November 4, 2022

SUBMITTED ELECTRONICALLY

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

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
Department of Treasury
1500 Pennsylvania Ave., NW
Washington, D.C. 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits (Notice 2022-50)

Dear Ms. Batchelder and Mr. Paul:

Thank you for providing the Solar Energy Manufacturers for America Coalition (SEMA)[1] the opportunity to provide comments pursuant to Notice 2022-50 regarding the elective payment provisions under § 6417 and the elective credit transfer provisions under § 6418 of the Internal Revenue Code, as added by § 13801 of Public Law 117-169, commonly known as the Inflation Reduction Act of 2022 (IRA).

I. Background

Our members are a diverse group of solar manufacturers throughout the entire solar supply chain that either have a significant manufacturing presence in the United States, or intend to

[1] https://semacoalition.org/about

start or shift significant portions of their manufacturing operations to the U.S. following passage of the IRA. They are focused on establishing a strong, secure, and resilient solar manufacturing supply chain to meet our current and future deployment needs in the U.S. and globally while creating good-paying manufacturing jobs.

As the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) work to develop and issue future IRA guidance, we hope the law's implementation will result in a policy environment that will spur a U.S. solar manufacturing renaissance. Given that solar is poised to be the world's leading source of energy by 2040, we must ensure that the IRA's implementation will result in reducing U.S. reliance on overseas supply chains to meet our future clean energy needs. With an approach that appropriately considers the important role that current and future solar manufacturers will play in building out the U.S. solar energy sector, we believe that we can have a secure, sustainable, and resilient, U.S.-based solar manufacturing supply chain in the very near future.

With this perspective in mind, we have prioritized questions and issues under this section that will have the greatest impact on SEMA members and the future of the U.S. solar manufacturing industry.

II. Request for Comments

.01 Elective Payment of Applicable Credits (§ 6417)

(3) In determining the amount treated as making a payment against tax under § 6417(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?

The Treasury and the IRS should develop and issue guidance explicitly clarifying that in the event of a direct pay election under § 6417 for § 45X, transferability will be available for any remaining years pursuant to § 6418.

(4) With respect to an election under § 6417(a) made by a partnership or S corporation pursuant to § 6417(c)(1) for any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation:

(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?
(b) Is guidance needed to clarify the treatment of a payment made pursuant to § 6417(c)(1)(A) to the electing partnership or S corporation? If so, what clarification is needed?

Providing clear, concise, and early guidance on how partnership or S corporation elections are treated under § 6417 is extremely important for the success of § 45X. Many of our members are contemplating various corporate structures as they look to invest in new advanced solar manufacturing facilities across the U.S., and need to know as quickly as practicable how the Treasury and the IRS intends to treat partnerships and S corporations. In particular, SEMA members would appreciate clarification on whether, in the case of a partnership that produces and sells eligible components under § 45X, the eligible component is property held by the partnership pursuant to § 6417(c)(1).

(5) With respect to the definition of the term "applicable entity" in § 6417(d)(1):

(a) What, if any, guidance is needed to clarify which entities are applicable entities for purposes of § 6417(d)(1)(A), and which taxpayers may elect to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D) for purposes of § 6417?

We recommend the Treasury and the IRS issue guidance to clarify which taxpayers may elect to be treated as applicable entities under § 6417(d)(1)(D). We believe that the Treasury and the IRS have the ability to take a broad and flexible approach to ensure that various types of structures can make the appropriate election. This will help ensure the success of § 45X and significant investments throughout the solar value chain.

(6) With respect to the elections under § 6417(d)(1)(B), (C), or (D):

(a) What, if any, issues could arise when an entity makes an election under § 6417(d)(1)(B), (C), or (D) and what, if any, guidance is needed with respect to such issues?

The direct pay option for solar manufacturers is critical to their future investment plans under § 45X. We believe that quick and clear guidance that ensures flexibility for taxpayers is needed to ensure that congressional intent with respect to § 45X is met.

§ 6417 does not provide a clear definition of "taxpayer." In the context of consolidated groups, questions could arise whether each member of a consolidated group can make a direct pay election. If the election by one member of the consolidated group triggers the 5-year period for other members of the consolidated group, then other members may not be able to benefit from the election until outside the five year period, when they are no longer eligible.

