December 2, 2025

The Honorable Kenneth J. Kies
Assistant Secretary for Tax Policy
Chief Counsel (Acting), Internal Revenue Service
Department of the Treasury
1500 Pennsylvania Ave., NW, Room 3120
Washington, DC 20220

Dear Assistant Secretary Kies:

On behalf of the American Public Power Association (APPA), I am writing today to ask the Department of the Treasury (Treasury) and Internal Revenue Service (Service) to provide guidance with respect to the new foreign-entity-of-concerns rules enacted as part of H.R. 1, the One Big Beautiful Bill Act (OBBBA).[1] Specifically, we request clarity on the application of the 15-percent-of-debt test for purposes of identifying a foreign influenced entity under section 7701(51)(D)(i)(I)(dd).[2] We believe that such guidance should provide that publicly offered debt[3] be treated as not having been issued to a specified foreign entity. This treatment best recognizes:

- The limited ownership of such publicly offered debt by foreign entities (let alone specified foreign entities);
- The extremely limited circumstances under which an entity to which publicly offered debt has been issued (the issuee) may exert influence over the issuer;
- The proportionally limited value of tax credits indirectly flowing to the issuee; and
- The potential impossibility of determining whether an issuee is, or ever was, a specified foreign entity.

Absent such a decision, however, we believe Code section 7701(a)(51)(D)(i)(dd), as drafted, requires four key clarifications:

- The underwriter – the first *bona fide* owner of the debt – should be the entity to which debt is considered issued for purposes of the test;

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[1] An Act commonly referred to as the One Big Beautiful Bill Act of 2025, P.L. 119-21, July 4, 2024 (OBBBA).
[2] All section references are to the Internal Revenue Code of 1986, as amended (Code).
[3] 26 CFR 1.1275-1(h).

- The debt test should be applied prospectively, preferably only to debt issued during the taxable year for which a credit is being sought;
- The issuer should be considered to be the direct obligor under the credit facility, not other involved entities such as the offtakers of power from the credit facility; and
- The issuer must be able to meet the debt test through reasonable due-diligence requirements.

It is worth noting that these issues are deeply interdependent. How one issue is resolved could dramatically affect the nature of clarifications needed for another. However, because these comments do not presume how these issues will be resolved in guidance, unless otherwise stated they consider each issue in isolation.

Background

By way of background, APPA is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. Public power utilities collectively serve over 55 million people in 49 states and five U.S. territories, and account for 15 percent of all sales of electric energy (as measured in kilowatt-hours) to end-use consumers. They are load-serving entities with the primary goal of providing the communities they serve with safe, reliable electric service at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of the utilities with the long-term interests of the residents and businesses in their communities. Public power utilities are generally units of state and local government, including political subdivisions of a state, instrumentalities, agencies, and joint powers agencies.

Public power utilities in the United States own 118,252 megawatts (MW) of power generation, roughly 10 percent of the national total. This includes generation from natural gas, coal, hydropower, nuclear power, oil, wind, solar, and other generation sources. Public power utilities generally finance large capital investments with municipal bonds – nearly $83 billion of such investments in the last decade. The bulk of these investments were for new generation needed – as the President said in his January 20, 2025, Executive Order Declaring a National Energy Emergency – to provide a “reliable, diversified, and affordable supply of energy to drive our Nation’s manufacturing, transportation, agriculture, and defense industries, and to sustain the basics of modern life and military preparedness.”[4]

While many technologies qualify for energy tax credits, tax credits intended to keep current nuclear generation viable and to spur new nuclear generation may be the most economically significant for public power. Specifically, public power utilities own 8,027 MW of the nation’s 99,435 MW of nuclear power generating capacity. Additionally, public power utilities are pursuing new nuclear power generation projects in Nebraska, Idaho, Tennessee, New York, and Washington. Given the magnitude of the capital investment for new nuclear power facilities, bond financing is at the core of their financing requirements.

[4] Exec. Order No. 14156 of January 20, 2025, 90 Fed. Reg. 8433 (Jan. 29, 2025).

