November 4th, 2022

Internal Revenue Service
CC:PA:LPD:PR (Notices 2022-50 and 2022-51), Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Via Federal eRulemaking Portal: http://www.regulations.gov

Subject: Lightsource bp Technical Comments on Notices 2022-50 and 2022-51

Office of Associate Chief Counsel:

Lightsource bp ("**LSbp**") respectfully submits comments to the Department of Treasury (the "**Treasury**") and the Internal Revenue Service ("**IRS**") pursuant to Notices 2022-50 and 2022-51, which requested comments on issues arising under sections 30C, 45, 45L, 45Q, 45U, 45V, 45Y, 45Z, 48, 48C, 48E, 179D, 6417 and 6418 of the Internal Revenue Code[1], as modified or enacted by the Inflation Reduction Act of 2022 (the "**IRA**").

LSbp's Renewable Energy Projects and Ambitions in the United States

LSbp is a renewable energy company pushing the frontiers of solar and storage solutions, backed by world-class execution capabilities. Together with our 50:50 joint venture partner BP America Inc. ("**BP**"), we are reimagining the energy landscape in the United States. With offices across the country, we're working with local communities, businesses and landowners to develop projects that generate the competitively priced, dependable and clean energy that America wants and needs.

LSbp Supports American Clean Power, Solar Energy Industries Association and BP Comments

Both American Clean Power ("**ACP**") and Solar Energy Industries Association ("**SEIA**") have provided comments pursuant to the Notice 2022-50, which LSbp fully supports. LSbp believes the comments contained in the ACP and SEIA comment letters accurately reflect LSbp's position and if guidance was promulgated consistent with these comments, LSbp would have the clarity and direction it needs as it continues to expand its renewables business in the United States.

LSbp also supports the comments about energy community requirements that BP submitted in response to Notice 2022-51.

In addition to the comments that ACP, SEIA and BP have provided, LSbp would urge the Treasury and the IRS to provide the following guidance.

Suggested Additional Guidance:

Transferability Election

[1] All references in these comments to a "section" without identifying the source are to a section of the Internal Revenue Code of 1986, as amended through today's date (the "**Code**").

1. Notice 2022-50 at 3.02(10) – For purposes of section 6418(g)(3), what, if any, guidance is needed to clarify the application of section 50 for purposes of credit recapture, basis adjustments, and eligibility related to section 50(b)(3)?

Recapture of Transferred Tax Credits

The IRA introduced a transferability regime under section 6418 whereby taxpayers can elect to transfer all or part of their tax credits to an unrelated party. The transferred tax credit is subject to recapture if there is a disposition of the property for which investment tax credit has been claimed within the recapture period or the property otherwise ceases to be investment tax credit eligible. However, it is unclear under section 6418 whether the transferor or the transferee suffers recapture of a transferred investment tax credit. LSbp believes that the transferor should be subject to recapture because the property for which investment tax credit has been claimed is beyond the transferee's control and subjecting the transferee to recapture will complicate transfers and make taxpayers hesitant to become buyers. Accordingly, LSbp requests guidance from the Treasury and the IRS clarifying that the recapture rules will apply to the transferor and the investment tax credit cannot be recaptured from the transferee.

Under section 6418, an eligible taxpayer can elect to transfer all or part of its tax credits to an unrelated party. *See* section 6418(a). The transferred tax credit is subject to recapture if there is a disposition of the property for which investment tax credit has been claimed within the first five years after the property is originally placed in service or the property otherwise ceases to be investment tax credit eligible. *See* section 6418(g)(3) (referencing the recapture rules under section 50(a)(1)). The eligible taxpayer must notify the transferee if the investment tax credit eligible property is disposed of within the recapture period or otherwise ceases to be investment tax credit eligible. *See* section 6418(g)(3)(B)(i). The transferee, in turn, is required to provide notice of the recapture amount to the eligible taxpayer. *See* section 6418(g)(3)(B)(ii).

However, it is unclear under section 6418 whether the eligible taxpayer (i.e., the transferor) or the transferee suffers recapture of a transferred investment tax credit. LSbp believes that the transferor should be subject to recapture because the property for which investment tax credit has been claimed is beyond the transferee's control. This position is consistent with the spirit of guidance released by the Treasury under section 1603 of the American Recovery and Reinvestment Act of 2009 (the "**Treasury Cash Grant Program Guidance**") that addressed the application of the recapture rules under section 50 with respect to a cash grant made under the Treasury cash grant program. The Treasury Cash Grant Program Guidance provided that the applicant that applied for the cash grant remained liable to the Treasury for the recapture amount even if the applicant disposed of the investment tax credit eligible property and no longer had control over the property. *See* Payments for Specific Energy Property in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009 Program Guidance published by the Treasury and originally issued in July 2009 and revised in March 2010 and April 2011. The Treasury Cash Grant Program Guidance provided, in relevant part:

> Selling or otherwise disposing of the property to an entity other than a disqualified person does not result in recapture provided the property continues to qualify as a specified energy property and provided the purchaser of the property agrees to be jointly liable with the applicant for any

> recapture. Recapture would occur in the event the property is resold to a disqualified person or ceases to qualify as a specified energy property. The applicant remains jointly liable to the Treasury for the recapture amount even if the applicant no longer has control over the property.[2]

The "applicant" referred to in the Treasury Cash Grant Program Guidance is analogous to the entity that makes the transferability election under section 6418. Under the Treasury Cash Grant Program Guidance, the applicant remained liable for the recapture amount even if the applicant disposed of the property and no longer had control over the property. Therefore, it follows that in the case of a transferability election, as the transferor has control over the property, the transferor should be liable for the recapture amount.

