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Report No. 1527  
April 30, 2026

The Honorable Scott Bessent  
Secretary of the Department of the  
Treasury, and Acting  
Commissioner of the Internal  
Revenue Service  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

The Honorable Kenneth J. Kies  
Assistant Secretary (Tax Policy) of  
the Department of the Treasury, and  
Acting Chief Counsel of the Internal  
Revenue Service  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

## Re: NYSBA Tax Section Report No. 1527 - Report on Notice 2026-15

Dear Secretary Bessent and Assistant Secretary Kies:

Please see attached Report No. 1527 of the Tax Section of the New York State Bar Association (the "**Report**") requesting guidance on the Prohibited Foreign Entity ("**PFE**") rules enacted by Public Law 119-21, commonly referred to as the "One Big Beautiful Bill Act." The Report addresses the application and administration of sections 7701(a)(51) and 7701(a)(52) of the Internal Revenue Code, which restrict eligibility for certain U.S. federal income tax credits for projects and producers owned by, controlled by, or receiving material assistance from PFEs.

The Tax Section commends Treasury and the IRS for issuing certain guidance in Notice 2026-15. Given the breadth and complexity of the PFE rules, and their material impact on determinations of credits under sections 45Q, 45U, 45X, 45Y, 45Z, and 48E of the Internal Revenue Code, the Tax Section believes there is a compelling need for additional timely and detailed guidance from the Department of the Treasury ("**Treasury**") and the Internal Revenue Service (the "**IRS**").

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This Report identifies areas which, based on our expertise and experience in tax administration and interpretation, and our interactions with market participants, merit additional guidance under the PFE rules on a priority basis. The Report focuses on priority issues relating to the scope and treatment of debt, partnerships, PFE status and testing mechanics, the existence or absence of effective control, and selected other matters associated with the PFE rules. Although the underlying statutory provisions may also reflect Congressional judgments about national security and energy policy, we do not express a view on these issues, which are outside the Tax Section's expertise.

We appreciate the opportunity to submit these comments and thank Treasury and the IRS for considering the views of the Tax Section. If you have any questions or would like to discuss any aspect of the Report, please do not hesitate to contact us. We would be pleased to assist in any way.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "L M Garrett", with a horizontal line extending to the right.

Lawrence M. Garrett  
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Enclosure

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**NEW YORK STATE BAR ASSOCIATION TAX SECTION  
REPORT REQUESTING GUIDANCE ON PROHIBITED FOREIGN ENTITY RULES**

**April 30, 2026**

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## I. Introduction

This report (the “**Report**”)<sup>1</sup> of the Tax Section of the New York State Bar Association (the “**Tax Section**”) addresses several new Code<sup>2</sup> provisions enacted by Public Law 119-21, commonly referred to as the “One Big Beautiful Bill Act” (the “**OBBBA**”), that restrict eligibility for certain U.S. federal income tax credits for projects and producers owned by, controlled by, or receiving

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<sup>1</sup> The principal authors of this report are Matt Donnelly and Paul Schockett, with substantial assistance from Abram Dorrough and Neil Kelliher. Helpful comments were received from Shariff Barakat, Drew Batkin, Kimberly Blanchard, Robert Cassanos, Jason Factor, Lawrence Garrett, M. John Jo, Maureen Linch, Deborah Paul, David Schizer, Michael Schler, Eric Sloan, Elaine Wilkins, and Libin Zhang. This Report reflects solely the views of the Tax Section and not those of its individual members or any other party.

<sup>2</sup> Unless indicated otherwise, all “section” references are to the Code, “Treas. Reg. §” references are to the Treasury regulations promulgated under the Code, and all “Prop. Treas. Reg. §” references are to proposed Treasury regulations promulgated under the Code.

material assistance from, persons sufficiently associated with “covered nations” in 10 U.S.C. § 4872(f)(2) (a “**Covered Nation**”).<sup>3</sup>

These new rules generally restrict ownership and control by, and material assistance from, “prohibited foreign entities” (“**PFEs**”) as defined in section 7701(a)(51)(A) (generally, “**PFE Rules**”) for taxpayers claiming certain U.S. federal income tax credits with respects to certain facilities, technologies, and components. These new rules (discussed in detail below) generally fall into two categories:

1. **Authority, ownership and control rules.** These rules (in section 7701(a)(51)) generally preclude determination of the credits available under section 45Q (carbon capture, utilization and sequestration), section 45U (zero-emission nuclear power production), section 45X (advanced manufacturing production), section 45Y (clean electricity production), section 45Z (clean fuel production), and section 48E (clean energy investment) for facilities owned or controlled by PFEs. Special “effective control” rules apply with respect to the credits under sections 45X, 45Y, and 48E.
2. **Material assistance rules.** These rules (in section 7701(a)(52)) generally preclude determination of the credits available under sections 45X, 45Y and 48E for facilities or producers receiving “material assistance” from PFEs, as defined in section 7701(a)(52)(A) (“**Material Assistance**”).

Given the importance of these credits to taxpayers and the material impact and complexity of these new restrictions, there is a compelling need for accelerated guidance from the Internal Revenue Service (the “**IRS**”) and Department of the Treasury (“**Treasury**”) to ensure consistent interpretation and application of the law. On February 12, 2026, the IRS and Treasury issued Notice 2026-15, which provides interim guidance with respect to the Material Assistance rules and very limited guidance on the authority, ownership, and control rules in section 7701(a)(51). The IRS and Treasury stated that they intend to issue more comprehensive proposed regulations and other guidance and requested comments on certain topics in Notice 2016-15.

This Report identifies areas which, based on our expertise and experience with tax administration and interpretation, and our interactions with market participants, merit additional IRS and Treasury guidance under the PFE Rules on a priority basis. Although the underlying statutory provisions may also reflect Congressional judgments about national security and energy policy, we do not express a view on these issues, which are outside the Tax Section’s expertise.

## II. Summary of Requests for Guidance

In summary, we request that the IRS and Treasury provide guidance with respect to the PFE Rules across five main categories: debt, partnerships, PFE status and testing mechanics, effective control, and certain other topics. Given the need for guidance prior to the first PFE

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<sup>3</sup> The nations are the Democratic People’s Republic of North Korea, the People’s Republic of China, the Russian Federation, and the Islamic Republic of Iran.

Determination Date (as defined herein), we request that the IRS and Treasury prioritize the first four categories. The specific guidance requests are:<sup>4</sup>

A. Debt

1. Provide guidance on the scope of “debt” as the term is used in sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II).
2. Provide guidance addressing when debt is considered “issued ... to” an SFE.
3. Provide guidance defining “publicly-traded debt” in section 7701(a)(51)(E)(iii)(II).
4. Provide guidance on the calculation of the debt test in section 7701(a)(51)(E)(iii)(II).
5. Provide guidance addressing the years for which issuances are relevant in sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II).
6. Provide guidance on whether the tests in sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II) apply only with respect to the debt of the regarded taxpayer that is the borrower (or under what circumstances the tests include the debt of related parties).
7. Provide guidance or procedures for how to substantiate that debt is not issued to an SFE (and in particular to an FCE).

B. Partnerships

8. Provide guidance on the treatment of partnerships that are neither SFEs nor FIEs but that have SFE or FIE partners.

C. PFE status and testing mechanics

9. Provide guidance regarding the meaning of “during the previous taxable year” in section 7701(a)(51)(D)(i)(II).
10. Provide guidance regarding whose “taxable year” is referred to in section 7701(a)(51)(A)(ii)(I)-(II)—the SFE/FIE or the credit claimant.

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<sup>4</sup> Capitalized terms are defined in the discussion below.

11. Provide guidance regarding what facts are taken into account in determining SFE or FIE status “as of the last day of such taxable year” under section 7701(a)(51)(A)(ii)(II).
12. Provide guidance addressing what constitutes a “payment” for purposes of section 7701(a)(51)(D)(i)(II).
13. Provide guidance or procedures for how to substantiate that an entity (including an equity owner) is not an FCE.
14. Provide guidance or procedures for how to substantiate that an equity owner is not an SFE (including an FCE).
15. Provide guidance on what “interests” are in the numerator and denominator of the fractions in section 7701(a)(51)(D)(i)(I)(bb)-(cc), and if these are equity interests, provide guidance on whether the interest is measured by vote or value.
16. Provide guidance addressing when typical voting rights as an equityholder amount to “direct authority to appoint a covered officer” of the issuer.

*D. Effective control*

17. Provide guidance on the meaning of the key terms in section 7701(a)(51)(D)(ii), including: “other arrangement,” “unrestricted,” “contractual right,” “related to the production of electricity,” “data,” “licensing agreement,” and “bona fide purchase or sale.”
18. Provide guidance on the scope of persons subject to treatment as FIEs by reason of section 7701(a)(51)(D)(i)(II)(bb)—in particular, whether it applies solely to credit claimants or whether it causes non-claimant suppliers to be treated as FIEs for purposes of the Material Assistance rules.
19. Provide guidance on the determination of what constitutes a “licensing” agreement in section 7701(a)(51)(D)(ii)(III)(aa).
20. Provide guidance on the determination as to which entities constitute a “contractual counterparty” in section 7701(a)(51)(D)(ii)(V).
21. Provide guidance addressing when intellectual property is licensed “on an exclusive basis” in section 7701(a)(51)(D)(ii)(II)(ff).
22. Provide guidance addressing when a contractual right is “retained” in section 7701(a)(51)(D)(ii)(III).

23. Provide guidance addressing when a contract is for “the provision of services” under section 7701(a)(51)(D)(ii)(II)(aa)(EE).
24. Provide guidance addressing when a taxpayer’s “utilization of intellectual property” is limited under section 7701(a)(51)(D)(ii)(II)(aa)(CC).
25. Provide guidance addressing when an agreement has been subject to “modification” under section 7701(a)(51)(D)(ii)(II)(aa)(GG).
26. Provide guidance addressing the scope of the phrase “without further involvement” in section 7701(a)(51)(D)(ii)(II)(aa)(FF).

*E. Other*

27. Provide guidance addressing the purchase of credits by FIEs.
28. Provide guidance on what is meant by “rules similar” to the January 1, 2025 begun construction guidance referenced in section 7701(a)(51)(J).
29. Provide guidance on the diligence taxpayers need to provide to satisfy the “reason to know” standards in section 7701(a)(52)(D)(iii)(III) and the Certification Safe Harbor in Notice 2026-15.
30. Provide guidance addressing enforcement of section 6695B.
31. Provide appropriate transitional relief for any forthcoming guidance.

**III. Scope of the Report**

While the PFE Rules reflect Congressional judgments about national security and energy policy, this Report does not analyze these considerations for three reasons. First, and most importantly, assessment of these policies and their implications is beyond the expertise of the Tax Section. Second, there is little legislative history to the OBBBA detailing Congress’s reasons for enacting the PFE Rules.<sup>5</sup> Covered Nations are defined by reference to Department of Defense procurement statutes that describe them as “non-allied” foreign nations.<sup>6</sup> A report prepared for the House Budget Committee with respect to an earlier draft of the legislation provides only that “[t]he Committee believes that prohibited foreign entities should not directly or indirectly benefit

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<sup>5</sup> Analogous (albeit narrower) rules addressing control by entities associated with Covered Nations were enacted in sections 48D(c)(1) and 50(a)(3) (advanced manufacturing investment credit) as part of the CHIPS Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366 (2022), and in section 30D(d)(7) (clean vehicle credit) as part of the Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

<sup>6</sup> *See, e.g.*, 10 U.S.C. § 4872.

from U.S. energy tax incentives.”<sup>7</sup> Third, different rationales could be offered for these national security and energy concerns, which could have competing implications for specific issues in the PFE Rules. For example, it is unclear to what extent Congress was concerned about: potential dependence by the U.S. on Covered Nations for energy infrastructure; specific actions that entities associated with Covered Nations might take; the cost of permitting such entities to claim subsidies funded by U.S. taxpayers; concerns about broader domestic or international market participation by such entities; or other considerations.

In light of the foregoing, this Report does not attempt to identify these different potential concerns, evaluate their applicability to particular circumstances, or weigh them in any statutory analysis. That said, we acknowledge that these broader policy considerations may impact rulemaking. In this Report, we only seek to present statutory ambiguities or gaps that we believe require resolution through IRS and Treasury guidance, along with our insights into which such areas of uncertainty are of greatest concern to affected taxpayers. In offering these insights, we draw on the expertise of our members in construing tax statutes based on applicable statutory language, as well as in considering administrability challenges and other considerations of tax policy that may guide rulemaking. As stated above, we recognize that other factors beyond our expertise might also be relevant, and we want to be clear that this Report does not address them. We do note in a handful of our requests below that non-tax policy considerations may be relevant to applicable rulemaking, but these specific observations are not intended to suggest that such considerations should or should not be paramount in these areas, or that the issues we highlight constitute an exhaustive list of areas where such non-tax policies may be relevant.

#### **IV. Summary of the PFE Rules**

This section summarizes the rules in sections 7701(a)(51) and 7701(a)(52) and certain related rules.

##### **1. Authority, Ownership, and Control Rules (Section 7701(a)(51))**

Section 7701(a)(51)(A)(i) defines a PFE to mean a “specified foreign entity” (“**SFE**”) or a “foreign-influenced entity” (“**FIE**”).

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<sup>7</sup> See H.R. Rep. No. 119-106 (2025), at 1675.

*i. SFEs and FCEs*

SFEs are defined by reference to two categories: (1) certain enumerated foreign government entities, military entities, and battery manufacturers<sup>8</sup> and (2) “foreign controlled entities” (“**FCEs**”).<sup>9</sup>

An FCE is generally defined to include (1) the government of a Covered Nation; (2) any agency or instrumentality of such a government; (3) a citizen or national of a Covered Nation who is not also a citizen, national, or lawful permanent resident of the United States; and (4) an entity, or qualified business unit of an entity, organized under the laws of, or having its principal place of business in, a Covered Nation.<sup>10</sup> Lastly, in the case of non-publicly traded entities, an FCE is defined as “any entity (including subsidiary entities)” that is “controlled” by any of the foregoing entities.<sup>11</sup> For purposes of the FCE definition, “control” is defined as ownership of more than 50 percent of vote or value in the case of a corporation, more than 50 percent of profits or capital in the case of a partnership, and more than 50 percent of beneficial interests in any other case.<sup>12</sup> For purposes of the SFE, FCE and FIE rules (discussed below), ownership is determined under the principles of section 318(a)(2) for corporations and “similar principles” for other entities.<sup>13</sup>

An FCE also includes any publicly traded entity that is “controlled” (under the above rules) either by one or more SFEs (other than FCEs) that are each required to report their beneficial ownership under Rule 13d-3 of the Securities and Exchange Act of 1934<sup>14</sup> or one or more FCEs (other than FCEs that are themselves only FCEs by reason of being “controlled” by another FCE) that are each required to perform such reporting.<sup>15</sup>

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<sup>8</sup> Section 7701(a)(51)(B). The enumerated entities are any “foreign entity of concern” described in subparagraph (A), (B), (D), or (E) of section 9901(8) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283; 15 U.S.C. § 4651); any entity identified as a Chinese military company operating in the United States in accordance with section 1260H of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116-283; 10 U.S.C. § 113 note); any entity included on a list required by clause (i), (ii), (iv), or (v) of section 2(d)(2)(B) of Public Law 117-78 (135 Stat. 1527); and any entity specified under section 154(b) of the National Defense Authorization Act for Fiscal Year 2024 (Public Law 118-31; 10 U.S.C. note prec. 4651).

<sup>9</sup> Section 7701(a)(51)(C).

<sup>10</sup> Section 7701(a)(51)(C)(i)-(iv).

<sup>11</sup> Section 7701(a)(51)(C)(v).

<sup>12</sup> Section 7701(a)(51)(G).

<sup>13</sup> Section 7701(a)(51)(H).

<sup>14</sup> The rule also extends to entities the ownership of which is reported under the equivalent rules of other exchanges or markets identified under section 1296(e)(1)(A)(ii).

<sup>15</sup> Section 7701(a)(51)(E)(ii). For purposes of this determination, an entity is treated as publicly traded if its securities are regularly traded on an exchange described in section 7701(a)(51)(E)(i)(I) (unless such exchange or

ii. *FIEs*

For non-publicly traded entities,<sup>16</sup> an FIE is defined to include any entity “with respect to which, during the taxable year”:

1. an SFE has the direct authority to appoint a “covered officer” of such entity,<sup>17</sup>
2. a single SFE owns at least 25 percent of such entity,
3. one or more SFEs own in the aggregate at least 40 percent of such entity, or
4. at least 15 percent of the debt of such entity has been issued, in the aggregate, to one or more SFEs.<sup>18</sup>

For publicly traded entities, an FIE is defined to include any entity “if during the taxable year”:

1. an SFE has the authority to appoint a “covered officer” of such entity,
2. a single SFE required to report its beneficial ownership under Rule 13d-3 of the Securities and Exchange Act of 1934 owns not less than 25 percent of such entity, or
3. one or more SFEs that are each required to report their beneficial ownership under Rule 13d-3 of the Securities and Exchange Act of 1934 own, in the aggregate, not less than 40 percent of such entity.<sup>19</sup>

For publicly traded entities, an FIE also includes an entity if “such entity has issued debt, as part of an original issuance, in excess of 15 percent of its publicly-traded debt to 1 or more [SFEs].”<sup>20</sup>

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market is incorporated or organized under the laws of a Covered Nation or has its principal place of business in a Covered Nation). Section 7701(a)(51)(E)(i)(III).

<sup>16</sup> For purposes of this determination, an entity is treated as publicly traded if its securities are regularly traded on an exchange described in section 7701(a)(51)(E)(i) (or not less than 80 percent of the equity securities of such entity are owned directly or indirectly by such an entity).

