



August 14, 2023

The Honorable Lily Batchelder
Assistant Secretary
U.S. Department of Treasury
Washington, DC 20220

The Honorable Danny Werfel
Commissioner
Internal Revenue Service
Washington, DC 20224

Re: IRS Notice REG-101607-23

Dear Assistant Secretary Batchelder and Commissioner Werfel:

On behalf of the nation's government finance officers, cities, and counties we appreciate the opportunity to provide comments in response to the U.S. Department of Treasury (Treasury) and Internal Revenue Service Notice (IRS) REG – 101607 – 23, the temporary regulations that govern the Inflation Reduction Act's (IRA) Tax Credit Elections.

Collectively, our organizations represent more than 23,000 government finance officials in State and local governments, 19,000 cities, towns and villages, and the nation's 3,069 counties. The Government Finance Officers Association (GFOA), the National League of Cities (NLC), and the National Association of Counties (NACo) work closely together on market and tax matters to help strengthen communities nationwide. Our members are dedicated to ensuring that reliable electric power is accessible and affordable for the long-term interests of the residents and businesses in their communities. We call on Treasury and the IRS to provide clarifications and guidance in the regulations that are important to the communities and residents we serve.

Local governments across the country are taking action to reduce greenhouse gas emissions, deploy renewable energy, and build community resilience against extreme weather events. The new elective pay option for local governments and governmental entities has the potential to expand these clean energy efforts and projects and make progress toward meeting local and national climate action goals. Our members support these efforts.

While we appreciate Treasury's acknowledgement that renewable electric generating projects and the acquisition of electric vehicles (EVs) and EV charging infrastructure are complex in nature and also the inclusion of broader market participants as eligible "agencies or instrumentalities" in the proposed

regulations, we remain concerned about the required complex pre-filing processes, the challenges that ongoing compliance and reporting will require, the overall cost of compliance, and the increased risks that collectively the rules currently present.

GFOA, NLC, and NACo are committed to the success of the IRA's direct pay program. However, after our members' review and assessment of the feasibility of the temporary regulations, we are concerned that the hard-fought gains of this program will not be utilized by local governments to make substantial renewable and clean energy investments, a sector that could potentially contribute to revolutionary impact. We strongly believe that if Treasury and the IRS do not heed our recommendations in this letter, the program will not yield the results the Administration is seeking.

Generally, our comments address matters of simplification, immediate cost, and the long-term risk parameters built into the proposed rules. More specifically, our members have noted concerns in three broad categories:

1. Pre-award project certification including process risks and costs
2. Ongoing compliance and reporting requirements
3. Municipal market perspectives of risk and added costs

Pre-award project certification including process risks and costs

Before local governments engage in IRA-compliant projects, they must weigh the costs against the benefits of utilizing elective pay. In this section, we articulate some of the perceived costs and risks of the temporary regulations and offer proposed relief to satisfy the concerns of local governments and governmental entities.

Complexity of Projects:

Local governments have a strong interest in both investing in renewable energy projects in their communities and receiving the benefit of an elective pay program. Many have expressed interest in applications of the IRA in projects such as solar and alternative energy generation projects, as well as electric vehicle fleet conversion. However, some projects are highly complex in nature, such as anaerobic digester facilities that process organic waste, geothermal systems arranged for generation, and retrofitting existing infrastructure with qualified renewable energy attributes.

Many infrastructure projects in the public sector not only require consultation from professional sectors (municipal advisors and bond counsel), but also participation from private sector partners such as underwriters and independent engineers in finalizing the projects. The pre-filing registration process magnifies the complexity and exacerbates several tax landmines to which local governments may be subject. We appreciate Treasury's acknowledgement that local governments can have joint ownership either by a 761 election out or through a tenancy in common. Existing facilities where this is used are both tenancies in common and have an election out.

Mandatory Pre-Filing Registration Process:

Local governments intending to utilize the tax credit elections have noted the mandatory pre-filing registration process will be onerous. Local governments have significantly limited resources to dedicate the attention necessary to comply with this process and may, in some cases, require robust technical assistance from a consultant or otherwise abandon these projects altogether. We also understand that

resources are required at all levels of government. For example, Treasury may have to establish ties to the U.S. Department of Energy (DOE) and benefit from their subject matter expertise throughout the program application process and on an ongoing basis. Therefore, below we provide suggestions on how to lessen that burden and encourage participation for local governments.