Moreover, subjecting the transferee to a recapture of a transferred investment tax credit will complicate transfers and make taxpayers hesitant to become buyers. Taxpayers would be reluctant to buy investment tax credits because they could be liable for the recapture amount even though they have no control over the property and cannot ensure that the transferor complies with all the conditions to ensure that there is no recapture of the transferred investment tax credits. Congress intended to promote the use of renewable energy by making tax credits more available through the introduction of the transferability regime under section 6418. If the Treasury determines that the transferee is liable for the recapture amount, then it would thwart this congressional intent by making taxpayers reluctant to buy investment tax credits.

Accordingly, LSbp requests guidance from the Treasury and the IRS clarifying that the recapture rules will apply to the transferor and the transferred investment tax credit cannot be recaptured from the transferee.

2. Notice 2022-50 at 3.02(2) – What, if any, issues could arise when a partnership or S corporation makes an election under section 6418(a) and what, if any, guidance is needed with respect to such issues?

LSbp requests guidance on a number of issues with respect to an election made by a partnership to transfer tax credits. First, the Treasury and the IRS should clarify that cash proceeds from the transfer of tax credits pursuant to section 6418 do not have to be distributed in the same proportion as the tax credits would have been allocated for tax purposes. The partners should be allowed to share the cash proceeds in accordance with the agreement between the partners.

Second, section 6418 provides that a partnership can both allocate a portion of its tax credits to its partners and sell a portion of its credits. Under section 6418(c), the election at the partnership level can be made for less than all of the applicable credits for such taxable year. LSbp requests guidance that in a case where tax credits are only partially transferred, each partner's distributive share of any credits not subject to an election under section 6418 should continue to be determined under the partnership agreement, and that any allocation of tax exempt income should also be determined by the agreement of such partners.

<u>Corporate Alternative Minimum Tax</u>

[2] *Id.*

LSbp further requests guidance clarifying how income received from transferred credits is 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. It is expected that the tax credits will not be transferred at 100 percent of their value in the market, but will be traded at a discount. The gain on the purchase of tax credits may be recorded in "adjusted financial statement income" under GAAP and IFRS. Under section 56A(c)(9), there is a specific exclusion from "adjusted financial statement income" for amounts attributable to election for direct payments of certain credits. LSbp requests guidance clarifying that, (i) any discount received or premium paid on the transferred tax credits would also not be deductible or includible in taxable income, and (ii) income received from tax credits transferred under section 6418 would also be excluded from "adjusted financial statement income" under section 56A.

Lease-Pass Through Election

Notice 2022-50 at 3.02(12) – Please provide comments on any other topics that may require guidance.

Lease-Pass Through Election

A pass through lease is a well-established mechanism that enables a lessor of an investment tax credit-eligible property to make an election to pass through the investment tax credit to the lessee of the property. LSbp believes that, under the IRA, the lease pass-through election in section 50(d)(5) should be able to be combined with a transferability election under section 6418.

The pass through election permits the lessee to determine its investment tax credit basis using the then-fair market value of the eligible property, rather than basing it on the cost of the eligible property (the tax-basis). *See* section 50(d)(5) (referencing former section 48(d)(1)(A)). The fair market value of such property is determined on the date possession is transferred to the lessee. *See* Treas. Reg. § 1.48-4(c)(2)(i).[3]

The Code sanctions this calculation even though the lessee may have yet to incur any cost regarding the property (i.e., to have paid any rent) and irrespective of whether the lessor constructed the project at a cost materially less than the fair market value of a fully operational project.

The legislative history from 1961 provides the following rationale for the pass through election, "the investment credit may be passed on in the case of these leases on the grounds that it is the decision of the lessee which in most cases brings about the demand for the additional investment." Staff of the Joint Comm. on Tax'n, General Explanation of Draft of Revenue Bill of 1961, at 10-11; *see also* H.R. Rep. No. 88-272, Part I, at 35 (1964). Thus, the lease-pass through election plays an important role in the allocation of capital by businesses of ensuring that a purchaser of an investment tax credit eligible asset is not advantaged relative to a lessee of such an asset.