Overview

For taxable years beginning after the date of the OBBBA's enactment (July 4, 2025), prohibited foreign entities cannot claim certain energy tax credits. Based on the legislative history, including public comments made during consideration of the OBBBA, we believe the primary purpose of the prohibited foreign entity provisions is to prevent entities controlled by a covered nation, primarily China, from benefiting from U.S. energy tax credits.[5]

Under the new restrictions, a prohibited foreign entity includes a foreign-influenced entity, which is defined based on several factors. One such factor is whether an entity meets the 15-percent-of-debt test, which states in relevant part that a foreign-influenced entity is one:

> [W]ith 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 specified foreign entities.[6]

As originally passed by the House, H.R. 1 imposed a 25-percent limit on debt "held" by specified foreign entities.[7] However, the amendment in the nature of a substitute offered by Budget Committee Chairman Lindsey Graham, which was ultimately adopted, created the language that was ultimately enacted into law: a 15-percent limit on debt "issued" to specified foreign entities (15-percent-of-debt test). We believe this clearly indicates that Congress was aware of the distinction between debt as initially issued and debt as currently held and that Congress decided that "issued" was preferable.

There is no legislative history that we could find discussing the types of debt to which the test should apply. We believe some commentors will suggest excluding notes, lines of credit, and other forms of short-term debt from the 15-percent-of-debt test. We can see a number of reasons to do so. It is worth noting, however, that debt at any level in and of itself does not impart functional control over the issuer or its operations by either the entity to which the debt is initially issued or by the current holder of the debt. Presuming the issuee is the underwriter of the debt (as will be discussed below), the entity to which debt is issued (the issuee) may negotiate the terms of the debt with the issuer, but that does not give the issuee functional control over the issuer, and the issuer can always seek another counterparty if the terms being sought are out of sync with what would otherwise be available in the market. After issuance, the powers of a debt holder[8] are even more diffused, limited to demanding payment if payment is not forthcoming and accepting or rejecting any subsequent changes in the terms of the debt in limited circumstances under which such changes may be sought by the issuer.

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[5] OBBBA also created new material assistance provisions intended to reduce reliance by the U.S. energy generation industry on supply chains from covered nations, primarily China. These provisions are not discussed by these comments.
[6] Code § 7701(a)(51)(D)(i)(dd).
[7] H.R. 1, § 112008(c) (as engrossed by the House), May 22, 2025 (proposed Code § 7701(a)(51)(D)(i)(VI)).
[8] Note that because publicly offered debt can be sold and exchanged, the original issuee may not be the current bondholder.

Likewise, the statute does not distinguish between publicly offered debt and debt that is privately placed. Again, however, we believe a strong argument can be made for differentiating between publicly offered debt and debt that is privately placed, with the former excluded from the 15-percent-of-debt test with respect to the determination of a specified foreign entity.

Absent such a decision, however, we believe Code section 7701(a)(51)(D)(i)(dd), as drafted, requires four key clarifications:

- The underwriter – arguably the first *bona fide* owner of the debt – should be the entity to which debt is considered issued for purposes of the test;
- The debt test should be applied prospectively, preferably only to debt issued during the taxable year for which a credit is being sought or at the very earliest to debt issued after guidance is available;
- The issuer should be considered the direct obligor under the credit facility, not other related entities, such as the offtakers of power from the credit facility; and
- The issuer must be able to meet the debt test through reasonable due-diligence requirements.

Publicly Offered Debt and China

For roughly 109 of the past 129 years for which data on publicly offered state and local debt is available, China did not exist in its current form; China did not have the legal ability to make investments in the United States; and China did not have the resources to make such investments. In fact, according to the American Enterprise Institute's China Global Investment Tracker,[9] investment by Chinese entities in the United States did not really begin in earnest until 2005 and had already begun to cool by 2018. So, while China made $185 billion in investments in the 13-year period from 2005 through 2018, it has made only $16 billion in additional investments in the six years since 2018, for a total of $201 billion in investments since 2005. Of those $201 billion, $18 billion were in the energy sector, $11 billion for oil and gas, $2 billion in "alternative" energy technologies, and most of the remainder in utilities that own a variety of generation facilities, including from coal, natural gas, nuclear, hydropower, wind, solar, and other sources.[10]

Likewise, as an indication of China's appetite for governmental debt ownership, while China's ownership of Treasury debt peaked in 2013 at $1.3 trillion, it has been selling off that debt and now holds an estimated $730 billion of the $9.1 trillion in Treasury debt held outside the United States.[11] Likewise, a

