November 4, 2022

The Honorable Janet L. Yellen
U.S. Secretary of the Treasury
Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50)
Room 5203, P.O. Box 7604
Ben Franklin Station, Washington, DC 20044

RE: Notice 2022-50, Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

Dear Secretary Yellen:

Amp Americas ("Amp") submits these comments to the U.S. Department of the Treasury ("Treasury") on the implementation and administration of certain provisions of the Internal Revenue Code of 1986 (as amended and restated, the "Code"), as amended by Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 ("IRA"). Amp appreciates the opportunity to provide Treasury its comment on aspects of the IRA.

Amp supports policies that address the imperative to reduce greenhouse gas emissions now. Incentives contained in the IRA will both stimulate rapid deployment of low carbon energy solutions and position the United States for leadership across a diverse portfolio of renewable energy production and manufacturing capabilities.

Founded in 2011 and based in Chicago, Illinois, Amp is an American-owned and operated developer, owner, and operator of facilities that convert dairy waste into carbon negative renewable natural gas ("RNG") and electricity. RNG produced by Amp fuels heavy duty truck fleets and hydrogen fuel cell vehicles and charges electric forklifts. Amp's facilities both reduce on-farm methane emissions upstream and displace higher emission fuels downstream. Accordingly, Amp's facilities are a crucial ingredient in the American energy transition and fight against climate change.

As a pioneer in the dairy RNG industry, Amp registered the first dairy RNG project certified by the U.S. Environmental Protection Agency's Renewable Fuel Standards Program to generate D3 RINs and the first dairy RNG project certified by California's Low Carbon Fuel Standard Program. Our experience building, operating, and reporting on these assets gives us a unique perspective on the implementation and administration of greenhouse gas emissions-based incentive frameworks.

With that introduction, Amp's specific comments are as follows:

I. Code Section 6418, Transfer of Certain U.S. Federal Income Tax Credits

Code Section 6418 revolutionizes the monetization of U.S. federal income tax credits by permitting owners of property that qualifies for U.S. federal income tax credits to transfer them to unrelated persons in exchange for cash. However, the new law is scant on details regarding how to accomplish these transactions. Amp requests that Treasury consider addressing two key issues that will give taxpayers certainty.

A. Reporting a Transfer

First, Amp requests that Treasury provide guidance that the person permitted to transfer the tax credit must file with Treasury a form specific to each facility or property with respect to which a transfer election is made. As you know, tax credit qualified property and facilities are typically held in partnership structures. Since Code Section 6418(c)(2) requires that a partnership (and not the partners of the partnership, which benefit from the tax credit) make the election permitted under Code Section 6418, the election form must be submitted by the partnership. Given that the requirements to submit Forms 8835 and 6418 are somewhat inconsistent as to whether a partnership or a partner must file the form, this is also a good opportunity to streamline reporting of the investment tax credits and production tax credits more generally.

Amp suggests that Treasury issue a new form for the purpose of reporting all energy-related income tax credits and require that only the facility or property owner (provided it is not a disregarded entity) file this form. This new form should include (a) a request for information as to whether a partnership, S corporation, or other taxpayer is the owner of the qualifying property or facility and (b) an option to elect to transfer all or a portion of the tax credit available. The form should have separate columns for (i) the total amount of tax credit available and (ii) the amount of tax credit that is transferred to an unrelated person so that it is easy for the taxpayer and the IRS to compare the total and transferred amounts to prevent double-counting.

Requiring that only the facility or property owner file the tax credit form will significantly simplify reporting by providing consistency and simplicity. This will, in turn, promote compliance and certainty for the Internal Revenue Service. Moreover, requiring that regarded facility or property owners file the form will ensure that developers like Amp are not required to share with investors tax forms that reflect other aspects of the developer's business.

The persons that ultimately benefit from the income tax credit, either as partners in a partnership or transferees in a Code Section 6418 transaction, should be required to report their share of the credits on Form 3800, General Business Credit. Amp further suggests that those taxpayers should be required to specify whether the credit was obtained as a partner in a partnership or transferee.

