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

RE: Comments on Notice IRS-2022-50

I. Introduction

The Fuel Cell and Hydrogen Energy Association (FCHEA) appreciates the opportunity to respond to the Department of Treasury's request for comments on direct pay and transferability of the hydrogen tax incentives recently enacted by the Inflation Reduction Act (IRA).

FCHEA is the national industry association representing over eighty-five leading companies and organizations advancing innovative, clean, safe, and reliable hydrogen energy technologies and solutions. FCHEA's members represent the entire global supply chain of the fuel cell and hydrogen industry including fuel cell and electrolyzer stack and system manufacturers, component suppliers, vehicle manufacturers, aviation companies, hydrogen producers, transporters, fuel distributors, utilities, end-users, and more. For over 30 years, FCHEA has provided a consistent industry voice to policymakers and regulators, working with Congress and administration officials to educate decisionmakers and support hydrogen-focused tax and policy incentives.

FCHEA is a longtime advocate of hydrogen, its potential uses, and its contribution to a clean energy future. For years, FCHEA has provided advice, guidance, and served as a resource for the DOE, Department of Transportation (DOT), Department of the Treasury (Treasury), federal policymakers, and other industry leaders. FCHEA appreciates the Biden Administration's commitment to developing an investment tax credit for hydrogen storage property and looks forward to being a resource to IRS and Treasury throughout the guidance process. FCHEA offers these comments leveraging its leadership, mentorship, and expertise within the hydrogen industry.

The Biden Administration has set *bold national decarbonization goals*, including 100 percent carbon pollution-free electricity by 2035 and net-zero GHG emissions by 2050. Hydrogen energy is increasingly viewed as an essential decarbonization option across the United States and around the world for a wide range of sectors. *The Road Map to a US Hydrogen Economy* report found that hydrogen could constitute 14 percent of the US energy demand, resulting in a 16 percent national reduction in CO_2 emissions and 36 percent reduction in NO_x emissions, a significant win for mitigating climate change and improving public health. In addition, the Road Map further estimates that by 2050 the hydrogen sector

would generate $750 billion per year in revenue and create 3.4 million jobs, demonstrating this sector's incredible economic as well as environmental potential.

Recognizing hydrogen's crucial role in decarbonization, the Biden Administration has provided critical support for the growing hydrogen economy. A pillar of the Biden Administration's support for key clean hydrogen programs is the inclusion of $9.5 billion in the Infrastructure Investment and Jobs Act, the centerpiece of which is the Regional Clean Hydrogen Hubs initiative. This program recently announced $7 billion in funding for 6-10 projects to develop holistic large-scale hydrogen production, distribution, and utilization networks across the country. This support, including the recent draft publication of the first *National Clean Hydrogen Strategy and Roadmap* by the Department of Energy (National Hydrogen Strategy), shows the commitment that the executive branch has made to the hydrogen economy. Another pillar of the Biden Administration's support for key clean hydrogen is Section 13204 of the IRA, which created the clean hydrogen production tax credit under Section 45V of the Internal Revenue Code. A third pillar is the new investment tax credit for energy storage technology that includes hydrogen under Section 48(c)(6)(A)(i).

II. Notice 2022-50

FCHEA appreciates the opportunity to provide feedback on Notice 2022-50 relating to direct pay and transferability of the recently enacted hydrogen production tax credit. Currently, FCHEA seeks to emphasize four key points on: (1) timing of payments, (2) direct pay and the offset of tax liabilities, (3) transferability and the corporate alternative minimum tax (AMT), and (4) excessive payment penalties. As additional issues or concerns arise, FCHEA welcomes the opportunity to provide additional feedback.

A. Treasury should require the IRS to refund overpayments within 45 days. Additionally, where a taxpayer is established/registered, Treasury should consider a mechanism to facilitate faster refunds.

Section 6417 of the IRA provides an election that allows certain taxpayers to treat most of the energy tax credits in the Act as a payment of tax. This provision allows a taxpayer to receive a tax refund to the extent that the sum of the taxpayer's actual tax payments and deemed section 6417 tax payments for the taxable year exceed its tax liability for the year. The section 6417 election is generally available to (1) certain tax-exempt persons and (2) any taxpayer for the first five years of carbon capture production tax credit of section 45Q, the clean hydrogen production tax credit of section 45V, and the advanced manufacturing production tax credit. Section 6418 of the IRA provides an election that allows taxpayers to which section 6417 does not apply to transfer its energy tax credits to another taxpayer.

