November 8, 2022

The Honorable Janet Yellen
Secretary
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re Request for Public Input on Implementing the Inflation Reduction Act's Clean Energy Tax Incentives

Dear Secretary Yellen and Commissioner Rettig:

Bank of America welcomes the request for public comment from the Treasury Department ("Treasury") and the Internal Revenue Service (the "IRS") regarding implementation of the Inflation Reduction Act's[1] clean energy tax incentives. It is important to align tax guidance to marketplace realities to ensure that the full potential of these investments are realized, and we welcome the opportunity to engage with Treasury and the IRS throughout the implementation process.

At Bank of America, we align our activities to help create economic prosperity while also addressing important societal priorities. This includes working with our clients to help shape a just transition toward the low-carbon, sustainable energy future. For many years, we have been working to reduce the environmental impact of our own business and operations. We achieved carbon neutrality in our operations in 2019 and have committed to achieving Net Zero in our financing activities, operations, and supply chain before 2050. Working with clients in every sector, we are making significant progress.

In 2021, Bank of America announced a goal of supporting our clients by mobilizing and deploying $1.5 trillion in sustainable finance capital by 2030, of which $1 trillion is dedicated to supporting the transition toward a low-carbon economy. In support of this goal, we engage with clients across all industry sectors and provide a comprehensive suite of financial solutions that includes lending, capital raising, advisory, investment services, and risk management. In 2021, on behalf of the work our clients are doing, we supported them with approximately $250 billion in sustainable finance activity toward this goal, of which more than $155 billion was for climate and environmental transition.

Since 2015, we have been a top renewable energy tax equity investor, with a portfolio of approximately $12 billion at the end of 2021. Historically, our investments have contributed to the development of approximately 16% of the total installed renewable wind and solar energy capacity in the United States.

[1] Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022).

We continue to expand our current capabilities to support our clients in their transition to more sustainable, low-carbon business models. We are supporting clients in our asset-based lending, tax equity and placement activities across specific clean energy sub-sectors. Further, we also are developing financial solutions for clients with new and emerging clean energy technologies that will be critical to provide additional carbon reductions beyond traditional renewable energy sources. This includes many technologies addressed and supported by the Inflation Reduction Act (IRA).

We continue to deploy various financing and investment mechanisms to support a multitude of technologies, including but not limited to:

- **Wind:** There continue to be key opportunities for capacity deployment in onshore and offshore wind technologies across the U.S.'s coastal waters. Bank of America has been actively engaged in this space.

- **Solar and Grid Energy Storage:** We have provided financing for distributed solar generation for residential and commercial/industrial customers, and we believe grid energy storage will play an essential role in solving intermittency issues surrounding wind and solar power. As a result, we have taken actions to support this growing technology to better backstop the energy grid and help prevent blackouts.

- **Electric Vehicles ("EVs") and EV Charging Infrastructure:** The transition of personal and commercial vehicles from internal combustion engines to electric motors necessitates significant investments in production capabilities, charging infrastructure, and customer financing solutions. We are positioning ourselves to be a leader in EV lending to our retail clients through education, offers, strategic alliances and cross-product integration. We are helping to accelerate the adaption by targeting lender relationships with manufacturers and creating co-branded marketing experiences with EV manufacturers or supporting businesses.

- **Hydrogen and Fuel Cells:** Hydrogen and fuel cells are emerging alternative technologies for the transportation industry. Bank of America is exploring ways to accelerate hydrogen deployment, at scale, and is engaging with subject matter experts to explore ways to develop and support the necessary infrastructure build-out, technological improvements and cost reductions that will be needed to fully and cost effectively commercialize hydrogen.

- **Biofuels and Sustainable Aviation Fuel ("SAF"):** Biofuels, including SAF and waste-to-energy, present an important way to reduce emissions when compared to traditional jet fuel. Bank of America will continue to look for opportunities to support this growing energy source.

- **Renewable Fuels:** Renewable fuels provide a source of diversification away from high emitting petroleum products for transportation uses. Following the growing adoption of fuel standards, renewable fuels will help in reducing greenhouse gas emissions and reliance on fossil fuels.

- **Geothermal Energy:** We believe that geothermal energy is largely untapped and could be another powerful source of renewable energy. As such, Bank of America has provided financing solutions to geothermal power producers and will continue to look for opportunities to support the potential of this energy source.