First, designate a team of dedicated IRS employees to answer basic questions about each credit/application so that applicants may have access to an IRS contact throughout the design, build, and operational execution of each complex energy project. For those projects that are less complex but on which applicants may have similar questions about each build, designate a Treasury staff member as a subject matter expert to answer questions in the design and development of the project falling under that subject matter. Treasury should accommodate batching for similar projects that does not leave the entity vulnerable for challenging the status of the project of the applicant entity. For example, several local governments have specific questions about the electrification of fleet vehicles and mobile machinery. Understanding/designating restructuring of the lease agreements would be helpful. The IRS could design this batching system similar to the “Paid Tax Preparers Model,” with a staffer dedicated to a particular subject matter or complex project. Additionally, the IRS should take the incoming questions that are batched and create FAQs addressing common questions.

Second, streamline the pre-filing registration process for projects that are less complex and may carry a smaller eligible elective credit amount. We specifically request that the IRS focus on providing plain English instructions and recommend that thresholds for the size of project, entity, or electable credit are established for streamlined eligibility. Doing so would free up the resources of the local government applicants on the front end of the project. This streamlined registration design could include inputs to ensure project eligibility and could also establish an avenue for regular communication for periodic reviews and compliance checks.

Continued Comments on Domestic Content Comments:

To qualify for a direct payment, tax-exempt domestic content requirements must be met once the domestic content rules become fully effective. At that time, if the domestic content rules are not satisfied by a tax-exempt entity, that entity will receive no tax credits. Local governments remain committed to satisfying the scope of local, state, and federal procurement policies when considering new and ongoing construction objectives. However, there may be conflicting regulations to comply with over multiple layers of government, in addition to ongoing supply chain delays and increased cost of goods.

It is imperative that these regulations are clear and straightforward as to how entities must account for procurement parameters in capital asset investment. Local governments, political subdivisions, and other participants in the public sector will rely on this flexibility as they plan projects in light of the domestic content requirement to determine if these standards can be met generally and are fiscally responsible. Penalties are now included in the temporary rules that enforce compliance with domestic procurement requirements that have not yet been set. A 20 week compliance requirement is too short for any infrastructure capital plan. We reiterate our partners at American Public Power Association’s reasonable ask: *There are headwinds to commencing construction where such a key aspect of project costs remains unknown. We understand the enormity of this task, but we strongly encourage Treasury and the IRS to provide guidance as soon as possible. To avoid whipsawing entities that do proceed with construction rather than awaiting guidance – in keeping with congressional intent – we would ask you to*

issue this guidance in proposed form to allow for public comment and urge that it include safe harbors available to projects that take the risk of moving forward pending the release of such guidance.

Cost Allocation:

As we commented in our initial letter on the IRA proposed rules,¹ tax-exempt bond allocations rules and pledged payment credits are not federal guarantees of governmental debt. Many public sector projects are financed with tax-exempt and taxable bonds. Therefore, the same cost allocation rules should be able to be used by a project owner for both determining what percentage of a project is financed with tax-exempt debt and for calculating any reduction necessary when energy tax credits are utilized.

Additionally, when direct payment credits are pledged as part of paying interest on outstanding debt, this action should not be considered a federal guarantee of that debt under Section 149 of the Code. We strongly support comments submitted by the National Association of Bond Lawyers on this matter.

Designation of Energy Communities:

While Notice 2023-29 provides some clarity on what constitutes an energy community regarding the energy community bonus credit for the investment and production credits, we remain concerned that it will be difficult for local governments to determine whether they satisfy the Statistical Area Category requirements. We offer the following recommendations to help to ensure maximum local government utilization of the elective pay option by providing certainty and minimizing substantial risks of excessive payment.

