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Via Electronic Submission

November 4, 2022

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50)
Room 5203, Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

RE: Comments on Section 6418

Dear Commissioner Rettig:

This letter is submitted in response to the request for comments in Notice 2022-50. We submit this comment letter on behalf of our client that is seeking to create a market for transferable tax credits and is willing to deploy capital as necessary to facilitate such a market. Transferability is more likely to achieve its highest liquidity and efficiency potential if intermediaries are allowed to facilitate trades and create structures that are able to mimic the benefits to developers of current tax equity structures. In order for tax credit transferability to mimic the benefits of existing tax equity structures, guidance regarding mechanics of long-term transfer arrangements needs to be provided. There are a number of ambiguities in need of clarification and that provide an opportunity to support the creation of a liquid market of federal tax credits. The comments herein are focused on several critical issues related to providing potential intermediaries and brokers appropriate tools to facilitate tax credit transfer transactions.

Creation of a Registration and Delegation System; Application of Section 6418(e)(2)

The statute provides ample support for guidance that allows taxpayers to enter into arrangements relating to the transfer of tax credits that have not yet been generated and may be generated in future tax years. Treasury should utilize the authorization contained in Section 6418(g)(1) to create a project registration system that facilitates potential involvement of an intermediary or placeholder transferee. Following the registration of a project, the eligible taxpayer that owns the project should be able to delegate the right to cause a transfer election to another taxpayer with respect to all or a designated portion of tax credits to be generated in the future. It is important that Treasury makes clear that such delegation is not a transfer of tax credits for purposes of Section 6418(e)(2) and that a transfer for purposes of Section 6418(e)(2) does not take place until the delegate takes an affirmative action in the registration system to cause the credits actually to be transferred to the delegate or another transferee identified by the delegate.

This delegation should be possible on a revocable or irrevocable (without delegate's consent) basis. Allowing this delegation to be made revocable only with the consent of the delegate would allow banks and other intermediaries to provide funds to the eligible taxpayer in anticipation of future credit generation, as currently is the case with existing tax equity structures. The second section of this comment letter suggests a potential tax treatment of the funds advanced in such a situation.

This type of registration and delegation system is not a major technological hurdle and should help prevent duplication and fraud. By creating an official registration system, taxpayers will be less susceptible to fraudulent sellers of tax credits. Taxpayers will come to know that as a matter of course in consummating a tax credit purchase transaction, having the delegation of transfer authority in the registration system is the only definitive proof that can be offered by a purported seller/marketer of tax credits as to the authenticity of the opportunity. Without an official system, it will be more likely that a single fraudulent seller of tax credits will sell the same bona fide credits to more than one taxpayer or even sell credits related to projects that do not exist. A registration system will also prevent project purchasers from unwittingly causing or furthering damage from a fraud in a situation in which a project seller represents that it hasn't transferred credits with respect to a project when the project seller has in fact transferred the credits already. The buyer of the project might then try to sell the credits without being aware of the first sale, thereby increasing the victims and unwitting perpetrators of the fraud and increasing friction between innocent taxpayers and the tax system generally.

With respect to project registration, the registration system should permit various means to identify projects prior to placement in service and then further allow an update to the identification of a project once the project has placed in service or otherwise becomes more identifiable. Means to identify projects prior to placement in service could include identification of the legal entity that will hold title to the project, physical location coordinates, equipment information and other project details. Taxpayers should be allowed to update the identification over time as the project becomes more developed or undergoes changes in ownership, design or location.

Consistent with this recommendation for a registration and delegation system, but also made as a separate recommendation if the above registration and delegation concept is not adopted in any form, Treasury should provide guidance clarifying that a transfer does not take place for purposes of Section 6418(e)(2) with respect to a given tax credit until the eligible taxpayer (or its delegate) specifically files the election to transfer such tax credit. Thus, contractual obligations to file such an election or allowing one party to cause another party to file such an election (e.g., call and put options) should not constitute a transfer for purposes of Section 6418(e)(2). Only the actual filing of the election in the form and manner prescribed by Treasury should constitute a transfer for purposes of Section 6418(e)(2). Narrowly defining a transfer for purposes of Section 6418(e)(2) would allow banks and other intermediaries to provide funds to the eligible taxpayer in exchange for contractual obligations to cause the filing of a tax credit transfer election. Further, those contractual rights could be traded, allowing liquidity and efficient price discovery, without running afoul of the restriction contained in Section 6418(e)(2). Eliminating ambiguity with respect to the application of Section 6418(e)(2) to the creation and trading of contractual obligations to cause a transfer filing is essential to the development of a tax credit transfer market.