[9] American Enterprise Institute, China Global Investment Tracker, https://www.aei.org/wp-content/uploads/2025/01/US-China-Tracker_January-2025-update.xlsx?x85095 (last visited Nov. 4, 2025).
[10] *Id.*
[11] Erik Bojnansky, *The Amount of US Debt That China Owns Will Make You Pause*, MoneyDigest, Aug. 20, 2025, https://www.moneydigest.com/1943642/how-much-united-states-debt-is-owned-by-china/.

recent report on direct loans made by China globally over the last 25 years, showed that of 1,871 loans totaling $294 billion made to U.S. entities, just five totaling $8 billion were to governmental entities.[12]

We could not find any data on China's ownership of state and local publicly offered debt, but all foreign ownership of state and local debt is reportedly limited to just $121 billion or about 2.8 percent of all state and local debt currently outstanding.[13] China's central bank was buying Treasury bonds because it received surplus U.S. dollars from Chinese companies selling assembled goods to the United States, and it needed a stable investment for those U.S. dollars. The same mechanics and impetus are not relevant to municipal bonds, but if we conservatively assume that China holds municipal debt in the same proportion as it holds federal debt,[14] then China would be holding roughly $10 billion of the $121 billion of municipal bonds that are held by offshore owners, or just 0.2 percent of the $4.3 trillion in state and local debt currently outstanding. And if the proportion of Chinese investment in bonds financing "alternative" energy sources is comparable to the proportion of such investments overall,[15] then China would hold just $100 million of municipal bonds financing alternative energy investments, or roughly 0.002 percent of all municipal bonds outstanding and 0.0007 percent of all municipal debt ever issued.

As noted above and discussed below, we believe that the issuee for purposes of the 15-percent-of-debt test should be the underwriter, which is the first *bona fide* owner of that debt, and we cannot find a single instance of a Chinese-controlled company underwriting publicly offered state or local debt. Even if Treasury and IRS were to look past the first *bona fide* ownership to determine the issuee of a debt issuance, the data above would indicate that the likelihood that specified foreign entities, primarily Chinese, are the issuees of publicly offered debt is minimal. While this does not alter the underlying statute, these facts provide some insight that should guide the manner in which the statute is implemented.

<u>Publicly Offered Debt Issued to Underwriters</u>

Privately placed debt is generally bought from the issuer without an intermediary and held until maturity. For example, a private loan is typically arranged directly between borrower and the lender, and even in a syndicated loan, there is generally full transparency as to the ultimate lenders.

In contrast, the process for issuing publicly offered debt is more complicated. The current method of book entry for a publicly offered debt requires a de facto holding company, Cede & Co., which is the nominee of the securities depository, to serve as nominal registered owner of the bond. The securities depository, the Depository Trust Company (DTC), serves as the intermediary between the issuer and DTC broker-

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[12] APPA analysis of AIDData, China's Global Loans and Grants Dataset, Version 1.0, available at https://www.aiddata.org/data/chinas-global-loans-and-grants-dataset-1-0.
[13] Board of Governors of the Federal Reserve System, *Financial Accounts of the United States, Second Quarter 2025*, (September 2025), at 123.
[14] Bojnansky, supra note 11.
[15] American Enterprise Institute, supra note 9.

dealer "participants"[16] that acquired an initial share of the debt. In this role, DTC facilitates debt service payments and information reporting to the beneficial owners of the debt.

The bond underwriter serves at least three key roles: first, it works with the issuer to determine the terms of the debt offering (i.e., the bond indenture); second, it purchases the beneficial ownership of the debt from Cede & Co. which, again, retains legal ownership of the bond; and third, it relays payments and information about the bond to the next known beneficial owner of the debt.

Upon issuance, a DTC participant may retain beneficial ownership of all or some of its share of the bond or sell some or all of that share to another entity. The entity to which an underwriter sells a share of the bond may retain the beneficial ownership, or – in turn – may have sold the beneficial ownership to another entity, which, again could retain the ownership or serve as an intermediary for a further resale of the beneficial ownership of the bond. It is worth noting that, unlike the de facto "sale" of bonds to Cede & Co., the initial issuance of a share of the beneficial ownership of the bond to the underwriter is a *bona fide* and binding transaction. For example, the underwriter is not obligated to sell any or all its share of the bond to another entity, and the issuer is not obligated to reclaim any portion of the bond that the underwriter fails to sell.

