



DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

REG-101552-24

RIN 1545-BR09

Election to Exclude Certain Unincorporated Organizations Owned by Applicable Entities from Application of the Rules on Partners and Partnerships

AGENCY: Internal Revenue Service (IRS), Treasury.

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

SUMMARY: This document contains proposed regulations that would modify existing regulations to allow certain unincorporated organizations that are organized exclusively to produce electricity from certain property to be excluded from the application of partnership tax rules. These proposed regulations would affect unincorporated organizations and their members, including tax-exempt organizations, the District of Columbia, State and local governments, Indian Tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and certain agencies and instrumentalities. The proposed regulations would also update certain outdated language in the existing regulations. This document also provides a notice of public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. A public hearing on these proposed regulations has been scheduled for May 20, 2024, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. If no outlines are received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, the public hearing

will be cancelled.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG-101552-24) by following the online instructions for submitting comments. Requests for a public hearing must be submitted as prescribed in the “Comments and Public Hearing” section. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted to the IRS’s public docket.

Send paper submissions to: CC:PA:01:PR (REG-101552-24), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, contact Cameron Williamson at (202) 317-6684 (not a toll-free number); and concerning submissions of comments and requests for a public hearing, contact Vivian Hayes at (202) 317-6901 (not a toll-free number) or by email to publichearings@irs.gov (preferred).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 761(a) of the Internal Revenue Code (Code) to carry out the purposes of section 6417 of the Code (proposed regulations). This document also provides notice of a public hearing on the proposed regulations.

I. Elective payment of applicable credits

Section 6417 was added to the Code by section 13801(a) of Public Law 117–169, 136 Stat. 1818, 2003 (August 16, 2022), commonly referred to as the Inflation Reduction Act of 2022 (IRA). Section 6417 allows an “applicable entity” (including tax-

exempt organizations, the District of Columbia, State and local governments, Indian Tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and certain agencies and instrumentalities) to make an election to treat an “applicable credit” (as defined in section 6417(b)) determined with respect to such entity as making a payment by such entity against the tax imposed by subtitle A of the Code, for the taxable year with respect to which such credit is determined, equal to the amount of such credit. Section 6417 also provides special rules relating to partnerships and directs the Secretary of the Treasury or her delegate (Secretary) to provide rules for making elections under section 6417. Section 6417(h) requires the Secretary to issue regulations or other guidance as may be necessary to carry out the purposes of section 6417. Generally, this includes issuing guidance to ensure that applicable entities that comply with the terms of section 6417 can benefit from its provisions. Section 13801(g) of the IRA provides that section 6417 applies to taxable years beginning after December 31, 2022.

On June 21, 2023, the Treasury Department and the IRS published in the *Federal Register* (88 FR 40528) proposed regulations (REG-101607-23) providing guidance on the section 6417 elective payment election (section 6417 proposed regulations). Proposed §1.6417-2(a)(1)(iv) provided that partnerships are not applicable entities described in section 6417(d)(1)(A) or proposed §1.6417-1(c), regardless of how many of their partners are themselves applicable entities. Accordingly, any partnership making an elective payment election must be an electing taxpayer (as defined in proposed §1.6417-1(g)), and, as such, the only applicable credits with respect to which the partnership could make an elective payment election would be credits determined under sections 45Q, 45V, and 45X for the time periods allowed in section 6417(d). However, proposed §1.6417-2(a)(1)(iii) provided that if an applicable entity is a co-owner in an applicable credit property through an organization that has made a valid

election under section 761(a) to be excluded from the application of the partnership tax rules of subchapter K of chapter 1 of the Code (subchapter K), then the applicable entity's undivided ownership share of the applicable credit property would be treated as a separate applicable credit property owned by such applicable entity. As a result, the applicable entity may make an elective payment election for the applicable credit(s) determined with respect to such share of the applicable credit property.

Comments were received in response to the section 6417 proposed regulations requesting that the Treasury Department and the IRS provide additional guidance as to the types of applicable credit property co-ownership arrangements that could validly elect under section 761(a) to be excluded from the application of subchapter K.

