DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 10012]

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

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document sets forth final regulations that modify existing regulations to allow certain unincorporated organizations that are owned in whole or in part by applicable entities to be excluded from the application of partnership tax rules. These regulations affect unincorporated organizations and their members, including tax-exempt organizations, the District of Columbia, State and local governments, Indian Tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and certain agencies and instrumentalities. The final regulations also update certain outdated language in the existing regulations.

DATES:

Effective date: These regulations are effective on January 19, 2025.

Applicability date: For the date of applicability, see § 1.761–2(f).

FOR FURTHER INFORMATION CONTACT: Concerning these final regulations, contact Cameron Williamson at (202) 317–6684 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Authority

This document contains amendments to the Income Tax Regulations (26 CFR part 1) under section 761(a) of the Internal Revenue Code (Code) issued by the Secretary of the Treasury (Secretary) pursuant to the authority granted under sections 761(a), 6031(a), 6417(d) and (h), and 7805(a) of the Code (final regulations).

Section 761(a) provides, in part, an express grant of regulatory authority for section 761(a) stating, ''[u]nder regulations the Secretary may, at the election of all the members of an unincorporated organization, exclude such organization from the application of all or a part of this subchapter.''

Section 6031(a) provides an express grant of regulatory authority for the Secretary to prescribe in forms or regulations partnership reporting information required ''for the purpose of carrying out the provisions of subtitle A.''

Section 6417(d) provides several express delegations of authority to the Secretary to enforce requirements for elective payments of applicable credits under section 6417 and recapture excessive payments. Section 6417(h) provides an express delegation of authority with respect to elective payments under section 6417, stating, in part, that ''[t]he Secretary shall issue such regulations or other guidance as may be necessary to carry out the purposes of this section.''

Finally, section 7805(a) authorizes the Secretary to ''prescribe all needful rules and regulations for the enforcement of [the Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.''

Background

I. Elective Payment of Applicable Credits

Section 6417 was added to the Code by section 13801(a) of Public Law 117–169, 136 Stat. 1818, 2003 (August 16, 2022), commonly referred to as the Inflation Reduction Act of 2022 (IRA). Section 6417 allows an ''applicable entity'' (including tax-exempt organizations, the District of Columbia, State and local governments, Indian Tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and certain agencies and instrumentalities) to make an election to treat an ''applicable credit'' (as defined in section 6417(b)) determined with respect to such entity as making a payment by such entity against the tax imposed by subtitle A of the Code, for the taxable year with respect to which such credit is determined, equal to the amount of such credit. Section 6417 also provides special rules relating to partnerships and directs the Secretary to provide rules for making elections under section 6417. Section 13801(g) of the IRA provides that section 6417 applies to taxable years beginning after December 31, 2022.

On March 11, 2024, the Department of the Treasury (Treasury Department) and the IRS published in the **Federal Register** (88 FR 40528) final regulations (TD 9988) providing guidance on the section 6417 elective payment election (section 6417 regulations). Section 1.6417–2(a)(1)(iv) provides that partnerships are not applicable entities described in section 6417(d)(1)(A) or § 1.6417–1(c), regardless of how many of their partners are themselves applicable entities. Accordingly, any partnership making an elective payment election must be an electing taxpayer (as defined in § 1.6417–1(g)), and, as such, the only applicable credits with respect to which the partnership could make an elective payment election would be credits determined under sections 45Q, 45V, and 45X for the time periods allowed in section 6417(d). However, § 1.6417–2(a)(1)(iii) provides that if an applicable entity is a co-owner in an applicable credit property (as defined in § 1.6417–1(e)), through an organization that has made a valid election under section 761(a) (section 761(a) election) to be excluded from the application of the partnership tax rules of subchapter K of chapter 1 of the Code (subchapter K), then the applicable entity's undivided ownership share of the applicable credit property is treated as a separate applicable credit property owned by such applicable entity. As a result, the applicable entity may make an elective payment election for the applicable credit(s) determined with respect to such applicable credit property.

Also on March 11, 2024, the Treasury Department and the IRS published in the **Federal Register** (89 FR 17613) proposed amendments (REG–101552–24) to the regulations under section 761(a) to carry out the purposes of section 6417 (proposed regulations). Generally, the proposed regulations would have amended certain provisions of § 1.761–2 as in effect and contained in 26 CFR part 1 to provide that unincorporated organizations meeting certain requirements (applicable unincorporated organizations) are eligible for certain modifications (referred to in the proposed regulations as ''exceptions'') to the existing requirements for making a section 761(a) election. The provisions of the proposed regulations are explained in greater detail in the preamble to the proposed regulations.

Concurrently with the publication of these final regulations, the Treasury Department and the IRS are publishing in the Proposed Rules section of this edition of the **Federal Register** a notice of proposed rulemaking (REG–116017–24) proposing to further add to and revise the provisions of § 1.761–2 (November 2024 proposed regulations). The proposed revisions to the provisions of § 1.761–2 by the November 2024 proposed regulations are explained in greater detail in the preamble to the November 2024 proposed regulations.

II. Overview of Section 761(a) and Prior § 1.761–2(a)(3)

Section 761(a) provides, in part, that under regulations the Secretary may, at the election of all of the members of an unincorporated organization, exclude such organization from the application of all or part of subchapter K if the organization is availed of: (1) for investment purposes only and not for the active conduct of a business, (2) for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted, or (3) by dealers in securities for a short period for the purpose of underwriting, selling, or distributing a particular issue of securities, provided that the income of the members of the organization may be adequately determined without the computation of partnership taxable income.

As discussed in the preamble to the proposed regulations, unincorporated organizations seeking to be excluded from the application of subchapter K so that one or more of their members can make an election under section 6417 are likely to be availed of for the purposes listed in section 761(a)(2), that is, for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted. Pursuant to the authority in section 761(a), prior § 1.761–2(a)(3) provides additional requirements for an unincorporated organization to elect to be excluded from the application of subchapter K under section 761(a)(2). Specifically, prior § 1.761–2(a)(3) requires that the participants in the joint production, extraction, or use of property: (i) own the property as co-owners, either in fee or under lease or other form of contract granting exclusive operating rights (co-ownership requirement), (ii) reserve the right separately to take in kind or dispose of their shares of any property produced, extracted, or used (severance requirement), and (iii) do not jointly sell services or the property produced or extracted (joint marketing requirement), although each separate participant may delegate authority to sell the participant's share of the property produced or extracted for the time being for the participant's account, but not for a period of time in excess of the minimum needs of the industry, and in no event for more than one year (one-year exception). These additional regulatory requirements are hereinafter referred to as the ''existing regulatory requirements'' and, along with the previously discussed statutory requirements, are referred to herein as the ''existing requirements'' to be eligible to elect out of the application of subchapter K.