First, Treasury should publicly publish an annual list of all the metropolitan statistical areas (MSAs) and non-metropolitan statistical areas (non-MSAs) that meet the Statistical Area Category requirements. Considering that Treasury already plans to provide a list of those MSAs and non-MSAs that meet the Fossil Fuel Employment threshold to be considered an energy community, providing the same information for those MSAs and non-MSAs that meet the Fossil Fuel Tax Revenue threshold will help to provide clarity for those local governments trying to determine whether they are eligible for the energy community bonus credit.

Second, if a local government is located within an MSA or non-MSA that is identified on the list published by Treasury, the local government should be able to use that list as evidence that they are located within an energy community. Treasury should not require any further information beyond what MSA or non-MSA the local government is located in for the local government to receive the energy community credit bonus.

Further, we commend DOE for publishing the energy community tax credit bonus mapping tool. However, we urge DOE to add in all relevant data with regard to brownfields and to Fossil Fuel Tax Revenue. Additionally, we urge Treasury to allow local governments to use this mapping tool as evidence that they qualify as an energy community for the purpose of the bonus credit when making an elective pay election.

¹ See November 9, 2022 submitted comments here: [66628d3d-704a-4c6a-b00f-e037411b4c47 IRA+Letter GFOA+NLC+NACo.pdf \(prismic.io\)](https://www.prismic.io/IRA+Letter+GFOA+NLC+NACo.pdf)

Ongoing Compliance and Reporting Requirements

We urge Treasury and the IRS to design the mechanisms and forms for the direct pay election as simply as possible and comparable to what taxable entities already use to claim credits. We also look forward to participating in the development and testing of these processes and to working with Treasury and IRS as they are designed and implemented.

Additionally, Treasury should provide a way for eligible entities to make a single election for multiple properties or projects. Smaller local governments do not have excess capacity in their finance offices to file multiple elections for properties or projects. 93 percent of cities in the U.S. have fewer than 30,000 residents and 70 percent of counties are rural with populations less than 75,000. Many governments have part-time finance employees or have small full-time staffs. It is vital for Treasury to understand that most cities and counties lack the capacity to do the work required to get elective pay on multiple properties or projects and should join efforts with the local government community to find ways to make the program accessible, workable, and implementable for communities across the country who would benefit from the goals of the program.

Moreover, the lack of capacity in local government finance offices will strain cities and counties' ability to take advantage of the production tax credit with a life lasting 10 years. A city or county would be required to register once and then renew the registration nine more times. This number of filings will overwhelm local government staff and disincentivize governments from undertaking a production tax credit project due to the sole fact that to receive elective pay the local government would have to file 10 returns in addition to the already steep burdens within the application and compliance requirements.

Simplifying 990 Compliance Instructions:

Very few tax-exempt entities are required to file Form 990-T. Those intending to elect the tax credit payment will be required to fill out and timely file a new IRS form in addition to the several IRS filings already conducted in the finance office. We propose two potential solutions to assist both local governments and the IRS in the filing process management, ensuring filing compliance, and working to eliminate the need for governments to seek and pay for external legal and other professional assistance to comply with the program.

First, consider adding the required IRS submission in a format already designed to provide local (and state) governments direct payment from the federal government such as the Form 8038-CP. Doing so would allow for streamlining of the process for those local governments already receiving direct pay and also could be designed for wider accessibility and understanding.

Second, if Form 990-T is the most feasible avenue for reporting the project, consider providing manuals or templates that would minimize any unintended intimidation or fears of noncompliance of potential beneficiaries of the elective pay tax credit. Also, we strongly recommend using Form 990-T EZ for smaller entities and projects.

Third, allow for some relief for new entrants. The temporary rules explain that if tax-exempt entities do not file by the due date or their extension date, they lose the whole election. Treasury must acknowledge that there may be a learning curve for new entrants. Many tax-exempt entities will not even know how to determine their taxable year. Why? Because they never have had to. They will not know to go to Code Section 441 for the answer. For example, tax-exempt entities might assume that the prefiling is the filing and may neglect to file the Form 990-T within the parameters. We recommend

Treasury provide relief under 6417(d)(3)(A)(i)(I) for those entities that have missteps in their initial filing. Our organizations stand ready to notify direct-pay electors to “mark their calendar,” and we ask Treasury to send out an email at least three weeks ahead of time to remind filers of the “new” required filing.