Specifically, stakeholders stated that certain facts and circumstances common to jointly owned and operated renewable energy projects appear to violate certain provisions of §1.761-2(a). Stakeholders requested that the Treasury Department and the IRS provide that applicable credit property indirectly owned via ownership of an interest in an entity (other than an entity required to be treated as a corporation under the Code) would still be considered owned as co-owners for purposes of §1.761-2(a)(3)(i).

Stakeholders also requested that parties to a joint ownership arrangement of applicable credit property producing electricity be permitted to delegate the authority to enter into multi-year power purchase agreements (PPAs).

II. Overview of section 761(a) and §1.761-2(a)(3)

Section 761(a) provides, in part, that under regulations the Secretary may, at the election of all of the members of an unincorporated organization, exclude such organization from the application of all or part of subchapter K if the income of the members of the organization may be adequately determined without the computation of partnership taxable income and the organization is availed of: (1) for investment purposes only and not for the active conduct of a business, (2) for the joint production,

extraction, or use of property, but not for the purpose of selling services or property produced or extracted, or (3) by dealers in securities for a short period for the purpose of underwriting, selling, or distributing a particular issue of securities.

The Treasury Department and the IRS understand that unincorporated organizations seeking to be excluded from the application of subchapter K so that one or more of their members can make an election under section 6417 are likely to be formed for the joint production of property, but not for the purpose of jointly selling services or property produced or extracted. Section 1.761-2(a)(3) provides additional requirements for such unincorporated organizations to elect to be excluded from the application of subchapter K. These additional requirements include that the participants in such unincorporated organizations: (1) own the property as co-owners, either in fee or under lease or other form of contract granting exclusive operating rights (co-ownership requirement), (2) reserve the right separately to take in kind or dispose of their shares of any property produced, extracted, or used (severance requirement), and (3) do not jointly sell services or the property produced or extracted (joint marketing requirement), although each separate participant may delegate authority to sell the participant's share of the property produced or extracted for the time being for the participant's account, but not for a period of time in excess of the minimum needs of the industry, and in no event for more than one year. When an electing organization is no longer eligible to elect to be excluded from subchapter K, its existing election automatically terminates, and the organization must begin complying with the requirements of subchapter K.

III. Reason for proposed regulations

A. Co-ownership and Severance Requirements

Under the current regulations, the requirements of §1.761-2(a)(3) are met only in situations in which interests in the property of an electing unincorporated organization

are owned directly by its members, rather than indirectly through ownership of interests in an entity that would otherwise be treated as a partnership under section 7701 and §301.7701-3 (for example, a limited liability company with multiple owners).

Stakeholders have requested that co-ownership arrangements of applicable credit property through an entity (other than one required to be treated as a corporation under the Code) be treated as satisfying the co-ownership and severance requirements. As support for this request, stakeholders have pointed out that pre-IRA guidance allowing for the use of partnership structures is widely used as a basis for structuring projects within the renewable energy industry and is well understood by all parties involved in the industry. However, direct co-ownership of renewable energy projects that meet the co-ownership and severance requirements is generally limited to projects directly including a utility or an off-taker as a co-owner. Stakeholders have argued that requiring renewable energy investments to be made directly, rather than through an entity, will make it more difficult for parties to such arrangements to obtain financing with respect to the investments or negotiate contracts.

In response to the concerns raised by stakeholders, the Treasury Department and the IRS agree that ownership of certain applicable credit property through an entity (other than one required to be treated as a corporation under the Code) is appropriate for purposes of satisfying the co-ownership and severance requirements in the context of an entity owned by one or more applicable entities seeking to make elections under section 6417; provided that, the other requirements of section 761(a) and §1.761-2, as it would be modified by these proposed regulations, are met. As previously described, arrangements treated as partnerships for Federal income tax purposes are not treated as applicable entities and cannot make elective payment elections except in the case of credits determined under sections 45V, 45Q, and 45X. Thus, the Treasury Department and the IRS agree with stakeholders that to further the intent of Congress to encourage

applicable entities to build, operate, and own renewable energy projects, it is necessary to expand the circumstances in which joint ownership arrangements of applicable credit property can be excluded from the application of subchapter K.