As discussed in the Summary of Comments and Explanation of Revisions, the proposed regulations would have modified some of the existing regulatory requirements for unincorporated organizations that meet certain requirements.

Summary of Comments and Explanation of Revisions

The Treasury Department and the IRS received 11 written comments in response to the proposed regulations. The comments are available for public inspection at *www.regulations.gov* or upon request. A public hearing on the proposed regulations was scheduled for May 20, 2024. There were no requests to speak at the scheduled public hearing. Consequently, the public hearing was cancelled. *See Election To Exclude Certain Unincorporated Organizations Owned by Applicable Entities From Application of the Rules on Partners and Partnerships; Hearing Cancellation,* 89 FR 43349 (May 17, 2024). After full consideration of the comments received, these final regulations adopt the proposed regulations with modifications in response to the comments described in this Summary of Comments and Explanation of Revisions. The provisions of § 1.761–2 as amended by the final regulations are referred to as ''revised § 1.761–2'' in this Summary of Comments and Explanation of Revisions.

Comments merely summarizing the statute or proposed regulations, recommending statutory revisions to section 761 or other statutes, addressing unrelated issues, or recommending changes to IRS forms or procedures are generally not addressed in this Summary of Comments and Explanation of Revisions or adopted in these final regulations. These comments included recommendations and questions regarding fact patterns specific to section 6417, the domestic content rules of section 45(b)(10), the credit for qualified commercial clean vehicles of section 45W, and the credit for alternative fuel vehicle refueling property of section 30C. While the Treasury Department and the IRS are studying some of those issues and intend to issue future guidance on those provisions, those recommendations and questions are unrelated to the purpose of these final regulations. Unless otherwise indicated in this Summary of Comments and Explanation of Revisions, provisions of the proposed regulations with respect to which no comments were received are adopted without substantive change.

I. Overview

Proposed § 1.761–2(a)(4)(ii) would have defined ''applicable unincorporated organizations'' as unincorporated organizations that meet several requirements. Proposed § 1.761–2(a)(4)(iii) would have modified the regulatory requirements in prior § 1.761–2(a)(3)(i) and (iii) for an applicable unincorporated organization that also met the regulatory requirements of prior § 1.761–2(b) and (e).

Part II of this Summary of Comments and Explanation of Revisions discusses comments received concerning the general effects of a section 761(a) election. Part III of this Summary of Comments and Explanation of Revisions discusses the comments received on the definition of an applicable unincorporated organization. Part IV of this Summary of Comments and Explanation of Revisions discusses the comments received on the modifications to the existing regulatory requirements. Part V of this Summary of Comments and Explanation of Revisions discusses the applicability date of these final regulations, the elimination of certain obsolete language, and certain administrative requirements that are under consideration for organizations taking advantage of the modifications to the existing regulatory requirements. Part VI of this Summary of Comments and Explanation of Revisions summarizes two comments not addressed in these final regulations.

II. Effects of an Election Under Section 761(a)

A. General

Subchapter K provides rules governing the taxation of partners and partnerships. When an unincorporated organization makes a valid section 761(a) election out of subchapter K, the rules of subchapter K no longer apply to that organization. As a result, for purposes of subchapter K, the unincorporated organization ceases to be a partnership and each member of the unincorporated organization is generally treated as a co-owner, that is, as directly owning its proportionate share of the organization's assets.

For example, an unincorporated organization that has made a valid section 761(a) election is not subject to section 704, which provides the rules for determining a partner's distributive share of a partnership's tax items. Instead, each member of an unincorporated organization that has made a valid section 761(a) election takes into account directly its ownership share of the organization's tax items. Accordingly, if an unincorporated organization with a valid section 761(a) election purchases depreciable property, an owner of a 30 percent interest in the organization may claim depreciation deductions as if it owned an undivided 30 percent interest in the organization's property (provided the owner is otherwise eligible for such deductions). That member cannot claim depreciation deductions beyond that member's ownership interest in the organization's property. Thus, any agreement among the members to specially allocate one member's depreciation deductions to another member would make the organization ineligible for a section 761(a) election.

One commenter asked for clarification of whether the following fact pattern is compatible with an election under section 761(a). A church (an applicable entity) forms a partnership with a nonprofit investor and a for-profit developer. The church contributes a site for energy property, which generates electricity and reduces the church's energy bill. The nonprofit investor makes grants and loans to the organization and is repaid by virtue of renewable energy credits or net metering from the clean energy property. The for-profit developer enters into a contract to maintain the system in exchange for a fee.

The facts described in the comment letter do not provide sufficient information to determine whether this situation is compatible with a section 761(a) election. If the investor receives all payments in its capacity as a lender and the for-profit developer receives its profits in its capacity as a third-party service provider, there might not be an unincorporated organization at all. If there is an unincorporated organization and it intends to make a section 761(a) election, each of its members must reserve the right separately to take in kind or dispose of their shares of any property produced, extracted, or used. If the investor or developer receives payments in excess of its pro rata ownership interests, this requirement will not be met. Moreover, if the contributions mentioned in this situation are intended to be non-recognition transfers for Federal income tax purposes, the contributing members would generally need to make such contributions under section 721(a), which is part of subchapter K. However, if a section 761(a) election is made, the organization is not subject to subchapter K, and thus, section 721(a) is inapplicable to transfers to the organization. Without section 721(a), the transfers would generally be taxable events.

One commenter asked how certain capital stacking combinations (including loans, forgivable loans, and grants) affect an organization's eligibility to make a section 761(a) election. To make a valid section 761(a) election, an unincorporated organization must comply with the requirements of section 761(a) and revised § 1.761–2. Provided that those requirements are met, the structure of an organization's capital stack would not appear to preclude it from making a valid section 761(a) election. Federal income tax law governs the treatment of these arrangements for purposes of determining whether an arrangement violates the requirements of section 761(a). For example, loans between members of the organization will be treated as debt to the extent they are treated as debt under Federal income tax law. Likewise, loans by a member to an organization would not be treated as a partnership liability under section 752, but a loan to each member of the organization in proportion to the member's ownership interest.

One commenter asked that applicable entities who are members in an applicable unincorporated organization that makes a 761(a) election be permitted to claim all applicable tax credit bonuses and adders. Bonus credit amounts, such as amounts for applicable credit properties located in energy communities, apply to property co-owned through an applicable unincorporated organization. The Treasury Department and the IRS have determined that no change to the final regulations is required to clarify this issue.

