November 3, 2022

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

Submitted electronically via regulations.gov

RE: Notice 2022-50 – Request for Comments

Dear Sir or Madam:

Molina Healthcare Inc. ("Molina" or "we") appreciates the opportunity to provide comments in response to Notice 2022-50 whereby the Treasury Department ("Department") and the Internal Revenue Service ("IRS")[1] have solicited public comments in connection with the issuing of guidance to implement the elective payment provision under §6417 and the elective credit transfer provisions under §6418 of the Internal Revenue Code ("Code"), as added by §13801 of the Public Law 117-169. 136 Stat. 2003 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 ("IRA"). This Commentary is accordingly submitted.

Background

Molina provides managed healthcare services under the Medicaid and Medicare programs, and through the state insurance marketplaces (the "Marketplace").

Molina has experience in purchasing certain transferable state tax credits that Molina considers to be relatively risk-free of recapture, penalties, or any other adverse consequences to a buyer. Typically, these state tax credits involve a state administrator who has preapproved the seller's application for credits, reviewed seller's documentation supporting such credit, approved a state form authorizing the transfer of the credit, and, finally, issued a credit certificate to Molina in the amount of the credit. These state tax credits are transferred using a simple purchase and sale agreement where Molina is, in part, not required to fund the closing until after Molina receives an original credit certificate in its name from the state administrator.

[1] Promulgating regulations is an interactive process between the IRS and the Department proper, Treas. Reg. §601.601. For the sake of simplicity, this commentary will refer to such a collaborative process in terms of the IRS promulgating the regulations.

Molina does not anticipate generating any credits under the IRA but will be reviewing the merits of purchasing certain transferable tax credits as provided in IRA. As such, our comments are primarily from the view of a prospective transferee taxpayer in hopes that the guidance issued by the IRS is easy to understand, administer, and reduces or eliminates uncertainties.

Guidance needed to Clarify Annualized Income Installment Method for Transferee Taxpayer

Code §6418(a) provides, in part, that the transferee taxpayer shall be treated as the taxpayer for purposes of this title with respect to such credit (or such portion thereof).

Code §6418(d) provides "In the case of any credit (or portion thereof) with respect to which an election is made under subsection (a), such credit shall be taken into account in the first taxable year of the transferee taxpayer ending with, or after, the taxable year of the eligible taxpayer with respect to which the credit was determined".

Treas. Reg. §1.6655-2(f)(3)(iii)(A) Annualized income installment method. With respect to a current year credit, the items upon which the credit is computed are annualized, the amount of the credit is computed based on the annualized items, and the amount of the credit is deducted from the annualized tax. For example, for an annualization period consisting of three months in a full 12-month taxable year, the items upon which the credit is based that are taken into account for the three-month period are multiplied by four, the credit is determined based on the annualized amount of the items, and the credit reduces the annualized tax.

Transferee taxpayers need to understand with certainty the *quarter* in which transferred tax credits reduce tax installment payments when transferee taxpayer purchases credits from eligible taxpayers with (i) same tax year and (ii) different tax year.

For taxpayers with the same year end, the most equitable solution would be to simply fold transferred credits into the existing Treas. Reg. §1.6655-2(f)(3)(iii)(A) where "the items upon which the credit is computed" would include transferred credits purchased during the annualization period.

Code §6418(d), however, seems to create an important and material timing issue where the transferee taxpayer and eligible taxpayer have different tax years given "*such credit shall be taken into account in the first taxable year of the transferee taxpayer ending with, or after, the taxable year of the eligible taxpayer with respect to which the credit was determined"*. We read this provision to provide that if a transferee taxpayer with a calendar year of December 31, 2023, purchases a credit on June 30, 2023, from an eligible taxpayer with a year ending March 31, 2024, the transferee taxpayer does not benefit from the transferred credit until after March 31, 2024. This read of the rule would result in a market where transferee taxpayers will essentially be limited to bidding on credits from eligible taxpayers with the same tax year.