As such, we believe that publicly offered debt should be considered as "issued to" the first *bona fide* beneficial owner of the debt – the underwriter (or underwriters in the case of an underwriting syndicate.) We believe this is the simplest approach that meets the letter of the statute.

Conversely, as will be discussed below, designating publicly offered debt as issued to subsequent beneficial bond holders – where the underwriter has resold the bond — may require arbitrary choices and not serve the purpose of the provision. By quick way of background, an underwriter that purchases a portion of a bond issuance generally may: keep a portion of the bond for its own use; sell a portion to another broker dealer that intends to keep it for its own use or resell it to institutional or retail investors; and/or sell a portion to institutional or retail investors.

If the issuees for purposes of the 15-percent-of-debt test are the entities to which an underwriter sells its portion of an issuance, how should the portion of an issuance kept by the underwriter be treated? Is the answer different if the underwriter keeps a portion for its own use, but eventually resells it? Does the treatment change if the second owner of the bond is also a broker dealer that immediately resells the bond to a retail investor? Conversely, what if either the underwriter or a secondary broker dealer intends to sell their share of an issuance, but fails to do so before issuance? One could construct a regime to answer such questions, but we believe the further guidance gets away from designating the underwriter as the issuee, the more likely the results will be arbitrary and lead to an inconstant application of the 15-percent-of-debt rule.

[16] A DTC participant is a financial institution, such as a broker-dealer or bank, that is authorized to deposit and hold securities at the Depository Trust Company (DTC).

The mechanics of the current book-entry system would also make identifying the issuee challenging. Once a bond has been issued, beneficial ownership can be, and often is, sold in secondary markets. In the United States in 2024 alone, there were 14 million municipal bond trades with a total par volume of $3.3 trillion in a market with just $4.3 trillion in total debt.[17] Broker dealers are obligated to keep track of beneficial ownership of debt to provide appropriate payment of interest and principal correctly. However, they may have no idea who owned the debt immediately previously, nor have any ability to determine beneficial ownership all the way back to original issuance. More importantly, the issuer, Cede & Co, and DTC have no direct knowledge of who the current owner is, let along the initial "beneficial owner."

In addition, since the original underwriter negotiates the initial terms of the debt (or merely accepts the terms set by the issuer in a competitive as opposed to negotiated sale), any bondholder's powers vis-a-vis the debt are generally limited to demanding payment as per the terms of the debt, and rejecting or agreeing to changes to the terms of the debt should they be sought (which occurs infrequently for publicly offered debt since it typically has fewer and less onerous covenants than privately negotiated debt). As such in the regular course of business, it is only during the initial negotiation of the terms of the debt when the first bond holder – the underwriter – can exert the most influence on those terms.[18] Even this limited power is further governed by the strict conduct standards for underwriters imposed by the Municipal Securities Rulemaking Board:

> In meeting this obligation, underwriters are expected to ensure that state or local government officials are aware of conflicts of interest well before becoming fully committed to completing the transaction with an underwriter, and that the issuer has the information required to be disclosed with sufficient time to take such information into consideration before making certain key decisions on the financing.[19]

The powers of any future bond holder are therefore constrained, limited and, even in the infrequent instances of accepting or rejecting proposed changes to the terms of the debt, extremely unlikely to be of any use.[20]

Finally, we believe some commentors may will suggest that the issuees should be the underwriter for the portions of an issuance it keeps for its own use, and the entities to which the underwriter sells the

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[17] Municipal Securities Rulemaking Board, 2024 Municipal Market Year in Review, January 2024, at 5.
[18] Municipal Securities Rulemaking Board Rule G-17 requires an underwriter to deal fairly at all times with state and local government issuers and investors. In meeting this obligation, underwriters are expected to ensure that state or local government officials are aware of conflicts of interest well before becoming fully committed to completing the transaction with an underwriter, and that the issuer has the information required to be disclosed with sufficient time to take such information into consideration before making certain key decisions on the financing.
[19] Municipal Securities Rulemaking Board, What to Expect from Your Underwriter (Jan. 2, 2012).
[20] Moody's Investor's Service, US Municipal Bond Defaults and Recoveries, 1970-2022 (July 19, 2023), at 8-9; showing the nine-year cumulative default rate for municipal bonds from 1970 to 2022 was 0.14 percent and for municipal utilities was just 0.07 percent.

remaining portions of an issuance. By itself, for the reasons stated above, this would be problematic. However, we believe such commentors may also suggest a due diligence regime in which the issuer can rely on the representations by the underwriter that it did not sell any of the issuance to a foreign specified entity.

