Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022

Section 6418 – Transferability of Credits
Corporate Alternative Minimum Tax

Background

Section 13801 of Public Law No. 117–169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), creates a new section 6418, Transfer of Certain Credits, which allows an eligible taxpayer to elect to transfer all (or a portion) of an eligible credit determined with respect to such taxpayer for any taxable year to an unrelated taxpayer. The transfer must be for cash. The proceeds are excluded from the gross income of the transferor and the payment is not deductible by the transferee. Once a credit is transferred, the transferee cannot transfer it further. Credits that have been carried back to a preceding taxable year or carried forward from a prior taxable may not be transferred.

Issue

Taxability - Under section 6418 Congress stated that the consideration for the transfer of credits is not taxable to the transferor or deductible for the transferee. In practice, the market price at which these renewable credits will be transferred is not expected to be the nominal amount of the credit but rather that the credits will be traded at a discount. This language shows the intent of Congress was to make the transfer of qualified tax credits non-taxable which should include any impact related to transferring credits at a discount. In addition, Generally Accepted Accounting Principles may require that the consideration received by the transferor of the credits as well as the gain realized by the transferee of the credits be recorded in the applicable financial statement as a non-tax item. Under the corporate alternative minimum tax (CAMT) there is a specific exclusion or adjustment to audited financial statement income (AFSI) for amounts attributable to the direct payments of certain credits, however it is unclear if section 6418 is provided the same exclusion.

Proposal

Congress intended that transferred credits are not subject to taxation including the CAMT and therefore the Treasury Department should clarify that the AFSI of the transferor of the credits and the transferee of the credits should be adjusted to remove any financial statement impact of the transferred credits. This clarification will help expedite clean energy investments for which these credits could be claimed through accelerating the establishment and orderly functioning of

the market for these credits by providing tax certainty with respect to the transferred credits. Therefore, please see the following proposed language which provides the clarification needed.

> (#) Transfer of certain credits under section 6418. The transfer of tax credits is a non-taxable transaction. Adjusted financial statement income shall be appropriately adjusted to disregard any amount that is taken into account by the eligible taxpayer or the transferee taxpayer on its applicable financial statement with respect to any eligible credit transferred in accordance with section 6418.

Support

The Treasury Department is granted broad authority to issue regulations under section 6418 that may be necessary to carry out the purposes of that section. The requested guidance is consistent with that authority and the policy supporting section 6418 to allow clean energy producers to effectively recognize the value of the credits arising from their targeted activities. While there is no specific adjustment under the CAMT for items of income or expense for credits that are transferred, broad authority has been provided to the Treasury Department to issue regulations or other guidance to provide for such adjustments to AFSI as the Treasury Department determines necessary to carry out the purposes of Section 56A(c)(15).

Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022

Section 6418 – Transferability of Credits
Normalization

Background

Section 13801 of Public Law No. 117–169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), creates new section 6418, Transfer of Certain Credits, which allows an eligible taxpayer to elect to transfer all (or a portion) of an eligible credit determined with respect to such taxpayer for any taxable year to an unrelated taxpayer. The transfer must be for cash. The proceeds are excluded from the gross income of the transferor and the payment is not deductible by the transferee. Once a credit is transferred, the transferee cannot transfer it further. Credits that have been carried back to a preceding taxable year or carried forward from a prior taxable may not be transferred.

Issue

Normalization. Under section 6418, an eligible taxpayer may elect to transfer tax credits and the transferee specified in such election (and not the eligible taxpayer) is treated as the taxpayer for purposes of such credit transferred. Some regulated public utilities are planning to elect to transfer credits under section 6418. Regulated public utilities generally are required to use a normalization method of accounting[1] for rate making purposes for public utility property.[2] For those public utilities that transfer credits, it is expected that the renewable energy facilities will be held in rate base and the customers will receive the benefits of the credits. It is not clear, however, if the benefits of these credits will remain subject to the normalization provisions since the assets associated with the credits will still be public utility property, but section 6418 indicates that the transferee taxpayer is treated as the taxpayer for purposes of the credit.

Proposal

The Treasury Department should clarify whether or not a public utility is required to use a normalization method of accounting to account for the benefit of a tax credit attributable to public utility property that is transferred under section 6418.

