherwise illegitimate claims, and allows efficient and prompt review (both before payment and through audits). Stakeholders recommended that all required documents and information should be able to be submitted easily via an online portal. Stakeholders recommended that information or registration should be as consistent as possible across sections 48D(d)(1), 6417(d)(5), and 6418(g)(1).

Proposed §1.6417-5 would provide 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 -2(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) provides an overview of this process and would require an applicable entity or electing taxpayer to satisfy the pre-filing registration requirements as a condition of, and prior to, making an elective payment election. An applicable entity or electing taxpayer would be required to 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 and report the registration number on its annual tax return with respect to an applicable credit property would be ineligible to make an elective payment election to

treat any credit determined with respect to that applicable credit property as a payment of tax. However, completion of the pre-filing registration requirements and receipt of a registration number would not, by itself, mean that the applicable entity or electing taxpayer would receive a payment with respect to the applicable credits determined with respect to the applicable credit property.

Proposed §1.6417-5(b) would provide the following pre-filing registration requirements.

First, an applicable entity or electing taxpayer must complete the pre-filing registration process electronically through an IRS electronic portal in accordance with the instructions provided therein, unless otherwise provided in guidance. If the election is by a member of a consolidated group, the member must complete the pre-filing registration process 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).

Second, an applicable entity or electing taxpayer must satisfy the registration requirements and receive a registration number prior to making an elective payment election on the applicable entity's tax return for the taxable year at issue.

Third, an applicable entity or electing taxpayer is required to obtain a registration number for each applicable credit property with respect to which an applicable credit will be determined and for which the applicable entity or electing taxpayer intends to make an elective payment election.

Finally, an applicable entity or electing taxpayer must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer, about the applicable credits, and about the applicable credit property, would allow the IRS to prevent duplication, fraud, improper payments, or excessive payments under section

6417. For example, verifying information about the taxpayer would allow the IRS to mitigate the risk of fraud or improper payments to entities that are not applicable entities or electing taxpayers. Information about the taxpayer's taxable year would allow the IRS to ensure that an elective payment election is timely made on the entity's annual tax return. Information about applicable credit properties, including their address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date would allow the IRS to mitigate the risk of duplication, fraud, and improper payments for properties that are not applicable credit properties. Information about whether an investment tax credit property was acquired using any Restricted Tax Exempt Amounts would allow the IRS to prevent improper payments.

Proposed §1.6417-5(c) would provide information about the required registration number. Proposed §1.6417-5(c)(1) would provide that, after an applicable entity or electing taxpayer completes the pre-filing registration process as provided in proposed §1.6417-5(b) for the applicable credit properties with respect to which the entity intends to make an elective payment election in the taxable year, 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, as provided in guidance.

Proposed §1.6417-5(c)(2) would provide that a registration number is valid only for the taxable year for which it is obtained. Proposed §1.6417-5(c)(3) would provide that, if an elective payment election will be made with respect to an applicable credit property for which a registration number under proposed §1.6417-5 has been previously obtained, the applicable entity or electing taxpayer would be required to renew the registration each year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts. Proposed

§1.6417-5(c)(4) would provide that, 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 would be required to amend the registration (or may need to submit a new registration) to reflect these new facts. For example, one stakeholder asked that, if a taxpayer becomes a party to an internal reorganization under section 368(a) (such as a merger or distribution in a nonrecognition transaction) during the election period, the elective payment election should carry over to the successor entity. The proposed regulations would provide 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 must 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.

Lastly, proposed §1.6417-5(c)(5) would provide that the applicable entity or electing taxpayer would be required to include the registration number of the applicable credit property on their annual tax return for the taxable year. The IRS will treat an elective payment election as ineffective with respect to the portion of a credit determined with respect to an applicable credit property for which the applicable entity or electing taxpayer does not include a valid registration number on the annual tax return.

The corresponding temporary regulations under §1.6417-5T published in the Rules and Regulations section of this edition of the ***Federal Register*** apply rules to taxable years ending on or after **[INSERT DATE OF PUBLICATION IN THE *FEDERAL***



**REGISTER]**, that are identical to those that would apply under proposed §1.6417-5.

The temporary regulations under §1.6417-5T expire on June 12, 2026.

## VI. Special Rules

Proposed §1.6417-6 would provide special rules relating to excessive payment as well as basis reduction and recapture.

