PAUL
HASTINGS

November 4, 2022

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

Re: Comments in Response to Internal Revenue Service Notice 2022-50
Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

Dear Sir or Madam:

We appreciate the opportunity to submit comments in response to Notice 2022-50 regarding questions arising under new Sections 6417 and 6418. We provide the following comments to address issues that require clarification or additional guidance in future regulations.

A. *3.01.* Elective Payment of Applicable Credits (§ 6417).

1. *3.01(5).* With respect to the definition of the term "applicable entity" in § 6417(d)(1):

***3.01(5)(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?**

To provide certainty to non-U.S. businesses that may desire to engage in business activities that would cause them to generate credits for which the direct pay option is available, the IRS should confirm that a non-U.S. person may be a taxpayer that may qualify as an "applicable entity" under Section 6417(d)(1)(B), (C), or (D). The IRS should also confirm that a non-U.S. person that directly or indirectly owns an interest in an otherwise "applicable entity" does not disqualify the entity for the direct pay option. Nothing in Section 6417 or any other portion of the Code requires that an "applicable entity" be a U.S. person or suggests that a non-U.S. person cannot own an interest in an "applicable entity", and thus the IRS should not so limit that definition in any promulgated regulations or other guidance.

Guidance should also be issued to confirm that an "applicable entity" (as defined in Section 6417(d)(1)(A)) may make an election under Section 6417 if it owns a facility or business that qualifies for applicable credits indirectly through a single-member limited liability company treated as a disregarded entity for federal income tax purposes.

2. *3.01(6).* With respect to the elections under § 6417(d)(1)(B), (C), or (D):

***3.01(6)(d).* Is guidance needed to clarify the prohibition of a transfer described in § 6418(a) by a taxpayer who has made an election under § 6417(d)(1)(B), (C), or (D)? If so, what clarification is needed?**

Section 6417(d)(1)(D)(iii) provides that "[f]or any taxable year described in clause (ii)(I), no election may be made by the taxpayer under section 6418(a) for such taxable year with respect to eligible components for purposes of the [credit for advanced manufacturing production under Section 45X(a)]." The IRS should clarify that if a taxpayer elects (under Section 6417(d)(1)(D)(ii)(II)) to revoke the application of the election to any taxable year described in Section 6417(d)(1)(D)(ii)(I), such transfer prohibition will not apply.

3. *3.01(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)?

The IRS should revise Form 3468 (Investment Credit) to allow for the elective pay of applicable credits. To prevent duplication, fraud, or improper payments, the IRS may consider requiring a taxpayer to state on the revised Form 3468, when making an election under Section 6417, that such taxpayer has not transferred any portion of such applicable credit under Section 6418. This statement is made under penalties of perjury, which carries significant criminal and civil penalties, if the statement that is made is fraudulent.

4. *3.01(10).* What, if any, guidance is needed to clarify the application of the excessive payment provisions of § 6417? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6417(d)(6)(B)? What, if any, guidance is needed to calculate the excessive payment amount under § 6417(d)(6)(C)?

Section 6417(d)(6)(A) generally provides that if any amount treated as a payment made to an applicable entity under Section 6417(a) constitutes an excessive payment, the applicable entity will be subject to an additional tax equal to the sum of (i) the amount of the excessive payment, plus (ii) an amount equal to 20% of the excessive payment. Under Section 6417(d)(6)(B), the amount described in clause (ii) in the preceding sentence will not apply if the applicable entity demonstrates that the excessive payment resulted from reasonable cause.

Further guidance is required as to when an excessive payment results from "reasonable cause" within the meaning of Section 6417(d)(6)(B). Treasury Regulation Section 1.6664-4(b) describes facts and circumstances that should be taken into account in determining whether reasonable cause

exists for purposes of the penalty under Section 6662, including the role of reliance on the appraisal of the value of property in such determination. The IRS should promulgate similar guidance here, including examples of situations in which excessive payments are or are not a result of reasonable cause. In that guidance, the IRS should provide that a taxpayer's reliance on an independent third-party appraisal will be a strong indicator that reasonable cause exists.

We also recommend that the IRS promulgate a rule that reasonable cause will be found when the difference between the amount in Section 6417(d)(6)(C)(i) (the payment claimed) and Section 6417(d)(6)(C)(ii) (the amount of the credit allowable) is less than 2% of the amount of the credit allowable. Such a safe harbor would allow for minor deviations from the actual credit amount, which we believe would not be indicative of an attempt by the taxpayer to receive an improper payment and instead are more likely to be a result of minor errors or sight differences in values that go into the calculation of the fair market value of a facility.

5. *3.01(11).* For purposes of § 6417(g), what, if any, guidance is needed to clarify the application of § 50 for credit recapture and basis adjustments to investment credit property?

Section 6417(g) provides that "rules *similar to* the rules of section 50 shall apply for purposes of [Section 6417]." Additional guidance is needed as to what specific provisions, if any, of Section 50 will apply to Section 6417, including investment credit property ceasing to be investment credit property and an applicable entity disposing of such property. We suggest using rules similar to those contained in Paragraph 6 (Recapture) of the Terms and Conditions for the Payments for Specified Energy Property In Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009.

6. *3.01(13).* Please provide comments on any other topics that may require guidance.

Treatment of Payments as Tax-Exempt Income. Guidance should clarify that amounts received by any taxpayer with respect to which the election in Section 6417(a) is made is treated as tax-exempt income.