<sup>17</sup> The term “covered officer” means, with respect to an entity: (i) a member of the board of directors, board of supervisors, or equivalent governing body; (ii) an executive-level officer, including the president, chief executive officer, chief operating officer, chief financial officer, general counsel, or senior vice president, or (iii) an individual having powers or responsibilities similar to those of officers or members described in the foregoing. Section 7701(a)(51)(F).

<sup>18</sup> Section 7701(a)(51)(D)(i)(I).

<sup>19</sup> Section 7701(a)(51)(E)(iii)(II). References to securities reporting rules include equivalent rules under any other exchange or other market identified in guidance issued under section 1296(e)(1)(A)(ii). Section 7701(a)(51)(E)(i)(I)(cc).

<sup>20</sup> Section 7701(a)(51)(E)(iii)(II).

iii. *Effectively Controlled*

Solely for purposes of the restrictions on credits determined under sections 45X (advanced manufacturing production), 45Y (clean electricity production) and 48E (clean electricity investment), an FIE also includes certain “effectively controlled” entities.

For purposes of sections 45Y and 48E, an entity is “effectively controlled” by an SFE if the entity made a payment to an SFE “during the previous taxable year” pursuant to a contract, agreement or other arrangement that entitles the SFE (or an entity “related” to such SFE under section 267(b) or section 707(b)) to exercise “effective control” over any qualified facility or energy storage technology (“**EST**”) “of the taxpayer” (or any person related to the taxpayer).<sup>21</sup> For purposes of section 45X, an entity is effectively controlled by an SFE if the entity made a payment to an SFE “during the previous taxable year” pursuant to a contract, agreement, or other arrangement that entitles the SFE (or an entity “related” to such SFE) to exercise “effective control” over the extraction, processing or recycling of any applicable critical mineral or the production of an eligible component that is not an applicable critical mineral, in each case with respect to any eligible component “produced by the taxpayer” (or any person related to the taxpayer).<sup>22</sup> This Report refers to any contract, agreement, or arrangement that conveys “effective control” for purposes of the above rules as an “**Effective Control Agreement.**”

For purposes of these rules, an Effective Control Agreement includes a licensing agreement for the provision of intellectual property (or any other contract, agreement, or other arrangement entered into with a contractual counterparty related to such licensing agreement), with respect to a qualified facility or EST, or the production of an eligible component (each an “**IP Licensing Agreement**”), pursuant to which any of the following contractual rights is retained by a contractual counterparty:

- a. the right to specify or otherwise direct one or more sources of components, subcomponents, or applicable critical minerals utilized in a qualified facility or EST, or in the production of an eligible component;
- b. the right to direct the operation of any qualified facility, EST, or production unit that produces an eligible component;
- c. the right to limit the taxpayer’s utilization of intellectual property related to the operation of a qualified facility or EST, or in the production of an eligible component;

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<sup>21</sup> Section 7701(a)(51)(D)(i)(II)(aa).

<sup>22</sup> Section 7701(a)(51)(D)(i)(II)(bb).

- d. the right to receive royalties under the licensing agreement or any similar agreement (or payments under any related agreement) beyond the 10th year of the agreement (including modifications or extensions thereof); or
- e. the right to direct or otherwise require the taxpayer to enter into an agreement for the provision of services for a duration longer than 2 years (including any modifications or extensions thereof).<sup>23</sup>

In addition to the above, an Effective Control Agreement includes any IP Licensing Agreement that does not provide the licensee with all the technical data, information, and know-how necessary to enable the licensee to produce the eligible component or components subject to the contract, agreement, or other arrangement “without further involvement” from the contractual counterparty or an SFE.<sup>24</sup> Finally, an Effective Control Agreement includes any IP Licensing Agreement that “was entered into (or modified) on or after [July 4, 2025].”<sup>25</sup>

Under an exception, an IP Licensing Agreement is not treated as an Effective Control Agreement in the case of a “bona fide purchase or sale” of intellectual property; however, a purchase or sale of intellectual property is not considered a “bona fide purchase or sale” where the agreement provides that ownership of the intellectual property reverts to the contractual counterparty after a period of time.<sup>26</sup>

Section 7701(a)(51)(D)(ii)(I)(bb) instructs the IRS and Treasury to issue regulations as are necessary to carry out the purposes of the effective control rules, including to prevent abuse of certain effective control rules. Before such Treasury regulations are issued, an Effective Control Agreement also includes the unrestricted contractual right of a contractual counterparty to (i) determine the quantity or timing of production of an eligible component produced by the taxpayer, (ii) determine the amount or timing of activities related to the production of electricity undertaken at a qualified facility of the taxpayer or the storage of electrical energy in EST of the taxpayer, (iii) determine which entity may purchase or use the output of a production unit of the taxpayer that produces eligible components, (iv) determine which entity may purchase or use the output of a qualified facility of the taxpayer, (v) restrict access to data critical to production or storage of energy undertaken at a qualified facility of the taxpayer, or to the site of production or any part of a qualified facility or EST of the taxpayer, to the personnel or agents of such contractual

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<sup>23</sup> Section 7701(a)(51)(D)(ii)(III)(aa)(AA)-(EE).

<sup>24</sup> Section 7701(a)(51)(D)(ii)(III)(aa)(FF).

<sup>25</sup> Section 7701(a)(51)(D)(ii)(III)(aa)(GG). In Notice 2026-15, the IRS and Treasury confirmed that any of six different identified IP Licensing Agreements in section 7701(a)(51)(D)(ii)(III)(aa) can give rise to an Effective Control Agreement independently of any other.

<sup>26</sup> Section 7701(a)(51)(D)(ii)(III)(bb).

counterparty, or (vi) “on an exclusive basis,” maintain, repair, or operate any plant or equipment which is necessary to the production by the taxpayer of eligible components or electricity.<sup>27</sup>

Finally, an Effective Control Agreement includes any other agreement or arrangement similar to the above that provides one or more contractual counterparties with “specific authority over key aspects” of the production of eligible components (for section 45X claimants) or energy generation in a qualified facility or EST (for section 45Y and 48E claimants) that are not included in the measures of control through authority, ownership, or debt held that are otherwise tested for FIE status.<sup>28</sup>

#### *iv. Determination Timing Rules*

The determination of whether an entity is an SFE or an FIE generally is made as of the last day of a taxable year.<sup>29</sup> Under a special rule, for purposes of “the first taxable year beginning after” July 4, 2025, the determination as to whether an entity is an SFE other than an FCE is made as of the first day of such taxable year.<sup>30</sup>

### 2. Material Assistance (Sections 7701(a)(52) and 6695B)

#### *i. Section 7701(a)(52)*

Section 7701(a)(52) defines Material Assistance to mean (with respect to any qualified facility or EST for purposes of sections 45Y and 48E) a “material assistance cost ratio” (“**Clean Electricity MACR**”) that is less than the applicable threshold percentage under section 7701(a)(52)(B), and (with respect to any facility which produces eligible components for purposes of section 45X) a “material assistance cost ratio” (“**Eligible Component MACR**”) that is less than the applicable threshold percentage under section 7701(a)(52)(C).<sup>31</sup>

The Clean Electricity MACR is a fraction (expressed as a percentage) for which the denominator is the “total direct costs” to the taxpayer attributable to all “manufactured products (including components)” that are incorporated into the qualified facility or EST, as applicable, upon completion of construction, and the numerator of which is the amount in the denominator *less* the amount of such costs attributable to all manufactured products (including components) that are mined, produced, or manufactured by a PFE.<sup>32</sup> The Energy Component MACR is a

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<sup>27</sup> Section 7701(a)(51)(D)(ii)(II).

<sup>28</sup> Section 7701(a)(51)(D)(ii)(I)(aa).

<sup>29</sup> Section 7701(a)(51)(A)(ii)(I).

<sup>30</sup> Section 7701(a)(51)(A)(ii)(II).

<sup>31</sup> Section 7701(a)(52)(A).

<sup>32</sup> Section 7701(a)(52)(D)(i).

fraction (expressed as a percentage) for which the denominator is the “total direct material costs” that are paid or incurred (within the meaning of section 461 and any regulations issued under section 263A) by the taxpayer for production of the eligible component, and the numerator of which is the amount in the denominator *less* the amount of such costs that are so paid or incurred for production of the eligible component that are mined, produced or manufactured by a PFE.<sup>33</sup>

The applicable thresholds in section 7701(a)(52)(B)-(C) vary depending on the facility, EST, or eligible component and generally increase annually through 2029.<sup>34</sup> For purposes of sections 45Y and 48E, the annual increase in the applicable Clean Electricity MACR threshold is based on when construction with respect to the facility or EST “began.”<sup>35</sup> Under section 7701(a)(52)(F), the beginning of construction is “determined pursuant to rules similar to the rules under Internal Revenue Service Notice 2013-29 and Internal Revenue Service Notice 2018-59 (as well as any subsequently issued guidance clarifying, modifying, or updating either such Notice), as in effect on January 1, 2025.”<sup>36</sup>

In Notice 2026-15, the IRS and Treasury provided an initial set of safe harbors to establish a framework for determining the applicable Clean Electricity MACR or Eligible Component MACR, including (i) an “Identification Safe Harbor” for determining the unit of manufactured products, components, and constituent materials with respect to which to compute the numerator and the denominator of the Clean Electricity MACR and the Eligible Component MACR, (ii) a “Cost Percentage Safe Harbor” (for taxpayers also using the Identification Safe Harbor) to then determine the Clean Electricity MACR or Eligible Component MACR based on Treasury-determined percentages of costs, and (iii) a “Certification Safe Harbor” that allows a taxpayer to rely on a certificate from its direct supplier that the product, component, or constituent material was not PFE-produced or PFE-sourced or as to the total direct costs (or material costs) paid or incurred by the taxpayer for the product, component or constituent material that was not PFE-produced or PFE-sourced.

*ii. Section 6695B*

In addition to the Material Assistance prohibitions on the sections 45X, 45Y and 48E credits, the OBBBA also introduced an additional penalty related to a determination that a taxpayer failed to satisfy the applicable Clean Electricity MACR or Eligible Component MACR threshold.

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<sup>33</sup> Section 7701(a)(52)(D)(ii).

<sup>34</sup> Congress directed the Secretary to issue threshold percentages for each of the applicable critical minerals in section 45X(c)(6) equal to or greater than the threshold percentage that would otherwise apply, taking into account domestic geographic availability, supply chain constraints, domestic processing capacity needs, and national security concerns. Section 7701(a)(52)(C)(ii).

<sup>35</sup> Section 7701(a)(52)(B).

<sup>36</sup> *Cf.* section 7701(a)(51)(J).

Under new section 6695B, if (i) a person provides a Clean Electricity MACR or Eligible Component MACR source certification with respect to any manufactured product, eligible component or constituent element, material or subcomponent of an eligible component, such person knows, or reasonably should have known, that the certification would be used in connection with a credit determination, and such person knows, or reasonably should have known, that such certification is inaccurate or false (without reasonable cause), and (ii) the inaccuracy or falsity resulted in the disallowance of an applicable credit and an understatement of income tax for the taxable year in an amount which exceeds the lesser of five percent of the tax required to be shown or \$100,000, then the person is liable for a penalty equal to the greater of \$5,000 or 10 percent of the amount of the underpayment solely attributable to the inaccuracy or falsity.

### 3. Credits Subject to the PFE Rules

This section summarizes the operative credits that are subject to the PFE Rules and certain other affected rules, their scope and the effective dates of the relevant PFE Rules.

#### *i. Section 45Q*

Section 45Q provides a 12-year credit for the capture and either utilization or sequestration of qualified carbon oxides. The SFE and FIE rules (excluding the Effective Control Agreement rules) apply to section 45Q credits claimed in taxable years beginning after July 4, 2025.<sup>37</sup>

#### *ii. Section 45U*

Section 45U provides a credit for the production and sale of electricity by a qualified nuclear power facility through taxable years beginning on or before December 31, 2032. The SFE rules apply to section 45U credits claimed in taxable years beginning after July 4, 2025, and the FIE rules (excluding the Effective Control Agreement rules) apply to section 45U credits claimed in taxable years beginning after July 4, 2027.<sup>38</sup>

#### *iii. Section 45X*

Section 45X provides a credit for the production and sale of certain eligible components through 2033 (terminating sooner for certain components or applicable minerals). The PFE Rules (including Effective Control Agreement rules and the Material Assistance rules) apply to section 45X credits claimed in taxable years beginning after July 4, 2025.<sup>39</sup>

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<sup>37</sup> Section 45Q(f)(10).

<sup>38</sup> Section 45U(c)(3).

<sup>39</sup> Section 45X(c)(1)(C), 45X(d)(4).

iv. *Sections 45Y and 48E*

Section 45Y provides a 10-year credit for the production and sale of clean electricity at a qualified facility, and section 48E provides an investment tax credit for the qualified investment in a qualified facility or EST, in each case subject to a four-year phasedown beginning after 2033 (and terminated for wind and solar projects that begin construction after July 4, 2026 and are not placed in service by December 31, 2027). The PFE Rules (including Effective Control Agreement rules and the Material Assistance rules) apply to section 45Y and 48E credits claimed in taxable years beginning after July 4, 2025.<sup>40</sup> For investment credits claimed under section 48E in taxable years beginning after July 4, 2027, section 50(a)(4) imposes a 100 percent credit recapture if the taxpayer makes a payment to an SFE pursuant to an Effective Control Agreement during the 10-year period following the date the investment credit property was placed in service.

v. *Section 45Z*

Section 45Z provides a credit for the production and sale of certain clean fuels through 2029. The SFE rules apply to section 45Z credits claimed in taxable years beginning after July 4, 2025, and the FIE rules (excluding the Effective Control Agreement rules) apply to section 45Z credits claimed in taxable years beginning after July 4, 2027.<sup>41</sup>

vi. *Section 6418*

Section 6418 permits eligible taxpayers to elect to transfer, on a one-time basis for cash, certain specified credits, including section 45Q, 45U, 45X, 45Y, 45Z and 48E credits. Section 6418(g)(5) prohibits the transfer of such credits to SFEs.

**V. Requests for Guidance with Respect to the PFE Rules**

A. *Debt*

1. Provide guidance on the scope of “debt” as the term is used in sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II).

Section 7701(a)(51)(D)(i)(I)(dd) defines FIE to include a non-publicly traded entity “with respect to which, during the taxable year ... at least 15 percent of the *debt* of such entity has been issued, in the aggregate, to 1 or more [SFEs],” and section 7701(a)(51)(E)(iii)(II) defines an FIE to include a publicly traded entity “if such entity has issued *debt*, as part of an original issuance, in excess of 15 percent of its publicly-traded *debt* to 1 or more [SFEs].”<sup>42</sup>

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<sup>40</sup> Section 45Y(b)(1)(E), 45Y(g)(13), 48E(b)(6), 48E(c)(3), 48E(d)(6).

<sup>41</sup> Section 45Z(f)(8).

<sup>42</sup> Emphasis added.

Section 7701(a)(51) does not define “debt” for these purposes. The Code contains numerous references to “debt,” which is generally defined under U.S. federal income tax principles as “an unqualified obligation to pay a sum certain at a reasonably close fixed maturity date along with a fixed percentage in interest payable regardless of the debtor’s income or lack thereof” and which is used to contrast debt and equity.<sup>43</sup> There are also references to a definition of “debt” under general U.S. federal income tax principles throughout the Treasury regulations.<sup>44</sup> Nevertheless, the Code also contemplates other obligations and liabilities (*e.g.*, contingent liabilities and trade payables) that could be labeled debt under certain (non-tax) uses of the term.

Given the potential breadth of the term “debt” and its importance to the determination of credit eligibility, it is critical that the IRS and Treasury provide guidance on the meaning of the term in sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II). Taking into account the term’s generally understood meaning elsewhere in the Code and its specific use in sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II) (*i.e.*, an ownership test that also applies with similar effect to ownership of “equity”), it would seem most appropriate and within the intent of the statute to define “debt” by reference to general U.S. federal income tax principles. In proposing guidance, we also request that special consideration be given to bank deposits, which generally may be treated as debt for tax purposes but would seem appropriately excluded as such for purposes of these PFE Rules, which otherwise seem intended to capture relationships with the potential to confer influence akin to that of a substantial equityholder.<sup>45</sup>

## 2. Provide guidance addressing when debt is considered “issued ... to” an SFE.

As noted, section 7701(a)(51)(D)(i)(I)(dd) defines FIE to include a non-publicly traded entity “with respect to which, during the taxable year ... at least 15 percent of the debt of such entity has been *issued*, in the aggregate, to 1 or more [SFEs],” and section 7701(a)(51)(E)(iii)(II) defines an FIE to include a publicly traded entity “if such entity has *issued* debt, as part of an original issuance, in excess of 15 percent of its publicly-traded debt to 1 or more [SFEs].”<sup>46</sup>

Section 7701(a)(51) does not further provide when debt is treated as “issued” for these purposes, nor does the Code generally define when a debt instrument is “issued” in the context of

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<sup>43</sup> *Gilbert v. Comm’r*, 248 F.2d 399, 402 (2d Cir. 1957) (“classic debt”).

<sup>44</sup> See Treas. Reg. § 1.1275-1(d); see also Treas. Reg. §§ 1.6045-1(a)(17), 1.385-3(g)(4) (cross-referencing Treas. Reg. § 1.1275-1(d)). Former Prop. Reg. §§ 1.357-1(b)(6) and 1.361-1(b)(15) (withdrawn at 90 Fed. Reg. 46776-46777 (Sep. 30, 2025)) also proposed to define “debt” by reference to Treas. Reg. § 1.1275-1(d) and general principles of U.S. federal income tax law.

<sup>45</sup> Additionally, similar to the issues for which we request guidance in Part V.7, we request consideration be given to issues raised by related-party debt—for example, to what extent is debt issued to a non-SFE related party taken into account in the calculations in sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II) (*e.g.*, can taxpayers cure issues arising under sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II) with related-party debt) or to what extent should debt issued to a related SFE be disregarded in the calculations if both the SFE lender and borrower are under the control of a non-SFE common parent.

