



November 3, 2022

Office of Associate Chief Counsel
Internal Revenue Service
U.S. Department of Treasury
1111 Constitution Ave. NW,
Washington, DC 20224

**RE: IRS Notice 2022-50
Request for Comments on Elective Payments of Applicable Credits and
Transfer of Certain Credits**

To whom it may concern:

On behalf of the American Council on Education (ACE) and the undersigned higher education associations, I write in response to IRS Notice No. 2022-0050 in which the Internal Revenue Service (IRS) of the Department of the Treasury seeks comments on elective payments of applicable credits and transfer of certain credits under sections 6417 and 6418 of the Internal Revenue Code (IRC), as added by section 13801 of the Inflation Reduction Act of 2022 (IRA) (Pub.L. 117-169).

Founded in 1918, the American Council on Education (ACE) is the major coordinating body for the nation's colleges and universities. ACE represents more than 1,700 college and university presidents and the executives at related associations. Together with the undersigned higher education associations, we represent all types of U.S. accredited, degree-granting institutions: two-year and four-year, public and private.

Higher education institutions were early leaders in promoting green infrastructure when about 800 institutions signed the America's Colleges and Universities Climate Commitment between 2007-2011. Subsequently, scores of higher education institutions, especially those with district heating systems and residential campuses, have developed detailed strategic and capital plans to decarbonize consistent with the Intergovernmental Panel on Climate Change (IPCC) targets. According to the [APPA, the professional association for educational facilities leaders](#), the total infrastructure backlog needs of the public higher education sector is \$76.1 billion,¹ with \$27.7 billion attributable to needs at two-year institutions or community colleges. Moreover, four-year institutions are often the size of small towns, with substantial infrastructure (buildings, district heating and cooling, energy generation) and concomitant carbon footprints. Research facilities, in particular, tend to be energy intensive. Progress on

¹ While the APPA makes a reasonable approximation, there is no single source of information for university deferred maintenance needs and APPA is likely underestimating the need.

emissions reductions will require substantial modernization. The opportunity to integrate climate goals and create education and research infrastructure for the 21st century is substantial.

Issue

The IRA includes several green energy tax credits important to state colleges and universities, many of which are interested in pursuing climate change mitigation efforts but face severe state budget constraints in accomplishing this. For example, many universities generate their own electrical power and would be interested in utilizing the electricity investment or production tax credits. Of particular interest is the new option providing direct pay election for claiming the credits, authorized by section 6417, which would enable most colleges and universities to monetize credits under the IRA by (i) lifting restrictions that could otherwise impede eligibility, and (ii) treating the credit as a direct payment against tax, enabling full refundability if the school has no Unrelated Business Income Tax (UBIT).

However, ambiguity in the section 6417(d)(1)(A) definition of “applicable entity” could prevent some public universities – those which are classified as government instrumentalities and do not have 501(c)(3) status – from making the election. Specifically, the definitional list of applicable entities in the newly created section 6417(d)(1)(A) does not include *instrumentality*.

Background

Broadly, an *instrumentality of the state* is an independent state entity, like a state hospital, that provides a public service. A state college or university is an example of an institution that may be deemed an instrumentality of the state. There are likely a significant number of institutions that may fall under this definition.

According to the IRS, whether an entity is deemed an instrumentality is determined by the following criteria:

- Performs a government function or used for a governmental purpose
- Function performed on behalf of a state or political subdivision
- Whether private interests are involved
- Control/supervision of the entity is vested in public authority
- Statutory authority necessary to create or use the entity
- Degree of financial autonomy and source of operating expenses

Government entities are not typically subject to federal income taxation. State instrumentalities generally rely on section 115 of the IRC. Pursuant to 115(1), income derived from (1) any public utility or the exercise of any essential government function and (2) accruing to a state or political subdivision is excluded from gross income. Some state instrumentalities, including public colleges and universities, also apply for exemption under section 501(c)(3) for reasons including deductibility of contributions or state and local tax

exemptions.² However, many, if not most, instrumentalities rely solely on section 115 and do not have section 501(c)(3) status.

IRA's (unintended) restriction

Two provisions of the IRC in particular limit the eligibility of tax credits for tax-exempt and government organizations – sections 50(b)(3) and 50(b)(4)(A)(i). Section 50(b)(3) limits eligibility for tax-exempt organizations, such as 501(c)(3) organizations, unless the organization's property is in an unrelated trade or business (and taxed under section 511). Section 50(b)(4)(A)(i), applicable to government entities, is even more restrictive: tax credits are not allowed for property used by any “State or political subdivision . . . or any agency or instrumentality of any of the foregoing.”

The new section 6417 created in the IRA allows “any applicable credit” to “be determined . . . without regard to . . . (4)(A)(i) of section 50(b)[.]”³ Under this provision, several definitions are provided for an *applicable entity* including, “[a]ny State or political subdivision[.]” but the definition does not include *instrumentalities*. This raises a concern as to whether the energy credits in the IRA are available to state universities deemed as *instrumentalities*. In light of the clear eligibility of “any State or political subdivision” and the broader goal of the green energy tax credit provisions to incentivize climate change mitigation efforts far and wide, it seems reasonable to believe that the omission of “instrumentalities” here was a technical drafting oversight.

The IRA includes language authorizing the Treasury Secretary to provide further definitional and administrative guidance on the green energy credit provisions. For example, section 6417(d)(1)(E) states that “[a]n election . . . shall be made at such time and in such manner as the Secretary may provide.”⁴ In addition, in section 6417(h), Congress gave the Treasury Secretary the authority and the mandate to “issue such regulations or other guidance as may be necessary *to carry out the purposes* of this section.” (emphasis added).

It is clear that the purpose of section 6417 is to apply to all state entities including the state itself, its political subdivisions, and their instrumentalities. This is evident from the language in section 6417, which tracks and references section 50(b)(4)(A)(i) but fails to list instrumentalities. Congress clearly intended to include instrumentalities in 6417, which references 50(b)(4)(A)(i).

Congress authorized the Secretary to interpret the elective payment of the applicable credit provisions in section 6417 to advance the broader *purpose* of the statute, including the 6417(d)(1)(A) applicable entity eligibility language. The Secretary should do so by implementing the intent of Congress to ensure that tax-exempt and government organizations would be eligible for the green energy tax credits in an effort to advance the ambitious climate change goals of the IRA. Therefore, in order to ensure that all public universities are eligible for these green energy tax credits and the direct pay election in

² For more information: [eotopice90.pdf \(irs.gov\)](#)

³ See section 6417(d)(2)(A).

⁴ See also section 6417(d)(3)(A), “such date as is determined appropriate by the Secretary.”

section 6417, we urge Treasury to issue guidance clarifying that state institutions that are deemed as *instrumentalities* are included in 6417(d)(1)(A).

Thank you for the opportunity to provide comments and for your consideration of our concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Ted Mitchell".

Ted Mitchell
President

On behalf of:

American Association of Community Colleges
American Association of State Colleges and Universities
American Council on Education
Association of American Universities
Association of Governing Boards of Universities and Colleges
Association of Public and Land-grant Universities
Council for Christian Colleges & Universities
National Association of College and University Business Officers
State Higher Education Executive Officers Association