<u>During the Taxable Year</u>

In addition to ascertaining the applicable issuee for purposes of the 15-percent-of-debt rule, guidance is needed to determine when such issuee must be identified. We believe that the debt test should apply to debt issued during the taxable year in which a credit is being sought. This comports with a clear reading of the provision and ensures that the application will be prospective. Additionally, it best aligns enforcement of the provisions with the period in which an issuee has the most influence over the debt terms, specifically, as underwriters work with the issuer to develop the terms of the issuance.

As noted above, a bondholder's influence over the terms of the debt is generally limited to situations in which the issuer is seeking to renegotiate those terms. However, such renegotiations are incredibly rare. For example, the nine-year cumulative default rate for municipal bonds from 1970 to 2022 was 0.14 percent and just 0.07 percent for municipal utilities, compared to an overall default rate of 10.09 percent for corporate bonds.[21] It is worth noting that "default" in this case includes "technical" defaults where payment was delayed, but ultimately made. It is also worth noting that in the rare instance where renegotiation is attempted, the entity to which debt was issued may no longer own it. Finally, in the case of a renegotiation, individual bondholders do not generally hold real power over the issuer because renegotiations are conducted through intermediaries or even the courts. Alternatively, "during the taxable year" could be read to indicate when the 15-percent-of-debt test must be assessed, i.e., the issuer must assess whether at any point during the taxable year more than 15 percent of the debt ever issued had been issued to a specified foreign entity. We strongly believe reading the provision to require assessing the totality of debt ever issued would be impossible to administer, unfair, and would be inconsistent with the intent of the limitation (i.e., limiting ability of a debtholders with significant influence over a taxpayer claiming an applicable tax credit to benefit from such credit).

The vast majority of state and local entities in the United States have been in existence for a century or longer. More importantly in this context, state and local entities also have been issuing bonds for centuries. Since 1896, the earliest year for which records could be found, state and local entities have issued 1,117,426 bonds (generally with multiple maturities), notes, and loans with a nominal dollar value of $15.6 trillion.[22] Of that debt, roughly $4.3 trillion (including conduit financing) remains outstanding.[23]

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[21] Moody's Investor Service, supra note 17 at 8-9.
[22] The Bond Buyer/ Thomson Reuters, 2010 Yearbook, 14-15; The Bond Buyer/Refinitiv, 2020 Yearbook, 14-15; The Bond Buyer, 2020 in Statistics, A2; The Bond Buyer, 2021 in Statistics, A2; The Bond Buyer, 2022 in Statistics, A2; The Bond Buyer, 2023 in Statistics, A2; The Bond Buyer, 2024 in Statistics, A2.
[23] Board of Governors of the Federal Reserve System, Financial Accounts of the United States, Second Quarter, 2025 (Sept. 11, 2025), 123.

For bonds that have been fully refunded, state and local entities cannot be expected to have retained sufficiently detailed records of long-passed borrowing, let alone records identifying to whom that debt was issued. Even if an issuer could determine to whom it had issued past debt, it will not have the information necessary to determine if the issuee were then or had become a specified foreign entity, nor would it have any leverage to compel the issuee (if it even still exists) to provide that information.

As a result, requiring that the issuer obtain such information now would create an impossible test that would bar any taxpayer with publicly issued debt from accessing energy tax credits.