<sup>46</sup> Emphasis added.

a debt instrument—in particular, whether a debt instrument is treated as only “issued” once (*i.e.*, on its original issuance) or whether and under what circumstances any subsequent holder is treated as having been “issued” the instrument. As with the prior request, given its importance to the determination of credit eligibility, it is critical that the IRS and Treasury provide guidance on the meaning of the term.

First, we acknowledge there is a clear difference in the language of sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II), but the import of the difference is not at all clear. Specifically, section 7701(a)(51)(D)(i)(I)(dd) refers only to debt that is “issued,” while section 7701(a)(51)(E)(iii)(II) refers to debt that is “issued ... as part of an original issuance.” One clear potential inference is that section 7701(a)(51)(E)(iii)(II) tests only the first holder of the debt instrument (“original issuance”), while section 7701(a)(51)(D)(i)(I)(dd) picks up some broader group of subsequent holders; however it is not clear that section 7701(a)(51)(D)(i)(I)(dd)’s language on its own actually supports (or that the differences in language are significant enough to compel) that conclusion, nor is it clear what incremental group of subsequent holders section 7701(a)(51)(D)(i)(I)(dd) could reasonably contemplate.<sup>47</sup> Notably, an earlier version of the OBBBA (the House Bill, discussed below<sup>48</sup>) defined the FIE debt test by reference to debt “held” by SFEs; the change to “issued ... to” could readily be understood as explicitly narrowing the scope of the test.

As generally used in the Code and Treasury regulations, “issued” would refer to the issuance of a debt instrument *by the borrower* to the holder; for tax purposes, any such “issuance” generally only happens once—when the debt instrument is issued for the first time, or *originally*, to the holder. (Any such debt instrument that was *re-purchased* and *re-sold* by the borrower as re-issuance as a corporate matter would be treated as a retirement and an original issuance of a new debt instrument for U.S. federal income tax purposes.) For example, “issue price” as defined in section 1273(b) for purposes of sections 1271-1275 is defined generally as the price received in the relevant offering or exchange *by the borrower* from the holders. Therefore, the term “original” issuance as used in sections 1271-1275, while clarifying that its scope clearly excludes secondary transactions, does not necessarily introduce any incremental meaning not already reflected in the term “issuance.”

Returning to the PFE Rules, the same interpretive question is posed by sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II). Clearly, section 7701(a)(51)(E)(iii)(II), with its clarifying reference to an “original issuance,” is only intended to test the first holder of the debt instrument. Section 7701(a)(51)(D)(i)(I)(dd) also clearly tests the holders in the original issuance of any debt instrument, but guidance should also confirm that those holders are also the only holders to whom such debt instrument is “issued” and that section 7701(a)(51)(D)(i)(I)(dd) does not test ownership by any subsequent holders. We acknowledge that the effect of such an interpretation would potentially minimize the import of the term “original” in section

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<sup>47</sup> One potential interpretation is that the “original issuance” limitation in section 7701(a)(51)(E)(iii)(II) excludes deemed issuances under Treas. Reg. § 1.1001-3. In any case, as discussed below, we recommend excluding all such deemed issuances from the scope of section 7701(a)(51)(E)(iii)(II).

<sup>48</sup> See *infra* note 66 and accompanying text.

7701(a)(51)(E)(iii)(II), but we believe this language can be read as a mere clarification in the vein of its use in section 1271-1275 and that attempting to infer any meaning from the absence of such term in section 7701(a)(51)(D)(i)(I)(dd) would be even more distortive. Practically speaking, we also have no suggestions for which subsequent holders could reasonably be tested under section 7701(a)(51)(D)(i)(I)(dd) as a person to whom debt was “issued.” For example, under no authority should a mere recording of a holder’s name in a register or the formal replacement of a note be treated as an issuance.

To the extent the IRS and Treasury are concerned about transactions in which an SFE acquires a debt instrument in a secondary transaction in form but in a transaction that in substance is akin to acquiring the debt instrument at issuance (*e.g.*, binding agreements to re-sell or transactions via agents), the IRS and Treasury could promulgate an anti-abuse rule or otherwise reaffirm that general principles of tax law concerning ownership of property will control the determination of whether a holder acquired the applicable debt instrument at issuance. Furthermore, guidance should confirm that section 7701(a)(51)(H) (“Determination of ownership”) applies under section 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II) to test the issuance by reference to the “owner” of the debt at issuance (*i.e.*, taking into account section 318 in the same manner as the equity ownership tests).

Next, guidance should address the role of underwriters. For reference, in the case of public offerings, section 1273(b)(1) excludes prices offered to underwriters from the determination of the issue price.<sup>49</sup> For similar reasons, it would seem sensible for guidance to make clear that issuances to underwriters, placement agents, and similar persons (whether under a best efforts or firm commitment arrangement) are ignored for purposes of the determinations under sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II).

Finally, guidance should also address any deemed issuance of a debt instrument under the principles of Treas. Reg. § 1.1001-3 as a result of a substantial modification of the instrument. As an initial matter, guidance could consider whether the distinction between an issuance and such a deemed reissuance suggests a distinction between the terms “issued” and “originally issued” in the FIE rules (*i.e.*, such that a deemed issuance would be taken into account under section 7701(a)(51)(D)(i)(I)(dd) but not under section 7701(a)(51)(E)(iii)(II)). However, as a practical matter, if deemed issuances resulting from substantial modifications are to be treated as tested issuances for purposes of sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II), it is not clear how any such rule would be administrable with respect to debt issued only in the form of a global note to the Depositary Trust Company and otherwise traded in “street name.” As a result, we would recommend that guidance generally exempt deemed reissuances of “publicly-traded debt” from testing under section 7701(a)(51)(E)(iii)(II) (subject to anti-abuse rules).<sup>50</sup>

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<sup>49</sup> Treas. Reg. § 1.1273-2(e).

<sup>50</sup> Non-tax policy concerns with certain outcomes resulting from testing only holders on the issuance of debt by the borrower and not retesting upon secondary market acquisitions may be viewed as relevant to any ultimate rulemaking. As noted above, these issues are beyond our expertise. *See supra* Part III.

3. Provide guidance defining “publicly-traded debt” in section 7701(a)(51)(E)(iii)(II).

As discussed, section 7701(a)(51)(E)(iii)(II) defines an FIE to include a publicly traded entity “if such entity has issued debt, as part of an original issuance, in excess of 15 percent of its *publicly-traded debt* to 1 or more [SFEs].”<sup>51</sup> “Publicly-traded debt” is not defined for this purpose—given its importance to the determination of credit eligibility, it is critical that the IRS and Treasury provide guidance on the meaning of the term.

The principles of Treas. Reg. § 1.1273-2(f), which determine when property is “traded on an established market” for purposes of section 1273(b), would seem most immediately relevant to this determination. We observe that “public trading” as used elsewhere in section 7701(a)(51)(E) is determined by reference to trading on regulated exchanges; however, section 7701(a)(51)(E)(iii)(II) makes no reference to regulated exchanges, and therefore the principles of Treas. Reg. § 1.1273-2(f) (which includes, *e.g.*, publicly available broker or price service quotes as determinative of a debt being “publicly traded”) would remain an appropriate basis for guidance under section 7701(a)(51)(E)(iii)(II).

4. Provide guidance on the calculation of the debt test in section 7701(a)(51)(E)(iii)(II).

As noted in each of the foregoing recommendations, section 7701(a)(51)(E)(iii)(II) defines an FIE to include a publicly traded entity “if such entity has issued *debt*, as part of an original issuance, in excess of 15 percent of its *publicly-traded debt* to 1 or more [SFEs].”<sup>52</sup>

Section 7701(a)(51)(E)(iii)(II) clearly provides that the threshold is calculated as 15 percent of the “publicly-traded debt” of the entity. Read literally, it would also provide that the tested issuances (which are only described as “debt”) are not limited to “publicly-traded debt” but include all debt of the entity. As with the foregoing discussion, this strict reading of the statute could have surprising and perhaps unintended consequences. Alternatively, unintended consequences could also arise if the tested issuances are those of “publicly-traded debt.”

Because the threshold figure in section 7701(a)(51)(E)(iii)(II) is the “publicly-traded debt” of the entity, it may make sense for the tested issuances to refer only to “publicly-traded debt.” The statutory text, however, refers to “debt” of the entity, creating the implication that the threshold is calculated as all debt issued as part of an original issuance to an SFE against 15 percent of its publicly-traded debt. The former interpretation would seem the more internally logical and appropriate reading because it would mean the resulting comparison is always “apples-to-apples” and thereby give more rationality to the “15 percent” comparison that the statute is weighing, consistent with the equity percentage ownership tests in the remainder of section 7701(a)(51)(E)(iii). (That said, such a result would allow a publicly traded entity to issue non-

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<sup>51</sup> Emphasis added.

<sup>52</sup> Emphasis added.

“publicly-traded debt” without limitation—also an anomalous result.) On the other hand, the latter (strict) interpretation more closely tracks the words of the Code but could create a trap for the unwary.

As an example of the unintended consequences under the strict reading, a publicly traded entity without any “publicly-traded debt” would become an FIE upon issuing any amount (even \$1) of non-publicly traded debt to an SFE, regardless of how much other non-publicly-traded debt it might have outstanding with entities that are not SFEs (such as \$1 billion under a private revolver facility with a bank). Moreover, were the same borrower not publicly traded, it would not be an FIE under section 7701(a)(51)(D)(i)(I)(dd)—*i.e.*, in contrast to the remainder of the statute, the test is less lenient when applied to publicly traded entities. Like other PFE Rules, the policy rationale for these outcomes is sufficiently unclear that taxpayers may reasonably take inconsistent reporting positions in the absence of guidance.

We do not believe that either interpretation is sound. We therefore request that the IRS and Treasury issue guidance that rationalizes application of the statute. More appropriate results would flow from limiting the relevance of “publicly-traded debt” to the calculation (except perhaps in cases where the borrower’s debt is largely comprised of publicly traded debt), and instead subject all borrowers to a test like that in section 7701(a)(51)(D)(i)(I)(dd) (and perhaps a future amendment will strike the reference to “publicly-traded debt” in section 7701(a)(51)(E)(iii)(II) to rationalize its application with section 7701(a)(51)(D)(i)(I)(dd)).<sup>53</sup> If the IRS and Treasury do not believe they have the authority to rationalize the results of the “publicly-traded debt” test via rulemaking, they should request a technical correction.

5. Provide guidance addressing the years for which issuances are relevant in sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II).

As noted, section 7701(a)(51)(D)(i)(I)(dd) defines FIE to include a non-publicly traded entity “with respect to which, *during the taxable year* ... at least 15 percent of the debt of such entity *has been* issued, in the aggregate, to 1 or more [SFEs],” and section 7701(a)(51)(E)(iii)(II) defines an FIE to include a publicly traded entity “if such entity *has issued* debt, as part of an original issuance, in excess of 15 percent of its publicly-traded debt to 1 or more [SFEs].”

First, for a non-publicly traded entity, the test applies in respect of debt that has been issued “during the taxable year” but for publicly traded entities, the test applies in respect of debt that has been issued without regard to whether it has been issued during the taxable year. That the debt test for publicly traded entities lacks this qualifier seems particularly intentional because the authority and equity tests for publicly traded entities (which are in clause (I) and directly adjacent to the debt test in clause (II)) explicitly include a “during the taxable year” qualifier. How to interpret this difference in language is challenging in the absence of any clear rationale—one clear potential inference is that publicly traded entities are not tested on a year-by-year basis, but instead the test is cumulative of all debt issued for all applicable taxable years. In the absence of guidance

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<sup>53</sup> Non-tax policy concerns with certain outcomes resulting from this approach may be viewed as relevant to any ultimate rulemaking. As noted above, these considerations are beyond the Tax Section’s expertise. *See supra* Part III.

providing for continuous testing or otherwise permitting curing of FIE status, this interpretation could render a publicly traded entity an FIE permanently. We therefore request that the IRS and Treasury issue guidance addressing the meaning of the absence of the language (“*during the taxable year*”) in section 7701(a)(51)(E)(iii)(II), and (consistent with our other recommendations) provide a path for entities that become FIEs by reason of these rules to cure such status.

Second, for a non-publicly traded entity, it is not clear whether the numerator and denominator for the testing fraction include (1) only debt issued *during the taxable year* or (2) all debt that *has been issued* during all applicable taxable years. The first interpretation would give more significance to the phrase “*during the taxable year*” in the statute, while the latter interpretation would give more significance to the phrase “*has been issued.*” The first interpretation would mean that an excessive issuance of debt to an SFE would only taint the borrower for one taxable year; the latter would mean that, like the FIE authority and equity ownership tests, an excessive issuance would continue to taint the entity year after year until cured (if curing is possible). The latter interpretation would also cause the test to operate in the manner that we interpret the test for publicly traded entities to apply in section 7701(a)(51)(E)(iii)(II) and therefore may not give sufficient meaning to the phrase “*during the previous taxable year.*” We therefore urge the IRS and Treasury to issue guidance addressing how to perform this test.

6. Provide guidance or procedures for how to substantiate that debt is not issued to an SFE (and in particular to an FCE).

The FIE determination rules in sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II) relating to debt all hinge on the determination of whether or not a debt has been issued to an SFE, but section 7701(a)(51) does not provide rules for taxpayers to substantiate whether the holder is an SFE. Given the importance of this determination, it is critical to administration of the rule that the IRS and Treasury provide guidance to ensure consistent application.

As a general matter, a regulatory regime that allows holders to certify their status to borrowers (akin to the certification regime that generally governs U.S. federal income and employment tax withholding), and upon which borrowers are permitted to rely (absent a reason to know the certification is false), would provide the most certainty to taxpayers and the IRS. A similar regime is contemplated elsewhere in the PFE Rules for suppliers under the Material Assistance rules in section 7701(a)(52).

In the case of SFEs other than FCEs, the development of, and compliance with, such a system does not seem burdensome to taxpayers or the IRS or Treasury to the extent the rules of chapters 3 and 4 can be leveraged. As discussed below, there is analogous “reason to know” guidance under the chapter 3 and 4 withholding regimes that could also serve as the basis for rules to prevent willful avoidance of a certification regime. For FCEs, such a regime will require a separate mirror regime for FCEs themselves to determine their own status as FCEs, based on similar principles for status certifications from equity owners up the chain.

However, given the urgency of these determinations and the time it may take the IRS and Treasury to establish any such regime (and the positions that taxpayers have been and are

continuing to be required to take pending any such guidance), interim guidance would be especially helpful, particularly guidance that allows taxpayers to rely on holder certifications as to SFE status in a manner similar to the Certification Safe Harbor in Notice 2026-15.

7. Provide guidance on whether the tests in sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II) apply only with respect to the debt of the regarded taxpayer that is the borrower (or under what circumstances the tests include the debt of related parties).

Section 7701(a)(51)(D)(i)(I)(dd) defines FIE to include a non-publicly traded entity “with respect to which, during the taxable year ... at least 15 percent of the debt of *such entity* has been issued, in the aggregate, to 1 or more [SFEs],” and section 7701(a)(51)(E)(iii)(II) defines an FIE to include a publicly traded entity “if *such entity* has issued debt, as part of an original issuance, in excess of 15 percent of its publicly-traded debt to 1 or more [SFEs].”<sup>54</sup>

No rule in section 7701(a)(51) addresses the testing of debt issuances by related entities. (By contrast, section 7701(a)(51) elsewhere has several explicit rules that treat related entities as a single taxpayer for purposes of applying certain provisions.<sup>55</sup>) A strict reading of the statute would only test the issuances of the regarded borrower and could have surprising and perhaps unintended consequences—both favorable and unfavorable—and so it is important to administration of the rule that the IRS and Treasury provide guidance to ensure consistent application.

To give an example, a non-PFE developer intending to claim a section 48E credit could form a direct wholly-owned corporate finance subsidiary to borrow money from an SFE to fund the development of a project owned by the parent or a brother-sister subsidiary of the finance subsidiary. While the finance subsidiary would be an FIE (because it is the only “entity” that is tested under sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II)) and is ineligible to claim a section 48E credit, neither its parent nor its brother-sister entities would be an FIE as a result of the transaction and could use the funds (which could even be on-lent from the FIE finance subsidiary) to develop the section 48E-eligible facility. On other hand, in a variation on the facts, if the non-PFE parent had \$1 billion of debt outstanding that was issued to non-SFE lenders and formed a direct wholly-owned corporate developer subsidiary to build a potentially section 48E-eligible facility, and the developer subsidiary borrowed \$1 from an SFE to construct the facility, the developer subsidiary would be an FIE and the facility would lose the section 48E credit.<sup>56</sup>

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<sup>54</sup> Emphasis added.

<sup>55</sup> See, e.g., section 7701(a)(51)(D)(ii)(IV) (aggregating the taxpayer with all related persons under sections 267(b) and 707(b) for purposes of certain of the effective control rules); section 7701(a)(51)(H) applying section 318(a)(2) for purposes of testing certain ownership).

<sup>56</sup> Perhaps it is an intended consequence that, if an SFE lender has no privity with the relevant facility or its owner, the loan from the SFE lender does not taint the facility owner. Conversely, if the SFE lender has recourse to the

The IRS and Treasury should either confirm the strict reading and the foregoing results and provide an anti-abuse rule to prevent abusive avoidance of sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II) through finance subsidiaries or related funding transactions, or propose guidance (similar to, *e.g.*, Treas. Reg. § 1.385-4 and similar rules) that mechanically tests sections 7701(a)(51)(D)(i)(I)(dd) and 7701(a)(51)(E)(iii)(II) on an enterprise basis by applying group rules.

## B. Partnerships

### 8. Provide guidance on the treatment of partnerships that are neither SFEs nor FIEs but that have SFE or FIE partners.