B. Joint Marketing Requirement

Under the current regulations, the joint marketing requirement provides that members of an unincorporated organization making an election under section 761(a) may not jointly sell services or the property produced or extracted by the unincorporated organization, except that each separate participant may delegate authority to sell the participant's share of the property produced or extracted for the time being for the participant's account, but not for a period of time in excess of the minimum needs of the industry, and in no event for more than one year.

Some stakeholders have requested that the current regulations under section 761(a) be modified to provide that multi-year PPAs entered into alongside other members of an unincorporated organization will not violate the joint marketing requirement. In support of this position, stakeholders have raised that utilities and other potential counterparties may be averse to negotiating with multiple owners of a single renewable energy project, especially if any such owners lack relevant renewable energy expertise. If applicable entities are at a disadvantage to negotiating with utilities and other potential counterparties because of the requirements under section 761(a)(2) and §1.761-2, investments in applicable credit property are unlikely to materialize in the manner intended by Congress. Likewise, if applicable entities cannot delegate authority to conduct such negotiations with respect to long-term projects—as is anticipated to be necessary for PPAs and similar arrangements—investments in applicable credit property are unlikely to materialize in the manner intended by Congress.

Explanation of Provisions

To carry out the purposes of section 6417 as intended by Congress, the

proposed regulations contained in this notice of proposed rulemaking would amend the regulations under section 761(a) to provide an exception to certain rules in §1.761-2(a)(3) in the case of an unincorporated organization that meets four requirements. First, the unincorporated organization must be owned, in part or in full, by one or more applicable entities (as defined in section 6417(d)(1) and §1.6417-1(c)). Second, the unincorporated organization's members must enter into a joint operating agreement with respect to the applicable credit property in which the members reserve the right separately to take in kind or dispose of their pro rata shares of the electricity produced, extracted, or used, or any associated renewable energy credits or similar credits. Third, the unincorporated organization must, pursuant to a joint operating agreement, be organized exclusively to jointly produce electricity from its applicable credit property (as defined in §1.6417-1(e)) and for which one or more of the applicable credits listed in section 6417(b)(2), (4), (8), (10), and (12) is determined. This requirement may be satisfied prior to the applicable credit property being placed in service (if necessary), provided the unincorporated organization is in the process of completing the applicable credit property and will operate the applicable credit property once it is placed in service. Fourth, one or more of the applicable entities will make an elective payment election under section 6417(a) for the applicable credits determined with respect to its share of the applicable credit property.

Solely for purposes of an election under section 761(a) by an unincorporated organization meeting those four requirements as well as the other requirements applicable under §1.761-2 (an applicable unincorporated organization), the proposed regulations would modify the co-ownership and joint marketing requirements under §1.761-2(a)(3) as follows.

The proposed regulations would modify the co-ownership requirement in §1.761-2(a)(3)(i) to permit the participants in the unincorporated organization to own the

applicable credit property through an organization that is an entity (other than an entity that is required to be treated as a corporation under the Code).

The proposed regulations would modify the joint marketing requirement in §1.761-2(a)(3)(iii) to provide that a delegation of authority to sell the participant's share of the property produced may allow the delegee to enter into contacts that exceed the minimum needs of the industry and may be for longer than one year, provided that the delegation of authority to act on behalf of the participant may not be for a period of time that exceeds the minimum needs of the industry, and in no event for more than one year. In other words, a participant would not be permitted to enter into an agreement binding the participant to an agency relationship for longer than one year, but an agent of a participant may enter into a PPA that binds a participant to sell electricity generated by the participant's share of the applicable credit property for longer than one year. The proposed regulations would include an example illustrating this proposed rule.

The proposed regulations would also update certain outdated references to §1.6031-1 and internal revenue officers. The Treasury Department and the IRS are considering additional updates to modernize the section 761(a) regulations, including rules addressing section 761(a) elections made by dealers in securities described in section 761(a)(3). The Treasury Department and the IRS are also considering changes to the revocation procedures described in §1.761-2(b)(3). Comments are requested regarding these considerations and any other potential updates to the section 761(a) regulations.

