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

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
United States Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, D.C. 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave., N.W.
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Re: Comments Pursuant to Notice 2022-50 Regarding Implementation of Inflation Reduction Act and Sections 6417 and 6418

Dear Madam and Sir:

Baker Botts LLP respectfully submits these comments regarding Inflation Reduction Act ("IRA") section 13801 and pursuant to Notice 2022-50, regarding sections 6417 and 6418. Our comments are the result of conferring with a number of our clients who have raised the issues and questions described below. We appreciate the opportunity to submit comments and would welcome the opportunity to discuss any of these issues with you prior to the issuance of guidance or proposed regulations under sections 6417 and 6418.

The IRA added sections 6417 and 6418 to the Internal Revenue Code. Under section 6417, certain taxpayers may elect "direct pay" treatment with respect to certain clean energy tax credits which cause such credits to be treated as payments of tax, thereby generating a refund in the event of a credit amount that exceeds a taxpayer's tax liability. Section 6418 allows taxpayers to elect to transfer for consideration, i.e., sell, certain credits to unrelated taxpayers for cash.

The provisions of section 6417 and 6418 are welcome additions to the Code as they will enhance the ability of developers of clean energy projects to monetize the tax credits generated therefrom, thereby facilitating the financing of such projects. The statutory provisions raise a number of questions and issues for resolution as to which guidance would be much appreciated. We describe below the issues that we have identified in conversations with our clients who are eager to use the elections offered by these sections to support the financing of their clean energy projects. For certain issues we also offer suggestions as to how guidance might address the issue.

Summary of Requests for Guidance

1. Guidance should clarify whether the risk of recapture with respect to a transferred credit falls on the transferor or the transferee of a credit transferred under section 6418.

2. Guidance should clarify that the parties may enter into a multi-year agreement to transfer credits.

3. Guidance should clarify the meaning of a transfer for "cash".

4. Guidance should clarify that a transferee of a credit pursuant to section 6418 may make a direct pay election with respect to such credit under 6417.

5. Guidance should clarify the interaction of section 45Q(f)(3) transfers of credits with section 6418 transfers and section 6417 direct pay elections with respect to such credits.

6. Guidance is needed regarding the small output exemption from the phase-out of the direct pay election under section 6417 for energy property.

7. Guidance should clarify whether a taxpayer may make an election under section 6417 with respect to a portion of the taxpayer's credits.

8. Guidance should clarify that a partnership may specially allocate tax credits and the revenue from the monetization thereof in a manner that effects elections under sections 6417 and 6418 at the partner level.

9. Guidance should clarify that consideration paid for a transfer of credits pursuant to section 6418 is not included in adjustable financial statement income for purposes of the corporate alternative minimum tax under section 55.

Requests for Guidance

1. **Guidance should clarify whether the risk of recapture with respect to a transferred credit falls on the transferor or the transferee of a credit transferred under section 6418.**

Section 6418 does not state explicitly whether the transferor or the transferee bears the risk of recapture with respect to a transferred credit. Section 6418(a) provides that a transferee taxpayer "shall be treated as the taxpayer for purposes of this title with respect to such credits," which would imply that the transferee, having claimed the transferred credit, is also exposed to recapture with respect to that credit. There is no explicit statement in section 6418 as to the party that bears the recapture risk, however.

Section 6418(g)(3) provides that, in the case of any election with respect to a credit under section 48, 48C or 48E: (i) the basis reduction required under section 50 shall apply to the property as if the credit was allowed to the transferor; and (ii) if the property is disposed of or otherwise ceases to be investment credit property, the transferor must provide notice of such occurrence to the transferee and the transferee must provide notice of the recapture amount to the transferor. The requirement to provide such notices implies, but does not clearly state, that the transferee is exposed to the recapture.

Credits arising under section 45Q are eligible credits that may be transferred pursuant to an election under section 6418. Credits claimed under section 45Q are also subject to recapture under section 45Q(f)(4) if the qualified carbon oxide ceases to be captured, disposed of or used in the manner required. Section 6418 does not speak to the recapture obligations in the event of a transfer of a section 45Q credit.