The operative restrictions on tax credits for PFEs apply if the taxpayer is an SFE or an FIE under section 7701(a)(51)(D)(i)(I).<sup>57</sup> For sections 45X, 45Y and 48E, they also apply to any qualified facility, EST, or eligible component with respect to which the taxpayer was “effectively controlled” by an SFE pursuant to section 7701(a)(51)(D)(i)(II).<sup>58</sup> Partnerships are often the taxpayer with respect to production tax credit-generating businesses, and partnerships allocate to partners the tax basis of property qualifying for investment tax credits.<sup>59</sup> When such a partnership is not a PFE and claims tax credits, or when partners are allocated tax basis of otherwise credit-eligible property held by such a partnership, it is unclear how any partners that are PFEs will be treated. The extent to which the presence of a PFE partner in a non-PFE partnership affects the partnership-level determination of a credit is particularly important in the context of tax credit sales by partnerships under section 6418—if the presence of such a PFE partner in such a partnership could affect the amount of credit available for sale, it could potentially affect the economic return to non-PFE partners in the partnership. Moreover, it is not clear whether any such credits, which are otherwise “determined” (for application of the PFE Rules) at the partnership level, are subjected to determination *again* (for application of the PFE Rules) at the partner level once allocated by the partnership to the partners.

If section 7701(a)(51) establishes entity treatment for partnerships (as seems clear from the statute, as discussed below), then the restrictions on claiming tax credits would be determined solely at the partnership level. Thus, a non-PFE partnership with PFE partners would be permitted to claim (and sell) tax credits or allocate tax credits or credit-eligible tax basis to its partners. However, if there are any circumstances under which the status of each partner would be relevant in determining the *partnership’s* ability to claim tax credits or the *partner’s* ability to claim credits allocated from the partnership (or with respect to basis allocated from the partnership), then

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facility or its owner, general tax principles must be applied to determine which entity is the true borrower—with there being a potential disallowance if the facility owner is the true borrower.

<sup>57</sup> See sections 45Q(f)(10), 45U(c)(3), 45X(d)(4)(A), 45Y(g)(13)(A), 45Z(f)(8), and 48E(d)(6)(A).

<sup>58</sup> See sections 45X(d)(4)(B), 45Y(g)(13)(B), and 48E(d)(6)(B).

<sup>59</sup> Treas. Reg. §§ 1.704-1(b)(4)(ii), 1.46-3(f).

guidance is needed to clarify whether (and how) credit disallowance applies with respect to such PFE partners in non-PFE partnerships.

There are clear indications in the statutory text that section 7701(a)(51) is meant to apply to partnerships as separate entities. For instance, section 7701(a)(51)(D)(ii)(IV) provides that the word “taxpayer,” when used in the effective control FIE tests under sections 7701(a)(51)(D)(ii)(I)-(III), includes any person related to the taxpayer under section 267(b) or 707(b). By causing the entities related to the partnership, rather than the partners, to be included in the effective control FIE tests, this suggests that the entity approach is being followed and that the partnership is the relevant entity when testing eligibility for tax credits. Similarly, section 7701(a)(51)(H) causes principles similar to those in section 318(a)(2) to apply for purposes of determining ownership under section 7701(a)(51). One would assume that this would be unnecessary if the aggregate approach to partnerships applied, as it would be assumed that the partnership would be looked through. Further, as discussed below,<sup>60</sup> the PFE Rules are credit “determination” rules that apply only at the level of the taxpayer with respect to whom the credit is “determined” (*i.e.*, the partnership).<sup>61</sup>

Assuming section 7701(a)(51) generally applies to partnerships on an entity-basis, there remains a question whether any further “look-through” rules under section 7701(a)(51)-(52) are appropriate (beyond those explicitly incorporated in the statutory text)—*i.e.*, rules that somehow require non-PFE partnerships to take into account the presence of PFE partners in performing credit determination and other related calculations. While the regulatory grant of authority in section 7701(a)(51) is broad, applying traditional statutory interpretation methodology to the particular statutory language at issue, entity treatment is the more natural reading of the statute and any such “look-through” of partnerships should be limited to abusive circumstances.<sup>62</sup> Moreover, any such “look-through” rules would have highly complex implications for calculating the Clean Electricity MACR and Eligible Component MACR where a partnership is in the supply chain.

A more uncertain implication of entity treatment of partnerships is the ability of PFEs to claim credits allocated (or derived from credit-eligible basis allocated) by non-PFE partnerships (*e.g.*, a *pro rata* non-PFE partnership with a PFE partner that owns a 24-percent interest in the partnership’s capital and profits). As noted, the PFE Rules are credit “determination” rules: in the case of production-based credits, the “determination” is clearly made at the partnership level; for the investment tax credit, Treas. Reg. § 1.46-3(f) “treat[s]” each partner “as the taxpayer” with

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<sup>60</sup> See *infra* Part V.27.

<sup>61</sup> See also section 7701(a)(51)(G)(ii), which clearly applies an entity approach to determining whether a partnership is an FCE.

<sup>62</sup> For example, the statute would not seem to support importing a look-through approach akin to the statutory framework of section 168(h)(6)(A); moreover, as discussed below, it is not clear whether the policy of the PFE Rules would support such an interpretation. See, *e.g.*, section 50(b)(4)(D) (applying the rules of section 168(h)(5)-(6) to partnerships claiming tax credits for property used by certain tax-exempt entities). However, anti-abuse rules could reasonably target other arrangements (*e.g.*, financial derivatives) that are engaged in with a principal purpose of avoiding the statutory ownership attribution rules under section 318(a)(2).

respect to its share of the basis of partnership credit-eligible property. However, Treas. Reg. § 1.46-3(f) does not preclude a credit “determination” rule from applying at the partnership level nor does it require a determination rule to apply *again* at the partner level. Moreover, in the case of a partnership that is selling credits under section 6418(a), all credit “determinations” are explicitly applied at the partnership level.<sup>63</sup> It would not be logical to allow the PFE partner to benefit from the cash proceeds of a sale of a credit, but not to be allowed the benefit of the allocation of the same unsold credit to the partner.

Accordingly, in our view, applying traditional statutory interpretation methodology to the particular statutory language at issue, the more natural reading of the PFE Rules would provide that, for a credit (or basis) allocated from a non-PFE partnership, the PFE Rules do not apply again at the partner level. However, in light of the investment tax credit regulations that could be read as inconsistent with this interpretation, and given the prevalence of partnerships in the marketplace and the importance of these issues to credit determination, allocation and transfer by partnerships, we request that the IRS and Treasury clarify these issues in guidance.<sup>64</sup>

### C. PFE status and testing mechanics

#### 9. Provide guidance regarding the meaning of “during the previous taxable year” in section 7701(a)(51)(D)(i)(II).

Section 7701(a)(51)(A) provides that, for any taxable year, the determination as to whether an entity is an FIE is made “as of the last day of such taxable year.” Under section 7701(a)(51)(D), an FIE includes an entity that “during the *previous* taxable year” made a payment pursuant to an Effect Control Agreement to an SFE.<sup>65</sup> By contrast, other FIE status determinations under section 7701(a)(51)(D) apply based on whether SFE has been granted certain covered officer appointment rights or owns a certain amount of debt or equity ownership “during the taxable year.”

The statutory language is inexplicable and raises the question of whether it reflects a drafting error: it is not at all clear why section 7701(a)(51)(A) would require a determination “as of the last day of [the] taxable year” that a payment was made “during the *previous* taxable year.” Moreover, applied literally, the phrase “during the previous taxable year” in section 7701(a)(51)(D) results in several incongruous and seemingly unintended outcomes. These points are discussed in detail below.

Based on the foregoing, application of the phrase “during the *previous* taxable year” seems likely to lead to materially divergent reporting positions, which can only benefit taxpayers at the

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<sup>63</sup> Section 6418(c).

<sup>64</sup> Non-tax policy concerns about certain outcomes resulting from determining credits only at the partnership level and not further determining credits at the partner level may be viewed as relevant to any ultimate rulemaking. As noted above, these considerations are beyond the Tax Section’s expertise. *See supra* Part III.

<sup>65</sup> Emphasis added.

expense of the Treasury. Therefore, we believe it is critical for the IRS and Treasury to provide guidance on the application of this rule. That guidance could either simply confirm the literal application of the rule (with the result that “previous” refers to *the year before the current year, i.e.*, the taxable year before the year with respect to which the determination in section 7701(a)(51)(A) is made) or could provide an interpretation that takes into account the legislative history of section 7701(a)(51) and the relationship of the rule to the rest of section 7701(a)(51)(D) (with the result that “previous” would be interpreted to refer to *the current year, i.e.*, the year with respect to which the determination in section 7701(a)(51)(A) is made). If the IRS and Treasury prefer the results of the latter interpretation but do not believe they have the authority to adopt it by regulation, they should request a technical correction.

The following is a discussion of the legislative origin of the questionable statutory language and several incongruous outcomes from the literal interpretation of the statute.

The drafting history of the OBBBA sheds some light on the origin of the language. The concept of an FIE was first introduced in the House Reconciliation Bill (the “**House Bill**”),<sup>66</sup> including the bifurcated approach to the definition—with one test based on debt, equity or authority, and the other based on control through payments to an SFE. The debt, equity and authority test was enacted into the OBBBA with substantially similar terms as originally proposed in the House Bill.

The House Bill’s test for payments to an SFE, on the other hand, reflected a wholly different measurement than was eventually enacted in the OBBBA (*e.g.*, the formula was based on a percentage of payments made in a taxable year) and was largely rewritten by the Senate. Specifically, the House Bill’s operative rules would have amended sections 45X, 45Y, and 48E to provide that (i) FIE rules applied in taxable years beginning after the date that was two years after enactment; (ii) in lieu of the Effective Control Agreement payment rules ultimately enacted in the OBBBA, the House Bill’s “payment”-based FIE rules looked at payments of dividends, interest, compensation for services, rentals or royalties, guarantees or any other fixed, determinable, annual, or periodic amounts; and (iii) under such rules, a taxpayer could be barred from claiming the applicable credits *either* by making certain payments *to FIEs or SFEs* in excess of a threshold “during such taxable year” *or* by having made payments in excess of a *higher* threshold *to SFEs* during the previous taxable year (*i.e.*, taxpayers with particularly excessive payments were both barred from claiming credits for two years and also tainted with FIE (and PFE) status in the second year, with the effect that tested payments *to* such taxpayers could taint *other* taxpayers).

Under the House Bill’s regime for sections 45X, 45Y, and 48E, the phrase “during the previous taxable year” was necessary because the test for particularly excessive payments to an SFE (which effectively carried a two-year penalty by making the taxpayer an FIE by reason of such payments during the previous taxable year) was specifically designed to taint the succeeding year (because a separate test applied to payments in the current year). (The House Bill would have

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<sup>66</sup> H.R. 1, §§ 112008, 112009, 112014, 119th Cong., 1st Sess. (2025) (Engrossed in House).

subjected the credits under section 45Q, 45U, and 45Z to the payment-based FIE rule, determined based on previous-year payments, but these provisions were not enacted in the OBBBA.)

For sections 45X, 45Y, and 48E, this regime did not cause the FIE payment test to operate on a one-year lag. An excessive payment to a PFE made by a calendar year entity in 2026 would have barred the payor from claiming credits in 2026 (and if the payments were particularly excessive and made to SFEs, would have rendered the entity an FIE (and a PFE) for 2027). Moreover, the House Bill's payment rule was imposed upon all credits with two-year delayed effect, with the result the two-tier regime could apply without gap and with reasonable opportunity to avoid its impact.

When the Senate introduced a new test for one-tier payment-based FIE status (centered around payments pursuant to Effective Control Agreements) that would apply with quicker effect, it removed the operative excessive-payments-to-SFE language in the FIE definition but did not change the introductory clause "during the previous taxable year." It did, however, add the timing rule in section 7701(a)(51)(A)(ii)(I), stating that the determination of whether an entity is a PFE is made on the last day of the entity's taxable year. Read together with section 7701(a)(51)(D), the retention of the word "*previous*" in the phrase "during the previous taxable year" appears to be a drafting error. The Senate's new test was ultimately enacted in the OBBBA.

Moreover, a literal construction of the phrase "during the previous year" in section 7701(a)(51)(D)(i)(II) creates a one-year lag in the application of the rule that leads to several seemingly illogical outcomes, a few of which are detailed below.

First, a calendar taxable year entity that otherwise is not a PFE but that makes a payment pursuant to an Effective Control Agreement for the first time during 2026 would not be an FIE for 2026. The entity only becomes an FIE when such payments are made "during the previous taxable year" in respect of the 2027 taxable year.<sup>67</sup> Second, literal application of the rule would effectively cause section 7701(a)(51)(D)(i)(II) to cease having effect a year before sections 45Y, 45X, and 48E terminate.<sup>68</sup>

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<sup>67</sup> This strict construction would create the same permissive results for taxpayers making a payment pursuant to an Effective Control Agreement to an SFE and claiming section 48E credits. Specifically, an entity that makes payments described in section 7701(a)(51)(D)(i)(II) with respect to a qualified facility in 2026 and that places the qualified facility in service in 2026 would not be an FIE for the year in which the credit was allowed (2026). Because the credit would be claimed prior to the effective date of the section 50(a)(4) recapture rule (*i.e.*, in a taxable year beginning on or prior to July 4, 2027), the credit would not be subject to recapture when the taxpayer "becomes" an FIE in 2027 by virtue of the payments it made in 2026. The taxpayer would therefore be allowed to claim *the entirety of the investment tax credit* despite having engaged in the exact conduct that the PFE Rules are meant to prohibit.

<sup>68</sup> Similarly illogical results follow from the acquisition of an FIE. If a target entity is an FIE because it has contracts violating section 7701(a)(51)(D)(ii), a non-PFE acquiror that purchases the entity and cleans up its contracts to remove the "effective control" provisions will need to wait out a full taxable year post-acquisition for the remediation to become effective.

Another troubling corollary to a literal interpretation is potential retroactive application for the initial year the rule applies to a taxpayer. The operative rules applying section 7701(a)(51)(D)(i)(II) make its bar effective for taxable years beginning after July 4, 2025; however, under a literal application the inputs that determine whether the bar applies could be backward-looking, making the bar retroactive in effect. (Under the House Bill, the previous-year-payment-based FIE rules avoided this problem by not taking effect until the first taxable year beginning two years after enactment.) Taking an extreme example, section 7701(a)(51)(D)(i)(II) could apply to a taxpayer whose taxable year begins on July 5, 2025—such a taxpayer would, for example, have needed to immediately monitor its ownership and covered officer appointment rights for that year to maintain eligibility for section 45Y, 45X, and 48E credits. But if that same entity made a prepayment pursuant to an Effective Control Agreement in its previous taxable year (ending July 4, 2025), and that prepayment is determined to be a payment attributable to the taxpayer's subsequent taxable year, a literal application of section 7701(a)(51)(D)(i)(II) would render that entity an FIE for its taxable year beginning July 5, 2025, in effect rendering the entity a PFE by reason of newly prohibited actions taken prior to enactment of the OBBBA when the taxpayer had no notice of their impact on tax credit eligibility (and at a time when a taxpayer may have made substantial outlays in reliance of the availability of those credits under pre-OBBBA law).

10. Provide guidance regarding whose “taxable year” is referred to in section 7701(a)(51)(A)(ii)(I)-(II)—the SFE/FIE or the credit claimant.

Section 7701(a)(51)(A)(ii) sets forth the date for determining whether an entity is a PFE (the “**PFE Determination Date**”):

(ii) Determination—

(I) In general. Subject to subclause (II), for any taxable year, the determination as to whether an entity is [an SFE] or [FIE] shall be made as of the last day of such taxable year.

(II) Initial taxable year. For purposes of the first taxable year beginning after the date of enactment of this paragraph, the determination as to whether an entity is [an SFE (other than an FCE)] shall be made as of the first day of such taxable year.

Two aspects of this provision are unclear. First, in testing the status of the entity on the last day of its taxable year, how is the status of a third party with a different taxable year taken into account? And second, does section 7701(a)(51)(A)(ii)(II) apply only during the first year post-enactment (*i.e.*, taxable years beginning between July 5, 2025 and July 4, 2026), or does it also apply to newly formed entities after July 4, 2025?

*i. Taking account of the taxable years of third parties*

A taxpayer is prohibited from claiming tax credits with respect to any taxable year in which it is a PFE.<sup>69</sup> The PFE Determination Date is generally, for any taxable year, “the last day of such taxable year.” However, the status of the taxpayer as a PFE for a taxable year may depend upon the status of third parties (*i.e.*, shareholders, lenders or contractual counterparties; “**Third Parties**”) as SFEs. When the Third Parties have a different taxable year than the taxpayer, it is unclear whether the status of the Third Party for this purpose is to be determined on the taxpayer’s own PFE Determination Date or else on a PFE Determination Date of the Third Party.

For example, in determining whether Taxpayer A is a PFE for its taxable year ending December 31, 2027, it is unclear if that status is based on the SFE status of Third Parties (1) as of December 31, 2027, (2) as of the end of each Third Party’s taxable year that begins during 2027, or (3) as of the end of each Third Party’s taxable year that ends during 2027.

We have not found any indication in the statute or legislative history of which of these interpretations is correct. In any case, the only answer seems to be one of these three alternatives. For various reasons discussed through this Report,<sup>70</sup> it seems that an entity’s PFE status cannot be determined on any day other than the last day of a taxable year (and would not be tested mid-year – *e.g.*, at the time of the transaction— which would be inconsistent with the statutory language and, as a practical matter, would itself raise challenging issues of application). Given the importance of this interpretation to the determination of a taxpayer’s PFE status and credit eligibility, we therefore request guidance from the IRS and Treasury addressing how this provision applies.