Support

Congress provided for the transferability of credits as a substitute for the use of the credits by utilities. Congress clearly provided for an opt-out of the normalization rules for energy storage technology under section 13102(5)(A) of IRA by adding to paragraph 2 of section 50(d) but provided no such specific exception to the normalization rules for transferred credits. On the other hand, Congress provided that the transferee would be considered the taxpayer for purposes

[1] Specifically for tax credits, former section 46(f)(2) provides an election under which a utility may flow through the investment tax credit as a reduction cost of service by no more than a ratable portion of the credit and the utility did not reduce rate base by any portion of the credit.
[2] Section 168(i)(10)

of the credit and therefore the transferee, the taxpayer with the credit, is not the utility that owns the public utility property and therefore not subject to the normalization rules. It is unclear whether Congress intended the normalization rules to apply with respect to public utility property for which the public utility transferred the credit. To avoid any doubt in the ratemaking process, EEI asks that the Treasury Department clarify this uncertainty.

Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022

Section 6418 – Transferability of Credits
Transfer to Tax Exempt Entity, Cash Payments, and Elections

Background

Section 13801 of Public Law No. 117–169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), creates new section 6418, Transfer of Certain Credits, which allows an eligible taxpayer to elect to transfer all (or a portion) of an eligible credit determined with respect to such taxpayer for any taxable year to an unrelated taxpayer. The transfer must be for cash. The proceeds are excluded from the gross income of the transferor and the payment is not deductible by the transferee. Once a credit is transferred, the transferee cannot transfer it further. Credits that have been carried back to a preceding taxable year or carried forward from a prior taxable may not be transferred.

Issue

EEI requests the Treasury Department to confirm that credits may be transferred to tax-exempt entities which may then elect to receive a direct payment for those credits under section 6417. EEI also requests guidance on certain aspects of the election to transfer credits, including confirming that an election may be made (1) separately for each taxable year such that an election may be made to transfer credits generated by a facility during one taxable year even though no election is made to transfer credits generated by that facility during another taxable year, and (2) by the parent of a consolidated group with respect to credits generated during the taxable year by all members of the group. In addition, EEI requests that the requirement to pay cash for credits is satisfied by prepayments and deferred payment obligations provided that the transferee cannot transfer any consideration other than cash in connection therewith. Finally, EEI requests that the tax-exempt income arising from the receipt of cash in consideration for the transfer of credits can be allocated among the partners in whatever percentage the partners determine provided that the sum of such tax-exempt income and the credits for which no election is made under section 6418 that is allocated to each partner is equal to that partner's distributive share of the otherwise eligible credit for the taxable year.

Proposal

See included draft regulations for specific language.

Support

Section 6418(g)(2)(A) addresses Excessive Credit Transfers and provides:

> [i]n the case of any amount treated as a payment . . . which the Secretary determines constitutes an excessive payment, the tax imposed on such entity by chapter 1 (regardless of whether such entity would otherwise be subject to tax

> under such chapter) for the taxable year in which such determination is made shall be increased by . . . (emphasis added).

The parenthetical phrase refers specifically to an entity not subject to the income tax, which means the transferee may be a tax-exempt entity. If it were, otherwise, the parenthetical would be unnecessary.

The Treasury Department is granted broad authority to issue regulations under section 6418 that may be necessary to carry out the purposes of that section. The requested guidance is consistent with that authority and comports with the policy behind section 6418 to allow clean energy producers to effectively recognize the value of the credits arising from their targeted activities.

Reg § 1.6418-1. Transfer of Certain Credits.

(u) Transferee taxpayer.
(#) Applicable entities and coordination with section 6417. A transferee taxpayer within the meaning of section 6418(a) shall include an applicable entity as defined in section 6417(d)(1)(A). An applicable entity that receives all or a portion of an eligible credit pursuant to an election made under section 6418 shall, to the extent such eligible credit is also an applicable credit as defined in section 6417(b), be entitled to make an election under section 6417 with respect to that credit.

(v) Election.
(#) Election for eligible credits described in section 6418(f)(1)(B). An election must be made separately with respect to each facility for which an eligible credit described in section 6418(f)(1)(B) is determined, and for each taxable year during the applicable credit period. Thus, 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, 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.
(#) Consolidated groups. 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 may be made by the parent of such group.