Comments are requested regarding the scope and requirements of these proposed regulations, including whether similar exceptions are necessary for applicable entities that own applicable credit properties that do not produce electricity. The Treasury Department and the IRS are considering a rule that would terminate a section 761(a) election made by an applicable unincorporated organization relying on an

exception in proposed §1.761-2(a)(4)(iii) if any interest in the applicable unincorporated organization is sold or exchanged unless the resulting members in the unincorporated organization make a new section 761(a) election within a specified time period. In addition, the Treasury Department and the IRS are considering a rule that would prevent the deemed election rules in §1.761-2(b)(2)(ii) from applying to any unincorporated organization relying on an exception in proposed §1.761-2(a)(4)(iii). Comments are requested regarding these considerations and other potential means of preventing abuse of the exceptions in proposed §1.761-2(a)(4)(iii).

Proposed Applicability Dates

Proposed §1.761-2(a)(4), which would be applicable to elections under section 761(a) by applicable unincorporated organizations to be excluded from the application of all of subchapter K, is 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) 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.

This proposed regulation mentions reporting and recordkeeping requirements that must be satisfied for unincorporated organizations to elect out of subchapter K. These collections of information are generally used by the IRS for tax compliance purposes and by taxpayers to facilitate proper reporting and recordkeeping. The likely respondents to these collections are businesses and tax-exempt organizations.

Unincorporated entities meeting the requirements outlined in §1.761-2(a)(4) of this proposed regulation satisfy relevant reporting requirements by submitting a statement attached to, or incorporated in, a properly executed partnership return, Form 1065, containing, in lieu of the information required by Form 1065 and by the instructions relating thereto, only the name or other identification and the address of the organization together with information on the return, or in the statement attached to the return, showing the names, addresses, and identification numbers of all the members of the organization; a statement that the organization qualifies under paragraphs (1) and either (2) or (3) of paragraph (a) of this section; a statement that all of the members of the organization elect that it be excluded from all of subchapter K; and a statement indicating where a copy of the agreement under which the organization operates is available (or if the agreement is oral, from whom the provisions of the agreement may be obtained). These requirements and associated forms are already approved by OMB under 1545-0123 for business filers. These proposed regulations are not changing or creating new collection requirements not already approved by OMB.

The recordkeeping requirements mentioned in this proposed regulation are considered general tax records under §1.6001-1(e). These records are required for the IRS to validate that electing taxpayers have consistently met the regulatory requirements outlined in §1.761-2. For PRA purposes, general tax records are already approved by OMB under 1545-0123 for business filers and 1545-0047 for tax-exempt organizations.

II. Regulatory Flexibility Act

The Secretary of the Treasury hereby certifies that the proposed regulations will not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

These proposed regulations would affect unincorporated organizations that elect

out of subchapter K in connection with an election under section 6417, as well as the members of such organizations.

Data is not readily available about these organizations. Such organizations could not have made an election out of subchapter K under the current regulations, so information about existing organizations that have made section 761(a) elections is not instructive.

Even if these proposed regulations affect a substantial number of small entities, such impact will not be significant. The proposed regulations do not make it more costly to make or maintain an election under section 761(a).

These proposed regulations do not change the procedural requirements under current §1.761-2(b) for making an election under section 761(a). Other than to conform to modern formatting conventions, the proposed regulations would amend §1.761-2(b) only by adding a parenthetical to clarify that in making a valid section 761 election, which requires attaching certain statements to a Form 1065 as required in accordance with the current regulations, proposed §1.761-2(a)(4) should be taken into account, as applicable, with regard to the required statement that the organization qualifies under §1.761-2(a)(1) and either §1.761-2(a)(2) or (a)(3) “(taking into account §1.761-2(a)(4), as applicable)”. Otherwise, an unincorporated organization making an election under these proposed regulations would not be required to submit anything additional or different than required under current §1.761-2(b).

These proposed regulations impose no new ongoing compliance costs. Though any unincorporated organization that has made an election under section 761(a) should ensure that it remains qualified under §1.761-2(a)(1) and either §1.761-2(a)(2) or (3) (taking into account proposed §1.761-2(a)(4), as applicable), the proposed regulations do not add to this obligation. In fact, these proposed regulations could make it simpler for certain unincorporated organizations to stay qualified, given their joint operating

agreements that satisfy the modified co-ownership and severance requirements and multi-year PPAs that satisfy the modified joint marketing requirement.