Interpreting “such taxable year” to refer solely to the taxpayer’s taxable year (the “**Taxpayer’s Taxable Year Interpretation**”) results in the following rule: the determination of whether a Third Party is a PFE shall be made as of the last day of the taxpayer’s taxable year. This interpretation makes the PFE Rules more administrable for the taxpayer, as each taxpayer is required to determine whether each counterparty is a PFE as of only one date each year; however, such an interpretation could require Third Parties to perform the test for the benefit of their counterparties (*e.g.*, borrowers, equity issuers, commercial customers) as of several hypothetical taxable years that each end on a different day during the Third Party’s actual taxable year. Guidance would also be needed to clarify how this interpretation would work when relationships change during a taxable year.

Conversely, interpreting “such taxable year” to refer solely to each Third Party’s taxable year (the “**Third Party’s Taxable Year Interpretation**”) increases precision. Under this interpretation, section 7701(a)(51)(A)(ii)(I) requires each taxpayer to determine whether each Third Party was an SFE as of the last day of the Third Party’s taxable year (except in the case of a Third Party’s first taxable year beginning after July 4, 2025). A taxpayer would then determine

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<sup>69</sup> See, *e.g.*, section 48E(d)(6) (“No credit shall be determined under subsection (a) for any taxable year if the taxpayer is [a PFE]”).

<sup>70</sup> See, *e.g.*, *infra* note 72.

its own PFE status based on each Third Party's status as of the last day of such Third Party's taxable year that ended with or within the taxpayer's taxable year, or that included the last day of the taxpayer's taxable year.

Neither the Third Party's Taxable Year Interpretation nor the Taxpayer's Taxable Year Interpretation fully addresses the consequences of changes in ownership or changes in PFE status during the taxable year, so either interpretation would require guidance from the IRS and Treasury clarifying how these situations should work.

Specifically, under the Taxpayer's Taxable Year Interpretation, in determining whether a taxpayer is an FCE, any controlling Third Party shareholder of a taxpayer would be tested on the last day of the taxpayer's taxable year, meaning that a taxpayer that is owned by a Third Party that ceases to be an SFE prior to the last day of the taxpayer's taxable year would likely<sup>71</sup> not be an FCE.<sup>72</sup> As long as the change in the Third Party's status occurs before the end of the Third Party's taxable year, the same result would hold under the Third Party's Taxable Year Interpretation. But if the Third Party has a taxable year ending prior to the taxpayer's taxable year-end, and if the Third Party ceases being an SFE during the period between year-ends, then testing the Third Party as of the end of its taxable year (*i.e.*, if the Third Party's Taxable Year Interpretation is adopted) would cause the opposite result, with the taxpayer being an FCE based on its controlling shareholder's former SFE status. The same discrepancy in results would follow if the controlling stake in the taxpayer was sold to a non-SFE during the taxable year.<sup>73</sup> We request that, regardless of which interpretation the IRS and Treasury adopt, they address these situations in guidance and clarify when, if ever, anti-abuse rules would apply to change these results.

Similar guidance is needed for purposes of determining whether a taxpayer is an FIE. Here, the IRS and Treasury would need to issue guidance clarifying how either interpretation interacts with the phrase "during the taxable year" in section 7701(a)(51)(D)(i)(I).<sup>74</sup> As it relates to the PFE Determination Date, this guidance would need to specifically address the result when a Third Party ceases to be an SFE, or sells the equity it held in the taxpayer to another Third Party, prior to the

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<sup>71</sup> See *infra* Part V.11 for detailed analysis of intra-year status changes.

<sup>72</sup> Practically speaking, any percentage-based ownership test would need to permit ostensible changes in status to fluctuate throughout the year, if only so as not to punish taxpayers merely by reason of the sequence of their investors' transactions: For example, in the case of the FIE debt and equity ownership tests, if the first investor to close their investment in an entity is a SFE (but subsequent investments are planned that will increase the denominator in a manner that the entity ultimately will not be an FIE), the entity could temporarily cross the FIE equity or debt ownership percentage threshold until the remaining investors' transactions close.

<sup>73</sup> Under the Taxpayer's Taxable Year Interpretation: if the controlling interest in the taxpayer is sold to a non-SFE prior to the last day of the taxpayer's taxable year, the taxpayer would not be an FCE for that taxable year. Under the Third Party's Taxable Year Interpretation: if the controlling interest in the taxpayer is sold to a non-SFE, the Third Party's Taxable Year Interpretation is indeterminate with respect to which Third Party should be tested (the selling Third Party, the buying Third Party, or both), but if the selling Third Party is tested, the taxpayer would be an FCE.

<sup>74</sup> See *infra* Part V.11 for detailed analysis of this interaction.

last day of the taxpayer's taxable year (in the case of the Taxpayer's Taxable Year Interpretation) or its own taxable year (in the case of the Third Party's Taxable Year Interpretation).

Finally, when determining whether a taxpayer is an FIE under the effective control provisions of section 7701(a)(51)(D)(i)(II), further guidance would be needed to clarify how either interpretation would work with respect to payments made during the taxable year.<sup>75</sup> Because effective control arises when a taxpayer makes a payment to an SFE, simply determining each Third Party payee's status as the end of the taxpayer's taxable year (in the case of the Taxpayer's Taxable Year Interpretation) or its own taxable year (in the case of the Third Party's Taxable Year Interpretation) may also lead to either over-inclusion or under-inclusion if a Third Party payee becomes, or ceases to be, an SFE during the course of the year.

The guidance from the IRS and Treasury regarding the applicable taxable year should therefore focus on (i) the overall interpretation of the PFE Determination Date; (ii) the issues arising when the taxpayer and Third Party do not have the same taxable year; (iii) how changes in a Third Party's PFE status during a taxable year are addressed (particularly with respect to privately held companies); and (iv) how this rule interacts with the effective control rules regarding payments to an SFE during a taxable year in sections 7701(a)(51)(D)(i)(I), (D)(i)(II) and (E)(iii)(I). In addition, such guidance should identify principles that would guide when, if ever, anti-abuse rules operate to change the results otherwise achieved under applicable mechanical rules.

*ii. Does section 7701(a)(51)(A)(ii)(II) apply to newly formed entities after July 4, 2025?*

The PFE Determination Date for SFEs (except FCEs) “[f]or purposes of the first taxable year beginning after the date of enactment of this paragraph” is the first day of such taxable year. This unambiguously applies to the first taxable year beginning after July 4, 2025, for any entity existing on July 4, 2025. But it is unclear whether “the first taxable year beginning after the date of enactment” is also meant to include the first taxable year of entities formed after July 4, 2025. The statutory text suggests that it is. First, section 7701(a)(51)(A)(ii)(II) is titled “Initial taxable year,” implying application beyond the year following enactment of the OBBBA.<sup>76</sup> Second, the “first taxable year” post-enactment is not synonymous with the first year post-enactment, with the former being a reference to a specific attribute of each taxpayer whereas the latter would be a reference to single 365-day year.

Despite this indication that the proper interpretation may be that section 7701(a)(51)(A)(ii)(II) applies to each entity's first post-OBBBA taxable year, regardless of when it is formed, taxpayers will need certainty by July 5, 2026 (when the first post-OBBBA year ends). Because this interpretation may rely on the interpretation of section 7701(a)(51)(A)(ii)(I), we request that the IRS and Treasury prioritize issuing guidance on both issues.

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<sup>75</sup> See *infra* Part V.11 for detailed analysis of this issue.

<sup>76</sup> But see section 7806(b).

11. Provide guidance regarding what facts are taken into account in determining SFE or FIE status “as of the last day of such taxable year” under section 7701(a)(51)(A)(ii)(II).

Section 7701(a)(51)(A)(ii)(I) states that the determination of whether an entity is a PFE is generally made on the PFE Determination Date (*i.e.*, “as of the last day of such taxable year”).<sup>77</sup> It is unclear whether this creates a one-time test based on the facts in existence on that date, or if the test looks to facts in existence during the course of the year (*i.e.*, the test applies continuously throughout the taxable year). If the test applies continuously, a further question arises regarding whether any *de minimis* rules, testing periods, or testing dates (or other conventions or safe harbors) will be adopted.

Section 7701(a)(51)(A)(ii)(I) may be fairly read to create a one-time test by referring to “the determination” of PFE status, which is made “as of the last day” of a taxable year. Specifically, use of “the determination” could be interpreted to imply that each entity is only tested once per taxable year. Further, the requirement that such determination be made “as of” the last day of the taxable year could be interpreted to mean that the test is applied by reference to a snapshot of facts existing on that day.

Any issues caused by this interpretation may be mitigated by common law doctrines such as the step transaction doctrine. For example, if an SFE has a contract to acquire a given percentage of an entity over the course of multiple closings, step transaction principles may apply to aggregate ownership. Moreover, the broad anti-abuse rulemaking authority in section 7701(a)(51)(K) could be used to ensure that entities are not permitted to make transitory changes to their authority, ownership, control or debt held to circumvent the timing rules. For example, we would expect anti-abuse rules to cover situations where an SFE owning 25 percent or more of a taxpayer is redeemed immediately prior to the PFE Determination Date with a binding obligation to reinvest on the first day following the PFE Determination Date.

Notwithstanding that section 7701(a)(51)(A)(ii)(I) could be interpreted to create a one-time test, there is also evidence that the test was meant to apply continuously throughout the taxable year. The effective control FIE test under section 7701(a)(51)(D)(i)(II) is implicated if a taxpayer makes a payment to an SFE “during the previous taxable year.” Taxpayers need certainty that any payments made during the relevant taxable year were not made to an SFE. A one-time test would undermine this certainty, potentially causing payments made to entities that were not SFEs on the payment date to be treated as having been made to an SFE if the payee becomes an SFE later in the taxable year.

The IRS and Treasury will need to determine if the remaining FIE tests also apply continuously. A natural reading of section 7701(a)(51)(D)(i)(I) suggests that they may: like section 7701(a)(51)(D)(i)(II), which applies to payments made “during the previous taxable year,” section 7701(a)(51)(D)(i)(I) applies to relationships “during the taxable year.” While the issues

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<sup>77</sup> For the first post-OBBA taxable year, the PFE Determination Date for SFEs described in section 7701(a)(51)(B)(i)-(iv) is the first day of such taxable year. Section 7701(a)(51)(A)(ii)(II).

discussed above with respect to the alternative interpretation of section 7701(a)(51)(D)(i)(II) do not arise under section 7701(a)(51)(D)(i)(I), statutory interpretation principles generally suggest that the phrase “during the [previous] taxable year” should be interpreted similarly in back-to-back subclauses.

If the FIE tests under both of sections 7701(a)(51)(D)(i)(I) and (II) are interpreted to apply continuously, then they would be distinguishable from the application of the SFE tests.<sup>78</sup> Unlike the FIE tests, there is no statutory provision suggesting that the SFE tests apply continuously. It would therefore be reasonable to interpret the SFE tests as only applying on a (potentially more lenient) one-time basis on the PFE Determination Date. The result may have been intended because SFE status is otherwise more statutorily disfavored (and therefore restrictive)—SFEs are barred from both claiming tax credits and effectively controlling other taxpayers who claim tax credits.<sup>79</sup>

Section 7701(a)(51)(A)(ii)(I) does not create any textual bar to interpreting any of these tests to apply continuously. The fact that the determination of whether an entity is a PFE is made “as of” the last day of the taxable year may be reasonably read to include any facts or events that have occurred “as of” such last day of the taxable year. Put differently, it is reasonable to view Congress’s use of the phrase “as of the last day,” rather than “on the last day,” as intending to cause the tests to apply with respect to facts and events existing at any point during the taxable year.

In the interest of consistent application of the Code, we urge the IRS and Treasury to issue guidance clarifying these points. When issuing this guidance, the IRS and Treasury should consider appropriate safe harbors, *de minimis* exceptions, and “cleansing” procedures for entities that briefly fall out of compliance with the PFE Rules and regain compliance within a reasonable timeframe. As discussed in our prior recommendation, this is particularly important with respect to application of the FIE tests when a Third Party becomes an SFE during the taxable year and with respect to tests that will naturally fluctuate over time, such as the FIE and FCE ownership and control tests.<sup>80</sup>

For example, the IRS and Treasury may consider adopting testing dates similar to those used in section 382, wherein the PFE Rules would be tested when a taxpayer’s equity is issued, redeemed, or transferred (but only if the taxpayer has actual knowledge of the transfer). Alternatively, the IRS and Treasury may consider implementing a quarterly testing methodology or averaging the SFE ownership of a taxpayer’s equity and debt over the taxable year. Finally,

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<sup>78</sup> This interpretation would apply to FCEs and any other SFE for any taxable year after its first taxable year beginning after July 4, 2025.

<sup>79</sup> Non-tax policy concerns with certain outcomes resulting from testing SFE status only on the PFE Determination Date may be viewed as relevant to any ultimate rulemaking. As noted above, these considerations are beyond the Tax Section’s expertise. *See supra* Part III.

<sup>80</sup> *But see supra* note 72.

cleansing procedures, such as deeming any failures to be disregarded if cured within a certain number of days, could further aid in the compliance with and administration of any test that applies continuously throughout the taxable year.

12. Provide guidance addressing what constitutes a “payment” for purposes of section 7701(a)(51)(D)(i)(II).

The “effective control” tests under section 7701(a)(51)(D)(i)(II) apply if an entity has “made a payment” to a [SFE] pursuant to a Effective Control Agreement. It is not clear whether “making a payment” is intended to be a material aspect of the “effective control” tests, or if it will be presumed to be satisfied if any prohibited contractual relationships exists.

A key issue for the IRS and Treasury to clarify is what constitutes a “payment” under section 7701(a)(51)(D)(i)(II). The word “payment” (or similar words such as “pay”) is often used in the Code and Treasury regulations, but it is typically only defined when specific provisions require precision.<sup>81</sup> Given the consequences of making a payment to an SFE under an Effective Control Agreement, we believe that the IRS and Treasury should issue guidance specifying the definition of “payment” for purposes of section 7701(a)(51)(D)(i)(II). This guidance should address the types of consideration that will constitute a payment and whether non-cash remittances (such as barter arrangements, the provision of services, or the delivery of goods) can constitute a payment under section 7701(a)(51)(D)(i)(II). This guidance should also address whether common transaction structures, such as earnouts, escrows and installment sales, constitute payments under section 7701(a)(51)(D)(i)(II) (and, if so, when such payments are deemed made, as described below).

For example, if a taxpayer enters into a non-royalty bearing license agreement with an SFE after July 4, 2025, will the IRS find an implied payment? If so, will it find such a payment in all cases, or only when the facts and circumstances indicate an effort to circumvent the “effective control” tests?

A second set of issues relates to the timing of cash payments. Guidance will be needed to address prepayments, lump sum payments, and similar arrangements. For instance, taxpayers may have paid upfront in 2024 for the purchase of equipment that contains a restricted IP license. Would the continued existence of such contract constitute an “effective control” of the taxpayer, despite the fact that no payment was (or will be) made on the contract in any taxable year beginning after July 4, 2025?

The interaction of the “payment” rule with tax accounting methods raises a similar set of issues. For tax accounting purposes, the concept of a “payment” in the Code is disaggregated from the associated tax liability or income inclusion. A “payment” is generally the transfer of cash or other property, whereas a taxpayer incurs the associated tax liability or income inclusion based on

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<sup>81</sup> See, e.g., Treas. Reg. § 1.148-1 (defining “payment” for purposes of arbitrage bonds).

the taxpayer's method of accounting.<sup>82</sup> By basing effective control on a taxpayer having "made a payment," section 7701(a)(51)(D)(i)(II) leaves open the question of what role, if any, the taxpayer's method of accounting plays in determining when a "payment" has been made. For example, if Taxpayer A (an accrual method taxpayer) makes a payment under an Effective Control Agreement with Taxpayer B (an unrelated SFE using the cash receipts and disbursements method) during the 2026 taxable year, but the "all events" test with respect to the payment is not satisfied until Taxpayer A's 2027 taxable year, would Taxpayer A be treated as having made the payment with respect to its 2026 taxable year (the year in which Taxpayer B included the payment in its income) or its 2027 taxable year (the year in which Taxpayer A claims the deduction)?

13. Provide guidance or procedures for how to substantiate that an entity (including an equity owner) is not an FCE.

As a subset of SFEs, FCEs are both barred from claiming tax credits and are capable of causing another entity to be an FIE.

The tests in section 7701(a)(51)(C)(i)-(iii) are relatively straightforward, and we do not expect them to cause issues for taxpayers (through direct application to an entity or indirectly to a controlled entity under section 7701(a)(51)(C)(v)). The test under section 7701(a)(51)(C)(iv), however, merits further guidance. We therefore request that the IRS and Treasury provide guidance defining the phrase "principal place of business" for purposes of section 7701(a)(51)(C)(iv). Moreover, depending on the scope of the definition, we request that the IRS and Treasury consider providing further guidance, including a safe harbor, for taxpayers to use when determining the principal place of business of the controlling equityholder of a Third Party under section 7701(a)(51)(C)(v). Finally, we request that the IRS and Treasury consider whether to publish broader guidance or procedures that taxpayers can rely upon when substantiating whether an entity is an FCE.

The phrase "principal place of business" appears throughout the Code and Treasury regulations. It is typically used to determine a taxpayer's location-specific rights or responsibilities, and is often left undefined and treated as a facts-and-circumstances determination using common law principles.<sup>83</sup> This approach poses the risk of substantial inconsistent application of section 7701(a)(51)(C)(iv) (and significant compliance issues) because section 7701(a)(51)(C)(iv) requires a taxpayer to determine a Third Party's principal place of business, even in situations where the third party has no direct relationship with the taxpayer. For example, in order to

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<sup>82</sup> See, e.g., Treas. Reg. § 1.446-1(c)(ii)(B) ("amounts prepaid for goods or services and amounts paid without a legal obligation to do so may not be taken into account by an accrual basis taxpayer any earlier than the taxable year in which those amounts are incurred."); section 467 (requiring timing rules different from the underlying cash payments for rental income and deductions from certain leases); section 460 (requiring timing rules different from the underlying cash payments for payments made pursuant to certain long-term contracts).