### A. Excessive payment

Pursuant to 6417(d)(6), proposed §1.6417-6 would provide 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 pursuant to proposed §1.6417-2(a)(2)(ii), constitutes an excessive payment. Proposed §1.6417-6(a) would provide 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 will be 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 chapter 1 tax). This would be the case even if the applicable entity or electing taxpayer is otherwise not subject to chapter 1 tax. The additional 20-percent chapter 1 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. If the additional 20-percent chapter 1 tax is applicable, it would apply in addition to any penalties, additions to tax, or other amounts applicable under the Code. The Treasury Department and the IRS anticipate that existing standards of reasonable cause will inform the determination by the IRS of whether reasonable cause has been demonstrated for this purpose.

The term “excessive payment” is proposed to be defined as an amount equal to the excess of (1) the amount treated as a payment under proposed §1.6417-2(a)(1)(i) or

-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 part II.C and II. D. or IV. of this Explanation of Provisions and without regard to section 38(c)) under the Code with respect to such facility or property for such taxable year.

Several stakeholders asked that the term “excessive payment” be determined without any tax credit utilization rules, such as those found in sections 38, 49, and 469. Because the statute provides that the amount of the credit should not exceed the amount “otherwise allowable” (without application of sections 38(c), without regard to sections 50(b)(3) and (4)(A)(i), and by treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity), the Treasury Department and the IRS are proposing that all other relevant code sections, including sections 38 (but not 38(c)), 49, and 469, would apply to the amount treated as a payment that is made by the applicable entity or electing taxpayer as described in part II of this Explanation of Provisions. Thus, if an applicable entity or electing taxpayer is an individual, trust, closely held corporation, or other taxpayer subject to the rules of section 469, or if an applicable credit is an investment tax credit that is determined including the rules of section 49, then those rules would apply. However, proposed §1.6417-2(c) would provide additional rules relating to the determination of applicable credits, such as the special rule for investment credit property acquired by a tax-exempt or government entity using nontaxable grants or other nontaxable proceeds, as described in part II.C. of this Explanation of Provisions.

In contrast, the amount of the payment to partnerships and S corporations described in part IV of this Explanation of Provisions has different proposed rules. As discussed in part IV of this Explanation of Provisions, in determining the applicable

credit amount that will result in a payment to a partnership or S corporation, the partnership or S corporation would be required to compute the amount of the applicable credit allowable (without regard to section 38(c)) as if an elective payment election were not made. However, because a partnership or S corporation is not subject to section 469 (that is, section 469 applies at the partner or shareholder level), the amount of the credit determined by a partnership or S corporation would not be subject to limitation by section 469. In addition, because the only applicable credits for which a partnership or S corporation may make the elective payment election are the section 45V credit, section 45Q credit, and section 45X credit, which are production tax credits, sections 49 and 50 (applicable to investment tax credits) would not apply to limit these applicable credit amounts.

Stakeholders asked for clarification on how the excessive payment would be determined and in which year the adjustment applies. The Treasury Department and the IRS anticipate that excessive payments may arise in a variety of situations, such as an improperly claimed bonus credit amount, an error in calculating a credit, inflated basis, failure to apply the section 38(d) ordering rules, or a misapplication of the credit utilization rules, among other things. The statute provides that the tax is imposed on the applicable entity in the year the determination of the excessive payment is made, despite the fact that this is a later year than the year in which the credit was allowable. The Treasury Department and the IRS request comments on whether additional guidance on excessive payments is needed.

#### B. Basis reduction and recapture

Proposed §1.6417-6(b) would provide rules similar to the rules of section 50 (without regard to section 50(b)(3) and (4)(A)(i)) 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 proposed regulations.)

One stakeholder asked how entities that don't normally file tax returns should report recapture events. The stakeholder asked that the reporting and payment of the recapture amount should be consistent with the rules applicable to taxable entities (that is, no reporting or payment due until a tax return would be due for the related calendar year). Proposed §1.6417-6(b)(2) would clarify that any reporting of recapture is made on the taxpayer's annual tax return in the manner prescribed by the IRS in future guidance, along with supplemental forms such as Form 4255, *Recapture of Investment Credit*.

Stakeholders asked whether recapture is considered an excessive payment event. The excessive payment rules operate separately from the recapture rules. The excessive payment rules apply where the credit amount reported on the original credit source form by the applicable entity or electing taxpayer was excessive. Recapture of a tax credit occurs when the original tax credit reported would have been correct without the occurrence of a subsequent recapture event. Thus, recapture events, including recapture events under sections 45Q(f)(4) or 50(a), do not result in an excessive payment.

Stakeholders asked that the proposed regulations clarify that basis reduction and recapture applies only to the investment tax credits. The section 50 rules, including basis reduction and recapture, only apply to investment tax credits so no clarification on this point is required.