For the reasons stated, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. The Treasury Department and the IRS invite comments on the number of entities affected and the impact of the proposed regulations on small entities.

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

III. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandate 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 Tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). These proposed regulations do not include any Federal mandate that may result in expenditures by State, local, or Tribal governments or by the private sector in excess of that threshold.

IV. 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. These proposed regulations do not have federalism implications and do not impose substantial, direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

V. 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 July 17, 2023, the Treasury Department and the IRS held a consultation with Tribal leaders requesting assistance in addressing questions related to the section 6417 proposed rules published on June 14, 2023, which informed the development of these proposed regulations.

VI. 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 regulations are adopted as final regulations, consideration will be given to comments regarding the notice of proposed rulemaking that are submitted timely to the IRS as prescribed in the preamble under the “**ADDRESSES**” section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be made available at <https://www.regulations.gov>. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

A public hearing has been scheduled for May 20, 2024, beginning at 10:00 a.m. ET, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. 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. Participants may alternatively attend the public hearing by telephone.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**. 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 available free of charge at the hearing. If no outline of the topics to be discussed at the hearing is received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the *Federal Register*.

Individuals who want to testify in person at the public hearing must send an email to 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-101552-24 and the language "TESTIFY In Person." For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG-101552-24.

Individuals who want to testify by telephone at the public hearing must send an email to 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-

101552-24 and the language “TESTIFY Telephonically.” For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG-101552-24.

Individuals who want to attend the public hearing in person without testifying must also send an email to *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-101552-24 and the language “ATTEND In Person.” For example, the subject line may say: Request to ATTEND Hearing In Person for REG-101552-24. Requests to attend the public hearing must be received by 5:00 p.m. ET on May 16, 2024.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to *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-101552-24 and the language “ATTEND Hearing Telephonically.” For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG-101552-24. Requests to attend the public hearing must be received by 5:00 p.m. ET on May 16, 2024.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Section of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to *publichearings@irs.gov* (preferred) or by telephone at (202) 317-6901 (not a toll-free number) by May 15, 2024.

Statement of Availability of IRS Documents

IRS notices and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are 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 author of these proposed regulations is Cameron Williamson. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by revising the entry for §1.761-2 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

* * * * *

Section 1.761-2 also issued under 26 U.S.C. 6417(h).

* * * * *

Par. 2. Section 1.761-2 is amended by:

- a. Revising and republishing paragraphs (a)(1), (a)(2)(i), and (a)(3)(i);
- b. Adding paragraph (a)(4);
- c. Revising and republishing paragraphs (b)(1), (b)(2)(i) and (ii), (b)(3)(i), (c), and (e); and
- d. Adding paragraph (f).

The revisions and additions read as follows:

§1.761-2 Exclusion of certain unincorporated organizations from the application of all or part of subchapter K of chapter 1 of the Internal Revenue Code.

(a) * * *

(1) *In general.* Under conditions set forth in this section, an unincorporated

organization described in paragraph (a)(2) or (3) of this section (taking into account paragraph (a)(4) of this section, as applicable) may be excluded from the application of all or a part of the provisions of subchapter K of chapter 1 of the Code. Such organization must be availed of (i) for investment purposes only and not for the active conduct of a business, or (ii) for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted. The members of such organization must be able to compute their income without the necessity of computing partnership taxable income. Any syndicate, group, pool, or joint venture which is classifiable as an association, or any group operating under an agreement which creates an organization classifiable as an association, does not fall within these provisions.

(2) * * *

(i) Own the property as co-owners,

* * * * *

(3) * * *

(i) Own the property as co-owners, either in fee or under lease or other form of contract granting exclusive operating rights, and

* * * * *

(4) *Exception for certain joint ownership arrangements of applicable credit property--(i) Scope.* Paragraph (a)(4)(iii) of this section provides certain exceptions to specified rules in paragraph (a)(3) of this section in the case of an applicable unincorporated organization meeting the requirements of paragraph (a)(4)(ii) of this section.