- **Carbon Capture and Sequestration:** We continue to actively seek opportunities regarding carbon capture to support our clients in hard to abate sectors as they transition to a low-carbon economy, which includes both sequestering captured carbon and using it in finished products such as cement and synthetic fuels. We also recognize the importance of removing anthropogenic CO_2 and seek to support direct air capture, bioenergy with carbon capture and sequestration, and biochar.

On October 5, 2022, Treasury and the IRS issued six notices requesting comments on various aspects of extensions and enhancements of energy tax benefits in the IRA. The notices are:

- Notice 2022-46, which requests comments on tax credits for clean vehicles;

- Notice 2022-47, which requests comments on energy security tax credits for manufacturing;

- Notice 2022-48, which requests comments on incentive provisions for improving the energy efficiency of residential and commercial buildings;

- Notice 2022-49, which requests comments on certain energy generation incentives;

- Notice 2022-50, which requests comments on the elective payment of applicable tax credits and transfer of certain tax credits; and

- Notice 2022-51, which requests comments on prevailing wage, apprenticeship, domestic content, and energy communities requirements.

Bank of America commends Treasury and the IRS for their commitment to providing expedited guidance. In response to the request for comments, we make the following recommendations for guidance to clarify certain provisions of the IRA pursuant to Notice 2022-49, Notice 2022-50, and Notice 2022-51.

I. Summary

A. Guidance should provide a safe harbor for the amount of a developer profit or development fee that can be capitalized into the basis of the energy property that qualifies for the investment tax credit (the "ITC") under Section 48[2] based on a specified percentage of the costs of developing the project, but exclusive of the developer profit or development fee.

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[2] Unless otherwise indicated, all references to "Section" or "Sections" herein are to the Internal Revenue Code of 1986, as amended as of the date hereof (the "Code"), and all references to "Treasury Regulations Section" are to regulations issued by Treasury, as most recently adopted or amended as of the date hereof.

B. Guidance should confirm the following with regard to the ITC for energy storage technology:

- A battery energy storage system that meets the definition of energy storage technology and is placed in service after December 31, 2022 is eligible for the full ITC regardless of the source of the electricity used to charge the system (and thus that the dual use rules under Treasury Regulations Section 1.48-9, including the 25% limit on using energy from sources other than solar or wind energy, do not apply to energy storage technology). An ITC that is claimed with respect to a battery energy storage system will not be subject to recapture, in full or in part, under Section 50 as a result of using energy from sources other than solar or wind energy, including energy from the grid, during the five-year period after the battery energy storage system is placed in service; and

- A battery energy storage system that meets the definition of energy storage technology and is placed in service after December 31, 2022 is eligible for the ITC, notwithstanding that it may be co-located with, operated in conjunction with, subject to a power purchase agreement with, or fully or partially charged with electricity from a wind or solar project that claims PTCs.

C. Guidance should provide the following clarifications with regard to the transfer of certain credits under Section 6418:

- The procedures for transferring eligible credits, including the timing of when such credits can be transferred and the form for transferor to report the amount of credits transferred;

- Clarify whether any tax due to a recapture of tax credits that follows a transfer under Section 6418(a) and that arises from the applicable investment credit property being disposed of, or otherwise ceasing to be investment credit property, would apply to, and be reported by, the transferee or transferor taxpayer;

- Confirm that taxpayers can make an election to receive a direct payment of the clean hydrogen production tax credit under Section 45V or the carbon capture credit under Section 45Q, in each case under Section 6417, and subsequently elect to transfer these credits under Section 6418 for the remaining tax credit periods;

- Whether an eligible credit can be first passed through to a lessee pursuant to the procedures in Treasury Regulations Section 1.48-4 and then transferred by the lessee to a third person;

- Whether an eligible credit can be transferred to individuals (or whether the passive activity rules under Section 469 and at-risk rules under Section 49 would prevent individuals from utilizing such credits);

- Whether an eligible credit can be transferred from a partnership in which some or all of the partners are individuals subject to the passive activity rules under Section 469 and the at-risk rules under Section 49); and

- Provide examples of what could constitute an excessive credit transfer under Section 6418(g)(2) and provide guidance on how a taxpayer can demonstrate the excessive credit transfer resulted from reasonable cause.