Congress provided the "direct pay" provision of section 6417 and the transferability provision of section 6418 to allow taxpayers to realize the value of the extensive energy tax credits provided by the IRA. Without these provisions, taxpayers without sufficient tax liability would have to rely on traditional "tax equity" investors to monetize their energy tax benefits. Under a tax equity transaction, the energy project developer and the investor enter into a complex financial arrangement whereby the investor essentially provides cash to the developer in exchange for the rights to the tax credits from the energy project and other consideration. The tax equity market is relatively constrained and could not accommodate the volume of new and enhanced energy tax credits provided by the IRA. Sections 6417 and 6418 are intended to supplement the tax equity markets to allow the energy tax benefits provided by the IRA to have their intended effect of providing incentives to address climate change.

One benefit of a traditional tax equity transaction is that the clean energy developer generally receives cash from the investor soon after the energy project is placed in service. This allows the developer to pay down construction and other loans from the original project and begin to invest in new

projects. Similarly, tax credit transfers under section 6418 must be made for cash, providing developers with immediate liquidity. Section 6417 should operate similarly; electing taxpayers should realize cash from direct pay as soon as possible and on a predictable schedule.

Under section 6417, electing taxpayers generally will be entitled to a refund upon the filing of the tax return for the taxable year to which the election relates.[1] To achieve the intended liquidity to clean energy developers, the IRS should prioritize these refund claims and expedite the payments as soon as possible. Section 6611 provides that a taxpayer is entitled to interest if the IRS does not act on a refund claim within 45 days. We request that the IRS use section 6611 as a model to set as a goal the payment of refund claims arising from section 6417 elections within 45 days of the filing of the applicable tax return.

We understand that there are challenges to our request; the funding issues of the IRS are well documented. Congress has provided additional funding, however, to implement the provisions of the IRA.[2] We urge that Treasury and IRS allocate a portion of these funds to process energy tax credit refunds in an expedited manner. Clean energy developers need the financing represented by the refunds to re-invest in their next clean energy project. Only through significant growth in investment in clean energy projects can the United States meet its climate change goals. The section 6417 refunds represent a significant source of financing for this investment.[3] Paying refunds within 45 days also will be fiscally responsible for the Treasury as it will avoid the payment of interest under section 6611.

We understand that there may be another concern with our request, namely, that refund claims could be subject to abuse. In some respect, Congress has already addressed this concern. If a taxpayer overstates the amount of tax credit for which a section 6417 election is made, such overstatement plus a 20-percent penalty is treated as an addition to tax. A 20-percent penalty is significant and should deter abusive behavior.

If Treasury and the IRS believe further safeguards are needed, they could limit accelerated refunds to taxpayers that have an established record with the IRS. These would include taxpayers that had filed at least five years of tax returns or have been registered with the IRS for at least a period of years for some other reason, such as the excise tax programs of sections 4101, 4222, 4662 and 4682. Treasury and IRS should also explore developing a registration program for section 6417 purposes. In addition, the IRS could consider cross-checking data bases of other government agencies, such as the Department of Energy, to confirm the validity of clean energy projects for which a section 6417 refund is claimed. If these and other safeguards prove effective, the IRS should shorten the proposed 45-day period for processing section 6417 refunds.

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[1] Section 6417(d)(4)(B).

[2] P.L. 117-169, §10301.

[3] Section 1603 of the American Recovery and Reinvestment Act of 2009 contained a program that provided Treasury grants, in lieu of tax credits, for developers of renewable energy projects. The program resembled the direct pay provision of section 6417. Treasury paid the grants within 60 days of the filing of the request for the grant.

B. Treasury should allow deemed deposits arising on the return filing date to be treated as made on a quarterly basis during the taxable year in which the credits arise solely for purposes of interest and penalty avoidance. Alternatively, Treasury should allow taxpayers to elect to split directly-pay-eligible credits between a direct pay amount and an amount used to offset their calculated liability.

As discussed above, section 6417 provides the direct payment mechanism for certain tax-exempt persons with respect to their applicable energy tax credits and for taxable persons with respect to the production tax credits provided in sections 45Q, 45V, and 45X. Some of these taxable persons will not have any taxable income for the year and will make full use of the election to refund all their credits. Other taxpayers will have an amount of refundable credits less than their capacity to use the credit under section 38(c) and likely will not make the section 6417 election; they will simply use their tax credits as they did before the enactment of the direct pay provision. In both these cases, the taxpayers receive full value for their credits in the year that they were generated.