<sup>83</sup> See, e.g., section 6091(b) (including a requirement to file returns in the internal revenue district in the taxpayer's principal place of business is located but not defining "principal place of business"); Treas. Reg. § 301.6091-1 (not defining "principal place of business").

determine if a purchaser of the taxpayer's equity (or debt) is an SFE, a taxpayer will need to determine if the purchaser or the purchaser's controlling shareholder (if any) is an FCE. To make this determination, the taxpayer will need to know *that entity's, and each intermediate owning entity's*, principal place of business. Absent rigorous analysis of each entity, analyzing all of each entity's global activities, a taxpayer cannot be certain that a counterparty is not an FCE.

To prevent section 7701(a)(51)(C)(iv) from becoming essentially unadministrable for taxpayers and the government alike, we recommend that the IRS and Treasury publish a definition of "principal place of business" for purposes of section 7701(a)(51)(C)(iv) that can be readily applied by Third Parties after conducting commercially reasonable diligence. While a fulsome definition may obviate the need for additional guidance, we also request that the IRS and Treasury consider providing safe harbors or other *de minimis* tests or conventions. For instance, to the extent it is not addressed in the definition, a convention allowing taxpayers to ignore the "principal place of business" prong of section 7701(a)(51)(C)(iv) for intermediary holding companies with no significant business activities other than holding equity of other companies would help to simplify the taxpayer diligence without undermining the effectiveness of the FCE tests.

While the "principal place of business" test creates the most obvious challenges, we further request that the IRS and Treasury consider whether broader guidance with respect to the remaining FCE tests may be helpful, including by defining key terms or providing diligence standards or certifications upon which taxpayers would be permitted to rely when determining if an entity is an FCE.

14. Provide guidance or procedures for how to substantiate that an equity owner is not an SFE (including an FCE).

Each of the FIE tests under section 7701(a)(51)(D)(i)(I)(aa)-(cc) and the "controlled" FCE test in section 7701(a)(51)(C)(v) is based on an SFE's ability to exert influence or control based on its ownership of an entity's equity. Taxpayer compliance therefore depends upon each taxpayer's ability to determine that its equityholders are not SFEs. While taxpayers are able to determine whether a counterparty violates some of the tests through publicly available information or basic diligence, other tests (such as the principal place of business of a counterparty under section 7701(a)(51)(C)(iv), discussed above, or the "control" test under section 7701(a)(51)(C)(v))<sup>84</sup> require taxpayers to obtain far more detailed information than is customarily available. We therefore request that the IRS and Treasury consider publishing guidance or procedures that taxpayers can rely upon when substantiating whether an equityholder is an SFE (similar to the rules requested in Part V.6 for determining that a lender is not an SFE).

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<sup>84</sup> See *supra* Part V.13 for detailed analysis of this issue as it relates to determining whether an entity is an FCE.

15. Provide guidance on what “interests” are in the numerator and denominator of the fractions in section 7701(a)(51)(D)(i)(I)(bb)-(cc), and if these are equity interests, provide guidance on whether the interest is measured by vote or value.

The equity ownership tests in sections 7701(a)(51)(D)(i)(I)(bb) and (cc) cause an entity to be an FIE if “(bb) a single [SFE] owns at least 25 percent of such entity, [or] (cc) one or more [SFEs] own in the aggregate at least 40 percent of such entity.” The PFE Rules do not indicate what ownership metric is used in the numerator and denominator of the 25 percent and 40 percent tests.<sup>85</sup>

Section 7701(a)(51)(G) provides that, for purposes of section 7701(a)(51)(C)(v), the term “control” is determined based upon “ownership (by vote or value)” in a corporation, “ownership of more than 50 percent of the profits interests or capital interests” in a partnership, and “ownership of more than 50 percent of the beneficial interests” in any other entity. While this provision is only explicitly applicable for purposes of the FCE determination, there is an argument that the FIE equity ownership tests should be determined based on these same metrics. We do not find this argument convincing. The ownership definitions provided in section 7701(a)(51)(G) are explicitly limited to defining “control” for purposes of section 7701(a)(51)(C)(v). To define ownership in section 7701(a)(51)(D)(i)(I)(bb) and (cc) based on these definitions would explicitly contravene that statutory limitation.<sup>86</sup> Nonetheless, we do not believe that there is a clear, statutorily required definition of “own” applicable to these tests, and we therefore request that the IRS and Treasury clarify the definition in guidance.

The IRS and Treasury will first need to determine whether the ownership fraction set forth in each of sections 7701(a)(51)(D)(i)(I)(bb) and (cc) is one fraction or multiple. If each entity is meant to have one ownership fraction, the IRS and Treasury will need to either determine the single criterion for each entity type that it will use when testing ownership or create a mathematical formula to combine multiple ownership indicators into a single fraction that is tested against the 25 percent and 40 percent thresholds.

Alternatively, if the IRS and Treasury determine that each entity may have more than one ownership fraction, the IRS and Treasury will be considerably less restricted in defining “owns,” as each method of ownership will be able to be tested against the 25 percent and 40 percent threshold separately. In this case, the inquiry for corporations would be whether the fractions set forth in sections 7701(a)(51)(D)(i)(I)(bb) and (cc) should include value (similar to section 382), value and voting power (similar to section 1504), or voting rights and number of shares of each class of non-voting stock (as in the definition of “control” under section 368(c)).

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<sup>85</sup> The same question applies to the public entity equity-ownership tests in sections 7701(a)(51)(E)(iii)(I)(bb) and (cc).

<sup>86</sup> To be clear, nothing would prevent the IRS and Treasury from independently determining that these definitions are appropriate under sections 7701(a)(51)(D)(i)(I)(bb) and (cc).

The determination for partnerships requires a more nuanced analysis. While ownership of a partnership is often measured by reference to profits interests and capital interests,<sup>87</sup> we do not believe that this metric would properly measure the ability of an SFE to influence a partnership. Instead, we believe that ownership of a partnership should, at a minimum, be defined to include ownership of interests entitling an equityholder to vote on key partnership decisions—specifically, interests in the partnership’s general partner or managing member, or other equity interests granting requisite voting rights. This definition would ensure that partnerships that are controlled (via voting rights) by SFEs with little economic interests are treated as FIEs. For example, if a partnership has a limited partner that owns 99 percent of the economics but has no voting rights and a general partner that is an SFE and owns 1 percent of the economics, the partnership should be viewed as influenced by the general partner. We would expect that treatment of ownership of capital or profits interests without voting power would be aligned with the analogous treatment in the corporate setting.

Given the lack of any statutory definition and the multiple reasonable potential interpretations of the ownership fractions in sections 7701(a)(51)(D)(i)(I)(bb) and (cc), we request that the IRS and Treasury clarify the issue in guidance in the interest of consistent application of the Code.

16. Provide guidance addressing when typical voting rights as an equityholder amount to “direct authority to appoint a covered officer” of the issuer.

An entity is an FIE described under section 7701(a)(51)(D)(i)(I)(aa) if an SFE has the “direct authority to appoint a covered officer” of the entity. At least three distinct questions affecting the interpretation of this provision will need to be addressed by the IRS and Treasury. First, it is unclear what constitutes “direct authority” and how direct authority differs from ownership of voting equity in an entity. Second, it is unclear why the publicly traded FIE test covering appointment rights covers “the authority” rather than the “direct authority.”<sup>88</sup> And finally, under what circumstances does an individual have “powers or responsibilities similar” to the roles listed in the “covered officer” definition? We request that the IRS and Treasury issue guidance clarifying how it will be interpreted and implemented.

*i. What does “direct authority” mean?*

Defining “direct authority” appears to be the biggest challenge in interpreting section 7701(a)(51)(D)(i)(I)(aa). We are unaware of any other rule in the Code or Treasury regulations that separates the “direct authority” to exercise appointment rights from the ownership of equity in a company. Because the tax law generally treats equity ownership (and specifically, in the case of corporations, the right to vote for members of the board of directors) as a proxy for appointment authority, there is little in the existing law differentiating equity ownership from the

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<sup>87</sup> See section 706(b); section 707(b); section 7701(a)(51)(G)(ii).

<sup>88</sup> Section 7701(a)(51)(E)(iii)(I)(aa).

“direct authority” to appoint a covered officer. But, given that the FIE tests under sections 7701(a)(51)(D)(i)(I)(bb) and (cc) are based solely on equity ownership, Congress presumably intended for section 7701(a)(51)(D)(i)(I)(aa) to address authority that is not solely reliant on equity ownership. We have explored several situations where this appointment authority may exist notwithstanding that an SFE equityholder owns less than 25 percent of an entity’s equity.

Section 7701(a)(51)(D)(i)(I)(aa) may apply to a corporation if the corporation has cumulative voting or a class of shares entitled to special voting rights (*i.e.*, the right to appoint a director separate from the common shares). It could also arise if any equityholders of an entity have entered into a voting agreement benefiting an SFE.

It is unclear, however, when veto rights are sufficient to give an SFE “direct authority to appoint a covered officer.” On the one hand, an unlimited right to veto covered officer appointments may provide an SFE with the functional authority to control the appointment of an entity’s covered officers where the SFE’s consent is both necessary and sufficient to the appointment of the officer. But on the other hand, more limited veto rights (*e.g.*, vetoes tied to experience requirements) and veto rights that are held by multiple equityholders may be properly viewed as incidental and thus not providing “direct authority” for the SFE to appoint a covered officer.

A similar question arises with respect to debt ownership. Given the bespoke and highly negotiated nature of many debt instruments, it is possible that some debt instruments will include terms that will give the counterparty the direct authority to appoint an entity’s covered officers in certain circumstances. But these rights will typically only spring into life in most debt instruments upon an event of default. In this case, we believe that the latent appointment authority should not be treated as “direct authority” under section 7701(a)(51)(D)(i)(I)(aa) unless and until an event of default provides the SFE with the *current* right to exercise such authority. We recommend that the IRS and Treasury also consider whether other, less common rights given to lenders under certain debt instruments may give rise to immediate “direct authority” to appoint a covered officer.

*ii. Is there a difference between “direct authority” to appoint a covered officer and “the authority” to appoint a covered officer?*

The non-publicly traded FIE appointment test under section 7701(a)(51)(D)(i)(I)(aa) is based on the “direct authority” to appoint a covered officer, while the publicly traded FIE appointment test under section 7701(a)(51)(E)(iii)(I)(aa) is based on “the authority” to appoint a covered officer. It is unclear whether Congress intended these standards to meaningfully differ, or if this difference in phrasing was included for another reason.

It is reasonable to argue that the publicly traded entity test casts a wider net than the non-publicly traded entity test: “direct authority” is necessarily a subset of all authority, so the publicly traded FIE test in section 7701(a)(51)(E)(iii)(I)(aa) should be interpreted to encompass more types of authority than the non-publicly traded FIE test in section 7701(a)(51)(D)(i)(I)(aa). But it is also possible to view the use of “the authority” in section 7701(a)(51)(E)(iii)(I)(aa) as instead providing context regarding the definition of “direct authority” in section 7701(a)(51)(D)(i)(I)(aa): because

publicly traded securities must follow the rules of the exchange on which they are listed, this argument would suggest that “the authority” encompasses the types of authority that public stock exchanges permit and that “direct authority” should be interpreted to cover only those types of authority.

Ultimately, because either of these interpretations is reasonable, we request that the IRS and Treasury provide guidance clarifying which controls.

*iii. Under what circumstances does an individual have “powers or responsibilities similar to those of officers or members described in” section 7701(a)(51)(F)(i)-(ii)?*

Under section 7701(a)(51)(F), a “covered officer” of an entity is, with respect to that entity: (i) a member of the board of directors, board of supervisors, or equivalent governing body, (ii) an executive-level officer, including the president, chief executive officer, chief operating officer, chief financial officer, general counsel, or senior vice president, or (iii) an individual having powers or responsibilities similar to those of officers or members described in clause (i) or (ii).

While there are certainly some clear-cut cases (*i.e.*, situations where an individual is stripped of her title but remains in an identical role), the subjectivity of clause (iii) of the “covered officer” definition creates the potential that it will be interpreted quite differently from one party to the next.

Certain common situations merit a brief discussion. First, we interpret the officer titles listed in clause (ii), when referenced in clause (iii) of the definition, to apply based on a universal standard (rather than each company’s unique title conventions). If the IRS and Treasury agree with this interpretation, we believe that the IRS and Treasury should provide guidance clarifying the role of each listed title (with particular focus given to “senior vice presidents”) based on the responsibilities of individuals with that title in large corporations. Second, we believe that guidance is needed to clarify how these titles apply to operating partnerships or joint ventures, if at all. Given the flexibility in structuring duties in an operating partnership, it is hard to draw meaningful distinctions based on these titles (and a joint venture may not have any covered officers).

We therefore request that the IRS and Treasury provide guidance clarifying which individuals have “powers or responsibilities similar” to the officers or members listed in clauses (i) and (ii).

#### *D. Effective control*

17. Provide guidance on the meaning of the key terms in section 7701(a)(51)(D)(ii), including: “other arrangement,” “unrestricted,” “contractual right,” “related to the production of electricity,” “data,” “licensing agreement” and “bona fide purchase or sale.”

The application of section 7701(a)(51)(D)(ii) depends on the interpretation of a collection of terms that are new to the Code or that are not commonly used in this context. Setting forth clear definitions of each of these terms will be a critical part of any forthcoming IRS and Treasury guidance. We therefore request that the IRS and Treasury issue guidance on the meaning of each of the following terms: *unrestricted*;<sup>89</sup> *contractual right*;<sup>90</sup> *related to the production of electricity*;<sup>91</sup> *data*;<sup>92</sup> *licensing agreement*;<sup>93</sup> *bona fide purchase or sale*.<sup>94</sup>

18. Provide guidance on the scope of persons subject to treatment as FIEs by reason of section 7701(a)(51)(D)(i)(II)(bb)—in particular, whether it applies solely to credit claimants or whether it causes non-claimant suppliers to be treated as FIEs for purposes of the Material Assistance rules.

Under section 7701(a)(51)(D)(i), the term FIE includes:

“*an entity . . . (II) which, during the previous taxable year, made a payment to [an SFE] pursuant to a contract, agreement, or other arrangement which entitles such [SFE] (or an entity related to such [SFE]) to exercise effective control over . . . (bb) with respect to any eligible component produced by the taxpayer (or any person related to the taxpayer) . . . (BB) the production of an eligible component.*”<sup>95</sup>

It is uncertain from this language whether entities that are not “taxpayers” (a term defined in section 7701(a)(14) to mean “any person subject to any internal revenue tax”) can be FIEs by

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<sup>89</sup> Section 7701(a)(51)(D)(ii)(II) (“During any period prior to the date that the guidance described in subclause (I)(bb) is issued by the Secretary, for purposes of clause (i)(II), the term “effective control” means the unrestricted contractual right of a contractual counterparty to . . .”).

<sup>90</sup> Section 7701(a)(51)(D)(ii)(II) (“During any period prior to the date that the guidance described in subclause (I)(bb) is issued by the Secretary, for purposes of clause (i)(II), the term “effective control” means the unrestricted contractual right of a contractual counterparty to . . .”).

<sup>91</sup> Section 7701(a)(51)(D)(ii)(II)(bb) (“determine the amount or timing of activities related to the production of electricity undertaken at a qualified facility of the taxpayer or the storage of electrical energy in energy storage technology of the taxpayer”).

<sup>92</sup> Section 7701(a)(51)(D)(ii)(II)(ee) (“restrict access to data critical to production or storage of energy undertaken at a qualified facility of the taxpayer, or to the site of production or any part of a qualified facility or energy storage technology of the taxpayer, to the personnel or agents of such contractual counterparty”).

<sup>93</sup> Section 7701(a)(51)(D)(ii)(III)(aa) (“In addition to subclause (II), for purposes of clause (i)(II), the term “effective control” means, with respect to a licensing agreement for the provision of intellectual property (or any other contract, agreement or other arrangement entered into with a contractual counterparty related to such licensing agreement) with respect to a qualified facility, energy storage technology, or the production of an eligible component, any of the following”).

<sup>94</sup> Section 7701(a)(51)(D)(ii)(III)(bb)(AA) (“Item (aa) shall not apply in the case of a bona fide purchase or sale of intellectual property”).

<sup>95</sup> Emphasis added.

reason of making payments under an Effective Control Agreement.<sup>96</sup> The question matters because numerous non-U.S. suppliers produce and sell components, materials, and minerals to section 45X claimants, who need to compute their Eligible Component MACR to claim section 45X credits and so need to confirm that their non-U.S. suppliers are not FIEs—and, more specifically, whether section 45X claimants need to inquire into the existence of any Effective Control Agreements to which their non-U.S. suppliers are party. (Likewise, non-U.S. suppliers seeking to certify the eligibility of their components, materials and minerals to section 45X complaints wish to confirm their own FIE status.)

First, we observe that section 7701(a)(51)(D)(i)(II) appears to deem entities as “effective control” FIEs without regard to whether the entities themselves claim section 45X, section 45Y or section 48E credits. Nevertheless, the interpretive issue seems limited to section 45X credits because “effective control” of a qualified facility or EST would only be of relevance to the actual section 45Y or section 48E claimant,<sup>97</sup> whereas section 7701(a)(51)(D)(i)(II)(bb) extends to effective control of “applicable critical minerals” and “eligible components” and therefore can potentially extend “effective control” FIE status to non-claimants of section 45X credits (because applicable critical minerals and eligible components can be produced by a non-claimant supplier and be sold to a section 45X claimants, as subcomponents or materials, to be incorporated into the claimant’s section 45X “eligible components”). The result—that section 45Y and 48E claimants do not need to diligence the “effective control” FIE status of their suppliers, but section 45X claimants do—is curious enough (and the statutory language is ambiguous enough) to warrant confirmation from the IRS and Treasury. Alternatively, the IRS and Treasury could interpret the section 45X rule consistently with the section 45Y and 48E rule and provide guidance that only potential section 45X credit claimants (and not non-claimant suppliers) can be “effective control” FIEs; this latter reading is a similarly reasonable construction of the statute and would continue to test section 45X claimants’ agreements for whether they convey “effective control” to an SFE (like section 45Y and 48E claimants).