D. Guidance should clarify whether (i) a partnership that has a partner that meets the definition of applicable entity in Section 6417(d)(1)(A) can elect partial direct pay (based on that partner's share) if one or more of the other partners in the partnership does not meet the definition of eligible entity and (ii) a partnership in which all of the partners meet the definition of applicable entity in Section 6417(d)(1)(A), but the partnership does not meet the definition of eligible entity, can elect direct pay.

E. Guidance should provide the following clarifications with regard to the domestic content bonus credit amount under Section 45(b)(9) and the special rule under Section 45(b)(11) for qualified facilities located in an energy community:

- Provide additional clarification regarding the application of the domestic content requirements to solar projects, wind projects and battery energy storage systems, including which parts of such projects are considered components or subcomponents and which parts of such projects need to be composed of domestic steel and iron;

- Further clarifications are needed regarding the requirements for an energy community for purposes of Section 48(b)(11), including how to apply the requirements to projects that are not entirely within the boundaries of an energy community and what sources are acceptable for demonstrating the required employment and tax revenue thresholds and unemployment rate are met;

- Provide clarifications on how the energy community requirements apply to projects that claim the PTC, including whether these requirements must be met each year during the PTC period; and

- Provide clarifications on how the recapture rules apply to a project claiming the ITC with a domestic content bonus.

II. Discussion

A. Safe Harbor for Developer Profit or Development Fee.

For purposes of the investment credit under Section 46, Section 48(a)(1) provides, in part, that the energy credit for any taxable year is the energy percentage of the basis of each energy property placed in service during such taxable year. Basis reflects the amount of a taxpayer's investment in property for tax purposes and is generally the cost of the property, which may include the capitalized portion of certain costs related to buying or producing the property. In the case of a renewable energy project that has been developed by the taxpayer, the basis may

include a development fee that is in addition to the total costs otherwise included in the basis of the project. Alternatively, in the case of a project that is purchased by the taxpayer, the basis of the project is generally the purchase price, which may reflect a developer profit in excess of the total costs incurred by the seller.

In line with guidelines for evaluating cost basis for a Treasury cash grant under section 1603 of the American Recovery and Reinvestment Tax Act of 2009, many market participants believe that an appropriate developer profit or development fee typically ranges from 10% to 20%, depending upon the development efforts undertaken by the developer in developing the project, which may include: (i) negotiation and management of various key contracts, (ii) engaging in competitive processes to select key service providers and negotiate associated agreements, (iii) negotiating and securing real estate and property-related agreements, (iv) managing the interconnection process, (v) evaluating environmental risks and securing key permits, (vi) self-procuring certain key equipment, (vii) originating and negotiating various financing agreements, and (viii) managing consultants hired to provide services to the Project.[3] There may be circumstances where a higher developer profit or development fee is justified, and a project may be sold multiple times during its development and construction, introducing questions about what should be counted in determining the amount of developer profit or development fee. As a result, due the factual nature of determining a developer profit or development fee, there is a significant uncertainty in the renewable energy industry regarding the appropriate amount of a developer profit or development fee. That uncertainty could result in challenges in financing a project and possibly a developer not being fairly compensated for its development work. As a result, guidance is necessary to provide certainty to the industry.

Section 3.02(2)(d) of Notice 2022-49 requests comments on any topics relating to the Section 48 credit that may require guidance. We recommend that Treasury and the IRS provide a safe harbor for the amount of a developer profit or development fee that can be capitalized into the basis of the energy property based on a specified percentage of the costs of developing the project (including all direct and indirect costs, but exclusive of the developer profit or development fee).

B. Battery Energy Storage Systems and Energy Storage Technology.

The IRA made significant amendments to Section 48, including expanding the definition of "energy property" to include, among other things, "energy storage technology" that is placed in service after December 31, 2022. Section 48(c)(6) defines energy storage technology to include property that receives, stores, and delivers energy for conversion to electricity and that has a nameplate capacity of not less than 5 kilowatt hours. Prior to the changes made by the IRA, energy storage systems were included in the definition of solar energy property or wind energy property to the extent that the energy storage systems were considered part of the solar generating facility or wind generating facility. Treasury Regulations Section 1.48-9 provides that an energy storage system constitutes solar energy property or wind energy property only if its

[3] *See generally "Evaluating Cost basis for Solar Photovoltaic Properties*,*"* U.S. Department of the Treasury (June 30, 2012) ("[T]he 1603 review team has found that appropriate markups typically fall in the range of 10 to 20 percent."); *see also* Bloomberg BNA, Daily Tax Report, *Project Finance Developer Fees Explained*, David Burton, November 25, 2014.

use of energy from sources other than solar energy or wind energy, as applicable, does not exceed 25% of its total energy input in an annual measuring period.