Stakeholders also asked that guidance be provided in the form of examples that illustrate the manner in which section 50 will be applied for purposes of basis reduction and recapture. Proposed §1.6417-6(b)(3) would provide an example.

### **Proposed Applicability Dates**

Each of proposed §§1.6417-1 through 1.6417-6 is proposed to apply to taxable

years ending on or after the date the Treasury decision adopting these regulations as final regulations is published in the ***Federal Register***. Entities may rely on these proposed regulations for elective payments of applicable credit amounts after December 31, 2022, in taxable years ending before the date the Treasury decision adopting these regulations as final regulations is published in the ***Federal Register***, provided the entities follow the proposed regulations in their entirety and in a consistent manner with respect to all elections made under section 6417. Sections 301.6241-1 and 301.6241-7 are proposed to apply to taxable years ending on or after the date these proposed regulations are published in the ***Federal Register***.

## **Special Analyses**

### I. 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 proposed regulations contain reporting and recordkeeping requirements. The recordkeeping requirements mentioned within these proposed 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 proposed 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 proposed 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 proposed regulations are not changing or creating new collection requirements not already approved by OMB.

These proposed regulations mention a requirement to register with the IRS to be able to elect payments as detailed in §1.6417-5. For further information concerning the registration, where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the corresponding temporary regulations (T.D. 9975) published in the Rules and Regulations section of this issue of the ***Federal Register***. These proposed regulations are not changing or creating new collection requirements beyond the requirements that are being reviewed and approved by OMB under the temporary regulations.

## II. 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 an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Treasury Department and the IRS have not determined whether the proposed rule, when finalized, will likely have a significant economic impact on a substantial number of small entities. This determination requires further study. However, because there is a possibility of significant economic impact on a substantial number of small entities, an IRFA is provided in these proposed regulations. The Treasury Department and the IRS invite comments on both the number of entities affected and the economic impact on small entities.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

#### 1. Need for and Objectives of the Rule

The proposed regulations would provide greater clarity to taxpayers that intend to take advantage of section 6417's credit monetization mechanism. 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 generate

eligible 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. Affected Small Entities

The RFA directs agencies to provide a description of, and where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, 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 proposed 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 this proposed regulation and in this IRFA, section 6417 and these proposed 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 proposed 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 through comments on this proposed rule and again when taxpayers start to make the elective payment election using the guidance and procedures provided in these proposed regulations.

## 3. Impact of the Rules

The proposed 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.

#### 4. Alternatives Considered

The Treasury Department and the IRS considered alternatives to the proposed 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 which is made by an applicable entity under section 6417. As described in the preamble to these proposed regulations, these proposed 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 entities that are small businesses versus others making an elective payment election would create a scenario where 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, when 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.

Comments are requested 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.

#### 5. Duplicative, Overlapping, or Conflicting Federal Rules

The proposed rule would not duplicate, overlap, or conflict with any relevant Federal rules. As discussed above, the proposed rule would 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 invite input from interested members of the public about identifying and avoiding overlapping, duplicative, or conflicting requirements.

#### 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). This proposed rule does 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. This proposed rule does not have federalism implications and does 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. This proposed rule does not have substantial direct effects on one or more federally recognized Indian tribes and does not impose substantial direct compliance costs on Indian tribal governments within the meaning of the Executive Order.

Nevertheless, on November 28, 2022, and November 29, 2022, the Treasury Department and the IRS held consultations with Tribal leaders requesting assistance in addressing questions related to the elective payment election under section 6417. Consultation was also held with Alaska Native Corporations on December 2, 2022. These consultations informed the development of these proposed regulations.

The Treasury Department and the IRS will hold additional consultations with Tribal leaders and Alaska Native Corporations after providing an opportunity for review of the proposed regulations and early in the process of publishing final regulations under section 6417.

## VII. Regulatory Planning and Review

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

## **Comments and Public Hearing**

Before these proposed amendments to the regulations are adopted as final

regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and any paper comments submitted, will be made available at <https://www.regulations.gov> or upon request.

Announcement 2023-16, 2023-20 I.R.B. 854 (May 15, 2023), provides that public hearings will be conducted in person, although the IRS will continue to provide a telephonic option for individuals who wish to attend or testify at a hearing by telephone. Any telephonic hearing will be made accessible to people with disabilities.

A public hearing is scheduled to be held in person on August 21, 2023, beginning at 10:00 a.m. ET, unless no outlines are received by August 14, 2023. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to comment by telephone at the hearing must submit written or electronic comments and an outline of the topics to be discussed as well as the time to be devoted to each topic by August 14, 2023, as prescribed in the preamble under the **ADDRESSES** section.

