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Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: "Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits," Notice 2022-50 (Oct. 5, 2022)

The Solar Energy Industries Association ("SEIA") is the national trade association of the U.S. solar energy industry. Our members promote the environmentally responsible development of distributed and utility-scale solar energy and storage. We are committed to working with federal agencies, environmental and conservation organizations, Tribal governments, state agencies, and other stakeholders to achieve this goal. On behalf of our member companies, SEIA appreciates the opportunity to provide these comments on the Internal Revenue Service's ("IRS") "Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits," Notice 2022-50 (Oct. 5, 2022).

I. Introduction

SEIA is committed to building a strong solar industry to speed the country's energy transition and address the climate crisis. As the national trade association for the U.S. solar energy industry, which employs more than 230,000 Americans, we represent over 1,000 organizations that manufacture, install, and support the development of solar energy. We firmly believe that the clean energy transition must be based on principles of equity and opportunity. These values are infused throughout our organization and ones we are actively working to advance within our industry.

The solar industry is deeply committed to helping our nation meet the renewable energy targets set forth by President Biden in a just and equitable manner. In order to modernize the grid and address the climate crisis, solar energy must account for at least 30% of U.S. generation by the end of this decade and 40-50% by 2035. That means roughly quadrupling our current pace of installations by 2030. We are in a race against time, and the Inflation Reduction Act ("IRA") can supercharge the nation's capacity to combat climate change in the very communities suffering the most from it.

Given the significant role in power sector decarbonization that solar energy will have, we believe that every tool in the toolbox – including the IRA – should be used to spur its development. Promoting clean energy investment activities that will abate the GHG emissions that cause climate change represents a rare opportunity to simultaneously advance three top Administration priorities: advancing environmental justice, combatting the climate crisis, and creating jobs.

II. Executive Summary

The IRA introduced two important new tax credit monetization mechanisms into the market for clean energy financing: direct pay and transferability. While we believe that both mechanisms have the potential to dramatically accelerate the deployment of clean energy, we urge Treasury and IRS to issue careful guidance on the issues discussed below. In particular, we urge Treasury and IRS to clarify several specific issues as soon as practicable:

Direct Pay

1. Applicable credit – confirm that credit amounts are determined before applying taxpayer-specific limitations on taxes imposed for a taxable year.

2. Applicable entity – confirm the inclusion of governmental units and instrumentalities in the definition of "State or political subdivision thereof," consistent with existing IRS guidance and other provisions of the IRC.

3. Reasonable cause – confirm that existing IRS guidance on penalty relief for reasonable cause will continue to apply.

Transferability

1. Eligible credit – confirm that credit amounts are determined before applying taxpayer-specific limitations on taxes imposed for a taxable year, without regard to transferor taxpayer's ability to utilize the tax credits for such taxable year.

2. Recapture risk – clarify whether the transferee or transferor of credits bears the risk of recapture.

III. Responses to Requests for Comment

.01 Elective Payment of Applicable Credits (§ 6417).

(1) What, if any, guidance is needed to clarify the meaning of certain terms in § 6417, such as applicable credit and excessive payment? Is there any term not defined in § 6417 that should be defined in future guidance? If so, what is the term and how should it be defined?

Applicable Credit

The term "applicable credit" for ITC purposes is "the energy credit determined under section 48" or "the clean electricity investment credit determined under 48E." In both cases, the term is based on the investment credit amount determined under IRC § 46 which, for purposes of IRC § 38, is the sum for the taxable year determined under IRC §§ 48 and 48E.

The term "applicable credit" for PTC purposes is "[s]o much of the renewable electricity production credit determined under section 45(a) as is attributable to qualified facilities which are originally placed in service after December 31, 2022" or "the clean electricity production credit determined under section 45Y(a)".

Both of these amounts are determined before application of IRC § 38, which generally determines the amount *allowed* as a credit against tax imposed under Chapter 1; in other words, IRC §§ 38(a)-(d) do not apply when determining the "applicable credit." Therefore, the term "applicable credit" available for elective payment treatment is determined without regard to taxpayer-specific IRC § 38 limitations when determining the amount of the credit which could otherwise reduce the tax imposed on the taxpayer for the taxable year.