Direct payment elections must be allowed to be made on a taxpayer-by-taxpayer basis (i.e. an entity-by-entity basis or facility-by-facility basis) – including within a consolidated group. An election by one entity within a consolidated group should not trigger the five year clock for another member of the group who may make a later election. We hope the Treasury and the IRS will expressly clarify this intended treatment.

Guidance must also ensure that the definition of "taxpayer" allows different members of a consolidated group to be considered a taxpayer for the purposes of § 6417. Overall, we recommend that the Treasury and the IRS take a broad and flexible approach in order to align with the intent and Congressional goals of the IRA.

For existing U.S. companies and companies that are in the process of making new manufacturing investments, having the ability to make a direct payment election for the full five-year period for each new facility that is built will be crucial to the success of § 45X. Clarity surrounding the definition of a taxpayer will help the rapid scaling of domestic solar manufacturing and will incentivize vertical integration when making manufacturing investments. Manufacturers that look to make investments into vertically integrated manufacturing or enter into creative structures with other partners will invest in different portions of the manufacturing process separately and at different times.

We must not create a situation that will limit future investments in the domestic solar supply chain. To do this, the Treasury and the IRS must ensure that manufacturers have the necessary flexibility to invest in different parts of the solar supply chain (i.e. wafer facility, cell facility) or have multiple phases in their investments, while still being able to make a direct payment election on a facility-by-facility basis throughout the duration of the IRA. A narrow and less flexible interpretation could limit manufacturers' ability to quickly ramp production of eligible components and also disincentivize them from investing in vertical integration.

Without this clarity, taxpayers could ultimately avoid consolidated group status and opt for less commercially efficient corporate structures. Additionally, taxpayers may be forced to transfer

credits under § 6418 sooner, meaning that a portion of the credit would be lost to discounts and the costs associated with transferring, instead of being reinvested in further buildout of the domestic solar supply chain.

The Treasury and the IRS – to stay in line with congressional intent – should expressly clarify and issue an interpretation that will incentivize the continued investment in new manufacturing facilities to be brought online over the next decade.

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

§ 45X – the advanced manufacturing production tax credit – is one of the few credits eligible for direct payment. This is because Congress recognized the importance of providing an immediate, regular, and recurring cash incentive – in particular for domestic solar manufacturers – with respect to both existing and future advanced solar manufacturing facilities. As a result, the Treasury and the IRS must develop flexible, timely, and regular opportunities for taxpayers to make an election in order to ensure the obvious intent of Congress is met.

Taxpayers – including several members of the SEMA Coalition[2] – have already announced accelerated production and substantial new manufacturing investments in response to the IRA's passage. But successful deployment of that new manufacturing capacity, and continued investment in new and existing facilities, will be dependent on the timeliness of direct payment.

To ensure the success of § 45X, the Treasury and the IRS should strongly consider allowing for more frequent elections than annually. One option could be to allow taxpayers to use the quarterly excise tax reporting mechanism to claim payments every quarter. This is a reasonable interpretation because § 6417 is in the excise tax part of the Code, and there is precedent for a quarterly direct payment approach. For example, the Treasury and the IRS could replicate the rules under §§ 6426 and 6427, which allow for quarterly, direct payments. In addition, the IRS should ensure that refunds are paid quickly, within 45 days after the return is filed.[3]

This is extremely important because it will take time for facilities – either new facilities or those being refurbished and restarted – to come online and operate at full capacity. As a result,

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[2] First Solar says it will spend up to $1.2 billion to expand U.S. production. - The New York Times; Meyer Burger solar panel facility in Arizona is back on track; Mission Solar will increase its module manufacturing capacity in Texas to 1 GW

[3] This is the period, which if the refund is paid, no interest is allowed on the overpayment. *See* section 6611(e)(1).

domestic solar manufacturers will need quick access to capital, and having the option to make elections on a quarterly basis will provide additional opportunities to reinvest in manufacturing operations and scale production expeditiously. If elections cannot happen as frequently, manufacturers will struggle to make large investments, ramp production, and benefit from § 45X as designed by Congress .