B. Effect of a Section 761(a) Election on Sections of the Code Outside of Subchapter K

One commenter requested a discussion of the effects of a section 761(a) election on provisions of the Code outside of subchapter K that reference partnerships, including section 6417. A detailed discussion of the effects of a section 761(a) election on provisions of the Code outside of subchapter K would require a careful examination of numerous provisions of the Code apart from those relevant to these final regulations and is not necessary for purposes of these final regulations. However, the application of a section 761(a) election to section 6417 is fundamental to the purpose of these final regulations, which is to carry out the purposes of section 6417 and thus, is addressed herein.

An organization with a valid section 761(a) election may be treated as a partnership for purposes of sections of the Code outside of subchapter K. In *Bryant* v. *Commissioner,* 46 T.C. 848 (1966), *aff'd,* 399 F.2d 800 (5th Cir. 1968), the Tax Court concluded that an organization that made a section 761(a) election was still a partnership for purposes of other parts of the Code, including the $50,000 investment tax credit limit on partnership assets provided by then section 48(c)(2)(D) of the Code. *See also Cokes* v. *Commissioner,* 91 T.C. 222 (1988) (section 761 election did not affect partnership status under the self-employment tax provisions of section 1402(a) of the Code); *Madison Gas and Electric Company* v. *Commissioner,* 72 T.C. 521 (1979), *aff'd,* 633 F.2d 512 (7th Cir. 1980) (notwithstanding a section 761 election, the startup costs of a joint venture were attributable to the partnership business and were not deductible under section 162(a) of the Code as the ordinary and necessary business expenses of the individual partners).

Though section 6417 is not in subchapter K, a section 761(a) election affects whether an entity is treated as a partnership for purposes of section 6417. Section 6417(h) provides that the Secretary shall issue such regulations or other guidance as may be necessary to carry out the purposes of section 6417. Pursuant to this broad authority, the Treasury Department and the IRS published § 1.6417–2(a)(1)(iii), which provides that if an applicable entity is a co-owner in an applicable credit property through an organization that has made a valid section 761(a) election, then the applicable entity's undivided ownership share of the applicable credit property will be treated as a separate applicable credit property owned by such applicable entity, and the applicable entity may make an elective payment election for the applicable credits determined with respect to such applicable credit property. This means that a section 761(a) election effectively causes an unincorporated organization not to be treated as a partnership for purposes of section 6417, including section 6417(c). Thus, the effect of a valid section 761(a) election for purposes of section 6417 is that each member of the organization is treated as directly owning its proportionate share of the applicable credit property. As a result, each applicable entity member of the organization may make an elective payment election (or, if not an applicable entity member, a transfer election under section 6418) with respect to its proportionate share of the applicable credit property.

Another commenter requested confirmation that a Tribal Energy Development Organization that makes a section 761(a) election is not a partnership for purposes of sections 168(h)(5) and (6) and 50(b)(3).

Section 168(h) describes tax-exempt use property (generally, certain property leased to a tax-exempt entity), the cost recovery of which is subject to special rules. Section 168(h)(5) generally provides that the determination of whether property leased to a partnership is tax-exempt use property shall be made by treating each tax-exempt entity partner's proportionate share as being leased to such partner. Section 168(h)(6) generally provides that, if any property which is not tax-exempt use property is owned by a partnership that has as partners both a tax-exempt entity and a person who is not a tax-exempt entity, an amount equal to such tax-exempt entity's proportionate share of such property is treated as tax-exempt use property. This rule applies only if any allocation to the tax-exempt entity of partnership items is not a ''qualified allocation,'' which (i) is consistent with such entity's being allocated the same distributive share of each item of income, gain, loss, deduction, credit, and basis and such share remains the same during the entire period the entity is a partner in the partnership, and (ii) has substantial economic effect within the meaning of section 704(b)(2). *See* section 168(h)(6)(B). Section 50(b)(3) and (4) preclude certain property used by tax-exempt organizations, governmental entities, and foreign persons from qualifying for an investment tax credit. For these purposes, section 50(b)(4)(D) provides that rules similar to those in section 168(h)(5) and (6) apply.

The existence of a partnership for purposes of these sections does not change the amount of depreciation deductions attributable to each member of an unincorporated organization that has validly made a section 761(a) election. A valid section 761(a) election requires the shares of property leased to or owned by an organization to be treated as leased to or owned by the members of the organization in proportion to their shares of the organization. This is how partnership property would be treated under section 168(h)(5) and would cause all allocations to the partners to be treated as ''qualified allocations'' for purposes of section 168(h)(6). Similarly, the IRS has determined in other areas of the law that co-owners of property may make independent elections with respect to deductions affecting their taxable income. *See* Rev. Rul. 83–129, 1983–2 C.B. 105, in which the IRS ruled that the co-owners of mineral leases that make a section 761(a) election may independently elect to deduct or capitalize their shares of mining development costs under section 616 of the Code; *see also* Rev. Rul. 81–261, 1981–2 C.B. 60, where the IRS noted that if a partnership makes a section 761(a) election, each partner is deemed to own directly its proportionate share of the partnership property for purposes of computing depreciation. Moreover, in the case of an applicable entity that makes an election under section 6417(a), section 6417(d)(2)(A) provides that applicable credits are determined without regard to section 50(b)(3) and (4)(A)(i).

III. Applicable Unincorporated Organizations

A. Applicable Entity Owner

Proposed § 1.761–2(a)(4)(ii)(A) would have required an applicable unincorporated organization to be owned, in whole or in part, by one or more applicable entities, as defined in section 6417(d)(1)(A) and § 1.6417–1(c). The Treasury Department and the IRS received no comments related to this section and adopt the proposed language without changes.

B. Joint Operating Agreements

Proposed § 1.761–2(a)(4)(ii)(B) would have provided that an applicable unincorporated organization must be an organization the members of which enter into a joint operating agreement (JOA) in which the members reserve the right separately to take in kind or dispose of their pro rata shares of the electricity produced, extracted, or used, and any associated renewable energy credits or similar credits. Proposed § 1.761–2(a)(4)(ii)(C) would also have provided, in part, that an applicable unincorporated organization must be organized pursuant to a JOA.

1. General

Commenters requested more information about the types of JOAs required by these provisions. Some commenters requested examples of permissible JOAs, and another commenter requested identification of any JOA provisions that would ''create issues'' for a JOA. One commenter asked whether JOAs that satisfy the requirements of § 1.761–2(a)(3) would also satisfy the requirements of proposed § 1.761–2(a)(4)(ii)(B) and (C) and requested that any specific rules applicable to JOAs solely for purposes of the proposed regulations apply prospectively so as to avoid any uncertainty with respect to existing JOAs.