Section 6417(c)(1)(C) provides that in the case of any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation, any amount with respect to which the election in Section 6417(a) is made is treated as tax-exempt income for purposes of Sections 705 and 1366. Section 6417 is silent as to whether such amounts are treated as tax-exempt income with respect to facilities or property held directly (or indirectly through a disregarded entity) by corporations, individuals, or other non-pass-thru taxpayers.

We recommend that any guidance clarify that amounts received with respect to which the election in Section 6417(a) is made should be treated as tax-exempt income for corporations, individuals, and other non-pass-thru taxpayers. Renewable energy facilities and other energy properties are often directly held by disregarded entities that are ultimately owned by partnerships, corporations,

or other entities. Each of these entities should receive equal income tax treatment for amounts received under Section 6417.

B. 3.02. Transfer of Certain Credits (§ 6418).

1. *3.02(1).* What, if any, guidance is needed to clarify the meaning of certain terms in § 6418, such as eligible credit, eligible taxpayer, and excessive credit transfer? Is there any term not defined in § 6418 that should be defined in guidance? If so, what is the term and how should it be defined?

To provide certainty to non-U.S. businesses that may desire to either engage in business activities that would cause them to generate credits or purchase credits, the IRS should confirm that a non-U.S. person or an otherwise eligible person in which a non-U.S. person holds an interest may be a taxpayer that may qualify as an "eligible taxpayer" or as a "transferee taxpayer" under Section 6418. Nothing in Section 6418 or any other portion of the Code requires that an "eligible taxpayer" or a "transferee taxpayer" be a U.S. person, and thus the IRS should not so limit those definitions in any promulgated regulations or other guidance.

2. *3.02(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)?

The IRS should revise Form 3468 (Investment Credit) or issue a similar form to allow for the transfer of eligible credits. Both the eligible taxpayer and the transferor taxpayer should be required to sign such form consenting to the transfer and include such form with their respective U.S. federal income tax returns. This statement is made under penalties of perjury, which carries significant criminal and civil penalties, if the statement that is made is fraudulent.

3. *3.02(9).* What, if any, guidance is needed to clarify the application of the excessive credit transfer provisions of § 6418? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6418(g)(2)(B)? What guidance is needed to calculate the excessive credit transfer amount?

Section 6418(g)(2)(A) generally provides that if any portion of an eligible credit which is transferred to a transferee taxpayer constitutes an excessive credit transfer, the transferee taxpayer will be subject to an additional tax equal to the sum of (i) the amount of the excessive credit transfer, plus (ii) an amount equal to 20% of the excessive credit transfer. Under Section 6418(g)(2)(B), the amount described in clause (ii) in the preceding sentence will not apply if the transferee taxpayer demonstrates that the excessive credit transfer resulted from reasonable cause.

Further guidance is required as to when an excessive credit transfer results from "reasonable cause" within the meaning of Section 6418(g)(2)(B). Treasury Regulation Section 1.6664-4(b) describes facts and circumstances that should be taken into account in determining whether reasonable cause exists for purposes of the penalty under Section 6662, including the role of reliance on the appraisal of the value of property in such determination. The IRS should promulgate similar guidance here, including examples of situations in which excessive credit transfers are or are not a result of reasonable cause. In that guidance, the IRS should provide that a transferee taxpayer's reliance on an independent third-party appraisal will be a strong indicator that reasonable cause exists. The IRS should also address the role of a transferee taxpayer's reliance on representations or statements made by the eligible taxpayer.

We also recommend that the IRS promulgate a rule that reasonable cause will be found when the difference between the amount in Section 6418(g)(2)(C)(i) (the credit claimed by the transferee taxpayer) and Section 6418(g)(2)(C)(ii) (the amount of the credit otherwise allowable to the eligible taxpayer) is less than 2% of the amount of the credit allowable. Such a safe harbor would allow for minor deviations from the actual credit amount, which we believe would not be indicative of an attempt by the transferee taxpayer to receive an improper payment and instead are more likely to be a result of minor errors or slight differences in values that go into the calculation of the fair market value of a facility.

> **4. *3.02(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?**

Clarification is required as to whether any increase in tax with respect to the recapture of an investment credit that is transferred under Section 6418 is required to be paid to the IRS by the eligible taxpayer or by the transferee taxpayer. It seems most appropriate that the increase in tax should be paid by the transferee taxpayer since they are the person that claimed the investment credit.

Clarification is also requested as to when investment credit property is considered "disposed of" or "ceas[ing] to be investment credit property" for purposes of this section. In addition, the IRS should consider excluding from these recapture rules a disposition of investment credit property by the eligible taxpayer as a result of a transfer of such property to the transferee taxpayer. We suggest using rules similar to those contained in Paragraph 6 (Recapture) of the Terms and

Conditions for the Payments for Specified Energy Property In Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009.

Section 6418(g)(3) triggers notice obligations if 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." We believe additional guidance is required with respect to both the notice from the eligible taxpayer of a triggering event and the notice from the transferee taxpayer of the recapture amount, including: (i) whether the IRS will issue a form on which such notice must be provided, (ii) whether a copy of the notice must be provided to the IRS, and (iii) when the notice is required to be delivered.

Conclusion

Thank you for the opportunity to provide comments on questions pertaining to the elective payment and credit transfers, provisions introduced by the Inflation Reduction Act. We look forward to working with the IRS and Treasury to further clarify these issues as future regulations are considered.

Sincerely,

/s/Paul Hastings, LLP

Paul Hastings, LLP