Guidance should clarify that when an elective payment is chosen by an applicable entity (or by a partnership or S corporation in the case of any applicable credit for any facility or property held directly by the partnership or S corporation), the tax credit utilization rules under IRC §§ 38, 49, and 469 (and any other credit limitation provision) are not applied for purposes of determining the amount of the applicable credit treated as a payment against tax because the applicable entity, partnership, or S corporation is no longer required to apply tax credit utilization rules to monetize the benefit of the credit.

Excessive Payment

The term "excessive payment" is defined with respect to a facility or property for which a § 6417 election is made for any taxable year as an amount equal to:

> "the excess of – (i) the amount treated as a payment which is made by the applicable entity under subsection (a), or the amount of the payment made

> pursuant to subsection (c), with respect to such facility or property for such taxable year, over (ii) the amount of the credit which, without application of this section, would be otherwise allowable (as determined pursuant to paragraph (2) and without regard to section 38(c)) under this title with respect to such facility or property for such taxable year."

This definition looks to the amount treated as a payment of tax by an applicable entity under § 6417(a) (or the special rule for partnerships under § 6417(c)) less the amount of the credit which would otherwise be allowable without the application of IRC § 38(c) ("limitation based on amount of tax") and without regard to the application of IRC §§ 50(b)(3) ("property used by certain tax-exempt organization") and 50(b)(4)(A)(i) ("property used by certain governmental units") while assuming such property was used in a trade or business of the applicable entity. Similar to the definition of the term "applicable credit" above, the term "excessive payment" should likewise encompass the removal of all tax credit utilization rules when determining the amount of the credit which, without application of this section, would be allowable with respect to such facility or property for such taxable year including the tax credit utilization rules under IRC §§ 38, 49, and 469. In addition, the amount of an "excessive payment" must be an amount determined by the Secretary to constitute an excessive payment for which the applicable entity has not been able to demonstrate to the satisfaction of the Secretary that the excessive payment resulted from "reasonable cause".

A key consideration is establishing how the reasonable cause exception will be applied, and whether that will be applied differently when the direct payment amount includes prevailing wage and apprenticeship bonuses (6% plus 24%), domestic content bonus (plus 10%), and/or energy community bonus (plus 10%). Ultimately, this will also include any step up to fair market value for purposes of claiming the ITC.

(2) With respect to the Secretary's discretion to determine the time and manner for making an election under § 6417(a):

(a) What, if any, issues could arise when an applicable entity described in § 6417(d)(1)(A) makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues?

Guidance is needed to address the treatment of other federal grants or funding provided to governmental entities making the election under § 6417(a). For example, is a state governmental entity (or instrumentality thereof, like a university) that receives other federal or state funds for the purchase or construction of ITC-eligible property under IRC § 48 permitted to claim the energy credit amount as an "applicable credit" equal to the full value of the spend, notwithstanding the fact that any grants received or cost-matching arrangement is not subject to income tax as gross income for federal income tax purposes by the applicable entity? Guidance is needed to address these scenarios, and it should apply equally to exempt and governmental entities as it would to a taxable entity, notwithstanding the double benefit conveyed permitting the exempt or governmental entity to claim direct pay on investments made on grants or any cost sharing funds which are also not subject to federal income tax.

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

For ease of administrability, governmental entities exempt from tax should be put on an equal footing with other exempt or taxable entities that are likewise entitled to make the election with their originally filed (through the extension date) federal income tax return (*e.g.*, the filing of a Form 990).

Similarly, direct pay elections should be made on a single new IRS Form, and this Form should require specific information regarding the type of applicable credit treated as a payment of tax under § 6417(a). Further, § 6417 encompasses two different elections: (1) the election under § 6417(a) to be treated as having made payment against tax imposed by Subtitle A, and (2) the election to be treated as an applicable entity for purposes of § 6417 for such taxable year under §§ 6417(d)(1)(B) (clean energy), (d)(1)(C) (carbon sequestration), or (d)(1)(D) (advanced manufacturing). But to the extent possible, the time and manner for making these two elections should be consolidated on a single IRS Form.

(3) In determining the amount treated as making a payment against tax under § 6417(a), is guidance needed to clarify the application of any other Code provision? If so, what is the Code provision and what clarification is needed?