(w) Payments for eligible credits.
(#) Required to be paid in cash. The transferee taxpayer is required under section 6418(b)(1) to pay cash to the eligible taxpayer as consideration for all or a portion of an eligible credit transferred pursuant to section 6418. For this purpose, cash shall include payments of cash prior to the taxable year in which the eligible credit is transferred (cash prepayments), cash paid during such taxable year, and obligations to pay cash in one or more taxable years subsequent to such taxable year (deferred cash payments), provided in each case that the transferee taxpayer cannot and does not transfer any consideration other than cash in connection with the transfer.

(x) Partnerships.

(#) Allocation of tax-exempt income. Section 6418(c)(1)(B) requires that a partner's distributive share of tax-exempt income arising from a transfer of a tax credit under section 6418 be based on such partner's distributive share of the otherwise eligible credit for each taxable year. This requirement will be satisfied if the sum of the partnership's tax-exempt income arising from the credit transfers and the tax credits that are not transferred by the partnership that is allocated to each partner is in accordance with such partner's distributive share of the otherwise eligible credit for the taxable year. Thus, a 50-50 partnership that elects to transfer half of its tax credits under section 6418 may allocate all of the tax-exempt income arising from such transfer to one partner and all of the tax credits for which no election under section 6418 is made to the other partner.

Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022

Section 6418 – Transferability of Credits
Recapture

Background

Section 13801 of Public Law No. 117–169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), creates new section 6418, Transfer of Certain Credits, which allows an eligible taxpayer to elect to transfer all (or a portion) of an eligible credit determined with respect to such taxpayer for any taxable year to an unrelated taxpayer. The transfer must be for cash. The proceeds are excluded from the gross income of the transferor and the payment is not deductible by the transferee. Once a credit is transferred, the transferee cannot transfer it further. Credits that have been carried back to a preceding taxable year or carried forward from a prior taxable may not be transferred.

Issue

Whether the transferor of the credit or the transferee of the credit should be responsible for reporting the recapture of the credit.

Proposal

Section 6418 is unclear whether in the case of a recapture event the credit is recovered by the government through the tax return of the eligible taxpayer or the tax return of the transferee taxpayer. Despite the statement that the transferee taxpayer is to be treated as the taxpayer with respect to the credits transferred[3], other provisions of section 6418 impose obligations with respect to the transferred credits on the eligible taxpayer and the transferee taxpayer.

i. The tax liability of the **transferee taxpayer** is increased for any excess credit and associated penalty, if any. [4]
ii. The **eligible taxpayer** must reduce the basis of the credit-eligible property as required by section 50(c). [5]
iii. The **eligible taxpayer** is responsible for reporting to the transferee taxpayer if a recapture event has occurred. [6]
iv. The **transferee taxpayer** is responsible for reporting the recapture amount to the eligible taxpayer. [7]

Transfer agreements will likely provide assurances and indemnities from the eligible taxpayer that the credit amount is correct and that the related property will remain in service for the required time. Any deviation will require compensation from the eligible taxpayer. When recapture events occur, the code only describes reporting requirements. It does not explicitly state which taxpayer must bear the burden of the recaptured credit on its tax return. For

[3] Section 6418(a)
[4] Section 6418(g)(2)
[5] Section 6418(g)(3)(A)
[6] Section 6418(g)(3)(B)(i)
[7] Section 6418(g)(3)(B)(ii)

administrative simplicity and market efficiencies, EEI recommends that both recapture and audit adjustments be reported on the eligible taxpayer's return since the eligible taxpayer will have the facts and documentation that control the amount of the credit for a recapture event. In addition, this will allocate the primary risk of recapture to the party that has the most control over the events that would result in recapture.

If the burden of the recapture must be reported on the tax return of the transferee taxpayer, the involvement of the eligible taxpayer will add complexity to the audit including the potential disclosure of the eligible taxpayer's information by the IRS in its audit of the transferee taxpayer. It will also require complex and detailed negotiations between the eligible taxpayer and the transferee taxpayer over their rights and responsibilities, which adds risk to the transaction and reduces the efficiency of any market for tax credits.

Support

Treasury is granted broad authority to issue regulations under section 6418 that may be necessary to carry out the purposes of that section.[8] The requested guidance is consistent with that authority and comports with the policy behind section 6418 to allow clean energy producers to effectively recognize the value of the credits arising from their targeted activities.