As used in the proposed regulations, the term ''joint operating agreement'' is intended to refer to agreements similar to those used by organizations that made an election under section 761(a) prior to the proposed regulations. Such agreements typically provide the terms by which the members of the unincorporated organization will meet the existing requirements to make a section 761(a) election. JOAs should continue to serve this purpose under the final regulations, regardless of whether an applicable unincorporated organization holds its property in an entity organized under local law. Accordingly, as a general matter, a JOA that satisfies the requirements of revised § 1.761–2(a)(1) and (3) will satisfy the requirements in revised § 1.761–2(a)(4)(ii)(B) and (C), provided that the organization to which that JOA applies satisfies the existing regulatory requirements, as modified by revised § 1.761–2(a)(4)(iii), if applicable. Because the final regulations do not change the rules currently applicable to JOAs, these final regulations do not need to make such rules apply prospectively. For the same reason, further clarification of the JOA requirements is unnecessary.

2. Right to Pro Rata Share

Commenters requested clarification of how credits and ownership interests would be allocated when members of an unincorporated organization reserve the right separately to take in kind or dispose of their pro rata shares of the electricity produced, extracted, or used, and any associated renewable energy credits or similar credits.

Pursuant to proposed § 1.761–2(a)(4)(ii)(B), each member of an applicable unincorporated organization would have been required to reserve the right separately to take in kind or dispose of their pro rata shares of any property produced, extracted, or used, and any associated renewable energy credits or similar credits. The determination of each member's ownership interest of an unincorporated organization (and, accordingly, each member's proportionate share of property produced, extracted, or used) must be made by the members and based on their ownership interests in the same manner as if they were co-owners in the underlying properties.

To illustrate, a co-owner of 40 percent of an unincorporated organization that has made a section 761(a) election must reserve the right separately to take in kind or dispose of its 40 percent pro rata share of the property produced, extracted, or used by the co-owners. This is true even when the members of an applicable unincorporated organization own property through an entity, as permitted by revised § 1.761–2(a)(4)(iii)(A). Example 1 has been added in revised § 1.761–2(a)(5)(i) to illustrate the general rule.

One commenter requested clarification that renewable energy certificates (RECs) produced through the generation of clean energy qualify as ''similar credits'' for these purposes. The Treasury Department and the IRS clarify that RECs are included as ''renewable energy credits or similar credits'' pursuant to revised § 1.761–2(a)(4)(ii)(B) and thus, each member of an unincorporated organization must reserve the right separately to take in kind or dispose of their pro rata shares of any RECs generated as a result of the organization's activities.

3. Joint Marketing

Some commenters asked whether specific JOA provisions or activities would violate requirements that apply to applicable unincorporated organizations, including that the organization's members do not jointly sell services or property produced or extracted. One commenter asked whether appointing a manager, creating an ownership committee, having expense-sharing agreements or incurring project-level debt would violate the existing requirements to make a section 761(a) election. Another commenter requested clarification that a managing member or general partner-equivalent (presumably, if the unincorporated organization takes advantage of the modification in proposed § 1.761–2(a)(4)(iii)(A)) can conduct normal project management functions for an unincorporated organization without violating the joint marketing requirement. That commenter requested, in the alternative, a ''roadmap'' setting forth how a managing member or general partner can comply with the joint marketing requirement in a practical manner. The same commenter also requested allowing representatives of an unincorporated organization to perform pre-filing and other ministerial services on behalf of the entities jointly owning applicable credit property.

An applicable unincorporated organization must meet all applicable requirements, including the existing requirements with the modifications contained in these final regulations, to elect out of subchapter K under section 761(a) and to maintain a section 761(a) election. Generally, the members of an unincorporated organization are permitted to have a representative handle management and ministerial duties typical of a managing member of a limited liability company (LLC) or general partner of a limited partnership without violating these requirements. The Treasury Department and the IRS understand that representatives with such duties may be required by local law for entities that may hold the organization's property under § 1.761–2(a)(4)(iii)(A) of these final regulations. These final regulations, however, do not provide a ''roadmap'' for permissible arrangements or rights and duties of such representatives as the list would not be exhaustive and could cause unintentional inferences to be drawn.

One commenter proposed allowing an applicable entity to direct some or all of its elective payments of applicable credit amounts under section 6417 to a separate account jointly owned by the applicable entity and other members of an applicable unincorporated organization to pay expenses directly related to the underlying applicable credit property's co-ownership. The commenter suggested applying rules similar to those applicable to assignments of payments under section 1603 (regarding grants for specified energy properties in lieu of tax credits) of the American Recovery and Reinvestment Act of 2009, Public Law 111–5, 123 Stat. 115 (2009), including that each payment be assigned to a bank or other financing institution, that the assignment cover all amounts payable and not be subject to further assignment (except that any assignment may be made to one party acting as an agent or trustee for the co-owners), and that the assignee file a Notice of Assignment.

As already discussed, § 1.6417–2(a)(1)(iii) provides that if an applicable entity is a co-owner in an applicable credit property through an organization that has made a valid section 761(a) election, then the applicable entity's undivided ownership share of the applicable credit property will be treated as a separate applicable credit property owned by such applicable entity, and the applicable entity may make an election under section 6417(a) for the applicable credits determined with respect to such applicable credit property. When an applicable entity makes an election under section 6417(a), such entity is treated as making a payment against the tax imposed by subtitle A of the Code. If this payment causes the entity to have an ''overpayment'' of tax in a taxable year, section 6402(a) generally provides that the entity may receive a refund equal to the amount of the overpayment over the entity's tax liability. This refund must be made to the person who made the overpayment (*i.e.,* the applicable entity). If that applicable member is a partnership or S corporation, section 6417(c)(1)(A) specifies that the payment for such election is made to the partnership or S corporation that made the section 6417(a) election. Accordingly, similar to the general rule under section 6417(a), refunds or payments under section 6417(c) generally cannot be paid to accounts in the name of someone other than the entity making the election. A valid section 761(a) election does not affect the application of this general rule and, therefore, these final regulations do not adopt the commenter's proposal.

C. Purpose of Organization

Proposed § 1.761–2(a)(4)(ii)(C) would have provided that an organization is an applicable unincorporated organization if it ''is organized exclusively to produce electricity from its applicable credit property (as defined in § 1.6417–1(e)) and with respect to which one or more applicable credits listed in section 6417(b)(2), (4), (8), (10), and (12) is determined.'' The scope of this rule was intended to remove certain impediments for these types of applicable unincorporated organizations that would otherwise comply with existing requirements. The Treasury Department and the IRS sought comments on the scope and requirements of the proposed regulations, including whether modifications similar to those in proposed § 1.761–2(a)(4)(iii) are needed for applicable entities that own applicable credit properties that do not produce electricity.