In addition to the comments above addressing the non-application of IRC §§ 49 and 469, Treasury should clarify the application of IRC §§ 6654 and 6655 (estimated taxes). The amount treated as a payment of tax under § 6417 should also be treated as a payment of estimated tax under §§ 6654 (individuals) and 6655 (corporations), and the timing for when such amounts are considered paid should generally follow treatment of applicable credits under §§ 6654 and 6655 that would have been taken into account (without the application of IRC 38(c)) if no direct payment election had been made under § 6417(a) but the entire credit amount was treated as a payment against tax. As a result, taxpayers should be eligible to obtain a quick refund of overpaid estimated tax before filing the tax return for the taxable year where the elective payment election has been made or will be made when the federal income tax return is filed.

(4) With respect to an election under § 6417(a) made by a partnership or S corporation pursuant to § 6417(c)(1) for any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation:

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues?

Treasury should clarify that a partnership or S corporation that makes an elective payment and allocates the corresponding tax-exempt income to its partners and shareholders based on their distributive share of the credits as if no election had been made can distribute cash in whatever manner the partnership agreement provides. There should be no limitation on how the partners or shareholders intend to utilize the cash proceeds from an overpayment of tax.

(b) Is guidance needed to clarify the treatment of a payment made pursuant to § 6417(c)(1)(A) to the electing partnership or S corporation? If so, what clarification is needed?

1. Treasury and IRS should clarify the application of other Code provisions to a partnership in which one or more partners, or an S corporation in which one or more shareholders, is an "applicable entity" under § 6417(d)(1). For example: does the term "shall" in § 6417(c)(1) bar applicable entity partners or shareholders from benefiting from an elective payment in an amount equal to their respective share of the applicable credits determined at the partnership or S corporation level (other than for §§ 45V, 45Q, and 45X credits)? Or will an aggregate theory apply such that each partner in a partnership will be treated as though that partner placed in service directly that partner's portion of ITC eligible basis?[1]

2. Will a partnership or S corporation leasing ITC property where a lease passthrough election has been made be treated as a partnership or S corporation directly holding the facility or property with respect to the applicable credit determined? This treatment would be consistent with the result for lease pass-through elections where the tenant is treated as the lessor for purposes of determining the amount of the applicable credit.

3. When an applicable entity holds some other ownership of a project (*e.g.*, a tenancy in common), can the applicable entity receive direct pay proportional to its ownership share, while non-applicable entities receive tax credits? At a minimum, Treasury should clarify that unincorporated joint ventures may also make elections under § 6417.

[1] *See* 26 C.F.R. § 1.46-3.

(5) With respect to the definition of the term "applicable entity" in § 6417(d)(1):

(a) What, if any, guidance is needed to clarify which entities are applicable entities for purposes of § 6417(d)(1)(A), and which taxpayers may elect to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D) for purposes of § 6417?

State or political subdivision thereof

Clarification is needed with respect to the definition of "State or political subdivision thereof," § 6417(d)(1)(A)(ii), and whether that term was intended to include the United States, any State or political subdivision thereof, any possession of the United States, or any agency or instrumentality of any of the forgoing. Does *any* governmental entity satisfy the definition of "any organization exempt from the tax imposed by subtitle A" when IRC § 115 applies?[2]

Political Subdivision

26 C.F.R. §1.103-1(b) defines a political subdivision as "any division of any State or local governmental unit which is a municipal corporation or which has been delegated the right to exercise part of the sovereign power of the unit. As thus defined, a political subdivision of any State or local governmental unit may or may not, for purposes of this section, include special assessment districts so created, such as road, water, sewer, gas, light, reclamation, drainage, irrigation, levee, school, harbor, port improvement, and similar districts and divisions of any such unit." The government's sovereign powers generally considered for meeting this definition are the power to tax, power of eminent domain, and police power. An organization need not have all three sovereign powers to be considered a political subdivision of a governmental unit but must have a substantial sovereign power to be considered a political subdivision.[3]

Integral Part

An entity may also be exempt from taxation as a governmental unit if it qualifies as an "integral part" of such a State or government. Determining whether an organization is an integral part of a state or municipal government hinges on whether the state is substantially involved in the activities of the organization, including consideration of the following factors:[4]

- Creation by executive order of the governor of a state
- Creation as an official state agency

[2] Governmental units, including states and their political subdivisions, are not subject to federal income tax. *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819). IRC § 170(c)(1) defines a governmental unit as "[a] State, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia."
[3] Rev. Rul. 77-165.
[4] Rev. Rul. 60-384.