With respect to section 45Q recapture events, only the transferor has access to the information needed to determine whether there has been a recapture event. For example, in general, a recapture event under Treasury Regulation section 1.45Q-5 occurs when there is a leak of qualified carbon oxide that exceeds the amount of carbon oxide sequestered in that year. The transferee will have no knowledge of the transferor's sequestration activity and whether it exceeds or is less than the leaked amount. In light of the information gap, consideration might be given to providing that the credit recapture risk is retained by the transferor and does not move to the transferee with the transfer of the credit. However, so providing might be viewed as inconsistent with the principle that the transferee is to be treated as the taxpayer with respect to the transferred credits.

If, however, the transferee is to recapture the claimed credit on its return, it will need to be advised of the recapture event by the transferor. Accordingly, guidance would need to require the transferor to provide notice of the occurrence of a recapture event, and the amount of the recapture, to the transferee. Similarly, the transferee will need to notify the transferor of the amount of recapture recognized by the transferee so that, to the extent the total recapture amount arising from the recapture event exceeds the amount recognized by the transferee, the transferor knows the amount of recapture remaining to be recognized.

Because section 45Q recapture events may arise up to three years after the credit is claimed, questions will also arise as to the extent of the notice obligation if either party has moved, been acquired or is otherwise not available. If the parties have not remained in contact, the notice may

not reach the proper persons to report the recapture. In this regard, it would be helpful if the notice requirements were circumscribed in a manner to limit the obligation of the notifying party to reach the recipient. For example, guidance could provide that the agreement to transfer the credit must contain the address of each party to be used for purposes of notice and that, if the transferor provides notice to such address by certified mail of the recapture event and the amount to be recaptured, the transferor has satisfied its responsibility.

2. Guidance should clarify that the parties may enter into a multi-year agreement to transfer credits

The election to transfer a credit under section 6418(a) is made with respect to credits of a taxpayer for any taxable year. Section 6418(f)(1)(C) provides that credit carryforwards or credit carrybacks may not be the subject of a section 6418 election. Accordingly, it is clear that the election is to be made with respect to credits for the transferor's current taxable year.

However, certain of the eligible credits under section 6418 accrue over a period of years, such as the 10-year credit period under section 45 and the 12-year credit period under section 45Q. As a result, it is likely that transferors and transferees will want to enter into agreements to transfer credits not just as to the current year but covering multiple future years in which credits may arise.

Such agreements may take the form of a current payment in exchange for a promise to transfer future credits when they arise or a promise to pay in the future for a transfer of future credits as they arise and are transferred. Neither form of agreement appears to conflict with the concept that the transfer of the credit occurs with respect to a current year's credit.

Nevertheless, if such agreements were somehow viewed as impermissible transfers of future credits the parties would be inhibited from striking agreements that would facilitate the transfer of credits. Accordingly, guidance that clarifies that the transferor and the transferee may agree to the payment of current consideration for the future transfer of credits and to the payment of future consideration for the future transfer of credits would certainly provide welcome support for the negotiation of such agreements.

3. Guidance should clarify the meaning of a transfer for "cash"

Section 6418(b) provides that any amount paid by a transferee as consideration for a transfer "shall be required to be paid in cash." It would be helpful if guidance clarified the meaning of payment in cash for this purpose. For many purposes in the Code "cash-equivalents" are equated to cash for tax purposes. Cash equivalents frequently are defined to include negotiable instruments. Transferors will be leery of accepting payment other than in the form of cash lest the transfer not qualify for the election under section 6418. It would be helpful if transferors could rely upon guidance that clarifies how narrowly the reference to "cash" is to be interpreted. For example, are there any circumstances in which a promissory note of the transferee could be treated as "cash" for purposes of section 6418? If a promissory note is not permissible consideration for

a transfer, can the parties agree to any delay in payment without running into a problem meeting the payment-in-cash requirement?

For example, if transferor agrees to make the section 6418 election on its return filed in October of Year 1 and transferee claims the credits on its return filed at the same time but the payment of cash consideration is scheduled for January of Year 2, is the consideration cash or a merely a promise to pay by the transferee? Guidance could clarify the result by providing that a transfer will be considered to have been a transfer for cash if the liability to pay is accrued by the transferee under its method of accounting in the tax year as to which the transferred credits relate.

4. Guidance should clarify that a transferee of a credit pursuant to section 6418 may make a direct pay election with respect to such credit under 6417

It appears that a section 6418 transferee of a credit may make a section 6417 election with respect to the transferred credit if the credit and the electing entity satisfy the requirements of section 6417. No prohibition on such a transfer followed by a direct pay election is presented in those sections. Nevertheless, guidance that clarifies such permissibility would be helpful because, without such guidance, taxpayers may not be willing to pay for the transfer of a credit and lenders may not be willing to finance projects that are counting on the monetization of credits through the direct pay election.