If non-claimants of section 45X credits can be “effective control” FIEs, the next question concerns the language that the “effective control” of such entity’s “applicable critical minerals” or “eligible components” also must be “with respect to any eligible component produced *by the taxpayer* (or any person related to *the taxpayer*).”<sup>98</sup> It is possible that this language is properly interpreted as treating non-claimant suppliers that are “taxpayers” as potential FIEs and therefore differently than those that are not “taxpayers” (and cannot be FIEs). On the other hand, it is possible that the change from “an entity” to “the taxpayer” was not intended to change the scope of the definition of FIE. Because the term “taxpayer” is used in the same manner in section 7701(a)(51)(D)(i)(II)(bb) (the “effective control” rule for qualified facilities and ESTs) without

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<sup>96</sup> Under section 7701(a)(14), the term “taxpayer” means “any person subject to any internal revenue tax.”

<sup>97</sup> Because any entity claiming credits for a qualified facility or energy storage technology is, by definition, a “taxpayer” under section 7701(a)(14), the ambiguity present in section 7701(a)(51)(D)(i)(II)(bb) is not present in section 7701(a)(51)(D)(i)(II)(aa).

<sup>98</sup> Emphasis added.

creating a similar ambiguity, Congress may have simply intended to use the same phrasing for both items (aa) and (bb) without intending to create a narrow exception for a non-taxpayer supplier producing eligible components.

Because these issues are critical for taxpayers' ability to accurately calculate their Eligible Component MACR, we request that the IRS and Treasury issue guidance clarifying whether non-“taxpayers” are subject to section 7701(a)(51)(D)(i)(II)(bb).

19. Provide guidance on the determination of what constitutes a “licensing” agreement in section 7701(a)(51)(D)(ii)(III)(aa).

Perhaps the most important distinction in the “effective control” FIE rules is whether or not a contract is an IP Licensing Agreement (referring to the term in section 7701(a)(51)(D)(ii)(III)(aa), “a licensing agreement for the provision of intellectual property (or any other contract, agreement or other arrangement entered into with a contractual counterparty related to such licensing agreement)”). Provisions in and modifications of such IP Licensing Agreements can render the taxpayer under “effective control” of the counterparty and therefore an FIE. Taxpayers therefore need clarity as to what agreements constitute IP Licensing Agreements to ensure that they are not entering into (or modifying) any such agreement with an SFE. Importantly, because a counterparty can become an SFE after a contract is entered into, it is not enough for taxpayers to simply avoid entering into IP Licensing Agreements with SFEs. We therefore request that the IRS and Treasury provide guidance defining IP Licensing Agreements, taking into account the range of common situations discussed below.

The first area for guidance is whether the provision of intellectual property embedded in a purchased component constitutes a “licensing” of intellectual property (an “**IP License**”). While we would assume that any “smart” component that relies on software to carry out its function would include an IP License, it is not clear that other components should also be treated as including an IP License when purchased. While most equipment purchase agreements will contain provisions licensing the product to the end user, the typical terms of these licensing provisions are dissimilar to the restrictions in section 7701(a)(51)(D)(ii)(III)(aa)(AA)-(FF) and so we request the IRS and Treasury to address the extent to which they are included in section 7701(a)(51)(D)(ii)(III)(aa)(GG).

A second general inquiry is whether an IP License can exist in the absence of a formal agreement. For example, would an agreement containing a covenant not to sue a counterparty for patent infringement, but not including any other provisions regarding intellectual property utilization, constitute an IP License? Given the severe consequences of making a payment under an IP Licensing Agreement with an SFE, there is a need for guidance to keep taxpayers from entering into unintended IP Licenses. The IRS and Treasury could address this concern by including in the definition of IP License a requirement that the predominant nature of the contract relate to intellectual property. This would provide clarity that, for instance, an instruction manual provided alongside purchased property does not constitute an IP License.

20. Provide guidance on the determination as to which entities constitute a “contractual counterparty” in section 7701(a)(51)(D)(ii)(V).

The “effective control” FIE rules concern certain prohibited relationships with a “contractual counterparty,” which is defined in section 7701(a)(51)(D)(ii)(V) as “an entity with which the taxpayer has entered into a contract, agreement, or other arrangement.” Guidance is needed from the IRS and Treasury to clarify when common commercial arrangements might constitute an “other arrangement” under this definition. For instance, must a taxpayer have entered into the contract directly, or would a subcontract or making a third party a beneficiary constitute an “other arrangement”? Similarly, how will assigned contracts be treated?

An example of a common project structure for developers of qualified facilities and ESTs may be instructive. When a developer enters into an engineering, procurement, and construction (“EPC”) contract, the EPC contractor will subcontract out many aspects of the work on the qualified facility and will procure from third-party suppliers many of the manufactured products needed for the qualified facility. In this role, the EPC contractor will enter into (and make payments under) many contracts either on behalf of, or that will ultimately be assigned over to, the developer. Moreover, in the case of section 45Y and section 48E projects, the developer may sell the qualified facility or EST prior to placement in service (in the case of section 48E qualified facilities or ESTs) or shortly after placement in service (in the case of section 45Y qualified facilities) to the ultimate credit claimant, and such claimant may or may not assume some or all (or none) of the rights and obligations under the EPC contract.

Guidance is needed to clarify when, if ever, these contracts would constitute “other arrangements” entered into between the taxpayer and the third-party subcontractor or supplier. Relatedly, guidance is needed to clarify how assignment of these contracts to the taxpayer will be treated, and whether the earlier payments made by the EPC contractor will be attributed to the taxpayer upon assumption of the contract (or if only post-assumption payments would be treated as a payment made by the taxpayer “pursuant to a contract, agreement or other arrangement”). Finally, guidance is necessary to confirm that claimants that purchase projects from developers (and that do not assume the developer’s contracts) will not be treated as a contractual counterparty to any such contracts, including where the developer uses the sales proceeds to make payments under such contracts.

A second situation where this issue arises is with IP Licenses. Often, project developers purchase components from non-SFE suppliers who utilize disputed intellectual property in the components. As part of the component purchase agreement, these suppliers will represent that they own the licensed intellectual property and, if this ever ceases to be true, that they will purchase or obtain a license for the disputed intellectual property. In many cases, the reason that this representation would cease to be true is that a third party has successfully invalidated the supplier’s patent. This makes the third party exceptionally unlikely to turn around and sell the intellectual property to the supplier, so the only remedy (absent another third party offering a license of similar intellectual property) is for the supplier to license the disputed intellectual property from the third party. Of course, if the third party is an SFE, this raises the question of whether the developer now

has an IP License with an SFE. We request that the IRS and Treasury address these indirect relationships when providing guidance on who constitutes a “contractual counterparty.”

21. Provide guidance addressing when intellectual property is licensed “on an exclusive basis” in section 7701(a)(51)(D)(ii)(II)(ff).

The right of an SFE to, “on an exclusive basis, maintain, repair, or operate any plant or equipment which is necessary to the production by the taxpayer of eligible components or electricity” constitutes an Effective Control Agreement under section 7701(a)(51)(D)(ii)(II)(ff). We request guidance from the IRS and Treasury regarding the meaning of the phrase “on an exclusive basis.” While there is a strong argument that phrase should be interpreted to require that an SFE has the sole right to maintain, repair, or operate the plant or equipment (and, concomitantly, the right to prevent others from doing so), taxpayers would benefit from certainty.

Additionally, it is not clear to us how rights reserved for affiliates of an SFE should be treated. Because an affiliate is a separate entity, and not the contractual counterparty, a strict reading of the statutory text would lead to the conclusion that an SFE could share certain maintenance, repair, or operational rights with an affiliate to break the exclusivity requirement under section 7701(a)(51)(D)(ii)(II)(ff). This sharing of rights could take two forms: either to another SFE affiliate or to a non-SFE (or even non-PFE) affiliate. Depending on the IRS and Treasury’s view of the meaning and purpose of the exclusivity requirement, one or both of these forms could be acceptable (or unacceptable). We therefore request that the IRS and Treasury clarify the scope of this provision and provide any additional guidance necessary to clarify whether multi-party non-exclusive arrangements violate the “effective control” prohibition.

22. Provide guidance addressing when a contractual right is “retained” in section 7701(a)(51)(D)(ii)(III).

Each of sections 7701(a)(51)(D)(ii)(III)(aa)(AA)-(EE) concerns “a contractual right retained by the contractual counterparty.” It is unclear whether a contractual counterparty must be able to unilaterally exercise a right for such right to be “retained by the contractual counterparty,” or if section 7701(a)(51)(D)(ii)(III) is meant to encompass any rights that a contractual counterparty may have under a contract (including those that would, for instance, be subject to review and comment from the taxpayer). This becomes particularly important in heavily negotiated transactions where many rights given to a contractual counterparty may be subject to any number of qualifiers or modifiers that would limit the contractual counterparty’s authority, including (i) temporal limitations, (ii) materiality or *de minimis* thresholds, (iii) efforts standards, and (iv) the taxpayer’s consent (in some cases determined in the taxpayer’s sole discretion and in other cases not to be unreasonably withheld, conditioned or delayed).

Moreover, the rights referred to in sections 7701(a)(51)(D)(ii)(III)(aa)(DD) (restriction on royalties beyond the 10th year) and 7701(a)(51)(D)(ii)(III)(aa)(EE) (restriction on services agreements longer than two years in duration) are of limited duration. It is unclear whether a right held by the taxpayer to terminate any such royalties or services agreements would prevent the

license from giving rise to “effective control.” If so, a secondary question emerges as to whether the termination right must be in the taxpayer’s sole discretion and without penalty.

Given the number of different ways a contractual right could be retained (or not retained) within a negotiated agreement, we request that the IRS and Treasury provide guidance clarifying when a contractual right is considered “retained.”

23. Provide guidance addressing when a contract is for “the provision of services” under section 7701(a)(51)(D)(ii)(II)(aa)(EE).

The restriction in section 7701(a)(51)(D)(ii)(II)(aa)(EE) refers to a “contractual right retained by the contractual counterparty *to direct or otherwise require the taxpayer to enter into an agreement for the provision of services for a duration longer than 2 years.*”<sup>99</sup>

The “direct or otherwise require” phrase is not in any of the other descriptions of IP Licensing Agreements. It appears to suggest that section 7701(a)(51)(D)(ii)(III)(aa)(EE) is violated only if a contractual counterparty has the right to require the taxpayer to enter into a future services agreement, but not if the taxpayer (i) has *voluntarily* entered into a present services agreement for a duration extending longer than two years or (ii) has a *mutual* option to enter into a future services agreement. The reasoning behind these distinctions is not made clear by the statute or legislative history.

These distinctions, if intentional, seem to imply that a services agreement with an SFE entered into on July 3, 2025 or earlier could be for an unlimited period, but if the parties instead granted the SFE a unilateral option to provide services for a period exceeding two years, the contract would be deemed to grant effective control to the SFE. Because this formalistic distinction seems arbitrary, we request that the IRS and Treasury clarify the meaning of “direct or otherwise require” and how it affects agreements where the contractual counterparty does not have a unilateral right to require the taxpayer to enter into an agreement for services.

Additionally, it is unclear whether product warranty agreements are agreements “for the provision of services” under section 7701(a)(51)(D)(ii)(III)(aa)(EE). Because product warranty agreements obligate the warrantor to repair or replace damaged or defective products, they often require the warrantor to commit to providing services at any point during the duration of the warranty. While it is not clear that this constitutes “an agreement for the provision of services,” it is at least arguable that it does. But because product warranties are generally freely voidable by the purchaser, it is not clear that they could facilitate a counterparty’s control of a taxpayer. It is therefore possible that the phrase “direct or otherwise require the taxpayer to enter into [a services agreement]” was added to carve out warranty agreements, which are generally not mandatory on purchasers. If this is correct, we request that the IRS and Treasury clarify this point in guidance. If the phrase was not intended to carve out warranties, we request that the IRS and Treasury clarify whether and how product warranties are treated under section 7701(a)(51)(D)(ii)(III)(aa)(EE).

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<sup>99</sup> Emphasis added.

24. Provide guidance addressing when a taxpayer’s “utilization of intellectual property” is limited under section 7701(a)(51)(D)(ii)(III)(aa)(CC).

Section 7701(a)(51)(D)(ii)(III)(aa)(CC) treats as an Effective Control Agreement any “contractual right retained by the contractual counterparty to limit the taxpayer’s utilization of intellectual property related to the operation of a qualified facility or [EST], or in the production of an eligible component.” It is unclear what it means to “limit the taxpayer’s utilization of intellectual property.” Construed broadly, this would create a full bar on licenses of intellectual property from any SFE, as the terms of any license will definitionally limit the counterparty’s uses of the licensed intellectual property. Given that section 7701(a)(51)(D)(ii)(III)(aa) has seven distinct limitations, the rule against superfluity indicates that this interpretation is not correct.<sup>100</sup> But other than providing context sufficient to disclaim this upper boundary, the statutory text provides little guidance on when a license limits utilization of intellectual property in a manner that allows an SFE “effective control” of the taxpayer. We therefore request that the IRS and Treasury clarify the types of limitations on utilization of intellectual property that give rise to effective control.

A second issue affecting the interpretation of the restriction set forth in section 7701(a)(51)(D)(ii)(III)(aa)(CC) also merits a brief discussion. By its terms, it is unclear whether section 7701(a)(51)(D)(ii)(III)(aa)(CC) applies to trademark licenses. While trademarks are intellectual property, it is not clear that trademark licenses limit the taxpayer’s utilization of intellectual property “*related to the operation* [of a qualified facility] or *in the production* of an eligible component.”<sup>101</sup> The restrictions found in trademark licenses are not the types of restrictions that would enable an SFE to effectively control a taxpayer’s operations or production activities. Instead, trademark licenses are more aptly described as related to a taxpayer’s general and administrative functions and purely incidental to operations or production activities. Therefore, from a technical standpoint, it is not clear that trademark licenses fall into the statutory restriction. Moreover, given the cascading nature of trademark licenses as different suppliers provide products for use in a qualified facility, EST or eligible component, there are practical reasons not to interpret section 7701(a)(51)(D)(ii)(III)(aa)(CC) to cover trademark licenses. For example, a solar facility may include modules bearing the trademark of one company, which themselves may contain solar cells bearing another company’s trademark and polymeric backsheet bearing another company’s trademark. This could apply to dozens of components and tracking such trademarks would represent a significant burden on taxpayers. Given the inability to exercise meaningful control through a trademark license, we therefore request that the IRS and Treasury specifically consider whether trademark licenses should be viewed as falling under section

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<sup>100</sup> See *TRW Inc. v. Andrews*, 534 U.S. 19 (2001) (“It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” (quoting *Duncan v. Walker*, 533 U. S. 167, 174 (2001) (internal quotation marks omitted))); see also *United States v. Menasche*, 348 U. S. 528, 538-539 (1955) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” (quoting *Montclair v. Ramsdell*, 107 U. S. 147, 152 (1883))).

<sup>101</sup> Emphasis added.

7701(a)(51)(D)(ii)(III)(aa)(CC) (or any other IP Licensing Agreement conveying effective control).

25. Provide guidance addressing when an agreement has been subject to “modification” under section 7701(a)(51)(D)(ii)(II)(aa)(GG).

Under section 7701(a)(51)(D)(ii)(III)(aa)(GG) a licensing agreement with an SFE “entered into (or modified)” on or after July 4, 2025 gives rise to *per se* effective control. The use of the phrase “or modified” leads to two questions: (1) what constitutes a modification? and (2) are modifications to bring an agreement into compliance with the rules of section 7701(a)(51)(D)(ii)(III)(aa)(AA)-(FF) allowed?

*i. What constitutes a modification?*

When used in the tax law, the word “modification” is typically defined in a context-dependent manner. For example, the regulations under section 1001 treat many changes in the terms of a debt instrument as a “modification” of the instrument, but they limit the tax consequences of a modification (*i.e.*, treatment as an exchange) to “significant modifications,” which are defined more narrowly. As used in the common law, a contract modification is generally any change or alteration which introduces new elements into, or cancels some of, the terms of an agreement while leaving the agreement’s general purpose and effect in place.<sup>102</sup> Given the range of possible interpretations and the centrality of IP Licensing Agreements to taxpayers’ compliance with the PFE Rules, we request that the IRS and Treasury clearly define “modification” for purposes of section 7701(a)(51)(D)(ii)(III)(aa)(GG).

*ii. Are modifications to bring an agreement into compliance with the rules of section 7701(a)(51)(D)(ii)(III)(aa)(AA)-(FF) allowed?*

The statutory text of section 7701(a)(51)(D)(ii)(III)(aa)(GG) does not include any exceptions for modifications that bring an agreement into compliance with the rules of section 7701(a)(51)(D)(ii)(III)(aa)(AA)-(FF), and section 5.01 of Notice 2026-15 appears to amplify the plain reading of the statute. Nonetheless, we believe that the IRS and Treasury should consider whether certain modifications that bring IP Licensing Agreements into compliance (*i.e.*, by removing any indicators of effective control by an SFE) should be permitted in certain cases or otherwise excluded from the definition of “modification.” Absent such guidance, we believe that the IRS and Treasury should explicitly state that all modifications that bring a contract into compliance (*i.e.*, by removing any indicators of effective control by an SFE) violate the rules of section 7701(a)(51)(D)(ii)(III)(aa)(GG), if this is indeed the IRS and Treasury’s interpretation of the provision.