Commenters generally recommended that the modifications in proposed § 1.761–2(a)(4)(iii) are also needed for organizations organized to own applicable credit property with respect to which any other applicable credit listed in section 6417(b) is determined. Some commenters requested clarity that certain facilities, especially battery storage facilities, ''produce electricity'' for purposes of the definition of an applicable unincorporated organization. One commenter asserted that the ''non-generative'' credits from section 6417(b) that were not included in proposed § 1.761–2(a)(4)(ii)(C) could be claimed by organizations ''availed of . . . for the joint . . . use of property'' and that such organizations should therefore be permitted to make a section 761(a) election if other existing requirements are met. The same commenter requested clarification that certain activities with respect to applicable credits, including time-limited delegations of relevant powers, would not violate the existing requirements to make a section 761(a) election. Another commenter asked for clarification that common, non-electricity revenue streams related to jointly owned projects, such as revenues from the sale of capacity and ancillary services, do not violate the requirement that an organization must be organized exclusively to produce electricity.

The Treasury Department and the IRS agree that organizations formed to own applicable credit property with respect to which any applicable credits (including non-generative credits) are determined should be permitted to apply the modifications to the existing section 761(a) rules contained in the proposed regulations. Section 761(a)(2) refers to organizations availed of ''for the joint production, extraction, or use of property,'' which is not limited to activities that produce electricity. Accordingly, pursuant to the authority in sections 761(a) and 6417(h), the final regulations revise the definition of an applicable unincorporated organization to include organizations organized exclusively to own and operate applicable credit property (as defined in § 1.6417–1(e)). The adoption in the final regulations of this definition of applicable unincorporated organization should not be read to imply that any particular factual arrangement permits a valid section 761(a) election. To make a valid section 761(a) election, an unincorporated organization, including an applicable unincorporated organization, must meet all the requirements of section 761(a) and the regulations thereunder.

D. Section 6417 Election

Proposed § 1.761–2(a)(4)(ii)(D) would have provided that an unincorporated organization is an applicable unincorporated organization only if one or more of its applicable entity members will make an elective payment election under section 6417(a) for the applicable credits determined with respect to its share of the applicable credit property.

One commenter recommended extending the modifications in proposed § 1.761–2(a)(4)(iii) to organizations for which no applicable entity member will make an election under section 6417. These final regulations are of limited scope and are promulgated, in part, pursuant to the authority in section 6417(h) to carry out the purposes of section 6417 by facilitating joint-ownership arrangements of applicable credit property by applicable entities. These final regulations do not adopt this commenter's recommendation because it is not necessary for purposes of these final regulations.

E. Other Requirements

Proposed § 1.761–2(a)(4)(ii) would have provided that an applicable unincorporated organization is an unincorporated organization described in prior § 1.761–2(a)(1) that meets the requirements of proposed § 1.761–2(a)(4)(ii)(A) through (D). The reference to prior § 1.761–2(a)(1) was intended to emphasize the statutory requirements under section 761(a) and prior § 1.761–2(a)(1) that: (1) the members of the unincorporated organization must be able to compute their income without the necessity of computing partnership income, and (2) the unincorporated organization must not be a syndicate, group, pool, or joint venture which is classifiable as an association, or operate under an agreement which creates an organization classifiable as an association. For clarity, the final regulations remove the reference to prior § 1.761–2(a)(1) in proposed § 1.761–2(a)(4)(ii) and include the requirements of prior § 1.761–2(a)(1) as revised § 1.761–2(a)(4)(ii)(E) and (F). In the final regulations, therefore, an applicable unincorporated organization is an unincorporated organization that meets the requirements of revised § 1.761–2(a)(4)(ii)(A) through (F).

One commenter requested that a Tribal Energy Development Organization (TEDO) be permitted to make an elective payment election regardless of its partnership status and be permitted to make special allocations. A TEDO that is formed as a partnership and meets the requirements may make a 761(a) election. Section 761 does not apply, however, to entities formed as corporations. In addition, special allocations are inconsistent with a section 761(a) election, which is available under the statute only to organizations that satisfy the severance requirement and the members of which can compute their income without the necessity of computing partnership taxable income. Accordingly, the final regulations do not adopt these requested changes.

Another commenter requested clarity about the eligibility of a ''partnership flip'' structure to make a section 761(a) election. Generally, these structures involve allocations of income, gains, losses, deductions, or credits that change at some point after the partnership has been formed. In the commenter's proposed structure, a taxable member of an unincorporated organization does not control the organization but owns a profits interest in the organization that allows the member to earn preferred returns over the course of its investment. The commenter suggested that this type of member should be permitted to individually elect out of partnership tax treatment under subchapter K, and then elect back into partnership treatment under subchapter K after it has recouped its investment.

Partnership flip structures, such as the one described by the commenter, violate the existing statutory requirements for electing out of subchapter K, even as modified by proposed § 1.761–2(a)(4)(iii). This is because such structures provide members with disproportionate amounts of income, gains, losses, deductions, or credits and thereby require an unincorporated organization to compute partnership taxable income to determine each member's share of the organization's income. These arrangements are also incompatible with the severance requirement, under which members must reserve the right separately to take in kind or dispose of their shares of any property produced, extracted, or used because members do not have a determinate ''share'' of the applicable credit property. For these reasons, the Treasury Department and the IRS clarify that partnership flip structures are not eligible to make a section 761(a) election.

IV. Specified Modifications for Applicable Unincorporated Organizations

A. Modified Co-Ownership Requirement

For applicable unincorporated organizations, proposed § 1.761–2(a)(4)(iii)(A) would have modified the co-ownership requirement such that the participants in the applicable unincorporated organization would be permitted to own applicable credit property through an unincorporated organization that is a legal entity, other than one treated as a corporation under any provision of the Code (modified co-ownership requirement).

One commenter requested confirmation whether the following situation is compatible with an election under section 761(a). A tax-exempt entity forms an LLC to raise money and serve as a special purpose vehicle to own and operate a clean energy project. The tax-exempt entity then sells equity securities in the LLC to investors. Prior to submitting the pre-filing registration with the IRS, the LLC makes an election under section 761(a). The tax-exempt entity or operator then decides if, and when, investors should be paid dividends based on their fractional ownership.

This situation is inconsistent with the modified co-ownership requirement. Organizations that have made a section 761(a) election do not pay dividends for Federal income tax purposes. Because each member of such organization is generally treated as directly owning its proportionate share of the organization's assets, each member is entitled to payments or credits with respect to the member's share of property produced, extracted, or used, regardless of whether any other member would have approved the distribution of such amounts.