We believe that a section 6417 direct pay election with respect to a section 6418 transferred credit is permissible for the following reasons: (i) there is no prohibition in section 6417 on making a section 6417 election with respect to a transferred credit; (ii) there no restriction in section 6418 on the nature of the transferee of the credit other than that it be an unrelated taxpayer; (iii) section 6418(a) provides that a transferee taxpayer "shall be treated as the taxpayer for purposes of this title with respect to such credits" and, once treated as the taxpayer with respect to the credit, the transferee is a taxpayer entitled to make the section 6417(a) election; and (iv) if the legislative intent with respect to the enactment of IRA section 13801 was to facilitate financing of clean energy projects by permitting the monetization of credits, then allowing a direct pay election with respect to a transferred credit furthers such legislative intent by facilitating the monetization of credits.

Section 6417(a) offers the direct pay election generally to "applicable entities," which are defined in section 6417(d) as organizations exempt from tax under subtitle A, any State or political subdivision thereof, the Tennessee Valley Authority, an Indian tribal government, any Alaska Native Corporation or any corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas.

Section 6418 requires that a credit be transferred to an unrelated "taxpayer." Section 7701(a)(14) defines the term "taxpayer" as meaning "any person subject to any internal revenue tax." Section 7701(a)(1) defines "person" as meaning an individual, a trust, estate, partnership, association, company or corporation. Certain of the "applicable entities" listed in section 6417

may therefore be "taxpayers" as so defined.[1] For example, a non-profit organization may be organized as a corporation and, although it is exempt from tax under subtitle A, it may be subject to other internal revenue taxes under other subtitles, such as excise taxes. Similarly, a rural electric cooperative may be organized as a corporation and may be subject to internal revenue taxes under subtitle T, section 1381 et seq. Therefore, certain of the "applicable entities" should qualify as "taxpayers" defined in section 7701 and as such would appear to be permissible transferees.

Section 6418 provides that an "eligible taxpayer" may make a section 6418 election and, in subsection 6418(f)(2), defines an "eligible taxpayer" as any taxpayer not described in section 6417(d)(1)(A). Therefore, the "applicable entities" of section 6417 are not permissible transferors of credits. There is not, however, any prohibition is section 6418 on applicable entities being transferees of credits. Neither does section 6417 provide that the direct pay election may not be made with respect to a transferred credit.

Section 6418(a) provides that a transferee taxpayer "shall be treated as the taxpayer for purposes of this title with respect to such credits." Therefore, if the transferee recipient of the credit is an entity eligible to make a section 6417(a) election, it appears that, once treated as the taxpayer with respect to the credit, it must have the ability to make the section 6417(a) direct pay election with respect to the credit.

Guidance that confirms that a credit may be transferred to an applicable entity followed by the applicable entity's election under section 6417(a) with respect to the transferred credit is essential. Although the statutory provisions do not prohibit such a transfer-and-elect means of monetization, resting permissibility upon the negative implication of the provision without more is unlikely to provide the security of treatment that we have observed is usually demanded by parties financing significant clean energy projects.

We understand that, in making direct pay available to applicable entities with respect to all the clean energy credits, there was an intent to allow such entities to monetize credits so that they could invest in and participate in the development of clean energy projects, a market in which they have largely been precluded from making direct investments because the credits arising therefrom were generally valueless to them. Guidance confirming the permissibility of a transfer-and-elect by applicable entities will allow such entities to participate in the financing of clean energy projects from which they have largely been foreclosed previously.

[1] See *Forrest City Prod. Credit Ass'n v. U.S.*, 300 F. Supp. 609, 613-14 (E.D. Ark. 1969), *aff'd,* 426 F.2d 819 (8th Cir. 1970) (stating that since nonprofits and production credit associations must pay employment taxes, they are taxpayers under section 7701(a)(14)); *Serv. Emps. Int'l Union v. IRS*, 1982 WL 1708 (D.D.C. 1982) (holding that "taxpayer" as used in section 6103 relied on the definition of "taxpayer" in section 7701(a)(14) and stating "[s]ince FICA employment taxes clearly fall within the meaning of 'any internal revenue tax', [501(c)(3)] organizations are properly deemed taxpayers for purposes of section 6103 [limiting disclosure of taxpayer return information]"); *B. Gregory v. Comm'r*, 149 T.C. 43, 48 (2017) (stating that since S corporations must pay employment taxes, they are taxpayers under section 7701(a)(14); *C. Southern v. Comm'r*, 87 T.C. 49, 54 at fn. 5 (1986) (stating that since partnerships must pay employment taxes, they are taxpayers under section 7701(a)(14)).