A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available at <https://www.regulations.gov>, search IRS and REG-101607-23. Copies of the agenda will also be available by emailing a request to [publichearings@irs.gov](mailto:publichearings@irs.gov). Please put "REG-101607-23 Agenda Request" in the subject line of the email.

Individuals who want to testify in person at the public hearing must send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to have your name added to the building access list. The subject line of the email must contain the regulation number REG-101607-23 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG-101607-23.

Individuals who want to testify by telephone at the public hearing must send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-101607-23 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG-101607-23.

Individuals who want to attend the public hearing in person without testifying must also send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to have your name added to the building access list. The subject line of the email must contain the regulation number REG-101607-23 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG-101607-23. Requests to attend the public hearing must be received by 5:00 p.m. EST on August 17, 2023.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to [publichearings@irs.gov](mailto:publichearings@irs.gov) to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-101607-23 and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG-101607-23. Requests to attend the public hearing must be received by 5:00 p.m. EST on August 17, 2023.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an

email to [publichearings@irs.gov](mailto:publichearings@irs.gov) (preferred) or by telephone at (202) 317-6901 (not a toll-free number) at least August 16, 2023.

## **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 <https://www.irs.gov>.

## **Drafting Information**

The principal authors of these proposed 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.

## **Proposed Amendments to the Regulations**

Accordingly, the Treasury Department and the IRS propose to 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 \* \* \*

\* \* \* \* \*

**Par. 2.** Sections 1.6417-0 through 1.6417-6 are added under the undesignated heading “Abatements, Credits, and Refunds” to read as follows:

**§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 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) Election with respect to credit for production of clean hydrogen.
- (c) Election with respect to 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.
- (e) Expiration 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. 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, for purposes of section 6417 and the section 6417 regulations, the following returns (and for each, any successor return)—

(1) For any taxpayer normally required to file an annual tax return with the IRS, such annual return (including the Form 1065 for partnerships and the Form 990-T 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 governmental entities), the Form 990-T; and

(3) For short tax year filers, the short year tax return.

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

(1) Any organization exempt from the tax imposed by subtitle A—

(i) By reason of section 501(a) of the Code; 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; and

(7) An agency or instrumentality of any applicable entity described in paragraphs (1)(ii), (2), or (3).

(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) 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) 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) (section 45U credit);

(5) So much of the credit for production of clean hydrogen determined under section 45V(a) 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 by reason of section 45W(d)(2) (section 45W credit);

(7) The credit for advanced manufacturing production determined under section 45X(a) (section 45X credit);

(8) The clean electricity production credit determined under section 45Y(a) (section 45Y credit);

(9) The clean fuel production credit determined under section 45Z(a) (section 45Z credit);

(10) The energy credit determined under section 48 (section 48 credit);

(11) The qualifying advanced energy project credit determined under section 48C (section 48C credit); and

(12) The clean electricity investment credit determined under section 48E (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 *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.

(g) *Electing taxpayer*. The term *electing taxpayer* means any taxpayer that is not an applicable entity described in paragraph (b) 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 §1.6417-1(e)(3), (5), or (7).

(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 which 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).

(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 date of publication of final rule.

### **§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, 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 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)(1), including if all of a partnership's partners are so described.

(v) *Members of a consolidated group of which an Alaska Native Corporation is the common parent.* In the case 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. 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 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) of the Code, 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) of the Code to be excluded from the application of subchapter K, 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 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 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 which 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

or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There is no relief available under §§301.9100-1 through 301.9100-3 of this chapter for an elective payment election that is not timely filed.

(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) 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 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. 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 6033(a) of the Code could request an extension of time to file, an automatic paperless six-month extension from the original due date is deemed to be allowed.

(ii) In the case of 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 due date (including extensions of time) that would apply if the taxpayer was 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 subparagraphs (ii) and (iii) of this paragraph, 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 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 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 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); 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);

(ii) Allows the applicable 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;

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

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

(3) *Special rule for investment-related credit property acquired with income, including income from certain grants and forgivable loans, that is exempt from taxation.*

For purposes of section 6417, income, including income from certain grants and

forgivable loans, that is exempt from taxation under subtitle A and 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 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, if an applicable entity receives a grant, forgivable loan, or other income exempt from taxation under subtitle A for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property (Restricted Tax Exempt Amount), and the Restricted Tax Exempt Amount 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 Amount equals the cost of investment-related credit property.

*(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 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. Thus, no election may be made under this section for any credits purchased 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 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. A purchases B for \$400,000. 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, 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. A purchases B using the grant and \$100,000 of A's unrestricted funds. A's basis in B is \$400,000 and A's section 45W credit is \$40,000. Since the amount of the restricted tax exempt grant 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 reduced.