B. Joint Marketing Modification and Agent Delegation Rule

For applicable unincorporated organizations, proposed § 1.761–2(a)(4)(iii)(B) would have modified the joint marketing requirement in prior § 1.761–2(a)(3)(iii) to provide that a delegation of authority to sell the participant's share of the property produced may allow the delegee to enter into contracts the duration of which exceeds the minimum needs of the industry and may be for longer than one year (the joint marketing modification), provided that the delegation of authority to act on behalf of the participant may not be for a period of time that exceeds the minimum needs of the industry, and in no event for more than one year (the agent delegation rule). Proposed § 1.761–2(a)(4)(vi) would have provided an example illustrating this modification to the existing regulatory requirements, in which each member of an unincorporated organization grants to the same agent a one-year delegation (not exceeding the minimum needs of the industry) of the member's authority to sell the member's share of electricity produced by the organization. The agent commits each member to a 15-year power purchase agreement (PPA). Because the delegation of authority is for a period no longer than one year, the requirements of proposed § 1.761–2(a)(4)(iii)(B) are met.

Commenters requested clarification on several issues relating to the joint marketing modification. Some commenters asked whether two or more members of an applicable unincorporated organization that has made a section 761(a) election may sell their share of the organization's output in the same contract. Some commenters also asked whether the 15-year period for the contract in the example is intended to serve as a safe harbor or limitation on the duration of such agreements.

Provided that the agent delegation rule and all other requirements under section 761(a) are satisfied, the joint marketing modification allows members of an applicable unincorporated organization to enter into contracts of any duration. Multiple members of the same applicable unincorporated organization may be party to the same contract. Members can also choose to sell their shares without a multi-year contract. The example merely illustrates the joint marketing modification and is not intended to be a safe harbor. No clarification is required to the joint marketing modification in the final regulations.

Commenters also requested clarification of the agent delegation rule. One commenter asked whether an agent would be subject to the rule if it was an Indian Tribal government or other applicable entity. Some commenters suggested eliminating the one-year limitation on agent delegations or allowing agent delegations to automatically renew after each year. One commenter suggested that certain organizations would need to sell their output into an organized market rather than pursuant to a fixed PPA. In this situation, according to the commenter, authority to sell the output for each applicable entity may need to be pursuant to an agreement that automatically renews annually. Another commenter suggested that the one-year limitation on agent delegations will harm applicable entities without technical expertise because non-applicable entities with their own expertise will not require an agent and could be able to take advantage of an applicable entity that is only able to use an agent for one year. Another commenter asked for clarification that a member of an unincorporated organization may delegate powers to an agent without limitation as long as no other member makes such a delegation.

The purpose of the agent delegation rule is to fulfill the statutory requirement in section 761(a)(2) that no organization making a section 761(a) election is formed ''for the purpose of selling services or property produced or extracted.'' This is a prohibition on joint marketing; accordingly, any member of an unincorporated organization may have an agent for any duration of time, provided that the agent does not represent more than one member of the applicable unincorporated organization. The agent delegation rule applies to any person or group of people acting on behalf of more than one member of an unincorporated organization, regardless of their status as an applicable entity.

The longstanding one-year exception to the joint marketing requirement in the existing regulations reflects a balancing of the statutory language with commercial necessities, and the proposed regulations reflected a similar balancing. Section 761(a)(2) does not permit an electing organization to conduct sales through an agent with indefinite authority on behalf of multiple members. Such a structure is necessarily ''availed of . . . for the purpose of selling services or property produced or extracted'' and is not eligible to elect out of subchapter K. These final regulations, therefore, do not adopt the suggestions to eliminate the agent delegation rule or allow agent delegations to automatically renew. However, in any given year, an agent may be delegated authority on terms identical to those in a past year, provided that the delegation of authority to act is not for a period of time that exceeds the minimum needs of the industry and each member delegating authority to that agent consents to those terms in writing at least once per year. Example 3 has been added in revised § 1.761–2(a)(5)(iii) to illustrate this rule.

One commenter requested that the phrase ''minimum needs of the industry'' be either clarified or deleted. That phrase is intended to be fact-sensitive; like the rest of the joint marketing requirement, the phrase is intended to balance statutory requirements with commercial necessities. These final regulations, therefore, do not adopt the commenter's request to clarify or eliminate it.

C. Specific Examples

Several commenters generally asked for more examples showing applications of the proposed regulations. In response, the Treasury Department and the IRS have added two examples to the final regulations.

V. Additional Information

A. Applicability Date

Except as provided in § 1.761–2(d), these final regulations apply to taxable years ending on or after March 11, 2024, the date on which the proposed regulations were published in the **Federal Register**. An applicable unincorporated organization that validly made a section 761(a) election meeting the requirements of these final regulations for a taxable year ending on or after March 11, 2024, will be treated as having made a valid section 761(a) election even if the election was made prior to the publication of these final regulations in the **Federal Register**.

B. Administrative Requirements

The preamble to the proposed regulations noted that the Treasury Department and the IRS were considering certain rules to prevent abuse of the modifications in proposed § 1.761–2(a)(4)(iii). One rule described in the preamble to the proposed regulations would have prevented the deemed election rules in prior § 1.761–2(b)(2)(ii) from applying to any unincorporated organization relying on a modification in proposed § 1.761–2(a)(4)(iii). One commenter recommended against adopting such a rule, which the commenter believed would be inconsistent with the goals of the proposed regulations and increase the likelihood of inadvertent disallowances of section 761(a) elections in non-abusive situations.

Although these final regulations do not adopt any rules regarding deemed elections, more administrative guidance is needed under section 761(a) to fulfill the purposes of section 6417. As a result, concurrently with the publication of these final regulations, the Treasury Department and the IRS are publishing in the Proposed Rules section of this edition of the **Federal Register** the November 2024 proposed regulations under section 761(a) (REG–116017–24), which would provide rules affecting the validity of elections under section 761(a) by applicable unincorporated organizations whose elections would not have been valid without the application of revised § 1.761–2(a)(4)(iii).

C. Obsolete Language

Section 1.761–2(b)(3)(i) provides, in part, that an application for permission to revoke a section 761(a) election must be submitted to the Commissioner of Internal Revenue, Attention: T:I, Washington, DC 20224, no later than 30 days after the beginning of the first taxable year to which the revocation is to apply. This language no longer reflects the correct procedure for obtaining permission to revoke a section 761(a) election and is therefore eliminated by these final regulations. The November 2024 proposed regulations would instead provide that such an application must be made by submitting a letter ruling request that complies with the requirements of Rev. Proc. 2024–1 or successor guidance. Section 1.761–2(b)(3)(i) also provides, in part, that a section 761(a) will be effective unless a member of the organization sends proper notice to the Commissioner ''within 90 days after the formation of the organization (or by October 15, 1956, whichever is later) . . .''. The final regulations would strike the parenthetical language to update and streamline the paragraph.

VI. Comments That Are Not Addressed in These Final Regulations

Two comments received were related to section 761 but outside the scope of these final regulations. These comments are summarized in this Part VI.