In addition to the applicable entities listed in section 6417(d)(1)(A), under section 6417(d)(1)(B), (C) and (D), all taxpayers will be treated as applicable entities for purposes of making the direct pay election with respect to credits under sections 45V (clean hydrogen), 45Q (carbon capture) and 45X (advanced manufacturing). As was the case with the applicable entities listed in section 6417(d)(1)(A), it appears that a transferee taxpayer receiving a credit pursuant to section 6418 is able to make a direct pay election under such provision of 6417(d) because neither section prohibits such a transfer or such an election by the transferee recipient.

With respect to the direct pay election for transferred credits under sections 45V, 45Q and 45X, however, the transferee's ability to make the election could be interpreted as limited by the phrase that describes the relevant tax year with respect to which the election may be made. For example, in section 45(d)(1)(B), the taxpayer may make the election with respect to "any taxable year in which such taxpayer has placed in service a qualified clean hydrogen production facility." In section 45(d)(1)(C), the taxpayer may make the election with respect to "any taxable year in which such taxpayer has . . . placed in service carbon capture equipment." In section 45(d)(1)(D), the taxpayer may make the election with respect to "any taxable year in which such taxpayer has . . . produced eligible components."

If these provisions are read not merely as descriptions of the taxable year for which the election may be made (i.e., the year placed in service, etc.) but, rather, as restricting the identity of the electing taxpayer to the taxpayer that placed in service the facility, etc., then it would not be possible for a taxpayer to receive a transfer of a credit from the taxpayer that placed the equipment in service or produced the components and then to make an election under section 6417(a) with respect to the credit.

We would respectfully suggest, however, that such an interpretation would be inconsistent with the legislative intent to allow for monetization of credits in order to facilitate financing of clean energy projects. If a qualifying clean energy project is placed in service, for purposes of accessing the direct pay election it should not matter whether the taxpayer that placed the project in service is the electing taxpayer or the transferor of the credit to the electing taxpayer. Accordingly, we request guidance that clarifies that the phrase "any taxable year in which such taxpayer has . . . placed in service carbon capture equipment" will be interpreted as meaning "any taxable year in which such taxpayer (or the transferor of the applicable credit to such taxpayer) has . . . placed in service carbon capture equipment."

We believe that sections 6417(a) and 6418 should be read together in the manner that clarifies the ability to transfer the credit followed by a direct pay election. It would be very helpful if guidance would clarify this point; the absence of such guidance will have a detrimental effect on the market for credit transfers and will certainly limit the opportunities of the tax-exempt organizations to participate in financing these projects.

5. Guidance should clarify the interaction of section 45Q(f)(3) transfers of credits with section 6418 transfers and section 6417 direct pay elections with respect to such credits.

Section 45Q(f)(3) provides that, if the person to whom the section 45Q credit is otherwise attributable makes an election under such section, the credit shall be allowable to the person that disposes of the qualified carbon oxide, utilizes the qualified carbon oxide, or uses the qualified carbon oxide as a tertiary injectant. In other words, by election the section 45Q credit may be transferred to the sequestering party.

Section 6418 provides that section 45Q credits may be transferred to any unrelated taxpayer by election and imposes no requirement that the transferee must be the sequestering party. Section 6418(e)(2) provides that no election may be made "by a transferee taxpayer with respect to any portion of an eligible credit which has been previously transferred to such taxpayer pursuant to this section."

Guidance that clarifies the interaction of these provisions would be helpful. For example, it would be helpful to know that the recipient of a transfer pursuant to section 45Q(f)(3) is eligible to, in turn, transfer such credit pursuant to section 6418 (and that such second transfer is not prohibited by section 6418(e)(2) since the previous transfer did not occur pursuant to section 6418).