One additional factor that should be considered by the Treasury and the IRS is how best to account for ramp up periods for new advanced manufacturing facilities coming online. For example, when a facility comes online, they usually start with smaller amounts of production before hitting 100% manufacturing capacity to ensure that safety standards and other key metrics are met. However, they should be allowed to elect direct payments when they are operating at a smaller production capacity, and over a full five year period when they are at 100% capacity. For example, if a facility begins ramping up production at the end of 2024, the Treasury and the IRS should issue guidance that indicates that eligible components produced and sold during the ramp period immediately prior to the entity's first full year of credit election qualify for a direct payment during year one. The Treasury and the IRS should consider this when developing guidance, as it will significantly reduce pressure around working capital requirements necessary to bring new manufacturing capacity onlines.

We believe it is important for the Treasury and the IRS to prioritize issuing this guidance in order to ensure rapid and robust investment in domestic solar manufacturing.

(9) For purposes of preventing duplication, fraud, improper payments, or excessive payments under § 6417, what information, including any documentation created in or out of the ordinary course of business, or registration, should the IRS require as a condition of, and prior to, any amount being treated as a payment made by an applicable entity under § 6417(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required? Should the IRS require the same documentation or registration as a condition of, and prior to, any amount being treated as a payment made by both an applicable entity as well as a taxpayer who is treated as an applicable entity after making an election under § 6417(d)(1)(B), (C), or (D)? Should the IRS require the same documentation or registration for all applicable credits? If not, how should the information or registration differ between applicable credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive payments under § 6417?

Documentation to prevent duplication, fraud, improper payments, or excessive payments is of utmost importance. It is critical the Treasury and the IRS do everything within their power to protect the interests of all taxpayers. However, we are concerned that overly onerous documentation requirements could create undue burden on taxpayers. To the greatest extent practicable, we strongly recommend that Treasury narrowly tailor any additional tax compliance obligations, requesting only information necessary to prevent duplication, fraud, improper payments, or excessive payments.

The Treasury and the IRS already collect significant amounts of information from taxpayers under pre-IRA regulations, and in order to promote efficiencies the agencies should leverage that data. For example, many of our members are already providing significant documentation based on their existing operations and structures – ranging from related party information to other pre-existing requirements. As a result, we believe the risks of duplication, fraud, improper payments, or excessive payments under this section are extremely low. If there are overly difficult burdens, our members may end up spending precious resources on compliance costs instead of creating good-paying manufacturing jobs throughout the country.

It is vital that we avoid a scenario where compliance costs end up driving business decisions. Any documentation requirements should not create friction in the normal operation of the business.

.02 Transfer of Certain Credits (§ 6418)

(2) Section 6418(c)(1) provides that, in the case of any eligible credit determined with respect to any facility or property held directly by a partnership or S corporation, the Secretary determines the manner in which such partnership or S corporation makes an election under § 6418(a) with respect to such credit.

> **(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?**

Providing clear, concise, and early guidance on how partnership or S corporation elections are treated under § 6418 is extremely important for the success of § 45X. Many of our members are looking at various corporate structures as they look to invest in new advanced solar manufacturing facilities across the U.S. and need to know sooner rather than later how the Treasury and the IRS intends to treat partnerships and S corporations. In particular, SEMA members would appreciate clarification on whether in the case of a partnership that produces

and sells eligible components under § 45X, the eligible component is property held by the partnership pursuant to § 6418(c)(1).

In addition, early guidance is needed to expressly permit the partnership to designate which partners' allocated credits are transferred and which partners' allocated credits are retained, in the event of an election to transfer a portion of § 45X is made by a partnership. This is important because partners may have divergent interests, and may have differing capacities to utilize their allocated credits. Our members believe that these determinations should be made based on the agreement between partners.

For partnerships generating eligible credits, requiring the election for transferring credits to be made at the partnership level has advantages for tax administration – i.e. maintaining records at the partnership level rather than for each partner. However, requiring the election to be made at the partnership level should not eliminate the flexibility afforded to taxpayers under § 6418 to either claim eligible credits on their tax returns or transfer credits in order to maximize the benefits provided under the law.

Therefore, we believe the Treasury and the IRS should issue clear guidance expressly permitting partnerships to designate which partners' allocated credits are being transferred and which partners' allocated credits are being retained.

