Internal Revenue Service
United States Department of the Treasury
Ben Franklin Station
P.O. Box 7604, Room 5203
Washington, D.C., 20044

RMI
1850 M St NW, Suite 280
Washington DC, 20036

November 4, 2022

Re: Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

Reduction Act of 2022, Notice 2022-50

Dear Secretary Yellen and Commissioner Rettig:

Thank you for the opportunity to respond to Treasury's Request For Information (RFI) on elective pay and transfer of certain credits in the Inflation Reduction Act (IRA). These changes present an important opportunity to incentivize energy infrastructure that will lead to greater grid reliability, economic development, and cleaner electricity generation. To ensure this outcome we seek to assist the Treasury Department in applying clear guidelines that will provide certainty for developers looking to monetize the tax credits in the IRA. In addition we hope our guidance can help with implementation of the proper guardrails to guarantee environmental integrity, while preventing double counting and fraud.

While we recognize the significance of all the questions enumerated in the RFI, we've chosen to address a few specific questions because these are areas of expertise. RMI is a global non-profit organization that focuses on deep decarbonization of the world's most-polluting sectors and leads sustainability programs across five geographies: the U.S., India, China, the Global South, and cities. RMI is a leading non-governmental organization in addressing the challenges and opportunities that come with utility transition finance. Our goal is to provide informative, technical comments and clarify language in IRA to ensure that the ITC is implemented efficiently and accurately.

If you have questions or want to discuss anything in this document further, please reach out to Russell Mendell at rmendell@rmi.org or David Posner dposner@rmi.org.

Sincerely,

RMI
Common Defense
Evergreen Action
League of Conservation Voters
Sierra Club
Union of Concerned Scientists

3.01 Transfer of Certain Credits.

(4)(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues

Treasury should address the ability of an applicable entity to make the election under 6417(a) if a partnership is formed with a for-profit entity. Forming a partnership with a for-profit entity should not impede the applicable entity from making the election. Various other tax incentives (i.e. real estate tax exemptions) are made available to non-profit eligible entities that form a partnership with an ineligible for-profit entity. Treasury should also allow applicable entities to form a partnership and make the election under 6417(a), in circumstances in which the eligible entity makes an election to be treated as a taxable entity under IRC 168(h)(6). It is common in the low-income housing tax credit program for a non-profit partner to make the 168(h)(6) election. Making the 168(h)(6) election should not preclude an eligible entity from making an election under 6417(a).

3.02 Transfer of Certain Credits.

(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?

Tax normalization compels a utility to flow through the realized value of any § 48 and § 48E investment tax credits claimed on property subject to rate-of-return regulation ("public utility property") to customers gradually over the life of the associated asset, effectively forcing the utility to retain some of the benefit of the credit (in present value terms) for itself and its shareholders. Unregulated companies are under no such requirement and can reflect the full value of the credit in customer pricing. In statute, the former Section 46(f), as made applicable by § 50(d)(2), requires that a credit otherwise allowed under § 38—(such as the § 48 and § 48E investment tax credits unless excluded from the requirement by virtue of § 46(f)(2)(A), § 46(f)(2)(B) or § 46(f)(2)(C)—be disallowed with respect to "public utility property" of the taxpayer unless the taxpayer normalizes the credit.

In the event that a regulated utility were to utilize § 6418(a) to transfer § 48 and § 48E investment tax credits claimed on public utility property to a non-public utility transferee taxpayer, the taxpayer with respect to the § 48 and § 48E investment tax credits is the transferee taxpayer. Since that transferee taxpayer does not own the public utility property eligible for the credit, § 46(f) is arguably inapplicable to the credit buyer. But as the credit seller (the regulated utility/transferor) is no longer treated as the taxpayer with respect to the credit, § 46(f) is also arguably inapplicable to the credit seller. If so, this would suggest that § 46(f) would no longer apply to either the eligible taxpayer or the transferee taxpayer, and that the regulated utility would no longer be required to normalize the proceeds from any such transfer. RMI suggests that the Treasury Department clarify the applicability of § 46(f) property definition when credits are transferred by an election made under § 6418.

(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?

The Treasury Department could significantly improve the likelihood of successful collection of tax revenues tied to credit recapture, basis adjustment, or eligibility assessment by providing guidance for the process for implementing the application of § 50 in the event of a transfer. This clarification would facilitate efficient implementation of tax credit transfers as intended by Congress when it legislated § 6418.

While 6418(a) specifies that the transferee taxpayer is treated as the taxpayer for purposes of the Code with respect to the credit, and would therefore be subject to the application of § 50, Treasury should, relying on the authority granted the Secretary in § 6418(h) to "issue such regulations or other guidance as may be necessary to carry out the purposes of this section," clarify that:

1. For the purposes of the application of § 50 and any subsequent collection or enforcement activities only, upon notification from the transferee taxpayer that the eligible taxpayer has indemnified it against all claims arising from the application of § 50, such claims shall be pursued instead as if the eligible taxpayer were the taxpayer subject to § 50.

2. If such indemnification notice is provided, Treasury will notify the eligible taxpayer (as well as the transferee taxpayer) of the recapture amount and deem such notification as satisfaction of the requirement of § 6418(g)(3)(B)(ii).

From the perspective of the Treasury Department, such guidance could better facilitate successful collection of tax revenues tied to application of § 50 when such action is determined to be necessary, as the eligible taxpayer can reasonably be expected to have had possession of all of the following:

(i) asset ownership information,

(ii) asset operational data,

(iii) an ownership stake in the physical asset, and

(iv) a cash amount obtained from the transferee, which, in the absence of the transfer of recapture risk, should be close to the face value of the credit and often exceed the amount subject to recapture.

As a result, guidance that focuses IRS pursuit of § 50 action on the eligible taxpayer upon provision of evidence of indemnification would more directly target the taxpayer gaining the greatest economic benefit from the tax credit and possessing direct responsibility for any conditions that might trigger § 50 action.

More broadly, this approach may also be critical to enabling the efficient functioning of – and facilitate broad potential tax transferee participation in – a tax credit transfer market that can maximize the value of the clean energy tax credits for their legislatively intended purposes of incentivizing clean energy investment and generation. Specifically, this guidance can help minimize transaction costs for such a market regime. Among the potentially most significant transaction costs is that of price discovery in a market where the seller is transferring risks that are largely unknown to, and unmanageable by, the buyer (in this case, the transferee). If, however, risk transference, such as the risk of credit recapture, can be effectively excluded from the transaction via indemnification, the buyer can correspondingly be induced to increase his or her offer for the purchased good. The suggested guidance would allow for such indemnification to be recognized directly by Treasury without the requirement of an intermediary that could increase costs and reduce efficiency. In the credit transfer market, maximum value for the good would approach the face value of the purchased credits minus the time value of the money used for purchase between the time of purchase and the time when taxes paid to the government are reduced.

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

Even if the transferred credit is not subject to recapture, the risk of disallowance due to clerical errors, reckless or intentional disregard of the rules or fraud by the eligible taxpayer will serve to depress the prices achievable in the transfer market, following the same logic outlined with regard to recapture risk. An indemnification procedure would provide for more efficient tax credit monetization. RMI therefore recommends that Treasury, relying on the authority granted the Secretary in § 6418(h), clarify that:

1. Upon notification from the transferee taxpayer that the eligible taxpayer has indemnified it against all claims arising from the disallowance of credits by the IRS, such claims shall be pursued instead as if the eligible taxpayer responsible for satisfaction of any tax liability resulting from a disallowance.

2. If such indemnification notice is provided, Treasury will notify the eligible taxpayer (as well as the transferee taxpayer) of the disallowed amount.