With respect to the section 6417 direct pay election, section 6417(d)(1)(C) offers the ability to make a section 6417 election with respect to section 45Q credits to a taxpayer with respect to any taxable year "in which such taxpayer . . . placed in service carbon capture equipment at a qualified facility." The transferee of a section 45Q under section 45Q(f)(3) may not have been the party that placed the carbon capture equipment in service. Yet, it would seem that such transferee should be equally entitled to make the section 6417 election. Accordingly, it would be extremely helpful to have guidance clarifying that the transferee of section 45Q credits under section 45Q(f)(3) is eligible to make a direct pay election under section 6417(d)(1)(C) with respect to such transferred credits regardless of whether such transferee was the party that placed the equipment in service.

We are aware that some companies have already entered into agreements to transfer the section 45Q credits arising from their projects to the sequestering party by making an election under section 45Q(f)(3). Such agreements would not have been needed had section 6418 been in place. Now that section 6418 is available, the parties that have already entered into transfer agreements should not be penalized and prevented from taking advantage of these new monetization techniques to effectuate the transfers they envisioned.

6. Guidance is needed regarding the small output exemption from the phase-out of the direct pay election under section 6417 for energy property

Section 48(a)(13) calls for rules similar to the rules of section 45(b)(10) to apply to implement the phase-out of the direct pay election under section 6417 for property that does not meet the domestic content requirements. Similarly, section 48E(d)(5) calls for rules similar to the rules of section 45Y(g)(12) to apply to implement the phase-out of the direct pay election for property that does not meet the domestic content requirements. Both sections 45(b)(10)(B) and 45Y(g)(12) exempt from the phase-out any electricity generating facility "with a maximum net output of less than 1 megawatt (as measured in alternating current)."

If rules similar to the rules of section 45(b)(10) and 45Y(g)(12) are to be developed for purposes of direct pay elections with respect to credits under section 48 and section 48E, then presumably such rules would contain a similar exemption from the phase-out for energy property with a small output. However, section 48 and 48E apply not just to electricity generating property but also to other types of energy property that does not necessarily generate electricity, such as energy storage property, biogas property and geothermal property. If the rules under section 48(a)(13) and 48E(d)(5) are intended to be similar to the rules of sections 45 and 45Y in this regard, then some other measurement of small size or capacity might be needed to apply to property that does not generate electricity. Without such a small-size exemption from the phase-out, any energy property that does not have an electric output (and cannot meet the domestic content requirements) would be exposed to the direct pay phase-out regardless of the size of the project.

One solution would be to apply the direct pay phase-out only to energy property that produces electricity (exempting property with a less than one megawatt output) but to exempt all other non-electricity-generating energy property from the direct pay phase-out. That solution might be supported on the basis that, since the statute calls only for rules similar to the section 45 rules and the section 45 rules apply the phase-out only to property that generates electricity, the section 48 rules would be similar to the 45 rules if they apply the phase-out only to electricity-generating property.

If it is determined that it is necessary to develop rules setting an exemption for small capacity, production or storage in the case of each type of section 48 property, such a task will be administratively quite difficult as it would call for technical understanding of each type of energy property and arbitrary line-drawing with respect to size untethered from any statutory provision guiding such determination. Even so, applying the direct pay phase-out to all energy property regardless of size would appear to be beyond the statutory mandate to apply rules similar to those of sections 45 and 45Y.

7. Guidance should clarify whether a taxpayer may make an election under section 6417 with respect to a portion of the taxpayer's credits.

Section 6417 does not explicitly state that a taxpayer may make a direct pay election with respect to less than all of its applicable credits with respect to the taxable year but there is also nothing in section 6417 that requires an "all or nothing" approach to the amount of applicable credits subject to the election. There is a statement that the taxpayer may make the election on a

facility-by-facility basis, however, which implies that not all a taxpayer's credits of a certain type must be subject to the election. See section 6417(d)(3)(B), (C), (D) and (E). It does seem clear that in the case in which a taxpayer has more than one type of the applicable credits listed in section 6417(b) that the taxpayer may make a separate election for each type of credit. See section 6417(a) ("In the case of . . . an election . . . under this section with respect to any applicable credit . . . ."). Therefore, if a taxpayer need not make an election with respect to all of its credits of all types, it would seem that it should be permissible for a taxpayer to make an election with respect to a portion of its credits of one type.