Section 3.02(1)(a)(i) of Notice 2022-49 asks what should be considered in determining what types of technologies are included in these new types of energy property, including energy storage technology. With respect to battery energy storage systems, we recommend that Treasury and the IRS issue guidance confirming the following:

- A battery energy storage system that meets the definition of energy storage technology and is placed in service after December 31, 2022 is eligible for the full ITC regardless of the source of the electricity used to charge the system (and thus that the dual use rules under Treasury Regulations Section 1.48-9, including the 25% limit on using energy from sources other than solar or wind energy, do not apply to energy storage technology). An ITC that is claimed with respect to a battery energy storage system will not be subject to recapture, in full or in part, under Section 50 as a result of using energy from sources other than solar or wind energy, including energy from the grid, during the five-year period after the battery energy storage system is placed in service; and

- A battery energy storage system that meets the definition of energy storage technology and is placed in service after December 31, 2022 is eligible for the ITC, notwithstanding that it may be co-located with, operated in conjunction with, subject to a power purchase agreement with or fully or partially charged with electricity from a wind or solar project that claims PTCs.

C. Transfers of Credits.

Section 6418 permits eligible taxpayers to transfer certain credits to an unrelated taxpayer. Section 6418(a) provides that, if a taxpayer elects to transfer all (or any portion specified in the election) of an eligible credit for any taxable year to another taxpayer (transferee taxpayer) that is not related to the eligible taxpayer, the transferee taxpayer specified in such election (and not the transferor) is treated as the taxpayer for purposes of the Code with respect to such credit (or such portion thereof). Any election under Section 6418 must be made at such time and in such manner as the Secretary of the U.S. Department of the Treasury (the "Secretary") may provide.

Notice 2022-50 states that Treasury and the IRS intend to issue guidance to implement the elective payment provisions under Section 6417 and the elective credit transfer provisions under Section 6418. Notice 2022-50 also requests general comments on questions arising under Sections 6417 and 6418, as well as specific comments on questions listed in Notice 2022-50. In particular, Notice 2022-50 asks commentators to specify the issues on which guidance is needed most quickly as well as the most important issues on which guidance is needed. We recommend that Treasury and the IRS provide the following clarifications with respect to the transfer of certain credits under Section 6418.

1. Procedures for Transferring Credits

Section 6418(c)(1) provides that, in the case of any eligible credit determined with respect to any facility or property held directly by a partnership or S corporation, the Secretary determines the manner in which such partnership or S corporation makes an election under Section 6418(a) with respect to such credit. Section 3.02(2)(b) of Notice 2022-50 asks what factors Treasury and the IRS should consider in determining the time and manner for making the election. We recommend that Treasury and the IRS consider timing issues relating to the election under Section 6418(a) and specify the procedures for making the election and transferring the credits. Specifically, we recommend guidance clarifying whether the credits can be transferred when they arise or are earned (and thus before the credits are reflected on a federal income tax return), such that the transferee can apply the credits against estimated tax payments. We also recommend clarifying that an ITC can be transferred (in whole or in part) after a project has been placed in service (including in the case of a project that was placed in service prior to enactment of the IRA). Finally, we recommend that Treasury and the IRS provide guidance on the type of information or registration that it may require a transferor taxpayer to prepare in connection with the election under 6418(a).

2. Recapture

Section 6418(g)(3) provides that the recapture rules under Section 50 shall apply in the case of any election under Section 6418(a) with respect to investment tax credits. Section 6418(g)(3) further provides that if the applicable investment credit property (as defined in Section 50(a)(5)) is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer (meaning the transferor) before the close of the recapture period described in Section 50(a)(1) then (i) such eligible taxpayer must provide notice of such occurrence to the transferee taxpayer (in such form and manner as the Secretary prescribes) and (ii) the transferee taxpayer must provide notice of the recapture amount, if any, to the transferor (in such form and manner as the Secretary prescribes). This rule seems to suggest that the recapture would apply to, and be reported by, the transferee taxpayer.

