November 4, 2022

SUBMITTED ELECTRONICALLY AND VIA USPS

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

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

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief
Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: Request for Meeting and Comments on Regulatory Implementation of the Inflation Reduction Act and Sections 6417 and 6418 of the Code Pursuant to Notice 2022-50.

Dear Ms. Batchelder and Mr. Paul:

Cypress Creek appreciates the opportunity to submit comments regarding the Inflation Reduction Act ("IRA") pursuant to Notice 2022-50, with the below answers to questions from the Treasury Department and IRS regarding §§ 6418 (on transferability) as added by the IRA, that should be addressed in guidance. We worked closely with the American Clean Power Association (ACP) and Solar Energy Industries Association (SEIA) to develop much of the comments below, and very much appreciate the staff of those organizations for their efforts.

I. EXECUTIVE SUMMARY

Cypress Creek Renewables in its comments below has prioritized detailed guidance from Treasury and IRS around § 6418, the "transferability" provision. It is critical that the relevant agencies provide:

- Clear definition of terms related to the transfer of credits.
- How cash payments related to this provision can be divided between different partnership agreements, and at what stage of a partnership those can be set.
- And finally, clear rules around what constitutes both "cash payments" and when transfers can take place.

II. QUESTIONS RAISED BY IRS

.02 Transfer of Certain Credits (§ 6418).

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

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

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

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

The transferor should not be subject to penalties where the taxpayer reasonably relied on a reasonable appraisal. An appraisal may be deemed per se reasonable where it does not exceed a certain step-up threshold. Treasury should adopt 26 C.F.R. § 1.6664-4(b)'s facts and circumstances test to determine reasonable reliance.

Finally, there should not be other deficiency procedures for transfers, like Congress included in other provisions of the IRA such as prevailing wages.

(2) 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 way such partnership or S corporation makes an election under § 6418(a) with respect to such credit.

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6418(a) and what, if any, guidance is needed with respect to such issues?

The IRS should clarify that cash proceeds from the transfer of tax credits pursuant to § 6418 do not have to be distributed in the same proportion as the credits would have been allocated for tax purposes. The sharing of cash among partners should be permitted to be determined by agreement of such partners.

Section 6418 provides that a partnership is permitted to both allocate a portion of its tax credits to its partners and sell a portion of its credits. The election at the partnership level under § 6418(c) is permitted to be made for less than all the applicable credits for such taxable year. Cypress Creek requests guidance that in such case, each partner's distributive share of any credits not subject to an election under § 6418 shall continue to be determined under the partnership agreement, and that any tax-exempt income allocations shall also be determined by agreement of such partners.

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

Multiple Facility Issues

Section 6418(f)(1)(B)(i) provides that the transferability election is made "separately with respect to each facility." Guidance is requested confirming that a taxpayer may elect to treat multiple properties that are

operated as a single project as a single facility for purposes of § 6418. Such an election should be provided solely for the convenience of the taxpayer and should not indicate whether facilities are treated as a single facility for any other purpose, nor does it define "facility" for any other purpose.

Guidance is requested on clarification of the method for allocating credits among multiple facilities when a transferability election is made for less than all the credits with respect to such facilities. An eligible taxpayer may make an election to transfer all, or a portion of an eligible credit determined with respect to a particular facility for one taxable year during the applicable credit period, while deciding not to make an election to transfer any portion of an eligible credit determined with respect to that facility for another taxable year during the applicable credit period. In the case of a project consisting of multiple facilities, guidance is requested confirming that the taxpayer may use any reasonable method for purposes of allocating the eligible credits generated by the project among the facilities for purposes of making the election under section 6418.

Affiliated Groups

Guidance is requested clarifying that in the case of an eligible taxpayer that is a member of an affiliated group of corporations filing a consolidated return, the election under section 6418 to transfer all or a portion of an eligible credit of the eligible taxpayer shall be made by the parent of such group.

(3) Section 6418(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 or shareholder is allowed under § 6418(a) with respect to any eligible credit determined with respect to such facility or property. If the election is made, what issues should be considered regarding the transfer of any portion of an eligible credit and what, if any, guidance is needed with respect to such issues? Further, what, if any, guidance is needed on allocating any amount received as consideration for transferring any portion of an eligible credit?

See above for requests for guidance regarding issues with respect to partners and partnerships.

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

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

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

Treasury and IRS should clarify that the transferor may elect the taxable year in which to claim the credit as between the year in which the credit was transferred or the year in which the energy property was placed in service.

Where all or a portion of a credit is transferred, Treasury should clarify that the transferor is not limited to electing a single year for the entirety of the transferred credit. By allowing elections for multiple years for a single transaction, guidance can support an otherwise inadequate market for tax equity.

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

Insofar as a taxpayer's cost under IRC § 1012 includes its overhead in creating an energy property under § 48 (typically 10%), the credit under § 48 should be an amount equal to the applicable percentage of those costs (including overhead), and that full credit should be preserved in a transfer for cash to an unrelated party under § 6418.