This approach would not be novel. Recently, the Treasury and the IRS permitted a similar result in regulations dealing with bonus depreciation, where adjustments exist following transfers of a partnership interest. While the election out of bonus depreciation is a partnership-level election, in light of the fact that different partners may have different interests in which bonus depreciation is claimed, the Treasury and the IRS permitted the flexibility to take each partner's circumstance into account where possible in order to provide the maximum benefit under the statute.

(3) Section 6418(c)(2) provides that, in the case of any facility or property held directly by a partnership or S corporation, no election by any partner or shareholder is allowed under § 6418(a) with respect to any eligible credit determined with respect to such facility or property. If the election is made, what issues should be considered regarding the transfer of any portion of an eligible credit and what, if any, guidance is needed with respect to such issues? Further, what, if any, guidance is needed on allocating any amount received as consideration for transferring any portion of an eligible credit?

Please see above comments with respect to necessary guidance and clarifications on partnerships.

(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?

The Treasury and the IRS should develop and issue guidance explicitly clarifying that in the event of a direct pay election under § 6417 for § 45X, transferability will be available for any remaining years pursuant to § 6418.

In addition, § 56A(c)(9) disregards any amount treated as a payment against tax pursuant to an election under § 48D(d) or § 6417 for purposes of adjusted financial statement income in the computation of the corporate alternative minimum tax ("CAMT"). As such, any financial statement income recognized due to direct pay elections in both § 48D(d) and § 6417 should not create incremental CAMT. The legislative intent of such a provision is intended to exclude both impacts from direct pay elections and similar impacts from the transfer of certain credits under § 6418. As such, § 56A(c)(9) should be clarified to also disregard any adjusted financial statement income for CAMT purposes generated by the transfer of credits pursuant to § 6418.

(8) For purposes of preventing duplication, fraud, improper payments, or excessive credit transfers under § 6418, what information, including any documentation created in or out of the ordinary course of business, or registration, should be required by the IRS as a condition of, prior to, or after any transfer of any portion of an eligible credit pursuant to § 6418(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required? Should the IRS require the same documentation or registration for all eligible credits? If not, how should the information or registration differ between eligible credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive credit transfers under § 6418?

As noted earlier, documentation to prevent duplication, fraud, improper payments, or excessive payments is of utmost importance. It is critical the Treasury and the IRS do everything within their power to protect the interests of all taxpayers. However, we are concerned that overly onerous documentation requirements could create undue burden on taxpayers. To the greatest extent practicable, similar to our comments in the previous section, we strongly recommend that Treasury limit documentation requirements in order to avoid duplicate documentation or

information collection that is already required to be maintained or provided by taxpayers to the Treasury and the IRS under pre-IRA regulations.

For example, many of our members are already providing significant documentation based on their existing operations and structures – ranging from related party information to other pre-existing requirements. As a result, we believe the risks of duplication, fraud, improper payments, or excessive payments under this section are extremely low. If there are overly difficult burdens, our members may end up spending precious resources on compliance costs instead of creating good-paying manufacturing jobs throughout the country.

Therefore, the Treasury and the IRS should narrowly tailor any additional tax compliance obligations, requesting only additional, non-duplicative information necessary to prevent duplication, fraud, improper payments, or excessive payments. It is vital that we avoid a scenario where compliance costs end up driving business decisions. Any documentation requirements should not create friction in the normal operation of the business.

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

Similar to our comments regarding direct payment, § 6418 should be implemented in such a way to allow elections to be made on a taxpayer-by-taxpayer basis (i.e. an entity-by-entity basis or facility-by-facility basis) – including within a consolidated or affiliated group. We request guidance to explicitly ensure that if a taxpayer (entity or facility) is receiving direct payment pursuant to § 6417, another taxpayer that is a part of a consolidated or affiliated group is not precluded from making an election under § 6418 (and vice versa).

Guidance must ensure the definition of taxpayer allows different members of a consolidated entity to be considered a taxpayer for the purposes of § 6417 and § 6418. As noted earlier, we recommend that the Treasury and the IRS take a broad and flexible approach that will incentivize the continued investment in new manufacturing facilities to be brought online over the next decade.