Section 3.02(10) of Notice 2022-50 asks what, if any, guidance is needed to clarify the application of Section 50 for purposes of Section 6418(g)(3). We recommend that Treasury and the IRS clarify how the recapture rules of Section 50 would apply, including clarification of whether any tax due to a recapture of tax credits that follows a transfer under Section 6418(a) and that arises from the applicable investment credit property being disposed of, or otherwise ceasing to be investment credit property, would apply to, and be reported by, the transferee or transferor taxpayer. This confirmation is important because we anticipate the risk of recapture will be a heavily negotiated aspect of any transfer of credits. We believe putting this burden on the transferee will limit transferability and recommend the proceeds initially received by the transferor (and treated as tax exempt) become taxable for the amount of recapture.

3. Election for Certain Credits

Section 6418(f)(1)(B) provides that in the case of certain credits, including the carbon capture credit under Section 45Q and the clean hydrogen production tax credit under Section 45V, an election under Section 6418(a) must be made (i) separately with respect to each facility

for which such credit is determined and (ii) for each taxable year during the 10-year period beginning on the date such facility was originally placed in service (or, in the case of the carbon capture credit under Section 45Q, for each year during the 12-year period beginning on the date the carbon capture equipment was originally placed in service at such facility).

Section 3.02(6) of Notice 2022-50 asks whether, in determining the amount of eligible credit transferred under Section 6418(a), guidance is needed to clarify the application of any other Code provision, and if so, what clarification is needed. Section 3.02(7) of Notice 2022-50 asks whether guidance is needed to clarify how any other Code provision applies to an eligible taxpayer or a transferee taxpayer when an election is made under Section 6418, and if so, what clarification is needed. We request that Treasury and the IRS issue guidance on the application of Section 6418(a) for any carbon capture projects or clean hydrogen projects in which a taxpayer has made an election to receive an elective payment of the carbon capture credit under Section 45Q or the clean hydrogen production tax credit under Section 45V.

Section 6417(d)(3)(C)(i) provides that, in the case of the carbon capture credit under Section 45Q, any election under Section 6417(a) to receive an elective payment: (i) applies separately with respect to the carbon capture equipment originally placed in service by the applicable entity during a taxable year, and (ii) in the case of a taxpayer who makes an election described in Section 6417(d)(1)(C), such election applies to the taxable year in which such equipment is placed in service and the four subsequent taxable years with respect to such equipment that end before January 1, 2033. Section 6417(d)(3)(C)(ii) provides that, for any taxable year described in Section 6417(d)(3)(C)(i)(II)(aa) with respect to carbon capture equipment, no election may be made by the taxpayer under Section 6418(a). Section 6417(d)(3)(D)(i) provides that, in the case of the clean hydrogen production tax credit under Section 45V, any election under Section 6417(a) to receive an elective payment (i) applies separately with respect to each qualified clean hydrogen production facility; (ii) must be made for the taxable year in which such facility is placed in service (or within the one-year period subsequent to the date of enactment of Section 6417 in the case of facilities placed in service before December 31, 2022), and (iii) in the case of a taxpayer who makes an election described in Section 6417(d)(1)(B), such election applies to such taxable year and the four subsequent taxable years with respect to such facility that end before January 1, 2033. Section 6417(d)(3)(D)(ii) provides that, for any taxable year described in Section 6417(d)(3)(D)(i)(III)(aa) with respect to a qualified clean hydrogen production facility, no election may be made by the taxpayer under Section 6418(a). Therefore, Section 6417 is clear that during the five-year elective payment period for carbon capture projects and clean hydrogen projects, if a taxpayer has made the election under Section 6417, it may not also transfer the Section 45Q or Section 45V credits to an unrelated taxpayer pursuant to Section 6418(b). However, the language of Section 6417 is unclear whether a taxpayer may transfer these credits after that five-year period for the remaining tax credit period. We believe that Treasury and the IRS should issue guidance to clarify whether a taxpayer may make an election under Section 6418(a) to transfer carbon capture credits under Section 45Q or clean hydrogen production tax credits under Section 45V after having previously made the election under Section 6417(a) to receive an elective payment of these credits for the year in which the related projects have been placed in service and the subsequent four taxable years.

4. Transfers of Credits and Lease Pass-Throughs

As noted previously, Section 3.02(6) of Notice 2022-50 asks whether in determining the amount of eligible credit transferred under Section 6418(a), guidance is needed to clarify the application of any other Code provision, and if so, what clarification is needed. In addition, in Section 3.02(7) of Notice 2022-50 asks whether guidance is needed to clarify how any other Code provision applies to an eligible taxpayer or a transferee taxpayer when an election is made under Section 6418, and if so, what clarification is needed.