Generally, Code §6418(d) provides for the *year* when transferee taxpayer may claim transferred credit. Respectfully, the IRS should issue guidance to clarify the *quarter* in which the transferee

taxpayer may claim the transferred credit given the interaction of Code §§6418(a), 6418(d), and Treas. Reg. §1.6655-2(f)(3)(iii)(A). To be sure, IRS guidance should address two possible scenarios where transferee taxpayer purchases credits from eligible taxpayers with (i) the same tax year and (ii) a different tax year.

Guidance needed to Clarify Federal Income Tax Consequences on the Transfer of Credits

Pursuant to § 6418(b), with respect to any amount paid by a transferee taxpayer to an eligible taxpayer as consideration for a transfer described in § 6418(a), such consideration (1) must be required to be paid in cash, (2) is not includible in the gross income of the eligible taxpayer, and (3) with respect to the transferee taxpayer, is not deductible under the Code.

Transferee taxpayers generally expect to purchase transferred credits at a "discount" i.e., at an amount less than the full value of the transferred credit. At least two "Big Four" firms believe the entire value of the transferred credit (i.e., including the discount) will reduce federal income tax expense for the transferee taxpayer under Generally Accepted Accounting Principles "(GAAP"). We believe this GAAP view is consistent with Code §6418(a) where the transferee taxpayer is seemingly stepping into the shoes of the eligible taxpayer. Under this approach, the discount is recorded in a company's federal tax expense and, thus, is not classified as *income* as follows:

Value of Transferred Credit:	$100
Less Purchase Price Paid:	$90
Discount	$10 ← reduction in transferee taxpayer's federal income tax?

If, however, the discount should be treated as income for federal income tax purposes and, Code §6418(b) prohibits the transferee taxpayer from claiming a tax deduction for the amount paid, then it would appear the *entire* value of the transferred credit would be taxable income for the transferee taxpayer as follows:

Value of Transferred Credit	$100
Less: Deductible Purchase Price Paid	$0
Taxable Income	$100?

As such, guidance is needed to clarify the federal income tax treatment of the discount in the hands of the transferee taxpayer.

Guidance needed to Calculate the Excessive Credit Transfer Amount

Code §6418(a) generally provides that the transferee taxpayer shall be treated as the taxpayer for purposes of this title with respect to such credit.

Code §6418(g)(2)(A) generally provides that transferee taxpayer is subject to recapture of excessive credit transferred ("Recapture") plus a 20% penalty.

The IRA is a game changer for certain taxpayers who expect to generate hundreds of millions (or billions) in tax credits. Many of the credits fall outside the bailiwick of the transferee taxpayer who will undoubtedly face a headwind in performing due diligence around the amount of the credit generated and transferred. IRS agents will undoubtedly face the same challenges when tasked with examining such credits.[2]

The eligible taxpayer (i.e., resident expert) is clearly in the driver's seat when determining the amount of credit generated and eligible to be transferred but, surprisingly, the statute provides that the *transferee* taxpayer is subject to Recapture and potential penalty.

While we appreciate this "risk" will be factored into the price of the credits, structure of purchase agreements, and impact due diligence, the IRS will need to examine eligible taxpayer's books and records to determine if hundreds of millions (or billions) of credits were calculated correctly. In our view, the person who *owns* the process of determining the credit (i.e., eligible taxpayer), should *own* the consequences of getting the credits right.

The IRS should clarify that any adjustments to credits calculated by an eligible taxpayer should first reduce any credits claimed by eligible taxpayer against its income tax obligations before the transferee taxpayer becomes subject to Recapture. Further, IRS should provide guidance on how Recapture should be allocated or apportioned to transferee taxpayers in a scenario where an eligible taxpayer transferred portions of a credit to multiple transferee taxpayers.

Preventing Duplication and Fraud

Code §6418(g) provides "As a condition of, and prior to, any transfer of any portion of an eligible credit pursuant to subsection (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".

The IRS should require eligible taxpayers to register with the IRS as a condition of, and prior to, transferring a portion of an eligible credit pursuant to Code §6418(a).