Tax Treatment of Advance Payments for Tax Credit Transfers

Clarifying the treatment of monetary transfers from a potential transferee is important to the creation of a liquid tax credit market. We use the term "potential transferee" because that entity may become the ultimate tax credit transferee, but it may instead sell that contractual right to be the tax credit transferee. Allowing money to change hands tax-free is important to allowing the tax credit transfer market to replicate the benefits of the tax equity market. A tax equity investor can provide the sponsor with a commitment to invest significant capital, and ultimately make such capital contributions, with the sponsor usually incurring no tax liability as a result of those contributions. This structure needs to be replicable in the tax credit transfer market, and the statute recognizes the importance of this with the exclusion contained in Section 6418(b).

Without clear guidance from Treasury, the statutory text of Section 6418(b)(3) does not provide comfort that the exclusion from gross income contained in Section 6418(b) is applicable in the context of a payment from someone who is not necessarily the ultimate transferee taxpayer. One method to provide clear guidance would be to allow a potential transferee taxpayer nevertheless to be treated as the transferee taxpayer until it sells its position as the transferee taxpayer. In other words, make the position of transferee taxpayer assignable. In conjunction, a purchaser of such position would be able to step into the shoes of the initial potential transferee taxpayer. Seller would recognize a loss if the purchaser paid less than the seller paid to the eligible taxpayer and seller would recognize a gain if the purchaser paid more than the seller paid to the eligible taxpayer. For example, assume A provides $100 to B, an eligible taxpayer that owns a wind project, as consideration for B's commitment to transfer tax credits to A. The $100 should not be income to B or deductible for A. A should be allowed to subsequently sell its tax credit transferee position to C. A will recognize a loss of $20 if C pays A $80 and A will recognize a gain of $20 if C pays $120.

If the above solution is not acceptable, then Treasury should provide guidance on structuring such advance payments as loans. Ideally, this guidance would provide a safe harbor such that the advance payments will be respected as loans for federal income tax purposes. One potential conceptual framework to draw from loosely is Section 467. The safe harbor would require the eligible taxpayer and the potential tax credit transferee to allocate advance payments to future credits. When those credits are generated, the loan is deemed to be repaid and the cash allocated to such credits is treated repaid from the eligible taxpayer to the transferee taxpayer and then immediately paid by the transferee taxpayer to the eligible taxpayer as consideration for the transferred credits. We recommend making this safe harbor simple as it will likely be used by many taxpayers who will not be seeking the advice of advisors who are experts on tax credit mechanics. Thus, we recommend against including complicated requirements to impute interest charges or question the validity allocations of consideration to tax credits.

Holders of the creditor position of a tax credit transfer loan should be able to sell that position to another taxpayer, with a basis in the loan equal to the amount transferred to the eligible taxpayer. Continued division of the position and transfer of the position should be allowed, so long as there's a new delegate entered into the registration system following each transfer. For example, assume A provides $100 to B, an eligible taxpayer that owns a wind project, as consideration for B's commitment to transfer tax credits to A. The $100 should be treated as a

loan from A to B that is repaid as the credits are ultimately generated. A should be able to sell $50 of that loan and the right to be the transferee taxpayer with respect to one half the designated future tax credits to C. C should be able to subsequently do the same.

A question arises as to the tax treatment of advanced payments made for credits that are never actually transferred. For example, a failure to transfer could be the result of failure to place into service for ITCs or a failure to operate at a specific level in the case of PTC and PTC-like credits. The language of Section 6418(b) could be read to apply only with respect to consideration paid for an actual transfer described in Section 6418(a), not an intended transfer that never takes place. Thus, it is necessary to determine the timing for an income recognition event for the eligible taxpayer and deduction for the intended tax credit transferee and the amounts thereof. We recommend that Treasury adopt a bright line in this regard and propose that the income inclusion and deduction occur in full simultaneous with the earliest to occur of (1) the eligible taxpayer revoking its delegation of tax credit transfer authority from the transferee, if revocable unilaterally, or the delegate consenting to such revocation otherwise, and (2) the expiration of the time to file the tax credit transfer election with respect to the designated tax credits. Further, there should be no income inclusion event if the eligible taxpayer has an obligation to repay to the transferee taxpayer the amount of consideration paid to the eligible taxpayer with respect to the tax credits that were not transferred. Alternatively, if Treasury is of the view that consideration received for a transfer of tax credits that does not actually take place can still be exempt from income, this should be stated explicitly in guidance and guidance should also make clear that a voluntary repayment or refund of such amount from the eligible taxpayer should not be treated as income to the intended transferee taxpayer unless the amount refunded exceeds the original amount paid to the eligible taxpayer for such tax credits.

We appreciate the opportunity to comment on these important issues regarding the implementation of Section 6418. If you have any questions regarding this submission or would like to discuss further, please contact Shariff Barakat at sbarakat@akingump.com or 202.887.4030.

Respectfully submitted,

Shariff Barakat