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

§ 6417

Guidance is needed to clarify whether a transferee taxpayer within the meaning of § 6418(a) includes an applicable entity as defined in § 6417(d)(1)(A). An applicable entity that receives all or a portion of an eligible credit pursuant to an election made under § 6418 should, to the extent such eligible credit is also an applicable credit as defined in § 6417(b), be entitled to make an election under § 6417 with respect to that credit. See also 01(3) in the Direct Pay section above.

Guidance is also requested to clarify that if direct pay is elected under § 6417 for any years for the §§ 45Q, 45V, and 45X credits, transferability may be elected for the remaining years under § 6418.

§§ 49 and 469

Section 6418(a) provides that the transferee will be treated as the taxpayer with respect to the credit. It is unclear whether that means that the §§ 49 and 469 at-risk and passive activity loss rules to apply to a transferee with respect to the transferred credit under § 6418. Guidance is requested to clarify whether the at-risk and passive loss rules apply to a transferee.

§ 56A

Cypress Creek also requests guidance clarifying clarifies how transferred credits are treated for purposes of the Corporate Alternative Minimum Tax under Section § 56A. Section 6418(b)(2)-(3) provides that the consideration for the transfer of credits is not taxable to the transferor or deductible for the transferee. In practice, it is an expectation that the markets for these renewable credits will not be transferred at 100 percent of their value but will be traded at a discount. In practice, GAAP and IFRS may also require the gain on purchase of tax credits to be recorded in the adjusted financial statement income and not be recorded as tax. Under § 56A(c)(9) there is a specific exclusion or adjustment to adjusted financial statement income for amounts attributable to election for direct payments of certain credits

(8) For purposes of preventing duplication, fraud, improper payments, or excessive credit transfers under § 6418, what information, including any documentation created in or out of the

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

For eligible credits related to power generating facilities, documentation could include interconnection agreements.

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

Guidance is requested clarifying that the excessive credit transfer under § 6418(g) will be assessed against the transferor to the extent of any transferred credits that are disallowed, and against the transferee to the extent the transferee claims credits more than the credits for which the transferee paid the transferor.

On reasonable cause, reference should be made to Treas. Reg. § 1.6664-4(b). The party responsible for any excessive credit transfer amount and any party subject to examination for an excessive credit transfer should have the right to challenge and/or appeal any adverse determination by the IRS or other agency. Guidance, particularly safe harbors, should clarify that due diligence, including being able to rely on the advice of competent tax professionals, meets the standard of "reasonable cause."

Other provisions in the Code and the IRA, such as the penalty for prevailing wages in § 45(b)(7)(B), include a specific reference to deficiency procedures and states that those procedures do not apply. *See* § 45(b)(7)(B)(ii). On the other hand, § 6418(g)(2)(A) says nothing about deficiency procedures. The IRS should make clear that the deficiency provisions apply to an determination of an excessive payment and parties should have the right to appeal any determination to the IRS Independent Office of Appeals.

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

It is unclear whether the transferor or the transferee is subject to recapture of a transferred investment tax credit under § 50(a). We requests guidance confirming that the § 50(a) recapture rules will apply to the eligible taxpayer (i.e., the transferor), and that tax credits cannot be recaptured from the transferee.

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

Payment in Cash

§ 6418(b)(1) requires the transfer of a credit be for "cash," but does not define it. Under § 6050I "cash" is defined for purposes of reporting by taxpayers of transactions more than $10,000 generally to help law enforcement detect illegal activity. Renewable energy projects, which can generate significant tax credits, often use more sophisticated means of transferring value between project partners and investors. Treasury should provide guidance that allows taxpayers to transfer generated tax credits for financial value, but with means that are more expansive than what is commonly viewed as "cash" under common usage and spelled out using § 6050I analysis.

Treasury should clarify whether it intends to prescribe a form agreement to facilitate the transfer of credits.

"*Sale-leasebacks and Inverted Leases*

Guidance is requested clarifying that both sale-leasebacks and inverted leases are permissible. Section 6418 does not prohibit a sale-leaseback of the investment tax credit property. Specifically, guidance is requested clarifying that sale-leasebacks within three months after assets are originally placed in service as permitted under § 50(d)(4) will not cause recapture for purposes of § 6418. In the case of such a sale-leaseback, the buyer-lessor should be treated as the original user of the leased property and allowed to make the election to transfer all or a portion of the investment tax credit under § 6418. Similarly, tax credits transferred to a lessee by election under Treas. Reg. § 1.48-4 to treat the lessee as if it had purchased the leased property should be transferrable by the lessee under § 6418.

Audits

Guidance is requested clarifying that with respect to audits conducted on the transferor, underpayments will be assessed against the transferor.

The guidance should clarify that standard procedures apply to any IRS examination and that subchapter B of chapter 63 (relating to deficiency procedures for income taxes), as well as other applicable provisions of subtitle F of the Internal Revenue Code, applies with respect to the assessment or collection of any taxes imposed with respect to any excessive credit transfer determination under § 6418(g)(2), with respect to any recapture event described under § 6418(g)(3), or otherwise with respect to any assessment or collection of taxes or penalties against the transferor or transferee(s) of an eligible credit.

III. CONCLUSION

We appreciate the opportunity to respond to this request for comments on § 6418 focused on transferability and look forward to continuing engagement with the IRS and Treasury on this issue.