- A state or state agency's having the power to appoint and remove the organization's board
- A state or a state agency's having the power to abolish the organization
- A state or a state agency's monitoring the organization's activities; and
- Using government employees to conduct activities

Instrumentality

Treasury and IRS should enumerate the broad range of instrumentalities clearly intended to qualify for direct pay. While some instrumentalities would qualify under (d)(1)(A)(i)-(ii) or (vi), it stands to reason that all instrumentalities were intended to qualify because they were included in prior existing prohibitions that also applied to other applicable entities (see IRC § 50(b)(4)(A)(i)), perform similar functions to otherwise eligible States and political subdivisions, and because instrumentalities are not clearly eligible for monetization of credits under § 6418. Alternatively, instrumentalities could be included as applicable entities under (d)(1)(A)(i) as entities exempt from tax under IRC § 115.

The intent of § 6417(d)(1)(A)(i) is clearly to allow all non-taxable entities to be eligible for direct pay. To facilitate rapid deployment, we encourage Treasury to release clear guidance as soon as possible that common types of instrumentalities – *e.g.*. state and local schools, libraries, and housing authorities – are eligible. We further encourage Treasury to list as comprehensively as possible examples of other entities that are tax exempt and thus eligible for direct pay.

SEIA understands that many instrumentalities – including school districts, universities, libraries, housing authorities, etc. – have strong interests in developing eligible solar energy property, and clarifying that they are applicable entities eligible for direct pay will help deploy more clean energy to large load centers providing vital public services.

Whether an entity is an "instrumentality" of a governmental unit is determined based on the following factors:[5]

- Whether it is used for a governmental purpose and performs a governmental function
- Whether it performs its function on behalf of one or more states or political subdivisions
- Whether private interests are involved, or whether states or political subdivisions have the powers and interests of an owner
- Whether control and supervision of the organization is vested in public authorities
- Whether express or implied statutory or other authority is needed to create and/or use the entity; and

[5] Rev. Rul. 57-128, 1957-1 C.B. 311 (applying IRC §§ 3121(b)(7) and 3306(c)(7)).

- The degree of the organization's financial autonomy and the source of its operating expenses.

Finally, Treasury should also clarify that exempt organizations that owe taxes, including exempt organization that elect to be taxable, are not disqualified from receiving elective payment.

(c) Is guidance needed to clarify the application of any Code provision other than § 6417 to an applicable entity, or a taxpayer electing to be treated as an applicable entity, that makes an election under § 6417(a)? If so, what is the Code provision and what clarification is needed?

Yes. As discussed above, Treasury should clarify that 26 C.F.R. § 1.46-3 applies to partnerships electing to receive direct pay, and the application of IRC §§ 50(b)(3) and (c)(4)(A)(i) to "applicable entities." Treasury should clarify whether tax credit utilization rules under IRC §§ 38(c), 49, 469, and rules similar to the rules of IRC § 168(h)(5) and (6) continue to apply with respect to only those applicable credits *not* treated as an elective payment under IRC 6417(a) at the partner and shareholder level.

(d) Are there specific issues that the Treasury Department and the IRS should address for applicable entities that are subject to non-tax legal requirements or other rules that may affect such entities' ability to make an election under § 6417(a)?

Guidance should make clear that no non-tax legal requirements are necessary to make the direct pay election (*e.g.*, registration in SAM.gov, as is required for IRC § 1603 grants). In addition, the guidance should make clear that no Davis-Bacon compliance requirement is necessary for purposes of making this election (however, the amount of the applicable credit and excessive payment may still be determined based on compliance with new labor requirements).

(6) With respect to the elections under § 6417(d)(1)(B), (C), or (D):

(d) Is guidance needed to clarify the prohibition of a transfer described in § 6418(a) by a taxpayer who has made an election under § 6417(d)(1)(B), (C), or (D)? If so, what clarification is needed?

Treasury should provide examples that show whether and when such transfer and election are mutually exclusive, including with respect to the amount of the applicable credit treated as an elective payment under § 6417(a).