Treasury Regulations Section 1.48-4 provides that the owner of energy property that enters into a lease of the property is entitled to elect to "pass through" the investment tax credit to the lessee if certain conditions are met including (i) the property is "Section 38 property" in the hands of the lessor (*i.e.*, it is depreciable property and certain other requirements are met), (ii) the property is new in the hands of the lessor, and the original use of such property commences with the lessor, (iii) the property would be "new Section 38 property" in the hands of the lessee if the lessee had actually purchased the property, (iv) the lessor is not a mutual savings, cooperative bank or certain entities described in Treasury Regulations Section 1.48-4(a)(1)(v), and (v) a statement of election to treat the lessee as a purchaser is filed in the manner required by the Regulations. For ITC purposes, the effect of the pass-through election is to treat the lessee as having purchased the property for an amount equal to its fair market value on the date possession is transferred to the lessee. We recommend that Treasury and the IRS clarify whether a taxpayer may transfer credits after having received the credit as lessee in a lease "pass through" under the rules of Treasury Regulations Section 1.48-4.

5. Transfers of Credits to Individuals

As noted previously, Section 3.02(6) of Notice 2022-50 asks whether, in determining the amount of eligible credit transferred under Section 6418(a), guidance is needed to clarify the application of any other Code provision, and if so, what clarification is needed. In addition, Section 3.02(7) of Notice 2022-50 asks whether guidance is needed to clarify how any other Code provision applies to an eligible taxpayer or a transferee taxpayer when an election is made under Section 6418, and if so, what clarification is needed. We recommend that Treasury and the IRS clarify whether a taxpayer may transfer eligible credits to individuals, and specifically whether the passive activity rules under Section 469 and at-risk rules under Section 49 apply to such transferee.

6. Transfers of Credits from Partnerships

As noted previously, Section 3.02(6) of Notice 2022-50 asks whether in determining the amount of eligible credit transferred under Section 6418(a), guidance is needed to clarify the application of any other Code provision, and if so, what clarification is needed. In addition, Section 3.02(7) of Notice 2022-50 asks whether guidance is needed to clarify how any other Code provision applies to an eligible taxpayer or a transferee taxpayer when an election is made under Section 6418, and if so, what clarification is needed. We recommend that Treasury and the IRS clarify whether a partnership in which some or all of the partners are individuals subject to the passive activity rules under Section 469 and at-risk rules under Section 49 may transfer eligible credits under Section 6418.

7. Examples of Excessive Credit Transfers

Section 6418(g)(2)(A) provides that, in the case of any portion of an eligible credit that is transferred to a transferee taxpayer pursuant to Section 6418(a) and that the Secretary determines constitutes an excessive credit transfer, the tax imposed on the transferee taxpayer for the taxable year in which such determination is made is increased by an amount equal to the sum of (i) the amount of such excessive credit transfer, plus (ii) an amount equal to 20 percent of the excessive credit transfer. Pursuant to Section 6418(g)(2)(B), the incremental 20 percent of the excessive credit transfer does not apply if the transferee taxpayer demonstrates to the satisfaction of the Secretary that the excessive credit transfer resulted from reasonable cause. Section 6418(g)(2)(C) defines the term "excessive credit transfer" to mean, with respect to a facility or property for which an election is made under Section 6418(a) for any taxable year, an amount equal to the excess of (i) the amount of the eligible credit claimed by the transferee taxpayer with respect to such facility or property for such taxable year over (ii) the amount of such credit that, without application of Section 6418, would be otherwise allowable with respect to such facility or property for such taxable year.

Section 3.02(9) of Notice 2022-50 asks what, if any, guidance is needed to clarify the application of the excessive credit transfer provisions of Section 6418, what factors should be taken into account in determining whether reasonable cause exists for purposes of Section 6418(g)(2)(B), and how to calculate the excessive credit transfer amount. We recommend that Treasury and the IRS provide examples of excessive credit transfers and clarify how a transferee taxpayer can demonstrate that such excessive credit transfer resulted from reasonable cause.