Further, the IRS should develop reporting requirements similar to Reg. §1.1060-1(e) where both buyer and purchaser are subject to similar information reporting requirements. In the current case, we suggest the IRS develop a new "§6418 Credit Transfer" form that is prepared by eligible taxpayer and provided to transferee taxpayer as a prerequisite to transferee taxpayer purchasing transferred credit with cash. Such form should include:

1. Name and employer identification number for both eligible taxpayer and transferee taxpayer;

[2] Presumably the IRS will engage a firm (e.g., MITRE) to exam these credits and such examination will be lengthy and very taxing on IRS resources, transferor and transferee taxpayers, and our courts.

2. the eligible taxpayer's annual tax year;
3. amount of credit and date transferred;
4. 'best of knowledge' attestation signed and dated by an officer of the eligible taxpayer that credits are true, have not been transferred to another transferee taxpayer, and eligible taxpayer satisfies all the applicable requirements to transfer such credits.

Both the eligible and transferee taxpayers should be required to file "§6418 Credit Transfer" form with their tax returns.

Additionally, the eligible taxpayer should be required to file a new "§6418 Annual Credit Transfer Summary" form with its income tax return that includes the following:

1. total amount of credit generated during the year;
2. name of transferee taxpayer(s), date of transfer(s), and amount of credits transferred for each credit or portion of credit transferred;

Reasonable Cause – Safe Harbors

Code §6418(g)(2)(B) provides that the penalty in Code §6418(g)(2)(A) does not apply if transferee taxpayer satisfies a reasonable cause provision.

Audited Financial Statement

For eligible taxpayers registered with the Securities & Exchange Commission ("SEC"), the eligible taxpayer's financial statement auditor will be a close second to the resident expert (i.e., eligible taxpayer) in terms of a thorough understanding of the credits generated and transferred. The financial statement auditor is already an expert when it comes to understanding the eligible taxpayer's business and will certainly spend a significant amount of time ensuring that the eligible taxpayer is generating and transferring valid credits given the materiality of such credits to the financial statements.

The IRS has previously acknowledged the ability and benefits of leveraging the work that goes into certified audited financial statements for SEC registrants when issuing safe harbors based, in part, on such audited financial statements.[3] The IRS has also recognized the benefits of utilizing disclosures in the audited financial statements when ensuring compliance with tax laws and regulations. [4]

We encourage the IRS to provide a safe harbor for transferee taxpayers who purchase credits from eligible taxpayers who are (i) SEC registrants and (ii) generating and transferring a threshold amount of credits such that transferee taxpayers and the IRS may leverage the work performed by the financial statement auditors. We believe such safe harbor will help stabilize the transfer market and reduce the risk of excessive credit transfers.

[3] See, e.g., §1.263(a)-1 (f).
[4] See, e.g., Schedule UTP

As an example of such required financial statement disclosures, the IRS should provide a safe harbor to transferee taxpayers where the eligible taxpayer discloses the following information in its audited financial statements:

1. amount of eligible expenses incurred for purposes of determining the credit;
2. amount of credit generated;
3. confirmation that domestic content is satisfied;
4. proceeds generated from credits transferred;
5. confirmation that the eligible taxpayer is not electing direct payment, if applicable.
6. table in the footnotes of the audited financial statements that summarizes the above information by year to validate that the credits generated equal or exceed credits transferred over a period of time.

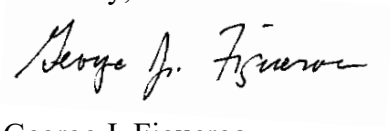
A transferee taxpayer who purchases credits from an eligible taxpayer with the requisite information disclosed in its audited financial statements should satisfy the reasonable cause provision in Code §6418(g)(2)(B).

"§6418 Credit Transfer" form

Re: our proposed "§6418 Credit Transfer" form described above….a transferee taxpayer who (i) claims the credit amount included on such form and (ii) files such form in its timely filed tax return, should satisfy a reasonable cause safe harbor in Code §6418(g)(2)(B).

In closing, Molina appreciates the opportunity to provide comments in response to the Notice 2022-50 and is looking forward to your guidance.

Sincerely,



George J. Figueroa
Vice President Tax