8. Guidance should clarify that a partnership may specially allocate tax credits and the revenue from the monetization thereof in a manner that effects elections under sections 6417 and 6418 at the partner level.

Many, if not most, large clean energy projects involving carbon capture and clean hydrogen production are undertaken by joint ventures between producers, operators, emitters, sequesterers, and off-takers. Such joint ventures are frequently conducted by entities treated as partnerships for tax purposes. It can therefore be expected that it will often be partnerships that will be making the elections offered by sections 6417 and 6418 to monetize the clean energy credits that they generate.

The partners in a clean energy project will inevitably have varying degrees of tax capacity to use the credits generated by the partnership, resulting in differences between the partners as to whether the credits should be retained by the partnership and allocated to the partners or monetized via the elections under sections 6417 and 6418. However, both sections 6417 and 6418 require the election to be made by the partnership, not the partner, thereby limiting the partners' ability to selectively monetize their share of the partnership's credits.

It is understandable that sections 6417 and 6418 would require that the elections be made by the partnership rather than the partners. Otherwise, there would be considerable administrative difficulty and complexity arising from the need for the IRS to review, monitor, track and reconcile the elections of multiple partners with respect to the credits earned or transferred by a partnership. Yet the absence of a partner-level election will inhibit the monetization of credits by partnerships that have partners with differing tax capacities.

A partner-level election could be replicated, however, via a special allocation of credits and the income associated with the monetization, without implicating the administrative complexities and oversight that would be presented were a partner-level election allowed. If guidance would acknowledge the permissibility of such allocations under section 704, the monetization of clean energy credits by partnerships would be greatly facilitated.

For example, consider a partnership with two partners: A, a 75% partner, who has a tax liability and can use the credits and B, a 25% partner, who does not have a tax liability against which to use the credits. The partnership places in service property that is eligible for $100 of credits under section 45Q. The partnership elects to transfer $25 of such $100 credits to an unrelated third party in exchange for cash of $25. The remaining unsold $75 of credits, rather than

being allocated 75-25, are allocated entirely to A. The $25 tax-exempt income from the transfer, rather than being allocated 75-25, is allocated entirely to B. The $25 is distributed entirely to B. As a result of these allocations, A is able to claim and use the share of credits it would have had if the partnership had not sold any credits and B has received the tax-exempt income and cash from the sale equal in amount to what it would have received had the partnership sold all its credits. Thus, the allocations work to give each partner what it would have received if the partner had been able to make a partner-level election.

Consider a second example. Assume the same facts from the prior example, except that B is an applicable entity described in clause (ii) of section 6417(d)(1)(A). As a result, 25% of the property is considered tax-exempt use property and, thus, under section 50(b)(4) the partnership may claim only $75 of credits. Pursuant to section 6417 (and consistent with section 6417(d)(2)), the partnership makes a direct pay election with respect to $25 of credits which it would otherwise have been entitled to claim but for the rules of section 50(b)(4). The partnership (i) distributes the $25 to B and allocates the corresponding tax-exempt income entirely to B and (ii) allocates the $75 of unmonetized credits entirely to A.

In these examples, the parties have not allocated the unmonetized credits or the income from the transfer in their general sharing ratio (or in accordance with the safe harbor for allocations of credits offered by Rev. Proc. 2020-12) and thus there is a risk that, without guidance sanctioning the allocations, the credits and income would be reallocated on the basis that the allocation is not in accordance with the partners' interests in the partnership. The partners have, however, allocated the combined benefits from the credits (i.e., the tax-exempt income from the monetization of the credits and the pass-through of the remaining credits) in their general sharing ratio (or in accordance with the safe harbor for allocations of credits offered by Rev. Proc. 2020-12). If guidance were to clarify the permissibility of such allocations, it would greatly facilitate the ability of taxpayers to use the monetization elections.