(ii) *Applicable unincorporated organization.* For purposes of this section, an *applicable unincorporated organization* is an unincorporated organization described in paragraph (a)(1) of this section:

(A) That is owned, in part or in whole, by one or more applicable entities, as defined in section 6417(d)(1) and §1.6417-1(c),

(B) The members of which enter into a joint operating agreement in which the members reserve the right separately to take in kind or dispose of their pro rata shares of the electricity produced, extracted, or used, or any associated renewable energy credits or similar credits,

(C) That, pursuant to the joint operating agreement, is organized exclusively to produce electricity from its applicable credit property (as defined in §1.6417-1(e)) and with respect to which one or more of the applicable credits listed in section 6417(b)(2), (4), (8), (10), and (12) is determined, and

(D) For which one or more of the applicable entities will make an elective payment election under section 6417(a) for the applicable credits determined with respect to its share of the applicable credit property.

(iii) *Specified exceptions for applicable unincorporated organizations.* Solely for purposes of an election under section 761(a) by an applicable unincorporated organization that meets the requirements of paragraphs (b) and (e) of this section:

(A) The requirement in paragraph (a)(3)(i) of this section is modified such that the participants are permitted to own the applicable credit property through an unincorporated organization that is an entity, other than one required to be treated as a corporation under any provision of the Code; and

(B) The requirement in paragraph (a)(3)(iii) of this section is modified such that the delegation of authority to sell the participant's share of the property produced may allow the delegee to enter into contracts the duration of which exceeds the minimum needs of the industry and may be for more than one year, provided that the delegation of authority to act on behalf of the participant may not be for a period of time that exceeds the minimum needs of the industry, and in no event for more than one year.

(vi) *Example*. This example illustrates the application of the specified exceptions for applicable unincorporated organizations described in paragraph (a)(4) of this section.

(A) *Facts*. T is an Indian tribal government as defined in §1.6417-1(c) and an applicable entity, and T and Y own an applicable credit property that will produce electricity through a limited liability company organized under T's tribal law (TLLC). No election under §301.7701-3 of this chapter has been made to treat TLLC as an association for Federal tax purposes. T and Y enter into a joint operating agreement with respect to the ownership and operation of the applicable credit property in which each of T and Y reserve the right separately to take in kind or dispose of their pro rata shares of the electricity produced and any associated renewable energy credits or similar credits. On January 1st of year 1, T and Y enter into delegation agreements with Q that delegate T's and Y's authority to Q to sell electricity generated by T's and Y's shares of the applicable credit property. The term of the delegation agreements is one year, which does not exceed the minimum needs of the industry. On June 1st of year 1, Q enters into a power purchase agreement with Utility on T's and Y's behalf that commits T and Y to sell the electricity produced from their shares of the applicable credit property to Utility for a term of 15 years. At the end of the day on December 31st of year 1, the delegation agreements terminate.

(B) *Analysis*. Because T and Y did not delegate authority for a period of more than one year to sell the electricity produced from their shares of the applicable credit property, the requirements of paragraph (a)(4)(iii)(B) of this section are met. Assuming that TLLC otherwise meets the requirements of paragraphs (a)(1) and (a)(4)(ii) of this section, TLLC is an organization described in paragraph (a)(4)(iii)(A) of this section and can make an election under paragraphs (b) and (e) of this section to be excluded from the application of all of subchapter K under section 761(a). As such, T can make an elective payment election for the applicable credits determined with respect to its share of the applicable credit property held by TLLC, assuming the requirements of section 6417 are otherwise met. The analysis in this example would be the same whether Y is also an Indian tribal government, another applicable entity, or some other person.

(b) * * *

(1) *Time for making election for exclusion*. Any unincorporated organization described in paragraph (a)(1) of this section and either paragraph (a)(2) or (3) of this section (taking into account paragraph (a)(4) of this section, as applicable) which wishes to be excluded from all of subchapter K must make the election provided in section 761(a) not later than the time prescribed by paragraph (e) of §1.6031(a)-1 (including extensions thereof) for filing the partnership return for the first taxable year for which exclusion from subchapter K is desired. Notwithstanding the prior sentence such organization may be deemed to have made the election in the manner prescribed in paragraph (b)(2)(ii) of this section.