(7) Section 6417(d)(3)(A)(i)(I) provides that, in the case of any government, or political subdivision, described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), any election made by these applicable entities under § 6417(a) must be made no later than such date as is determined appropriate by the Secretary. What factors should the Treasury Department and the IRS consider when providing guidance on the due date of the election for these applicable entities?

> Treasury and IRS should consider parity with return-filing taxpayers, including allowances for extensions.

(8) Section 6417(d)(4)(A) provides that, in the case of any government, or political subdivision described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), the payment described in § 6417(a) is treated as made on the later of the date that a return would be due under § 6033(a) if such government or subdivision were described in § 6033 or the date on which such government or subdivision submits a claim for credit or refund at such time and in such manner as the Secretary provides. What factors should the Treasury Department and the IRS consider when providing guidance to clarify the timing and manner of a payment made by these governments or political subdivisions?

> See above.

(10) What, if any, guidance is needed to clarify the application of the excessive payment provisions of § 6417? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6417(d)(6)(B)? What, if any, guidance is needed to calculate the excessive payment amount under § 6417(d)(6)(C)?

> Determinations of excessive payment amounts should consider the ability of certain payees such as States, subdivisions, instrumentalities, and charitable tax-exempt organizations to pay such amount without significant disruption to public services provided or charitable purpose. More generally, existing IRS guidance on penalty relief for reasonable cause should continue to apply,[6] with particular attention paid to how the reasonable cause exception can be satisfied in the context of base versus bonus credit, as discussed above.

(11) For purposes of § 6417(g), what, if any, guidance is needed to clarify the application of § 50 for credit recapture and basis adjustments to investment credit property?

> Treasury and IRS should clarify that the reference in § 6417(g) to "subsection (c)(2)(A)" should actually be to "subsection (d)(2)(A)"; there is no subsection (c)(2)(A) in § 6417. Guidance should clarify that applicable entities are permitted

[6] *See, e.g.*, https://www.irs.gov/payments/penalty-relief-for-reasonable-cause; IRS AM 2011-004 (treatment of excessive payments for IRC § 1603 grants).

to determine the amount of their applicable credit without the application of IRC §§ 50(b)(3) (tax-exempt use) and (b)(4)(A)(i) (governmental use) rules. It should also address similar procedures as are required under § 6418 requiring notification of a recapture event and repayment of the recaptured applicable credit amount on Form 3468 when a tax-exempt or governmental entity has an early disposition. And it should confirm parity with § 6418 regarding notification of recapture only.

(12) The advanced manufacturing investment credit under § 48D also contains an elective payment provision under § 48D(d). The Treasury Department and the IRS seek comments on whether the elective payment provisions of § 6417 should operate similarly or differently than the elective payment provision under § 48D.

The partnership or S corporation directly holding any such ITC eligible property shall make the direct pay election, and once made, no election by any partner or shareholder shall be allowed. Treasury should confirm that no foreign entity of concern prohibition or recapture provisions apply in the context of § 6417.

(13) Please provide comments on any other topics that may require guidance.

Treasury should provide additional guidance that permits the applicable entity to treat the applicable credits generated during the quarter to be treated as a payment against quarterly estimated tax (assuming such amount was due). As such there should be a quarterly overpayment of estimated tax which normally can be refunded via Form 4466 either after the end of the taxable year (but before the return for the year is filed), or at the end of a particular quarter.

.02 <u>Transfer of Certain Credits (§ 6418).</u>

(1) What, if any, guidance is needed to clarify the meaning of certain terms in § 6418, such as eligible credit, eligible taxpayer, and excessive credit transfer? Is there any term not defined in § 6418 that should be defined in guidance? If so, what is the term and how should it be defined?