LSbp believes that in a situation where the lease pass-through election is combined with a transferability election, the investment tax credit should be determined based on the notional fair market value of the

[3] The guidance for the Treasury Cash Grant Program clarified again that "a lessor who is eligible to receive a Section 1603 payment with respect to a property may elect to pass-through the Section 1603 payment to a lessee. . . Such an election will treat the lessee as having acquired the property for an amount equal to the independently assessed fair market value of the property on the date the property is transferred to the lessee." Treasury Cash Grant Program Guidance (July 2009/Revised March 2010, January 2011 and April 2011).

project. For example, a solar developer (i.e., the lessor) builds a project for $90x and makes a lease pass-through election to pass the investment tax credit to a corporation.[4] Under the lease pass-through rules, the tax credit is calculated based on the notional fair market value, even though neither the lessee nor the lessor paid that amount for the project. If the fair market value of the project is $110x, with the 30 percent investment tax credit, the buyer of the tax credit should be entitled to a $33x tax credit rather than $27x.

The statutory language seems to provide no intent to treat a transferability scenario differently from a lessee using the investment credit to reduce its federal income tax liability. LSbp believes that to follow this six decade old provision of the Code, the buyer of the tax credit should be entitled to a $33x tax credit. It should be permitted to combine a transferability election with a lease-pass through election. This is because even though under section 6418(e)(2) only one "transfer" is allowed, the statutory language does not suggest a Congressional intent that the lease-pass through election should also be treated as a transfer.

Energy Community

Notice 2022-51 at 3.04 – Energy Community Requirement

(1) Section 45(b)(11)(A) provides an increased credit amount for a qualified facility located in an energy community. What further clarifications are needed regarding the term "located in" for this purpose, including any relevant timing considerations for determining whether a qualified facility is located in an energy community? Should a rule similar to the rule in section 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines), the rules in 26 C.F.R. §§ 1.1400Z2(d)-1 and 1.1400Z2(d)-2, or other frameworks apply in making this determination?

The purpose of providing a bonus credit for projects located in an energy community is to provide tax benefits to communities that have been impacted by the energy transition. LSbp proposes that a project should be considered to be located in an energy community if any part of the project is located on land which would qualify under any of the three categories of an energy community (i.e., brownfield site, a qualifying metropolitan statistical area or non-metropolitan statistical area, or a qualifying census tract) under section 45(b)(11)(B).

Alternatively, LSbp would also support the suggestion by ACP in its comment letter that projects should able to claim the bonus credit for energy communities if, (i) at least 10% of the total project is located in an energy community, which can based upon the nameplate capacity of generation or storage, total project cost, or area by acreage; or (ii) a substation of the project, or switchgear for projects that do not have a substation, is located in an energy community and the majority of the project's output is routed through the energy community.

Finally, LSbp would recommend that, if any part of an energy project is located in an energy community, the investment tax credit or production tax credit should be increased by the percentage of the relative

[4] The same issue arises under section 6417, if a tax-exempt entity leased the project and made a direct payment election.

capitalized construction cost, nameplate generation, or area by acreage that is located within the energy community.

In the context of offshore wind, the point of interconnection of an offshore wind project, a port facility substantially used for staging and crewing for the project, or at least one onshore substation should be the determining area for purposes of determining if the qualified facility is located in an energy community.

(2) Does the determination of a brownfield site (as defined in subparagraphs (A), (B), and (D)(ii)(III) of section 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(39))) need further clarification? If so, what should be clarified?

Section 101 (39)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("**CERCLA**"), 42 U.S.C. 9601(39)(B), provides that the term brownfield site does not include facilities that are on the "National Priorities List" and that are the subject of administrative orders, court orders, or consent decrees. LSbp requests clarification on two issues with respect to these exclusions.

First, LSbp requests guidance confirming that once a facility that was on the National Priorities List and/or was subject to an applicable administrative order, court order or consent decree under section 101 (39)(B) of CERCLA, 42 U.S.C. 9601(39)(B), has either been delisted from the National Priorities List and/or the court orders or consent decrees have been lifted, then that facility should qualify for the bonus credit under 45(b)(11)(B), if it otherwise qualifies as a brownfield under section 101 (39)(B) of CERCLA, 42 U.S.C. 9601(39)(B).

Second, LSbp requests guidance confirming that if a site is located either in a qualifying metropolitan statistical area or non-metropolitan statistical area or a qualifying census tract, that also happens to be located on a brownfield site, but is excluded from the definition of a brownfield site under section 101 (39)(B) of CERCLA, 42 U.S.C. 9601(39)(B) (e.g., it was subject to an applicable court order, administrative order, or was on the National Priorities List), then it should still qualify for the bonus credit under section 45(b)(11)(B).

Conclusion

In sum, LSbp reiterates its support for the comments provided by both ACP and SEIA and appreciates the opportunity to submit these comments. LSbp would welcome the opportunity to meet with the Treasury and the IRS to discuss these issues further as proposed and final rules are promulgated. Please reach out to Alyssa Edwards at alyssa.edwards@lightsourcebp.com to discuss.

Respectfully submitted,

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