(2) *Method of making election.* (i) Except as provided in paragraph (b)(2)(ii) of this section, any unincorporated organization described in paragraph (a)(1) of this section and either paragraph (a)(2) or (3) of this section (taking into account paragraph (a)(4) of this section, as applicable) which wishes to be excluded from all of subchapter K must make the election provided in section 761(a) in a statement attached to, or incorporated in, a properly executed partnership return, Form 1065, which shall contain the information required in this paragraph (b)(2)(i). Such return must be filed with the Internal Revenue Service Center where the partnership return, Form 1065, would be required to be filed if no election were made. To determine the appropriate Internal Revenue Service Center, the principal office or place of business of the person filing the return will be considered the principal office or place of business of the organization. The partnership return must be filed not later than the time prescribed by paragraph (e) of §1.6031(a)-1 (including extensions thereof) for filing the partnership return with respect to the first taxable year for which exclusion from subchapter K is desired. Such partnership return shall contain, in lieu of the information required by Form 1065 and by the instructions relating thereto, only the name or other identification and the address of the organization together with information on the return, or in the statement attached to the return, showing the names, addresses, and identification numbers of all the members of the organization; a statement that the organization qualifies under paragraph (a)(1) of this section and either paragraph (a)(2) or (3) of this section (taking into account paragraph (a)(4) of this section, as applicable); a statement that all of the members of the organization elect that it be excluded from all of subchapter K; and a statement indicating where a copy of the agreement under which the organization operates is available (or if the agreement is oral, from whom the provisions of the agreement may be obtained).

(ii) If an unincorporated organization described in paragraph (a)(1) of this section

and either paragraph (a)(2) or (3) of this section (taking into account paragraph (a)(4) of this section, as applicable) does not make the election provided in section 761(a) in the manner prescribed by paragraph (b)(2)(i) of this section, it shall nevertheless be deemed to have made the election if it can be shown from all the surrounding facts and circumstances that it was the intention of the members of such organization at the time of its formation to secure exclusion from all of subchapter K beginning with the first taxable year of the organization. Although the following facts are not exclusive, either one of such facts may indicate the requisite intent:

(A) At the time of the formation of the organization there is an agreement among the members that the organization be excluded from subchapter K beginning with the first taxable year of the organization, or

(B) The members of the organization owning substantially all of the capital interests report their respective shares of the items of income, deductions, and credits of the organization on their respective returns (making such elections as to individual items as may be appropriate) in a manner consistent with the exclusion of the organization from subchapter K beginning with the first taxable year of the organization.

(3) *Effect of election—(i) In general.* An election under this section to be excluded will be effective unless within 90 days after the formation of the organization (or by October 15, 1956, whichever is later) any member of the organization notifies the Commissioner that the member desires subchapter K to apply to such organization, and also advises the Commissioner that the member has so notified all other members of the organization by registered or certified mail. Such election is irrevocable as long as the organization remains qualified under paragraph (a)(1) of this section and either paragraph (a)(2) or (3) of this section (taking into account paragraph (a)(4) of this section, as applicable), or unless approval of revocation of the election is secured from the Commissioner. Application for permission to revoke the election must be submitted

to the Commissioner of Internal Revenue, Attention: T:1, Washington, DC 20224, no later than 30 days after the beginning of the first taxable year to which the revocation is to apply.

* * * * *

(c) *Partial exclusion from subchapter K.* An unincorporated organization which wishes to be excluded from only certain sections of subchapter K must submit to the Commissioner, no later than 90 days after the beginning of the first taxable year for which partial exclusion is desired, a request for permission to be excluded from certain provisions of subchapter K. The request shall set forth the sections of subchapter K from which exclusion is sought and shall state that such organization qualifies under paragraph (a)(1) of this section and either paragraph (a)(2) or (3) of this section (taking into account paragraph (a)(4) of this section, as applicable), and that the members of the organization elect to be excluded to the extent indicated. Such exclusion shall be effective only upon approval of the election by the Commissioner and subject to the conditions the Commissioner may impose.

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(e) *Cross reference.* For requirements with respect to the filing of a return on Form 1065 by a partnership, see §1.6031(a)-1.

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(f) *Applicability date.* Except as provided in paragraph (d) of this section, this section applies to taxable years ending on or after **[INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

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