A. Implementation

One commenter asked for clarification of how audits of joint structures would take place, including by identifying the specific parts of Treasury and the IRS involved in such audits and the standard of review for such audits. Another commenter requested the development of educational materials, ''office hours,'' and other guidance to improve understanding of the regulations and uptake of applicable credits. Another commenter requested that the Treasury Department and the IRS provide clear rules for the pre-registration filing process for applicable credit property co-owned by taxpayers making transferability elections. These final regulations do not provide information about audit procedures or the development of further guidance, but the Treasury Department and the IRS will continue to monitor the elective payment process to determine whether there are areas in which more efficiencies can be created.

B. Tribal Organizations

One commenter noted that wholly owned Tribal corporations appear to be incapable of making an election under section 761(a) because such entities are corporations for Federal tax purposes. The treatment of entities wholly owned by Tribal governments is addressed by a separate rulemaking and is therefore outside the scope of these final regulations. For information on how to provide comments in response to that separate rulemaking, see the notice of proposed rulemaking (REG–113628–21), *Entities Wholly Owned by Indian Tribal Governments,* published in the **Federal Register** (89 FR 81871) on October 9, 2024.

Special Analyses

I. Regulatory Planning and Review

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

II. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) generally requires that a federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

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

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

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

III. Regulatory Flexibility Act

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

These final regulations would affect unincorporated organizations that elect out of subchapter K in connection with an election under section 6417, as well as the members of such organizations.

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

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

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

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

For the reasons stated, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

Pursuant to section 7805(f), the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandate Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of $100 million (updated annually for inflation). These final regulations do not include any Federal mandate that may result in expenditures by State, local, or Tribal governments or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These final regulations do not have federalism implications and do not impose substantial, direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

VI. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) prohibits an agency from publishing any rule that has Tribal implications if the rule either imposes substantial direct compliance costs on Indian Tribal governments, and is not required by statute, or preempts Tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive order. These final rules do not have substantial direct effects on one or more federally recognized Indian tribes and do not impose substantial direct compliance costs on Indian Tribal governments within the meaning of the Executive order.

Nevertheless, on April 5, 2024, the Treasury Department and the IRS held a consultation with Tribal leaders requesting assistance in addressing questions related to the section 761(a) proposed rules published on March 11, 2024, which informed the development of these final regulations.

VII. Executive Order 14112: Reforming Federal Funding and Support for Tribal Nations To Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination

Executive Order 14112 (Reforming Federal Funding and Support for Tribal Nations to Better Embrace Our Trust Responsibilities and Promote the Next Era of Tribal Self-Determination) reaffirms the executive branch's support for Tribal self-determination as the most effective policy for the economic growth of Tribal Nations and the economic well-being of Tribal citizens. Executive Order 14112 requires agency heads to take certain actions, consistent with applicable law and to the extent practicable, to increase access to ''Federal funding and support programs for Tribal Nations''; provide Tribal Nations with the flexibility to improve economic growth and address the specific needs of their communities; and reduce administrative burdens. Section 2(b) of the Executive order defines ''Federal funding and support programs for Tribal Nations'' as including ''funding, programs, technical assistance, loans, grants, or other financial support or direct services that the Federal Government provides to Tribal Nations or Indians because of their status as Indians.'' As section 1 of the Executive order explains, ''As we continue to support Tribal Nations, we must respect their sovereignty by better ensuring that they are able to make their own decisions about where and how to meet the needs of their communities. No less than for any other sovereign, Tribal self-governance is about the fundamental right of a people to determine their own destiny and to prosper and flourish on their own terms.'' These commitments build on a recognition of principles of sovereignty, sovereign immunity, and self-governance that have been repeatedly reaffirmed by the Supreme Court. *See, e.g., Three Affiliated Tribes of the Fort Berthold Reservation* v. *Wold Engineering, P.C., et al.,* 476 U.S. 877, 890–91 (1986); *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505, 510 (1991). The Treasury Tribal Advisory Committee has advised that Tribes consider ''financial support'' in Executive Order 14112 to include tax matters that range from tax credits to Federal tax rules that regulate Tribal revenue.

Consistent with Executive Order 14112, the Treasury Department and the IRS recognize the importance of protecting and supporting Tribal sovereignty and self-determination. These final regulations would further Tribal self-determination and self-governance and reduce administrative burdens by providing Tribes the ability to directly make section 6417 elections for applicable credit property held through applicable unincorporated organizations provided all applicable statutory and regulatory requirements are satisfied.

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as a ''major rule,'' as defined by 5 U.S.C. 804(2).

Statement of Availability of IRS Documents

IRS notices and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov.*

Drafting Information

The principal author of these final regulations is Cameron Williamson. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendments to the Regulations

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

PART 1—INCOME TAXES

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

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

* * * * *

Section 1.761–2 also issued under 26 U.S.C. 446(b), 761(a), 6031(a), 6417(d), and 6417(h).

* * * * *

■ **Par. 2.** Section 1.761–2 is amended by:

■ a. Revising and republishing paragraphs (a)(1), (a)(2)(i), and (a)(3)(i);

■ b. Adding paragraphs (a)(4) and (5);

■ c. Revising and republishing paragraphs (b)(1) and (2), (b)(3)(i), (c), and (e); and

■ d. Adding paragraph (f).

The revisions and additions read as follows:

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

(a) * * *

(1) *In general.* Under the conditions set forth in this section, an unincorporated organization described in paragraph (a)(2) or (3) of this section (taking into account paragraph (a)(4) of this section, as applicable) may be excluded from the application of all or a part of the provisions of subchapter K of chapter 1 of the Internal Revenue Code (subchapter K). Such organization must be availed of for investment purposes only and not for the active conduct of a business, or for the joint production, extraction, or use of property, but not for the purpose of selling services or property produced or extracted. The members of such organization must be able to compute their income without the necessity of computing partnership taxable income. Any syndicate, group, pool, or joint venture which is treated as a corporation for Federal tax purposes does not fall within the provisions in this paragraph (a)(1).

(2) * * *

(i) Own the property as co-owners;

* * * * *

(3) * * *

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

* * * * *

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

(ii) *Applicable unincorporated organization.* For purposes of this section, an *applicable unincorporated organization* is an unincorporated organization:

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

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

(C) That, pursuant to the joint operating agreement, is organized exclusively to own and operate applicable credit property (as defined in § 1.6417–1(e));

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

(E) The members of which are able to compute their income without the necessity of computing partnership taxable income; and

(F) Which is not a syndicate, group, pool, or joint venture which is classifiable as an association, or any group operating under an agreement which creates an organization classifiable as an association.