B. The Market Should Determine When Taxpayers May Agree to Transfer and Pay For Credits

Code Section 6418(e)(1) provides that a taxpayer must elect to transfer eligible credits no later than the "due date (including extensions of time) for the return of tax for the taxable year for which the credit is determined." Code Section 6418(d) provides that a transferee shall take an eligible credit into account in the first taxable year of the transferee ending with, or after, the taxable year of the transferor with respect to which the credit was determined. However, no portion of Code Section 6418 addresses the timeline for when the taxpayer may agree to transfer tax credits or when a taxpayer may take payment for eligible credits.

Amp urges Treasury to permit the market to determine the earliest date to agree to a transfer of tax credits and make payment for them.

The clear goal of Code Section 6418 is to allow for greater flexibility in structuring transactions to utilize federal income tax credits. This is apparent in the abrupt departure from decades of precedent prohibiting taxpayers from transferring federal income tax credits and very sparing language in the statute. With this new tool, we have significant opportunities to expand the available pool of tax credit investors and drive

historic amounts of private capital toward renewable energy production projects. Placing arbitrary limits on the time when a taxpayer may agree to transfer or take cash in exchange for eligible credits would artificially constrain the ability of taxpayers to structure transactions, thus reducing the efficacy of Code Section 6418.

Specifying a timeline for when taxpayers may agree to transfer eligible credits or pay for them would also be inconsistent with the plain goal of Code Section 6418 to decouple ownership of property for U.S. federal income tax purposes from utilization of income tax credits. Prior guidance, e.g., Revenue Procedure 2007-65,[1] that specified that a taxpayer must meet certain minimum investment requirements before a tax credit becomes available, rests on the general requirement under Code Sections 45 and 48 that a taxpayer own a facility or property.[2] However, Code Section 6418 strips away this requirement by permitting the person who is otherwise entitled to claim an eligible credit in respect of a facility or property, i.e., its owner, to transfer the tax credit to another entity. Thus, prior guidance such as Revenue Procedure 2007-65 should still operate in order to determine the *ability* of a person to elect to transfer an eligible credit, but not *when* the transfer may be agreed, or cash may be transferred in consideration of it.

Finally, it does not appear that Treasury would gain anything by specifying when a taxpayer may agree to transfer eligible credits or receive cash compensation for them. Code Section 6418(b)(2) and (3) are plain that amounts received in exchange for eligible credits are not included in the transferor's gross income, nor deductible by the transferee. This treatment eliminates many of the reporting and compliance considerations inherent in a transfer. Moreover, Code Section 6418(d) plainly states when the transferee may account for the eligible credit, i.e., only when it has become available.

Based on the above, there is no reason for Treasury to specify or require a particular time by which a taxpayer may agree to transfer eligible credits or take payment for them (assuming the transferor complies with Code Section 6418 and that the facility or property complies with the requirements of the law governing an eligible credit).

[1] 2007-46 IRB 967.

[2] See, e.g., Code Section 45(a)(2)(A), which provides for the amount of credit that may be claimed by a taxpayer by reference to kilowatt hours "produced by the taxpayer … at a qualified facility," and Code Section 45(d)(1), which provides that in respect of a facility that uses wind, a qualified facility means any facility "owned" by the taxpayer. Code Section 48 does not require that the credit is available only to an owner of property. However, Treasury Regulations Section 1.48-1(a), which despite relating to a now-repealed version of Code Section 48 is still viewed as authoritative, defines Section 38 property as including property "with respect to which depreciation … is allowable to the taxpayer." Code Section 167 implies, but does not expressly state that depreciation deductions are allowed only to the owner of property. However, this point is made plain in Code Section 167(d) by Congress referring to a holder of a life tenancy in property as the "absolute owner" of the property and stating that depreciation deductions "shall be allowed to the life tenant." The ownership requirement is, of course, altered in some cases, e.g., sale leaseback structures under Treasury Regulations Section 1.48-4.

II. Conclusion

Amp appreciates the opportunity to communicate these points to Treasury in advance of the release of any guidance interpreting the new tax credits enacted as part of the IRA. In the event you have any questions or would like to discuss any of the points raised herein, please contact Amp's General Counsel, Jim Waddell, at Jim.Waddell@AmpAmericas.com.

Sincerely,

DocuSigned by:
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Grant Zimmerman
Chief Executive Officer
Amp Americas