Eligible credit

With respect to the term "eligible credit," see our response to sec. III(.01)(1) above. In addition, IRC § 469 is a taxpayer-specific set of utilization rules that must be applied where the otherwise eligible credit amount allowable for such taxable year may be disallowed to the extent the credit is generated from a passive activity and the taxpayer does not have a corresponding amount of tax imposed for such taxable year from passive trade or business activities necessary to utilize the otherwise allowable ITC or PTC. In these scenarios (similar to the application of IRC § 38), the allowable credit amount otherwise determined for such taxable year under IRC §§ 48, 48E, 45(a), and 45Y(a) is carried to the subsequent year and reconsidered to determine whether it is allowed against the federal income tax imposed for such taxable year. We believe the term "eligible credit" as defined in § 6418(f) is based on the amount determined as allowable under IRC §§ 48, 48E, 45(a), and 45Y(a) for such taxable year without regard to transferor taxpayer's ability to utilize the tax credits for such taxable year, and therefore, without regard to the application of the IRC §§ 38 and 469 limitations. Guidance should clarify whether this interpretation of the statute is correct.

Guidance should also clarify whether the term "eligible credit" is defined to incorporate other taxpayer-specific limitations or restrictions at the taxpayer level, or in certain cases under special rules applying aggregate theory to partnerships and S corporations which may impact the determination of the credit allowable for such taxable year under IRC §§ 48, 48E, 45(a), and 45Y(a). For example, guidance is needed to address whether the application of the at risk rules under IRC § 49, the normalization rules under former IRC § 46(f), the tax exempt use rules under IRC § 50(b)(3), and the governmental use rules under § 50(b)(4)(A)(i) including whether rules similar to the rules of IRC § 168(h)(5)-(6) are applied *before* determining the eligible credit amount under IRC §§ 48 and 48E for such taxable year in the hands of the transferor, or whether these limitations are merely applied by the transferee taxpayer *after* the eligible credits have been transferred.[7]

In the context of investment tax credits the transferor maintains control over the operation of the qualified facility or energy property and is required under § 6418(g)(3)(B)(i) to notify the transferee taxpayer in the case of a recapture event under IRC § 50(a). Therefore, it appears that the transferee steps into the shoes of the transferor only with respect to the amount of the eligible credit determined after the application of all non-taxpayer specific utilization limitations (described above) in the year of transfer, as this would be the amount allowable as a credit determined under IRC §§ 48, 48E, 45(a), and 45Y(a) in the hands of the transferor for the taxable year. To the extent these limitations are applied when determining the amount of the eligible credit available for transfer to the transferee taxpayer for any such taxable year, it would be nonsensical to apply these limitations a second time to the transferee taxpayer.

Last, this approach is supported by the amendment made in section 13801(c) of the Inflation Reduction Act. This section amends IRC § 50(d) in the case of a REIT making an election under § 6418 by "turning off" the application of former IRC §§ 46(e)(1)(B) and 46(e)(2)(B), thereby permitting REITs to determine the eligible

[7] For example, § 6418(a) states that the transferee taxpayer "shall be treated as the taxpayer for purposes of this title with respect to such credit (or such portion thereof)." Does that mean that the transferee taxpayer steps into the shoes of the transferor before the application of these non-taxpayer specific utilization limitations (*i.e.*, IRC §§ 38 and 469) when determining the amount of the eligible credit that may be transferred by the eligible taxpayer for such taxable year, or is the term "eligible credit" in this context the amount determined *after* the application of these non-taxpayer specific utilization limitations?

credit amount available for transfer without regard to the application of these REIT-specific limitations which would otherwise apply when determining the amount of the investment credit allowable for such taxable year. This strongly suggests that the term “eligible credit” defined in § 6418(f)(1) incorporates the application of all non-taxpayer specific utilization limitations imposed under §§ 49 and 50 and rules similar to the rules of IRC 168(h)(5)-(6) in the case of partnerships and S corporations seeking to make the transfer election under § 6418. Guidance should clarify whether this interpretation of the statute is correct.

Reasonable cause

Treasury and IRS should define “reasonable cause” as that term is used in § 6418(g)(2)(B) (see below).

Section 6418 requires the transferee to pay a 20% penalty on excessive transfers. As drafted, this penalty applies to the initial transfer of the tax credit. While other penalties could apply to subsequent violations as a result of a recapture of which the statute requires the transferor to notify the transferee,[8] Treasury should clarify that the 20% excessive transfer is not applied with respect to recapture unrelated to the initial excessive transfer.[9]

Treasury should also impose certain limitations on the amount of excessive transfers subject to penalty. For example, the amount subject to penalty should be limited to the difference between the cash amount paid and the amount of the credit applied to the property basis.