D. Direct Pay.

Section 6417 allows certain taxpayers to elect to treat applicable credits as a direct payment rather than a credit against their federal income tax liabilities. Section 6417(a) provides that, in the case of an applicable entity making an election with respect to any applicable credit determined with respect to such entity, such entity is treated as making a payment against its federal income tax for the taxable year with respect to which such credit was determined equal to the amount of such credit. Any election under Section 6417 can only be made at such time and in such manner as the Secretary may provide. Section 6417(d)(1)(A) defines the term "applicable entity" to mean (i) any organization exempt from tax imposed by subtitle A; (ii) any State or political subdivision thereof; (iii) the Tennessee Valley Authority; (iv) an Indian tribal government (as defined in Section 30D(g)(9)); (v) any Alaska Native Corporation (as defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)); or (vi) any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas.

Section 6417(c)(1) provides that, in the case of any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation, any election under Section 6417(a) is to be made by such partnership or S corporation and must be made in such manner as the Secretary may provide. Section 6417(c)(2) provides that, in the case of any facility or property held directly by a partnership or S corporation, no election by any partner of shareholder is allowed under Section 6417(a) with respect to any applicable credit determined with respect to such facility or property.

Section 3.01(13) of Notice 2022-50 asks for comments on any other area of Section 6417 that may require guidance. We recommend that Treasury and the IRS clarify whether a partnership that has a partner that meets the definition of applicable entity in Section 6417(d)(1)(A) can elect partial direct pay (based on that partner's share) if one or more of the other partners in the partnership does not meet the definition of eligible entity. In addition, we recommend that Treasury and the IRS should issue guidance on whether a partnership in which all of the partners meet the definition of applicable entity in Section 6417(d)(1)(A), but the partnership does not meet the definition of eligible entity, can elect direct pay.

E. Domestic Content and Energy Community.

Section 45(b)(9) (and a corresponding provision under Section 48) makes available to taxpayers increased PTC and ITC amounts for projects that are placed in service after December 31, 2022, and that meet certain domestic content requirements. Additionally, Section 45(b)(11) (and a corresponding provision under Section 48) make available to taxpayers increased PTC and ITC amounts for projects that placed in service after December 31, 2022, and that are located in "energy communities."

A project qualifies for the domestic content adder if any steel and iron included in the project was produced in the United States and at least 40% (or 20%, in the case of offshore wind) of any "manufactured products" that are components of the project (upon completion of construction) are mined, produced, or manufactured in the United States.

A project qualifies for the energy community adder if the project is located in (i) a brownfield site, (ii) a metropolitan statistical area or non-metropolitan statistical area that has (or, at any time after December 31, 2009, had) 0.17% or greater direct employment or 25% or greater local tax revenues related to the extraction, processing, transport or storage or coal, oil or natural gas (as determined by the Secretary) and has an unemployment rate at or above the national average unemployment rate for the previous year (as determined by the Secretary), or (iii) a census tract in which after December 31, 1999, a coal mined closed, or after December 31, 2009, a coal-fired power plant was retired (or a census tract directly adjoining any census tract described in this clause (iii)).

Section 3.03(5) of Notice 2022-51 asks for comments on any topics relating to the domestic content requirement that may require guidance. Similarly, Section 3.04(7) asks for comments on any topics relating to the energy community requirement that may require guidance. Further to that request, we recommend that Treasury and the IRS provide additional clarification regarding the application of the domestic content requirements to solar projects, wind projects and battery energy storage systems, including which parts of such projects are considered components or subcomponents and which parts of such projects need to be composed of domestic steel and iron. For example, is a battery storage system for which final assembly occurs in the United States considered produced in the United States, or does the taxpayer need to consider where the component parts of the battery were manufactured? Further clarifications are also needed regarding the requirements for an energy community for purposes of Section 48(b)(11), including how to apply the requirements to projects that are not entirely within the boundaries of an energy community and what sources are acceptable for demonstrating the required employment and tax revenue thresholds and unemployment rate are met. In addition, we

recommend Treasury and the IRS clarify how the energy community requirements apply to projects that claim PTCs, including whether these requirements must be met each year during the PTC period. Finally, we recommend that Treasury and the IRS clarify how the recapture rules apply to projects claiming the ITC with a domestic content bonus.

III. Conclusion

We thank you for the opportunity to provide comments regarding implementation of the IRA's clean energy tax incentives and believe that clarification of the provisions discussed above will improve the ability of taxpayers to use these tax credits to increase the deployment of renewable energy production and infrastructure.

Sincerely,

/s/ James Carlisle
Senior Vice President
Public Policy Federal Government Relations
Bank of America Corporation