We request that the IRS and Treasury give special consideration to self-executing modifications that cause a contract to be interpreted in accordance with any future clarification, change, or new interpretation, of the law. These savings clause-style provisions are often included

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<sup>102</sup> See, e.g., *Evans v. Henson*, 73 Ga.App. 494(2), 37 S.E.2d 164 (1946).

in contracts because taxpayers intend to align their contractual obligations with the law and to force the contract into compliance if any law changes during the term of the contract. As such, they are not meant to change the parties' respective rights and responsibilities, and, when triggered, only modify the contract to the minimum extent necessary to remain compliant with the new law or legal interpretation.

26. Provide guidance addressing the scope of the phrase “without further involvement” in section 7701(a)(51)(D)(ii)(III)(aa)(FF).

Under section 7701(a)(51)(D)(ii)(III)(aa)(FF), a taxpayer is effectively controlled by an SFE if the taxpayer has made a payment under an IP Licensing Agreement and

[s]uch contract, agreement, or other arrangement does not provide the licensee with all the technical data, information, and know-how necessary to enable the licensee to produce the eligible component or components subject to the contract, agreement, or other arrangement *without further involvement* from the contractual counterparty or a [SFE].<sup>103</sup>

It is unclear if the phrase “without further involvement” is meant to address involvement beyond that which is commercially reasonable for unrelated third parties entering into similar agreements, or if it meant to act as a full bar on post-closing involvement by the contractual counterparty. Given that section 7701(a)(51)(D)(ii)(III)(aa)(EE) permits service agreements for up to two years, it seems unlikely that “without further involvement” is meant to create a full bar on post-closing involvement by the contractual counterparty, but the IRS and Treasury should confirm this interpretation. Assuming that is correct, there still remains a wide range of plausible interpretations of the phrase “without further involvement.” We therefore believe that it is critical that the IRS and Treasury clarify its meaning, and we request that the IRS and Treasury specifically address whether the counterparty providing the taxpayer with employee training or performing assembly and initial testing at a taxpayer’s facility is considered “further involvement” from the counterparty or SFE.

A possible interpretation is that section 7701(a)(51)(D)(ii)(III)(aa)(FF) addresses whether intellectual property and other proprietary information was shared, while section 7701(a)(51)(D)(ii)(III)(aa)(EE) addresses the requirements for service contracts relating to implementation of such information. This interpretation avoids the conflict between the two provisions by allowing the phrase “without further involvement [from the counterparty]” to refer to further sharing of intellectual property or proprietary information, rather than further services.

Even if the IRS and Treasury interpret these provisions differently, we would request that the IRS and Treasury avoid interpreting them in a way that would ban all employee training arrangements associated with IP Licenses. Because employee training is a central method of transferring “technical data, information, and know-how,” it would seem internally inconsistent for section 7701(a)(51)(D)(ii)(III)(aa)(FF) to require “all the technical data, information, and

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<sup>103</sup> Emphasis added.

know-how” to be provided to the licensee without permitting the licensee’s employees to be trained on how to use such data, information, and know-how.

Another area of concern relates to assembly and initial testing of equipment subject to an IP License. Because the information needed to assemble and conduct initial testing of equipment is different from the information needed to operate the equipment, the provision of assembly and initial testing services by a contractual counterparty should not give rise to an inference that less than “all the technical data, information, and know-how” necessary to produce components has been provided to the taxpayer. It is common practice for suppliers to provide certain installation and initial testing of equipment, so taxpayers need certainty regarding the extent to which any such practices could run afoul of section 7701(a)(51)(D)(ii)(III)(aa)(FF). Unless the IRS and Treasury adopt a broad view of “without further involvement,” we believe that these common market practices should not fall under section 7701(a)(51)(D)(ii)(III)(aa)(FF).

*E. Other*

27. Provide guidance addressing the purchase of credits by FIEs.

The OBBBA added new section 6418(g)(5), which provides that an eligible taxpayer (within the meaning of section 6418(f)(2)) may not transfer any portion of the credits under sections 45Q, 45U, 45X, 45Y, 45Z, and 48E to an SFE. As a result, SFEs cannot purchase these credits.

The new rule makes no reference to FIEs, which therefore remain able to purchase credits under section 6418. While we believe the foregoing is the clear intent of the OBBBA, given the burden of monitoring FIE status (as discussed above), we believe it is critical for the IRS and Treasury to confirm that FIEs remain eligible to purchase credits under section 6418.

Confirmation via guidance is necessary because the operative rule in section 6418(a) provides that, in the case of an eligible taxpayer which elects to transfer some or all of a credit under sections 45Q, 45U, 45X, 45Y, 45Z, and 48E “determined with respect to such taxpayer for any taxable year” to an unrelated transferee taxpayer, the transferee taxpayer “(and not the eligible taxpayer) shall be treated as the taxpayer for purposes of this title with respect to such credit (or such portion thereof).”<sup>104</sup>

In guidance issued to date under section 6418, the IRS and Treasury have generally taken the position that the “determination” of a credit remains with the eligible taxpayer (under the Code provision providing explicit rules for credit “determination” (*e.g.*, section 48E), as well as under sections 49 and 50(b)), and not the transferee taxpayer (and so the transferee taxpayer therefore does not re-apply the “determination” rules).<sup>105</sup> The “shall be treated” rule, therefore, has the limited effect of providing that the transferee taxpayer “shall be treated” as the taxpayer only for

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<sup>104</sup> Emphasis added.

<sup>105</sup> Treas. Reg. § 1.6418-2(f)(3)

the purposes of applying certain computation, utilization, and allowance rules (such as sections 38 and 469) to the transferee taxpayer.<sup>106</sup>

The operative rules imposing the PFE bar in sections 45Q(f)(10), 45X(d)(4), 45Y(g)(13), 45U(c)(3), 45Z(f)(8), and 48E(d)(6) each provide that “[n]o credit shall be determined . . .” under such section and therefore it seems clear that Congress understood that the PFE bar was a “determination” rule that was tested only at the level of the eligible taxpayer (*i.e.*, the transferor). This also explains why, when Congress wanted to prevent SFEs from purchasing credits, Congress needed to enact a separate rule (section 6418(g)(5)) to achieve that result. Notably, in the House Bill, the PFE Rules relating to authority, ownership, and control operated as a bar to “allowance” of the credit under section 38 (not determination under sections 45X, 45Y and 48E); this was rejected in the Senate and the OBBBA as enacted clearly provides that these PFE Rules apply only to preclude “determination” of the credit.

Nevertheless, given the subtlety of the IRS and Treasury’s analysis in Treas. Reg. § 1.6418-2(f)(3) and the need for certainty that FIEs remain eligible to purchase credits, we request that Treas. Reg. § 1.6418-2(f)(3) be amended to clarify (or that the preamble of the PFE regulations provide sufficient clarification) that the PFE Rules are “determination” rules that apply only to the eligible taxpayer, not the transferee taxpayer.

28. Provide guidance on what is meant by “rules similar” to the January 1, 2025 begun construction guidance referenced in section 7701(a)(51)(J).

Section 7701(a)(51)(J) provides that, for purposes of applying any provision under section 7701(a)(51), “the beginning of construction with respect to any property shall be determined pursuant to rules similar to the rules under Internal Revenue Service Notice 2013-29 and Internal Revenue Service Notice 2018-59 (as well as any subsequently issued guidance clarifying, modifying, or updating either such Notice), as in effect on January 1, 2025.”

We request the IRS and Treasury provide guidance confirming that Notices 2013-29 and 2018-59 (as modified) continue to apply to determine the “beginning of construction” of a qualified facility or EST wherever relevant under section 7701(a)(52).

First, we observe that none of the rules in section 7701(a)(51) make reference to the “beginning of construction” of a property, and so the rule appears to contain a drafting error on its face to the extent it purports to apply to section 7701(a)(51).<sup>107</sup> Nevertheless, section 7701(a)(52)(F) provides that “rules similar to the rules under [section 7701(a)(51)(J)] shall apply for purposes of [section 7701(a)(52)]” and so the rules are relevant with respect to numerous determinations under section 7701(a)(52).

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<sup>106</sup> *Id.*

<sup>107</sup> Although not determinative, a pattern of drafting errors in sections 7701(a)(51)-(52) should be probative of the best reading of other provisions that appear (albeit less obviously) to contain drafting errors. *See supra* Part V.9.

Notices 2013-29 and 2018-59 (as modified) provide detailed guidance under sections 45 and 48 for how a taxpayer can establish “beginning of construction” for facilities eligible for section 45 credits and property eligible for section 48 credits. The guidance has been extended to the credits under section 45Y and 48E<sup>108</sup> and has been replicated in other guidance.<sup>109</sup>

Shortly after the enactment of the OBBBA, President Trump issued Executive Order 14315, which directed the Secretary to issue guidance by August 18, 2025 to “strictly enforce the termination” of the section 48E ITC and section 45Y PTC for wind and solar facilities under sections 70512(l)(4) and 70513(g)(5) of the OBBBA, and to “ensure that policies concerning the ‘beginning of construction’ are not circumvented.”<sup>110</sup> On August 15, 2025, the IRS and Treasury issued Notice 2025-42, which limited the availability of the Five Percent Safe Harbor (solely for purposes of sections 70512(l)(4) and 70513(g)(5) of the OBBBA) to solar facilities with a maximum net output (based on nameplate capacity) equal to 1.5 megawatts.

The text of section 7701(a)(51)(J)—which codifies Notices 2013-29 and 2018-59 (as modified) “as in effect on January 1, 2025”—is clear on its face, *i.e.*, it allows taxpayers to continue to apply Notices 2013-29 and 2018-59 (as modified) to determine the “beginning of construction” of a facility wherever relevant under section 7701(a)(52). The specific reference to such rules “as in effect on January 1, 2025” makes clear that Congress intended the pre-existing and long-established guidance to continue to apply; the term “rules similar” would seem only to reflect the fact that Notices 2013-29 and 2018-59 (and the guidance “clarifying, modifying, or updating” those Notices) relate to section 45 and 48, and not sections 45Y or 48E.

Nevertheless, given how critical the determination of a qualified facility’s or EST’s “beginning of construction” is to the requirements placed on a taxpayer claiming section 45Y and section 48E credits under section 7701(a)(52), the IRS and Treasury should confirm the continued application of Notices 2013-29 and 2018-59 (as modified) under section 7701(a)(52). The events leading up to the publication of Notice 2025-42 created uncertainty regarding the continued application of Notices 2013-29 and 2018-59 (as modified); although that specific uncertainty was resolved by Notice 2025-42, taxpayers would benefit greatly from knowing that Notices 2013-29 and 2018-59 (as modified) continue to apply generally under section 7701(a)(52). Moreover, taxpayers have continued to rely on these notices, including in many instances to establish beginning of construction under section 7701(a)(52) before January 1, 2026.

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<sup>108</sup> Notice 2022-61, 2022-52 I.R.B. 560.

<sup>109</sup> *See, e.g.*, Notice 2020-12, 2020-11 I.R.B. 495 (applying similar guidance under section 45Q).

<sup>110</sup> Ending Market Distorting Subsidies for Unreliable, Foreign Controlled Energy Sources, July 7, 2025, *available at* <https://www.whitehouse.gov/presidential-actions/2025/07/ending-market-distorting-subsidies-for-unreliable-foreign%E2%80%91controlled-energy-sources/>.

29. Provide guidance on the diligence taxpayers need to provide to satisfy the “reason to know” standards in section 7701(a)(52)(D)(iii)(III) and the Certification Safe Harbor in Notice 2026-15.

For purposes of the Material Assistance rules, section 7701(a)(52)(D)(iii)(I) provides that, not later than December 31, 2026, the Secretary shall issue safe harbor tables (and other guidance) to identify the percentage of total direct costs of any manufactured product that is attributable to a PFE, identify the percentage of total direct material costs of any eligible component which is attributable to a PFE, and provide all rules necessary to determine the amount of a taxpayer’s material assistance from a PFE. In Notice 2026-15, the IRS and Treasury previewed forthcoming regulations that would provide these tables and other certifications, including a “Certification Safe Harbor” for determining supplier direct costs and whether products, components and constituent materials and PFE-produced or PFE-sourced.<sup>111</sup> Until 60 days after such tables are issued, taxpayers may rely on the tables in Notice 2025-08 to establish the percentage of the total direct costs of any listed eligible component and any manufactured product, and rely on a supplier certification of the total direct costs or the total direct material costs, as applicable, of such product or component that was not produced or manufactured by a PFE (or that such product or component was not produced or manufactured by a prohibited foreign entity).<sup>112</sup>

However, section 7701(a)(52)(D)(iii)(III) provides that if the taxpayer knows “(or has reason to know)” that a manufactured product or eligible component was produced or manufactured by a PFE, the taxpayer must treat all direct costs with respect to such manufactured product, or all direct material costs with respect to such eligible component, as attributable to a PFE. Also, if the taxpayer knows “(or has reason to know)” that a supplier certification is inaccurate, the taxpayer may not rely on such certification.<sup>113</sup> In Notice 2026-15, the IRS and Treasury provided a similar exception to use of the “Certification Safe Harbor.”<sup>114</sup>

Given the importance of supplier certifications to a taxpayer’s determination of its MACR, the IRS and Treasury should issue guidance on what diligence a taxpayer is required to perform with respect to its supplier and its direct costs, beyond receipt of a certification, in order to establish that the taxpayer did not have “reason to know” that its supplier’s certification was inaccurate.

Given that section 6695B (also enacted by the OBBBA) imposes a penalty on suppliers that make inaccurate statements, it would seem that taxpayers should be able to be entitled to strong reliance on supplier statements alone; put differently, there is arguably no other diligence exercise that taxpayers could engage in to determine their supplier’s costs or status that provides a stronger remedy than the potential application of section 6695B. That said, there are questions

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<sup>111</sup> 2026-11 I.R.B.

<sup>112</sup> Section 7701(a)(52)(D)(iii)(II).

<sup>113</sup> Section 7701(a)(52)(D)(iii)(III)(bb) (emphasis added).

<sup>114</sup> 2026-11 I.R.B., at § 4.03(2)(c)

about the enforceability of section 6695B (discussed below) and, absent voluntary compliance with section 6695B and based on the explicit “reason to know” language in section 7701(a)(52), we discuss below approaches to guidance to ensure both that taxpayers perform sufficient diligence and that taxpayers can rely with certainty on otherwise valid certifications.

The rules under section 7701(a)(52)(D)(iii)(III) and in the eventual regulations could be based on the similar “reason to know” rules that backstop the chapter 3 and chapter 4 withholding tax regimes, which seem the most directly analogous. These regimes similarly rely on counterparty status certifications to determine whether withholding is imposed, subject to such certification being invalid if the payor has “reason to know” the certifications are false. For example, under Treas. Reg. § 1.1441-7(b)(2), a withholding agent has “reason to know” that a claim of chapter 3 status is unreliable or incorrect if its knowledge of relevant facts or statements contained in the withholding certificate or other documentation is such that a “reasonably prudent person in the position of the withholding agent would question the chapter 3 claims made.”<sup>115</sup> The rules go on to provide situation-specific indicia of inaccuracy, including inaccurate information on the face of the certification or other clear contradictory indicia of status (such as a mailing address or phone number). Other rules in this regime appropriately limit the scope of review imposed on taxpayers to recently collected information.<sup>116</sup>

Similar rules, subject to similar limitations, could be applied to supplier certifications under section 7701(a)(52) in a manner that balances the need to assure taxpayer diligence with the need to provide taxpayers’ certainty in their reporting positions and related commercial arrangements.

### 30. Provide guidance addressing enforcement of section 6695B.

New section 6695B(a) imposes a penalty on a person if (i) the person provides a Clean Electricity MACR or Eligible Component MACR cost or source certification with respect to any manufactured product, eligible component, or constituent element, material, or subcomponent of an eligible component, (ii) the person knows, or reasonably should have known, that the certification would be used in connection with a credit determination, (iii) such person knows, or reasonably should have known, that such certification is inaccurate or false (without reasonable cause), and (iv) the inaccuracy or falsity resulted in the disallowance of an applicable credit and an understatement of income tax for the taxable year in an amount which exceeds the lesser of five percent of the tax required to be shown or \$100,000. The penalty is equal to the greater of 10 percent of the amount of the underpayment solely attributable to the inaccuracy or falsity or \$5,000.<sup>117</sup>

New section 6695B provides substantial additional comfort regarding the accuracy of Clean Electricity MACR or Eligible Component MACR cost and source certifications, but its enforceability seems uncertain with respect to non-U.S. persons with no connection to the United

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<sup>115</sup> Similar rules apply under the chapter 4 withholding regime. *See* Treas. Reg. § 1.1471-3(e).

<sup>116</sup> *See, e.g.*, Treas. Reg. §§ 1.1441-7(b)(3), 1.1471-3(e)(4)(vii).

<sup>117</sup> Section 6695B(b).

States beyond the sale of a product, component or mineral (potentially outside the United States) and the related customer certification. While we are not commenting on the enforceability of section 6695B, mere questions about its enforceability may raise concerns about the integrity of related certifications and taxpayers' ability to rely on them and may hamper the efficient administration of the Material Assistance rules. Moreover, it would seem that suppliers making accurate certifications and seeking access to U.S. buyers may be willing to subject themselves voluntarily to section 6695B. We recommend the IRS and Treasury consider guidance to allow suppliers to agree voluntarily to subject themselves to the section 6695B penalty; guidance under section 7701(a)(52) could even condition delivery of a valid certification on the supplier entering into such an agreement.

31. Provide appropriate transitional relief for any forthcoming guidance.

As noted in the foregoing suggestions, the PFE Rules contain numerous terms that could give rise to multiple reasonable interpretations of the statute. Until guidance is issued, taxpayers have been and will continue to be required to take positions based on these varying interpretations (including making expenditures, taking deliveries, and entering into binding legal agreements). In promulgating guidance, we urge the IRS and Treasury to provide taxpayers with transition or grandfathering rules that do not penalize taxpayers that have taken positions that, although potentially inconsistent with the eventual regulations, nonetheless represent reasonable, good faith efforts to apply the PFE Rules responsibly.