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

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

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

(5) *Examples.* The following examples are intended to illustrate the principles of this section.

(i) *Example 1*—(A) *Facts.* G and H enter into a joint operating agreement to own and operate a facility that will produce solar energy. G, an applicable entity, is entitled under the joint operating agreement to take in kind or dispose of 40% of the energy produced by the unincorporated organization and H, which is not an applicable entity, is entitled to the remaining 60%. G and H form LLC, a limited liability company, to hold the solar energy property that G and H intend to operate pursuant to the joint operating agreement. In accordance with the joint operating agreement, G owns a 40% ownership interest in LLC and H owns the remaining 60% ownership interest. G will sell its share of energy produced by the facility in a manner designed to generate applicable credits under section 45(a) and will make an election under section 6417(a) with respect thereto. LLC makes a valid election under section 761(a) to be excluded from subchapter K.

(B) *Analysis.* G will be entitled to any credits under section 45(a) generated by its sale of energy produced by LLC that G has the right to take in kind or dispose of (which, under the joint operating agreement, is 40% of the energy produced by LLC). Assuming all other requirements are met, G will be able to make an elective payment election under section 6417 for the applicable credits determined with respect to its ownership share of the solar energy property.

(ii) *Example 2*—(A) *Facts.* T is an Indian Tribal government as defined in § 1.6417–1(c) and an applicable entity. Through a limited liability company organized under T's Tribal law (TLLC), T and Y own and operate applicable credit property that will generate electricity the sale of which will generate applicable credits under section 45(a). TLLC is not treated as an association taxable as a corporation for Federal tax purposes and no election under § 301.7701–3 of this chapter has been made to treat TLLC as such. T and Y enter into a joint operating agreement with respect to the ownership and operation of the applicable credit property in which each of T and Y reserve the right separately to take in kind or dispose of their pro rata shares of property produced, extracted, or used and any associated renewable energy credits or similar credits. TLLC is formed exclusively to own and operate an applicable credit property with respect to which section 45(a) credits will be determined. On January 1st of year 1, T and Y enter into delegation agreements with Q that delegate T's and Y's authority to Q to sell the electricity generated by T's and Y's shares of the applicable credit property. The term of the delegation agreements is one year, which does not exceed the minimum needs of the industry. On June 1st of year 1, Q enters into a power purchase agreement with Utility on T's and Y's behalf that commits T and Y to sell the electricity produced from their shares of the applicable credit property to Utility for a term of 15 years. At the end of the day on December 31st of year 1, the delegation agreements terminate.

(B) *Analysis.* Because T and Y did not delegate authority for a period of more than one year to sell the output from their shares of the applicable credit property, the requirements of paragraph (a)(3)(iii) of this section (as modified by paragraph (a)(4)(iii)(B) of this section) are met. Assuming that TLLC otherwise qualifies as an applicable unincorporated organization, TLLC is an organization described in paragraph (a)(4)(iii)(A) of this section and can make an election under paragraphs (b) and (e) of this section to be excluded from the application of all of subchapter K under section 761(a). As such, T can make an elective payment election for the applicable credits determined with respect to its share of the applicable credit property held by TLLC, assuming the requirements of section 6417 are otherwise met. The analysis in this example would be the same whether Y is also an Indian Tribal government, another applicable entity, or some other person.

(iii) *Example 3*—(A) *Facts.* The facts are the same as in paragraph (a)(5)(ii)(A) of this section (*Example 2*), except that at the end of the day on December 31, T and Y each agree, in writing, to a new agent delegation agreement with Q with substantively identical terms as the agent delegation agreement in effect during year 1.

(B) *Analysis.* Because each of T and Y have agreed, in writing, to engage Q in an agency relationship lasting no longer than one year, the results are the same as in paragraph (a)(5)(ii)(B) of this section (*Example 2*). In contrast, if the agent delegation agreement renewed automatically, T and Y have effectively entered into an agent delegation agreement lasting longer than one year and have violated the requirements of paragraph (a)(4)(iii)(B) of this section. In that case, TLLC would not be eligible to make or maintain an election under section 761(a). As such, T could not make an elective payment election for the applicable credits determined with respect to its share of the applicable credit property held through TLLC.

(b) * * *

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

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

(ii) *Deemed election rule.* If an unincorporated organization described in paragraph (a)(1) of this section and either paragraph (a)(2) or (3) of this section (taking into account paragraph (a)(4) of this section, as applicable) does not make the election provided in section 761(a) in the manner prescribed by paragraph (b)(2)(i) of this section, it will nevertheless be deemed to have made the election if it can be shown from all the surrounding facts and circumstances that it was the intention of the members of such organization at the time of its formation to secure exclusion from all of subchapter K beginning with the first taxable year of the organization. Although the following facts are not exclusive, either one of such facts may indicate the requisite intent:

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

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

(3) * * *

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

* * * * *

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

* * * * *

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

(f) *Applicability date.* Except as provided in paragraph (d) of this section, this section applies to taxable years ending on or after March 11, 2024.

Heather C. Maloy,

Acting Deputy Commissioner.

Approved: November 6, 2024.

Aviva R. Aron-Dine,

Deputy Assistant Secretary of the Treasury (Tax Policy).

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2024–0869]

RIN 1625–AA08

Special Local Regulation; Lake Havasu, Lake Havasu City, AZ

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a special local regulation for the 2024 Lake Havasu City Christmas Parade of Lights that will be held on the navigable waters of Lake Havasu, AZ. This action is necessary to provide for the safety of life on these navigable waters of Lake Havasu during a vessel parade. This rule would prohibit spectators from anchoring, blocking, loitering, or transiting through the area of a predetermined parade route unless authorized by the Captain of the Port San Diego or a designated representative.

DATES: This rule is effective from 4 p.m. through 9 p.m. on December 14, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2024–0869 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Shelley Turner, Waterways Management, U.S. Coast Guard Sector San Diego, CA; telephone (619) 278–7656, email *MarineEventsSD@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule under the authority in 5 U.S.C. 553(b)(B). This statutory provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' The Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because we must establish this special local regulation by December 14, 2024. The Coast Guard did not receive sufficient notice of the parade in time to publish an NPRM. As such, it is impracticable to publish an NPRM because we lack sufficient time to provide a reasonable comment period and then consider those comments before issuing the rule. This regulation is necessary to ensure the safety of life on the navigable waters of Lake Havasu during the marine event.

Also, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be contrary to public interest because immediate action is needed to ensure the safety of life on the navigable waters of Lake Havasu during the marine event on December 14, 2024.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70041. The Captain of the Port Sector San Diego (COTP) has determined that the large presence of vessels in Lake Havasu associated with the 2024 Lake Havasu City Christmas Parade of Lights on December 14, 2024, poses a potential