The transferor should not be subject to penalties where the taxpayer reasonably relied on a reasonable appraisal. An appraisal may be deemed per se reasonable where it does not exceed a certain step-up threshold. Treasury should adopt 26 C.F.R. § 1.6664-4(b)’s facts and circumstances test to determine reasonable reliance. The reasonable cause exception should also apply when a transferee has obtained a tax opinion or otherwise reasonably relied on expert counsel regarding the determination of the amount of the credit allowable in the hands of the transferor that was properly transferred to the transferee.[10]

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[8] This is made clear by how the term excessive credit transfer is defined based on the amount “claimed” by the transferee for such taxable year (*i.e.*, the year of transfer) over the amount of the credit “allowable” to the transferor if no transfer had been made.

[9] The excessive credit transfer definition is based on the amount of the credit transferred for “such taxable year” which is the year of transfer based on what was claimed by transferee less what was allowable by transferor.

[10] While these are two potential examples, general reasonable cause guidance should also continue to apply; *see* https://www.irs.gov/payments/penalty-relief-for-reasonable-cause.

Portion

Section 6418(a) contemplates the transfer of “any portion” of an eligible credit. Treasury should provide guidance on how partnership (or S corporation) profits will be treated when certain portions are transferred. For example, will each partner receive a pro rata percentage of general profits? Can partners (consistent with operating agreements) elect to reduce or increase their shares with the consent of other partners? Can “slices” of credits that correspond to specific bonus credits be transferred and claimed by different partners? SEIA recommends an approach that permits any of these elections before the final tax return filing date and that considers only positive profit shares. Such an approach would improve liquidity in a new market, permit greater optionality in partnership risk allocation, and reduce overall transaction costs.

(4) What, if any, guidance is needed with respect to parameters or limitations on a transferee taxpayer’s eligibility to claim the credit?

Section 6418 provides several safeguards against improper transfers. Among others, the transferor must receive “cash”; the transferee is responsible for a 20% penalty on excessive credit transfers; and the transferor maintains the responsibility for notifying the transferee of subsequent recapture. This regime has sufficient protections in place such that a transferor should not ordinarily be required to undertake due diligence about the eligibility of the transferee.

SEIA believes it may be helpful for Treasury and IRS to confirm that the transferee ordinarily bears the risk of recapture after transfer. As an initial matter, SEIA understands that in many cases, the marketplace regarding indemnification or for similar insurance products will eventually help fill in potential gaps on recapture risk. Nevertheless, this infrastructure may take months or years to fully develop. For less sophisticated or resourced participants in the credits market, clarity could help avoid inadvertent recapture events (and potentially existential tax burdens on certain smaller entities). However, in no event should any guidance on this issue unduly impede or burden regular commerce in transferred credits.

There are several prudential reasons why Treasury should adopt this view. By clarifying that the transferee bears the risk, the purchaser of a credit would be encouraged to have some relationship with the transferor asset owner post-transfer as an additional safeguard against recapture. This in turn could aid the Treasury Department when it audits transfers by having additional diligence to rely on for both points in the transaction, freeing up Treasury resources and reducing audit times. In addition, transferee risk serves a basic fairness function: as the entity that claimed and enjoyed a tax benefit, it should also bear the risk of losing that benefit.

This and other questions may also be appropriate for resolution in new guidance on overall § 50 rules post-IRA. The solar industry may benefit in other ways from such a review.

(5) For purposes of § 6418(d), what, if any, guidance is required to determine the proper taxable year in which to claim any credit that was transferred pursuant to an election made under § 6418(a)?

Treasury should clarify that the transferee taxpayer can only claim the credit in a taxable year in which or with which the credit was determined in the hands of the transferor. This is similar to the the rules applied to partners and shareholders that have a different taxable year as the partnership or S corporation. Guidance should also address how this rule applies for taxpayers with non-end of calendar year fiscal year ends.

(6) In determining the amount of eligible credit transferred under § 6418(a), is guidance needed to clarify the application of any other Code provision? If so, what is the Code provision and what clarification is needed?

See comments on the meaning of "eligible credit," above.

(7) Is guidance needed to clarify how any other Code provision applies to an eligible taxpayer or a transferee taxpayer when an election is made under § 6418? If so, what is the Code provision and what clarification is needed?