The guidance could be as straightforward as a safe harbor providing that, in the event a partnership makes an election under section 6417 or 6418 as to less than all of the eligible credits of the partnership in a given taxable year, an allocation of the unmonetized credits to and among the partners that are not allocated the tax-exempt income derived from the election will be treated as in accordance with the partners' interests in the partnership if the partnership also allocates the tax-exempt income derived from the election to and among the partners that do not receive an allocation of the unmonetized credits, and the sum of the unmonetized credits and the tax-exempt income from the transfer of the credits is allocated among the partners in a manner that meets (or is deemed to meet under any IRS-issued safe harbor such as Rev. Proc. 2020-12) the requirements of section 704(b) and the regulations thereunder. The guidance should also clarify that, consistent with the second example above, a partnership with both tax-exempt partners and non-tax exempt partners may make an election under section 6417as to the portion of the credit which it would otherwise have been entitled to claim but for the rules of section 50(b) so long as (i) the direct payment received as a result of the election under section 6417 and the resulting tax-exempt income is allocated solely to partners that are "applicable entities" within the meaning of section

6417(d)(1)(A) or are treated as "applicable entities" under section 6417(d)(1)(B), (C) or (D) and (ii) the sum of the unmonetized credits actually allowed after taking into account the rules of section 50(b) and the tax-exempt income from the monetization of the credits under section 6417 is allocated among the partners in a manner that meets (or is deemed to meet under any IRS-issued safe harbor such as Rev. Proc. 2020-12) the requirements of section 704(b) and the regulations thereunder.

The partners should not be prevented from using the monetization methods that have been offered merely because they happen to be conducting their project through a partnership vehicle rather than via direct ownership. Requiring that partnerships allocate all clean energy credits in accordance with the partnership's general sharing ratio or otherwise applicable manner means that partnerships must either (i) forego monetizing their credits and force some partners to receive credits they cannot use or (ii) monetize the credits but for an amount that is less than the value the partner with tax capacity could have gotten from claiming the credit.

Recognizing the administrative difficulties with a partner-level election, guidance that allows partnerships to replicate a partner-level election through special allocations of the relevant tax items would resolve a clear obstacle to use of the monetization techniques that are intended to facilitate financing of clean energy projects.

9. Guidance should clarify that consideration paid for a transfer of credits pursuant to section 6418 is not included in adjustable financial statement income for purposes of the corporate alternative minimum tax under section 55.

The IRA amended section 55 to implement a corporate alternative minimum tax, imposed generally on an applicable corporation's adjusted financial statement income ("AFSI"), which is defined in new section 56A. Section 56A(c)(9) excludes from the definition of AFSI any amount treated as a payment against tax pursuant to a direct pay election under section 6417. Section 56A does not, however, explicitly exclude from the definition of AFSI any amount received as consideration for a transfer pursuant to an election under section 6418.

Section 6418(b)(2) provides that the amount paid as consideration for a transfer of a credit "shall not be includible in gross income of the eligible taxpayer." Section 6418(c)(1) provides that in the case of a transfer of a credit by a partnership any amount received as consideration "shall be treated as tax-exempt income" for purposes of sections 705 and 1366." These provisions exhibit a clear intent that the consideration for the transfer not be subjected to tax in the hands of the transferor.

Without attempting to speak to the proper financial accounting treatment of consideration received for a credit transfer, however, it does appear that the cash consideration received in exchange for a transfer of credits could be treated as income for financial statement purposes. Therefore, despite the clear intent of section 6418 to the contrary, without an exclusion for

purposes of section 56A, the transfer consideration could trigger taxation of the transferor under section 55.

Clean energy projects frequently require very large capital investments. The companies best disposed to make such large capital investments are often the very same companies that have revenue in an amount that will give them exposure to the corporate alternative minimum tax. However, when such companies wish to monetize their investment by selling the credits generated therefrom, if the consideration is not excluded from their AFSI, they will be unable to monetize the credit without incurring a tax of 15% on such amount. Due to the size of the credit transactions that may arise from some large projects, the failure to exclude the transfer consideration from AFSI could in fact cause some companies to become subject to the alternative minimum tax that would not have otherwise been subject to the tax by increasing their financial statement income above $1 billion.

Given the clear statement of section 6418 that the consideration received for a transfer does not give rise to taxable income, we believe that the failure to exclude section 6418 transfer consideration from AFSI when section 6417 direct pay amounts are excluded was an oversight. Therefore, we urge that guidance clarify that consideration paid for a transfer under section 6418 is not included in AFSI. Such guidance could be provided either under section 56A, pursuant to the delegation of regulatory authority under section 56A(c)(15), or under section 6418 as an interpretation of the provision in section 6418(b)(2) that the "consideration shall not be includible in gross income of the eligible taxpayer."

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We appreciate the opportunity to submit these comments and are available to discuss these issues in greater detail or answer any questions you may have.

Respectfully submitted,

Baker Botts LLP

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