Global Infrastructure Investor Association
Promoting Private Investment in Infrastructure

4 November 2022

SUBMITTED ELECTRONICALLY

Internal Revenue Service

CC:PA:LPD:PR (Notice 2022-50)

Room 5203

P.O. Box 7604, Ben Franklin Station

Washington, DC 20044

Dear Sirs and Madams:

The Global Infrastructure Investors Association (GIIA) respectfully submits these comments on direct payments and transferability in response to Notice 2022-50. GIIA is the membership body for the world's leading investors in infrastructure. GIIA's members represent more than $342bn of infrastructure assets across all 50 U.S. states and collectively represent approximately $1.3 trillion of global infrastructure assets under management.

Transfer of credits following direct payment election

Taxpayers that are not tax-exempt entities may elect direct payments under Section 6417 for credits under Sections 45Q, 45V, and 45X, and also may transfer these credits under Section 6418. Section 6418(d)(1)(D)(ii) provides that a direct pay election under Section 45X for a tax year after 2022 also applies to the following four tax years ending before 2033. Sections 6418(d)(3)(C)(i) and (D)(i) provide that, for the Section 45Q and Section 45V credits, a direct payment election is made for the tax year a facility is placed in service and applies for that year and the next four tax years ending before 2033.

The Section 45Q, 45V, and 45X credits apply on an annual basis to production or carbon capture for a tax year and are not based on facility cost. The statute does not appear to prohibit the transfer of these credits after the expiration of the direct payment election. Therefore, we request that the IRS and Treasury provide an express rule clarifying that a taxpayer that is not a tax-exempt entity that makes a direct payment election may transfer a Section 45Q, 45V, or 45X credit after the five-year election period.

Timing of direct payments

Taxpayers commonly finance energy production, manufacturing, and similar facilities through equity financing. Direct payment appears to be intended to be an alternative source of financing for the construction or refitting of facilities. However, a taxpayer cannot realize the benefit of these provisions until a facility has been constructed and placed in service, and elects direct payment only when it files its tax return for that tax year substantially later.

Accordingly, monetization of the credits is not available for several years after the beginning of construction and as many as two years after a facility is placed in service. Under these circumstances, the direct payment option does not provide meaningful upfront financing. We note that other credits, for example, the employee retention credit under Section 2301 of the CARES Act and the premium tax credit under Section 36B, provide for advance payments of those credits.

In light of the purpose of the provision, we request that the IRS and Treasury consider either a similar mechanism for taxpayers to elect and receive direct payments during a tax year that a facility is anticipated to be placed in service or to consider issuing guidance similar to the progress investment tax credit rules that would be a partial solution.

Direct payment and transfer elections by partnerships

Tax-exempt entities may elect direct payments under Section 6417 for any of 12 credits but may not transfer credits under Section 6418. Other taxpayers may transfer most of the credits for which tax-exempt entities may elect direct payments, but their direct payment election is limited to the Section 45Q, 45V, and 45X credits.

Under Sections 6417(c) and 6418(c), the direct payment and transfer elections are made at the partnership level. It is unclear which elections a partnership may make when it has both tax-exempt and taxable entities as partners. We suggest that the IRS and Treasury apply rules similar to the ownership allocation rules of Section 45(e)(3) to this situation. Thus, for example, if tax-exempt entities hold 40% of the ownership interest in a partnership and taxable entities hold 60%, the partnership may elect to receive direct payment of 40% of the amount of a credit and transfer 60%.

Thank you for the opportunity to submit comments on these important issues. Please feel free to contact our U.S. representative David Quam or me for questions or additional information.

Yours sincerely,

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