Added Risks Due to IRC section 6417(A)(6)(ii) Excessive Payment:

We strongly recommend easing the burden of the Excessive Payment Statute for tax-exempt entities. A reasonable cause exception that would apply to the good faith effort of the applicable entity relative to its due diligence. We encourage the IRS and Treasury to fully articulate best practices in due diligence and internal controls in good faith to avoid the penalty.

The financial impact on local governments that face an IRS repayment demand would be more serious, likely forcing local leaders to scale back spending on other needs, and potentially prompting them to take on additional debt to finance the payments, adding to their long-term costs without any benefit to residents.

Municipal Market Perspectives, Risks and Added Costs

Tax-exempt entities will require a variety of consultants to ensure tax compliance and to accomplish the design and build a public facility. Our members have noted the internal process of weighing the cost of compliance against the benefit of elective pay. If costs outweigh the benefit, then the jurisdiction will have less incentive to participate in the program.

Required Municipal Market Professionals:

As fully articulated above, our members remain concerned about the up-front and ongoing costs of compliance. Some examples of procured professional consultation that may be required in the project deal team will certainly include:

- *Registered Municipal Advisor*—to help determine if the projects are financially feasible and suitable, and to participate in the structuring of the financing and possible ongoing responsibilities, as a fiduciary to the municipal entity
- *Independent Engineer*—to assess project feasibility and design/build demands
- *Energy Market Advisor*—provides an assessment of energy production and determination of product demand
- *Municipal Bond Tax Counsel*—may provide consultation for energy projects in particular and ensure that the transaction adheres to ALL bond regulations
- *Municipal Bond Disclosure Counsel*—may provide disclosure advice about information material to investors about the transaction, and on an ongoing basis
- *Compliance Officers*—many governments would have to outsource functions in order to monitor rule compliance such as procurement parameters of direct pay sourcing, and monitor wage and apprentice rules
- *Broker Dealers/Banks* – parties that would underwrite the bonds and financing and include investor demand and market conditions into the initial pricing of the transaction.

Insurance Concerns:

Project insurance is very common in tax equity deals, but this would be the first time the insurance market addresses notions of elective pay and transferability in energy production facilities. It is likely that the insurers will meet the need to ensure the projects, but premiums would be gauged based on the type of credit and the potential for risk, which the insurers would add in. For example, with domestic content parameters and waivers still unavailable, insurers may consider this greater risk, which will be added into the premium and, ultimately, increasing the price of the project.

General Municipal Market Concerns:

Uncertainty about the timing and ultimate amount of the credit payment would lead to increased financing costs for all local governments because investors would likely look for a higher yield and perhaps additional reserve funds, to offset the risk of future cash-flow shortfalls due to potential clawbacks or penalties.

For local governments to utilize the IRA Tax Credit Elections to reduce greenhouse gas emissions, deploy renewable energy projects, provide affordable and accessible clean energy to their residents, and build community resilience, we strongly urge Treasury to alter these regulations so that the tax credits can be used as Congress intended. Without these changes, there could be an opportunity lost at all levels of government and most importantly, to the citizens.

On behalf of the nation's government finance officers, cities, and counties, we thank you for considering these comments and recommendations. We would appreciate the opportunity to meet with Treasury and IRS staff to discuss our comments further and we look forward to working with Treasury and IRS to ensure that the final guidance and regulation will best help local governments realize the full benefits of the IRA. If you have any questions, please contact: Emily Brock (GFOA) at ; Michael Gleeson (NLC) at ; or Paige Mellerio (NACo) at pmellerio@naco.org.

Sincerely,



Emily S. Brock
Director of Federal Policy
Government Finance Officers Association



Irma Esparza Diggs
Senior Executive and Director Federal Advocacy
National League of Cities

A handwritten signature in dark ink, appearing to read "Mark Ritacco". The signature is fluid and cursive, with the first name "Mark" and last name "Ritacco" clearly distinguishable.

Mark Ritacco
Chief Government Affairs Officer
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