



November 4, 2022

VIA E-FILING

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

**Re: Notice 2022-50 - Request for Comments  
Elective Payment and Transfer of Certain Credits (Sections 6417 and 6418)**

To Whom It May Concern:

Please find below comments from taxpayers that requested we submit comments on their behalf relating to elective payment and transfer of certain credits (Sections 6417 and 6418). These comments focus on the guidance necessary to provide a high level of confidence that this credits are available to taxpayers such that they can transact in manner contemplated by the Congress.

### **SECTION 6417 – ELECTIVE PAYMENT**

*IRS Request for Comments: With respect to the definition of the term “applicable entity” in Section 6417(d)(1): (a) What, if any, guidance is needed to clarify which entities are applicable entities for purposes of Section 6417(d)(1)(A), and which taxpayers may elect to be treated as applicable entities under Section 6417(d)(1)(B), (C), or (D) for purposes of Section 6417? (b) What types of structures are anticipated to be used by applicable entities, and taxpayers who have elected to be treated as applicable entities under Section 6417(d)(1)(B), (C), or (D), when seeking to apply 6417(a)?*

Issue Presented: Pursuant to Section 6417(d)(1)(D), a taxpayer that produces eligible components (as defined in Section 45X(c)(1)) shall be treated as an applicable entity and eligible for direct pay. Pursuant to Section 6417(d)(1)(D)(ii)(I), a taxpayer that makes such election will be treated as making the election for the four succeeding taxable years.

\*\* Requested Guidance:

Each corporate member of a consolidated group is eligible to make the election pursuant to Section 6417(d)(1)(D), and the tolling of the four-year election will apply for each member separately.

Purpose: Several clients have requested this guidance since the development of manufacturing facilities will take time and come on-line at different times/years. Each project will be developed in a separate corporate entity so the tolling of the four-year direct pay option separately for member/project is important such that each member/project will have the opportunity to access the direct pay provisions for its first four years of operation. Under Treas. Reg. Section 1.1502-77, the group parent generally makes tax elections on behalf of subsidiaries and files for refunds on their behalf, but the elections are valid at the subsidiary level.

## **SECTION 6418 - TRANSFERABILITY**

### **Issue #1:**

*IRS Request for Comments:* In determining the amount of eligible credit transferred under Section 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?

Issue Presented: Section 6418 provides that the transferee taxpayer is treated as the taxpayer. However, the statute does not seem to address how other provisions of the Code that may impact the amount of the credit available to the eligible taxpayer should be treated. Sections 49, 465 and 469 can affect the amount of the credit available to the eligible taxpayer.

### **\*\* Requested Guidance:**

The term “any other industrial technology designed to reduce greenhouse gas emissions” Sections 49, 465 and 469 apply to the eligible taxpayer and not the transferee taxpayer for purposes of determining the amount of the eligible credit that may be transferred to a transferee taxpayer.

### **Purpose:**

Taxpayers have requested this guidance as it may impact the level of due diligence needed to determine the amount of credit available for transfer. It would also allow individual transferee taxpayers of these credits to purchase credits and provide the liquidity needed by developers.

### **Issue #2:**

*IRS Request for Comments:* What, if any, guidance is needed with respect to parameters or limitations on a transferee taxpayer's eligibility to claim the credit?

Issue Presented: Section 6418(a) provides that an eligible taxpayer may make an election to transfer an eligible credit. The eligible taxpayer must make the election no later than the due date (including extension) for the tax return that includes the eligible credit. Several questions have been raised about the effective date of the transfer of the eligible credit.

### **\*\* Requested Guidance:**

The effective date of the transfer of the credit is the date of the election or, at the election of the eligible taxpayer, the date specified in the election but not more than 75 days prior to the election.

An election process similar to Treasury Regulation section 310.7701-3(c)(1)(iii) for the election procedure would work and would be a procedure with which taxpayers are familiar.

Purpose: The election similar to Treas. Reg. section 310.7701-(c)(1)(iii) would allow eligible taxpayers the flexibility to maximize the value received for the credit. For example, providing an effective date that allows a transferee taxpayer to report the credit in the year generated and use such credit to report its estimated tax payments.

**Issue #3:**

IRS Request for Comments: Please provide comments on any other topics that may require guidance.

Issue Presented: Section 6418(a) provides an eligible taxpayer may elect to transfer all (or any portion specified in the election) of an eligible credit. The definition of an eligible credit in Section 6418 is Code specific but is not project specific.

**\*\* Requested Guidance:**

An eligible taxpayer that generates eligible credits from a section listed in Section 6418(f)(1) may transfer the eligible credits or a portion of such credit without having to identify the specific project generating the credit.

Purpose: Taxpayers that generate credits from multiple facilities eligible for credits listed in Section 6418(f)(1) would be able to transfer a fixed dollar amount of credits. For example, if a taxpayer generates 1 million of credits pursuant to Section 45, the eligible taxpayer could transfer the first 500k of credits. The remaining 500K could be sold to another transferee. This would potentially allow the eligible taxpayer to maximize the value of the credits transferred in the first tranche allow a more efficient transfer of credit.

**Issue #4:**

IRS Request for Comments: Please provide comments on any other topics that may require guidance.

Issue Presented: Section 6418 applies for tax years beginning after 12/31/22. It does not specify whether the eligible credit must be generated after 12/31/22.

**\*\* Requested Guidance:**

The term “eligible credits” includes eligible credits generated in 2022 if the tax returns that include such credit have not been filed prior to the election.

Purpose: Given the ambiguity of the statutory language regarding the effective start date of Section 6418, it should be read broadly to also cover 2022 credits.

Sincerely,

Phil Tingle, Partner  
Heather Cooper, Partner

**McDermott  
Will & Emery**