Likewise, if the 15-percent-of-debt test applies to the issuer's debt still outstanding during the year the tax credit is taken, state and local entities may know who underwrote the debt, but the underwriters may no longer exist, likely no longer own any of the debt, or may no longer have any records to diligence their status at the time the debt was originally issued or may not have an interest in providing the information necessary to determine whether they were, or are now, a specified foreign entity. Likewise, the issuer will have no information about the beneficial owners to whom the underwriters might have sold that debt, nor any leverage to compel those entities to disclose information to determine whether they were, or are now, a specified foreign entity. As such and as further explained below, retroactive application of the 15-percent-of-debt test even to debt outstanding during the taxable year that the credit is taken would be administratively impractical and not consistent with the purposes of the FEOC limitations.

Current debt

Since the creation of the DTC in 1973, bonds have migrated from physical documents in which coupons were literally "clipped" to claim payment of interest and principal to dematerialized obligations that are maintained in book-entry form only. DTC plays multiple roles in this new book-entry system, serving as an intermediary between issuers and underwriters in municipal finance. For example, an issuer sends an interest payment to DTC, DTC then sends proportionate shares of that payment to the DTC participants that hold a share of the issuance, these DTC participants retain the share of the payment for the portion of the issuance for which they retain beneficial ownership and send the remainder to either the ultimate beneficial owner or, potentially, another intermediary. As a result, the issuer has no direct knowledge of the identity of the party to which the debt was issued other than the original underwriters and cannot readily obtain that information. Likewise, DTC does not possess that information either. Finally, while DTC participants retain records of current beneficial owners of a bond issue, DTC participants would not likely know, or have any way of identifying, the first beneficial owners of the debt. It is time consuming and expensive for an issuer to determine who currently owns its debt, but it may be cost prohibitive if not impossible to determine the party to which the debt might have been initially issued beyond the underwriter.

So, as with past debt, imposing the 15-percent-of-debt test on previously issued and still outstanding publicly offered debt would, again, be tantamount to a repeal of the energy tax credit that the issuer is seeking to claim given the impossibility of identifying the original beneficial owners. Moreover, even if such an original issuee could be identified, that issuee would have no meaningful influence over the U.S. issuer seeking to claim an applicable energy credit because bond issues are necessarily uniform in their terms and have no meaningful direct-control features that would align with the intent of 15-percent-of-debt test.

Further Discussion of Timing

As noted above, we believe that publicly offered debt should treated as not having been issued to a specified foreign entity for purposes of the 15-percent-of-debt test. If such an exclusion is not adopted, the debt test should be applied prospectively, preferably limited to the year in which the credit is being sought and focused on the parties to which the debt is issued in that year. At the very least, the test should apply only to debt issued after guidance is provided by Treasury or the IRS and under no circumstances to debt issued prior to the date of enactment, the earliest time at which an issuer would be "on notice" of the new prohibited foreign entity regime.

The Issuer

The 15-percent-of-debt test applies to the debt "of such entity" seeking an energy tax credit. We recommend a strict reading of this provision in the forthcoming guidance. Take for example a joint powers agency (JPA) formed by two or more public authorities jointly to exercise a power common to them all. Insofar as the JPA is a distinct legal entity that issues debt on its own behalf, the debt test should apply only to the debt that it has issued and not attributed to its constituent members. Likewise, a city, county, or state may form a corporation, agency, or instrumentality, to perform certain functions. Again, insofar as that entity is a distinct legal entity authorized to issue debt on its own behalf, the debt test should apply only to the debt it has issued.

Due Diligence

The Code as amended by OBBBA denies certain energy tax credits to entities that fail the 15-percent-of-debt test. It does not, however, indicate how an entity must go about establishing that it has passed the debt test. The issue is a challenging one, and we continue to work with other stakeholders to provide a mechanism that meets the letter and spirit of the OBBBA. A lack of clarity on the issues discussed above is a further complication. A regime requiring an investigation of every initial retail owner for every bond ever issued would look entirely different[24] than a prospective test that treats the underwriter as the entity to which debt is issued. The latter would be both administrable and consistent with the intent of the new limitation, while the former is not and would effectively cut off access to the energy credits that are specifically intended for public power providers.

[24] And, as discussed above, be entirely unworkable and tantamount to repeal.

We will continue to work on this issue with other stakeholders and stand ready to work with Treasury as well.

Conclusion

Thank you for your consideration and please feel free to contact me at jgodfrey@publicpower.org, (202) 256-7710.

Sincerely,

/s/ John Godfrey

John Godfrey
Senior Government Relations Director