[8] Section 6418(h)

Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022

Section 6418 – Transferability of Credits
Registration and Certification Process and Authority of Parent to Transfer Credits for all Members of a Consolidated Group

Background

Section 13801 of Public Law No. 117–169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), creates new section 6418, Transfer of Certain Credits, which allows an eligible taxpayer to elect to transfer all (or a portion) of an eligible credit determined with respect to such taxpayer for any taxable year to an unrelated taxpayer. The transfer must be for cash. The proceeds are excluded from the gross income of the transferor and the payment is not deductible by the transferee. Once a credit is transferred, the transferee cannot transfer it further. Credits that have been carried back to a preceding taxable year or carried forward from a prior taxable may not be transferred.

Issue

In order to permit the transfer of credits most efficiently, EEI asks the Treasury Department to clarify the tax return reporting, registration and certification requirements for a credit transfer for both the eligible taxpayer and the transferee taxpayer.

Section 6418(g)(1) provides:

> As a condition of, and prior to, any transfer of any portion of an eligible credit pursuant to [section 6418(a)], the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section.

Clarification is requested as to (1) the tax return filing process, and (2) the registration/certification process for the transferred credits for both the eligible taxpayer and the transferee taxpayer. Confirmation is also sought that the parent of an affiliated group of corporations that file a consolidated return may transfer the credits of any member of the consolidated group.

Proposal

1. Provide clarity regarding the information required for the tax return filing process for both the eligible taxpayer and the transferee taxpayer with due consideration that both parties agree to and file the same form, similar to the process for reporting section1060 allocations on IRS Form 8594.

2. Provide for a simple, efficient and expedient registration/certification process that allows both the eligible taxpayer and the transferee taxpayer to have confidence that the requirements are satisfied. The Treasury Department should consider (1) a process that allows either party to provide a standard form evidencing certification, and (2) a public registration/certification list, possibly on the IRS' website, identifying projects of eligible taxpayers with credits that are qualified for transfer.
3. Provide confirmation that the parent of an affiliated group of corporations that file a consolidated tax return may act as the transferor of credits generated by members of the consolidated group.

Support

Congress intended to provide for an efficient credit transfer process that guards against duplication, fraud, improper payments, or excessive payments. Providing ready access to the identity of registered participants will facilitate the development and operation of a broad and efficient market.

In a consolidated group, it is possible that several members of the group will generate transferable tax credits in any given tax year. Clarification that the common parent may act as the transferor will provide a more efficient means of transferring the credits in comparison requiring each member of the consolidated group to separately act as the transferor. This is particularly true if several members generate small amounts of transferable credits. The proposed clarification is consistent with the Treasury Regulations requiring tax credits be applied against tax liability of the group on a consolidated basis (Treas. Reg. §1.1502-2) and the provisions that treat the common parent as the agent for the consolidated tax group (Treas. Reg. §1.1502-77).

Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022

Section 6418 – Transferability of Credits
Partnerships Electing Out of Subchapter K

Background

Section 13801 of Public Law No. 117–169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), creates new section 6418, Transfer of Certain Credits, which allows an eligible taxpayer to elect to transfer all (or a portion) of an eligible credit determined with respect to such taxpayer for any taxable year to an unrelated. In the case of any facility or property held directly by a partnership, only the partnership may elect to transfer an eligible credit and no election is allowed to any partner.

Issue

Transfer Election – An unincorporated organization otherwise treated as a partnership may elect out of the application of subchapter K of chapter 1. The new section 6418, however, is not under subchapter K of chapter 1. It is therefore unclear whether the joint owners of a facility under an unincorporated arrangement that elected out of the subchapter K treatment may elect to transfer the eligible credit.

Proposal

It appears the intent of Congress was to provide transferability to the tax owners of the eligible credit. When an unincorporated organization elects out of the subchapter K treatment, the tax owners of the eligible credit are the joint owners of underlying facility, and not the unincorporated organization. Therefore, it should be clarified that the term "partnership" as referenced in section 6418(c) does not include unincorporated organizations that have elected to be excluded from subchapter K treatment under Treas. Reg. §1.761-2(b).

Support

Treasury is granted broad authority to issue regulations under section 6418 that may be necessary to carry out the purposes of that section. The requested guidance is consistent with that authority and comports with the policy behind section 6418 to allow clean energy producers to effectively recognize the value of the credits arising from their targeted activities.