The application of section 6417 is a bit more complicated for taxpayers between these two extremes: those that have taxable income but applicable credits in excess of their capacity to use the credits under section 38(c). If they do not make the section 6417 election, they will use their credits to reduce their current year tax liability (and their required estimated tax payments) up to the limitation allowable under section 38(c). Any excess would become a credit carryover. This is an inappropriate result because section 6417 was intended to allow the full, current use of certain energy tax credits and eliminate credit carryovers. It also provides disparate treatment compared to taxpayers who can fully refund or fully use their tax credits.

Alternatively, if the taxpayer makes the section 6417 election, the taxpayer's energy tax credits are converted to a payment of tax deemed made on the date that the tax return was filed. Under this scenario, the taxpayer would be required to make estimated tax payments through the year, determined without the benefit of reductions for tax credits. The taxpayer would be allowed a refund for the full amount of its applicable tax credits, but at the cost of having made excessive estimated tax payments. This creates a time value of money detriment that, as discussed in Part A above, acts as a disincentive to clean energy deployment and puts these taxpayers at a competitive disadvantage relative to taxpayers that receive full immediate value for their credits.

There are at least two ways for Treasury guidance to address this situation. One way would allow taxpayers to make estimated tax payments by taking into account all applicable credits for which a section 6417 election is available (i.e., the credits would reduce the estimated payment requirements as allowed by the section 6655 regulations).[4] Its tax return for the year would show a balance due after these estimated tax payments but before the effects of the section 6417 election were taken into account. The election would treat the applicable tax credits as a payment of tax on the filing of the tax return. This deemed payment would eliminate the balance due and would create a refund for the credits not used to offset the balance due. Treasury guidance would waive any estimated tax penalties that would otherwise accrue as a result of the taxpayer determining its estimated tax amounts as if it did not make the section 6417 election.

This proposal is based on the premises that a taxpayer should not have to (1) make estimated tax payments that do not correspond to its effective tax liability and (2) overpay its estimated taxes as a "toll charge" for making a section 6417 election. Treasury has the authority to promulgate these proposed rules under sections 6417(h), 6655(j), and 6655(g).[5]

An alternative method to address this situation would be to allow a taxpayer making a section 6417 election to designate the portion of any applicable credit subject to the election, with the remaining portion taken into account as a tax credit on the taxpayer's tax return. The allocation would be made on an annual basis. This rule is perhaps easier to state than the rule described above, but it does create complications for the taxpayer. The taxpayer will need to determine accurately how to allocate its applicable credits between refundable and non-refundable amounts. An over-estimation by the taxpayer would result in a credit carryover and an under-estimation would result in an estimated tax underpayment. Further, the proposal would provide that a subsequent redetermination of an applicable tax credit would first result in a redetermination of any portion of the credit that was not subject to the section 6417 election and not as an excessive payment under section 6417(e)(6).[6] Any amount of credit that the taxpayer elects not to treat as not subject to section 6417 could not be transferred to another taxpayer under section 6418.

There is nothing in section 6417 that requires an "all or nothing" approach to the amount of applicable tax credits subject to the election. The provision simply requires the taxpayer to make the election on a facility-by-facility basis.[7] In fact, section 6417(d)(3)(D)(ii) provides that no election may be made under section 6418 in the case of a clean hydrogen production facility for which a section 6417 is made. This rule would not be required if a taxpayer's entire tax credit from a facility was subject to the direct pay election. There would be nothing left to transfer. Further, the Secretary has broad authority regarding the form and manner of the election under section 6417(a) and the implementation of the provision under section 6417(h).

We urge Treasury to adopt either method described above (or any comparable method) to address the situation of taxpayers that have the need to both use and receive refunds for applicable credits in a taxable year. We see no additional administrative burden placed on the IRS by adoption of either rule or any potential for abuse. Without such a rule, some taxpayers will not realize the fully intended benefit of the section 6417 election and will be at a competitive disadvantage relative to taxpayers can that full use or do not need the election. These dichotomies may have negative effect on clean energy deployment and may not correspond with Congress's intent.

C. Treasury should recognize the potential diversity of accounting treatment for transferred credits and provide certainty by clarifying that tax-exempt income generated from transferring credits is excluded from the minimum tax base.

The IRA provided a book minimum tax of 15 percent on the adjusted financial statement income (AFSI) of an applicable corporation. Section 56A(a) defines AFSI as the net income or loss of the taxpayer as set forth on the taxpayer's applicable financial statement, with various adjustments.