(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. B uses \$20,000 of its own funds plus the \$60,000 grant to build P. B's basis in P is \$80,000. 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 grant (\$60,000) plus the section 48 credit (\$40,000) exceeds P's cost by \$20,000, B's section 48 applicable credit is reduced by \$20,000 so that the total amount of the section 48 investment credit plus the restricted tax exempt grant equals the cost of P.

(iv) Example 4. 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 transferred 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 sections 6418 and 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 return is required under sections 6011 or 6033(a), on the later of—

(i) The date that a return would be due under section 6033(a) (determined



without regard to extensions) if the taxpayer were described in that section, 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. Paragraphs (e)(2) and (e)(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 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 plus the amount of current year GBCs (including current applicable credits) allowed

for the taxable year under section 38 (including, for clarity purposes, the ordering rules in section 38(d)). 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 when determining the elective payment amount for the taxable year.

(iii) Apply the GBCs allowed for the taxable year as computed under paragraph (e)(2)(ii) of this section, including those attributable to applicable credits as GBCs, against the tax liability computed in paragraph (e)(2)(i) of this section.

(iv) Identify the amount of any excess or unused current year GBC, as defined under section 39, attributable to current year applicable credit(s) for which the applicable entity is making an elective payment election. Treat the amount of such unused applicable credits 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).

(v) Reduce 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 paragraph (e)(2)(iii) of this section, and by the net elective payment amount (if any) that is treated as a payment against tax, 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 any underpayment of estimated tax under sections 6654 and 6655 of the Code.

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

(i) *Example 1.* U is a tax-exempt university described in section 501(c)(3) whose 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 section 48 credit reduces U's UBIT liability to \$400,000. U pays its \$400,000 tax liability on November 15, 2024. Because there is no unused current year applicable credit, paragraph (e)(2)(iv) of this section does not apply. 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). U uses \$60,000 of its \$100,000 of section 48 credit against its tax liability (paragraph (e)(2)(iii) of this section). U's net elective payment amount is \$40,000 (paragraph (e)(2)(iv) of this section). U reduces its applicable credit by the \$60,000 claimed against tax in paragraph (e)(2)(iii) of this section and by the \$40,000 net elective payment amount determined 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 \$40,000 refund to U. 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). Paragraph (e)(2)(iii) of this section does not apply. Under paragraph (e)(2)(iv) of this section, the entire \$500,000 is a net elective payment amount. 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. 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 2024, 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 completes and attaches Form 3800 which shows the amount of each current credit, including current section 45X credit with registration number, and business credit carryforwards of \$25,000 (its GBC for the taxable year) (paragraph (e)(2)(ii) of this section). Using the ordering rules in sections 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), leaving \$25,000 of tax liability (paragraph (e)(2)(iii) of this section). 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)(iv) 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 which 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 section 45X credit claimed as a GBC for the taxable year, as provided in paragraph (e)(2)(iii) of this section, as well as by the \$25,000 net elective payment amount determined in paragraph (e)(2)(iv) of this section, 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).

(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 (without extensions). 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.

(f) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

### **§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) 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. Only one

election may be made 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 in 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 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 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 date of publication of final rule.

**§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 of the Code, 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). 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, sections 49 and 50 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 date of publication of final rule.

#### **§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, an Indian Tribal government, or a U.S. territory; 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, as determined under section 441 of the Code.

(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) Any 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 (1) possess legal authority to bind the applicable entity or electing taxpayer or (2) 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.

(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 on the annual tax return.

(d) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

### **§1.6417-6 Special rules.**

(a) *Excessive payment--(1) In general.* In the case of any elective payment amount which 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 which, 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.

(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 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 which 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 date of publication of final rule.

## **PART 301—PROCEDURE AND ADMINISTRATION**

**Par. 3.** The authority citation for part 301 is amended by adding entries in numerical order 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. 4.** Section 301.6241-1 is amended by:

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

The additions and revisions 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) applies to partnership taxable years ending on or after **[INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]**.\* \* \*

\* \* \* \* \*

**Par. 5.** Section 6241-7 is amended by:

1. Redesignating paragraph (j) as paragraph (k);
2. Adding new paragraph (j);
3. Revising the first sentence of newly redesignated paragraph (k)(1); and
4. 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) *Applicability date*--(1) *In general*. Except as provided in paragraph (k)(2) (relating to paragraph (b) of this section) and paragraph (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 **[INSERT DATE OF PUBLICATION IN FEDERAL REGISTER]**.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.