The previous comments regarding the definition of excess credit transfer and the determination of the amount allowed to the transferee should only be specific to the application of the taxpayer specific utilization rules. Guidance should clarify that all other limitations should be applied for purposes of determining the amount of the eligible credit in the hands of the transferor that is available for transfer under § 6418(a).

(8) For purposes of preventing duplication, fraud, improper payments, or excessive credit transfers under § 6418, what information, including any documentation created in or out of the ordinary course of business, or registration, should be required by the IRS as a condition of, prior to, or after any transfer of any portion of an eligible credit pursuant to § 6418(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required? Should the IRS require the same documentation or registration for all eligible credits? If not, how should the information or registration differ between eligible credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive credit transfers under § 6418?

IRS could consider annual reporting similar to that under the IRC § 1603 grant program. Taxpayers that make a direct payment election or transfer election could report annually on the same form that governs the elections (see above). That form could also require certain information (kWh produced, etc.) in sufficient detail that the IRS could audit and prevent duplication, fraud, improper payments, and excessive payment or excessive credit transfers. Last, this form could also be used as a way to satisfy the notification requirements under § 6418.

(9) What, if any, guidance is needed to clarify the application of the excessive credit transfer provisions of § 6418? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6418(g)(2)(B)? What guidance is needed to calculate the excessive credit transfer amount?

Transferees are required to pay a 20% penalty for excessive credit transfers under §6418 unless there is a reasonable cause. Under § 6662, taxpayers are allowed to avoid accuracy-related penalties provided they have received and relied on the advice of other tax professionals. This should be the same rule for § 6418. Guidance, particularly safe harbors, should clarify that due diligence, including being able to rely on the advice of competent tax professionals, meets the standard of "reasonable cause."[11]

(10) For purposes of § 6418(g)(3), what, if any, guidance is needed to clarify the application of § 50 for purposes of credit recapture, basis adjustments, and eligibility related to § 50(b)(3)? Pursuant to § 6418(g)(3)(B)(i), an eligible taxpayer must notify the transferee taxpayer if, during any taxable year, the applicable investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period. What factors should be considered in determining the form and manner of this notice? Likewise, pursuant to § 6418(g)(3)(B)(ii), the transferee taxpayer must notify the eligible taxpayer of the recapture amount. What factors should be considered in determining the form and manner of this notice?

The reporting requirements described in 26 C.F.R. § 1.48-4 may be instructive, and IRS could require both the transferor and the transferee to provide statements in federal income tax returns each year during the recapture period to ensure consistency. Alternatively, prescribing a specific form or statement (such as that required for § 1603 grant transfers under a lease pass-through election) filed in the tax returns of both the transferor and the transferee would likewise ensure consistency as those forms could require signatures of both parties.

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[11] IRS may also consider promulgating a list of documents the transferee can maintain to support application of the reasonable cause exception. Such documents could include cost segregation or annual production reports, tax opinions, valuation reports, and documentation evidencing eligibility for bonus credits.

(12) Please provide comments on any other topics that may require guidance.

Section 6418(b)(1) requires the transfer of a credit be for "cash," but does not define "cash." Cash payment is defined under IRC § 461 such that use of a note is not considered a cash payment. Treasury should confirm that this type of bar (along with a bar on in-kind compensation) is what is meant by payment of "cash" compensation in exchange for the transferred credits; but a binding promise to pay cash in the future would be considered "cash" (and treated as non-taxable until an actual transfer of cash is made). There should also be an ability to "net" a cash liability without the actual transfer of cash.

Treasury should clarify whether it intends to prescribe a form agreement to facilitate the transfer of credits. Such a form could be similar to that for IRC §§ 48C and 45D credits, among others, and potentially include an assignment information sheet (like Form 8900 for purposes of IRC § 45G credits).

IV. Conclusion

SEIA appreciates the Department of the Treasury's efforts to implement the IRA. Time is of the essence to fight the climate crisis, and we are encouraged by your quick efforts to clarify the IRA's clean energy rules of the road. We look forward to continuing to work with you on implementation.

Thank you for the opportunity to provide these responses. If you have any questions, please contact Ben Norris at (202) 556-2909 or bnorris@seia.org.

Sincerely,

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