Section 56A(c)(5) provides that AFSI is to be determined by disregarding certain taxes, including Federal income taxes. The purpose of the adjustment is to put AFSI and regular taxable income on the same pre-tax basis. The last sentence of section 56A(c)(5) authorizes the Secretary to issue such guidance as necessary to provide for the proper treatment of current and deferred taxes. AFSI is also adjusted to

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[4] In essence, the taxpayer would be making estimated tax payments that in total should equal the taxpayer's tax liability in excess of the section 38(c) limitation. In fact, a perhaps stronger case can be made that a taxpayer that is ultimately due a refund should not have to make any estimated tax payments at all.

[5] Treasury could interpret section 6655(g)(1)(B) ("the credits against tax *provided* by part IV") as the tax credits determined for the year before the section 6417 election converts such credits to a payment of tax.

[6] To the extent a redetermination reduces the allowable amount of credit by an amount that exceeds the amount of tax credit retained by the taxpayer, such excess would be treated as an excessive payment.

[7] See, sec. 6417(d)(3)(D) in the case of clean hydrogen production facilities.

disregard any amount treated as a payment against tax under a section 6417 election, which allows certain taxpayers to elect to treat certain energy tax credits as a direct payment of tax, to the extent such amount was not otherwise taken into account under section 56A(c)(5). This adjustment to AFSI conforms the financial statement and regular tax treatment of section 6417 payments. Taxpayers may also offset their book minimum tax liability with general business credits, subject to section 38 limitations.

Section 6418 provides that a taxpayer may elect to transfer, for cash, certain energy tax credits to another taxpayer. The transfer transaction is treated as a non-taxable event for both the transferor and transferee for regular tax purposes. The accounting treatment of the transfer transaction is unclear, however. Some certified public accounting firms seem to believe that generation of credits should be recorded through income tax expense, and subsequent transfer of the tax credits should be treated as the disposition of any other asset, which would give rise to a small pre-tax loss equal to the discount at which the credits are sold. In that case, after application of the section 56A(c)(5) adjustment, the only effect on AFSI would be a small loss. Other firms believe that if the taxpayer generating credits intends to transfer them, the taxpayer should account for the initial generation of the credits outside the income tax line. With this treatment, generation of the credits would create substantial AFSI.

Treasury should exercise the authority granted to the Secretary in section 56A(c)(5) to issue guidance that provides the effects of a transfer of a tax credit under section 6418 will be disregarded in determining AFSI. Such guidance would provide consistent treatment among taxpayers with transferred credits, taxpayers that use their own tax credits to reduce their tax liabilities, and taxpayers that make section 6417 elections. It would also provide consistent treatment among taxpayers regardless of the views of the auditors of their financial statements.

The guidance recommendation would also further a congressional purpose underlying section 6418, which is to allow clean energy developers without sufficient tax liability to efficiently transfer their energy tax credits to taxpayers with the tax liability to absorb the credits. Without the opportunity to transfer tax credits, clean energy developers would not have the capital or incentive to deploy the projects that are supported by the credits. Because Congress removed income tax considerations from tax credit transfers for regular tax purposes, it would then seem inconsistent if Congress, in the same Act, intended to limit the tax credit transfer market by imposing book tax liabilities and uncertainties on tax credit transfers.

D. Treasury should create a safe harbor against the excessive payment penalties specified in section 6417(d)(6)(A)(ii) for hydrogen produced and verified by an unrelated third party.

Treasury should use its authority to carry out the purposes of section 6417(d)(6)(B) to provide that an excessive payment resulted from reasonable cause if the hydrogen to which the excessive payment is attributable was verified by an unrelated third party. Specifically, we request clarification that such third-party verification of hydrogen production would meet the “reasonable cause” exception specified under Section. 6417(d)(6)(B). More generally, we would like clarification on what will be considered reasonable cause under Section 6417, in relation to the production of clean hydrogen under Section 45V.

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FCHEA is appreciative of the opportunity to provide these comments on direct pay and transferability issues. The association and its members are dedicated to supporting the Administration however necessary to ensure that the Inflation Reduction Act guidance on hydrogen tax incentives

accurately reflects the scientific and business realities of the hydrogen sector. Please feel free to contact FCHEA CEO Frank Wolak at FWolak@FCHEA.org with any comments or questions you may have regarding this submission or any other hydrogen related issue.

Sincerely,

Frank Wolak
President & CEO
Fuel Cell and Hydrogen Energy Association

cc: The Honorable Lily L. Batchelder, Assistant Secretary for Tax Policy
Mr. William M. Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical)