

# IRS Issues Proposed Regulations on Tax Credit Transfers

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On June 14, the Treasury Department (Treasury) and the Internal Revenue Service (IRS) issued [proposed regulations](#) and [temporary regulations](#) on tax credit transfers pursuant to Section 6418 of the Internal Revenue Code of 1986, as amended (Code), which was enacted by the [Inflation Reduction Act](#). Section 6418 allows eligible taxpayers to elect to transfer certain tax credits, including the ITC and PTC, to unrelated taxpayers rather than using the credits against their federal income tax liabilities. The IRS also issued regulations on direct payments pursuant to Section 6417, which we will address in a subsequent update.

The temporary regulations, which govern the registration requirements, will apply to taxable years ending on or after the date they are published in the *Federal Register* (currently scheduled for June 21, 2023). The proposed regulations would apply to taxable years ending on or after the date the final regulations are published in the *Federal Register*. Taxpayers may rely on these proposed regulations for taxable years beginning after December 31, 2022, and before the date the final regulations are published in the *Federal Register*, if they follow the proposed regulations in their entirety and in a consistent manner.

Comments on the proposed regulations must be received by August 14, 2023. A public hearing on the regulations will be held on August 23, 2023.

## Summary

The proposed regulations are over 100 pages and extremely detailed. Readers who want just the highlights can focus on the following summary. Subsequent sections discuss the regulations in greater detail.

- **Paid-in-Cash Requirement.** Any amounts paid by a buyer in connection with the transfer of a credit must be paid in cash or the transfer election will be disallowed. Cash payments should be made within the period beginning on the first day of the seller's taxable year when the credit is determined and ending on the due date for the transfer election statement.
- **Multiple Buyers.** A seller can sell credits to more one buyer. For example, a seller can transfer 40% of a credit to one buyer and 60% to another. A seller cannot separately sell any bonus amounts related to transferred credits.
- **Separate Elections.** Sellers must make separate transfer elections with respect to each eligible credit property and (for the PTC and Section 45Q credit) for each taxable year.
- **Transfer Election Statement.** A transfer election statement must be signed under penalties of perjury by an individual with authority to legally bind the seller and must include the written consent of an individual with authority to legally bind the buyer. The transfer election statement requires that the seller provide to the buyer the "required minimum documentation" — *i.e.*, information to validate the existence of the eligible credit property, any bonus credits amounts, and the evidence of credit qualification.

- **Timing of Election.** The election must be filed on an original return and may not be revised on an amended return or an administrative adjustment request. No late-filing relief is available. Once made, a transfer election is irrevocable.
- **One Transfer.** A buyer cannot resell a transferred credit. However, an allocation of a credit to a partner of a buyer partnership is allowed. An intermediary can arrange a transaction between a buyer and seller but cannot acquire ownership of the credit.
- **Credit Limitations.** Limitations in Section 49 and Section 50(b) (including the tax-exempt use property limitations) affect the amount of eligible credit that can be transferred. The passive activity rules in Section 469 do not affect the amount of eligible credit that can be transferred but do affect the amount of credit that can be utilized by the buyer.
- **Tax Treatment of Transfer.** The purchase price is not includible in the gross income of the seller and is not deductible by the buyer. The buyer does not have gross income with respect to the discount (*i.e.*, the excess of the transferred credit over the amount paid).
- **Buyer Tax Matters.** The buyer may claim a transferred credit on an amended return. A buyer may take into account a credit that it has purchased, or intends to purchase, when calculating its estimated tax payments.
- **Partnership Sellers.** The regulations provide partnerships with the flexibility to determine, separately with respect to each partner, whether to sell any of the credits otherwise allocable to the partner, and if so, how to allocate the tax-exempt income from the purchase price among the partners. The partnership can distribute the cash however it wants.
- **Partnership Buyers.** If a partnership buys a credit, each partner's share of the credit is based on such partner's share of the Section 705(a)(2)(B) expenditures used to fund the purchase of the credit, which is determined by the partnership agreement.
- **Registration.** Before making a transfer election, the seller must register with and provide information to the IRS through an IRS electronic portal in accordance with the instructions provided therein. The seller will receive a unique registration number from the IRS for the eligible credit property. That registration number must be used in subsequent reporting. It is unclear when the electronic portal will be ready or how long the registration process will take.
- **Excessive Credit Transfers.** If there is an excessive credit transfer (*i.e.*, the buyer claims a bigger credit than the seller could have), the tax imposed on the buyer will be increased by the amount of the excessive credit transfer and a 20% penalty. The 20% penalty does not apply if the transferee taxpayer demonstrates that the excessive credit transfer resulted from reasonable cause. The factors supporting reasonable cause — diligence, third-party expert reports, representations from the seller concerning the transfer, etc. — suggest a conservative road map for buyers to follow in tax credit transfer deals.
- **Recapture.** The buyer generally takes into account the recapture amount for an ITC or Section 45Q recapture event, except that in the case of a seller partnership, the seller and its partners take into account recapture caused by dispositions of partnership interests.

## Overview and Key Concepts

In the terminology of the regulations, an “eligible taxpayer” may make an election (a “transfer election”) to transfer to a “transferee taxpayer” a “specified credit portion” of an “eligible credit” determined with respect to an “eligible credit property.”

“Eligible taxpayer” means any taxpayer, other than “applicable entities” that are eligible for direct pay of eligible credits under Section 6417. The term “taxpayer” generally means any person subject to any internal revenue tax and includes entities that have U.S. employment tax or excise tax obligations even if they do not have U.S. income tax obligations (including entities treated as partnerships).

“Transferee taxpayer” means any taxpayer that is not related (within the meaning of Section 267(b) or 707(b)(1)) to the eligible taxpayer.

“Specified credit portion” means a proportionate share (including 100%) of an entire eligible credit that is specified in a transfer election. A specified credit portion of an eligible credit would be required to reflect a proportionate share of each bonus credit amount that is taken into account in calculating the entire amount of the eligible credit determined with respect to a single eligible credit property. Thus, an eligible taxpayer cannot separately sell one or more bonus amounts of an eligible credit.

“Eligible credit” means the alternative fuel vehicle refueling property determined under Section 30C to the extent treated as a credit listed in Section 38(b), the renewable electricity production credit determined under Section 45(a) (PTC), the credit for carbon oxide sequestration determined under Section 45Q(a), the zero-emission nuclear power production credit determined under Section 45U(a), the clean hydrogen production credit determined under Section 45V(a), the advanced manufacturing production credit determined under Section 45X(a), the clean electricity production credit determined under Section 45Y(a), the clean fuel production credit determined under Section 45Z(a), the energy credit determined under Section 48 (ITC), the qualifying advanced energy project credit determined under Section 48C, and the clean electricity investment credit determined under Section 48E. Credit carryforwards and carrybacks are not eligible credits.

“Eligible credit property” means the unit of property of an eligible taxpayer with respect to which the amount of an eligible credit is determined and for which registration is required. For the PTC and the Section 48E ITC (except with respect to energy storage technology), a taxpayer generally would be required to register and make the election on a qualified facility-by-qualified facility basis. For the Section 48 ITC, a taxpayer would be required to register and make an election on an energy property-by-energy property basis or, in the alternative, for an entire energy project. For the Section 48E ITC with respect to energy storage technology, a taxpayer would be required to register and make the election on a property-by-property basis. For the Section 45Q credit, a taxpayer would be required to register and make an election with respect to a single process train of carbon capture equipment.

### **Paid-in-Cash Requirement**

Consistent with Section 6418(b)(1), the regulations would require that any amounts paid by a transferee taxpayer in connection with the transfer of a specified credit portion be paid in cash. If any consideration is other than cash, the transfer election is disallowed.

- It can be expected that typical tax credit transfer transactions will be straightforward purchases of credits for cash. However, the possibility of a complete disallowance of the transfer means care should be taken to ensure there is no other disguised consideration involved in the transaction, such as a discount on services provided to a customer who is also purchasing credits from the eligible taxpayer.

Some stakeholders were concerned that prepaid or deferred payments could run afoul of the paid-in-cash requirement. The regulations would provide that a payment does not violate the paid-in-cash requirement if the cash payment is made within the period beginning on the first day of the eligible taxpayer’s taxable year during which a specified credit portion is determined and ending on the due date for completing a transfer election statement. The regulations also would clarify that a contractual commitment to purchase eligible credits will not violate the paid-in-cash requirement if all cash payments are made during the required time period.

### **Who Can Make the Election**

The regulations would clarify the election rules for a variety of ownership situations:

- **Disregarded Entities.** A disregarded entity would not make a transfer election. Instead, the eligible taxpayer treated as the owner of the assets of the disregarded entity would make the election.
- **Co-Owners.** If there are multiple owners of undivided interests in eligible credit property, each co-owner's share of the eligible credit property is treated for Section 6418 purposes as a separate eligible credit property. A similar rule applies to a partnership that has made an election out of Subchapter K pursuant to Section 761(a).
- **Consolidated Groups.** A member of a consolidated group of corporations must make a transfer election (rather than the common parent of the group as agent for the member).
- **Partnerships and S Corporations.** A partnership or S corporation must make a transfer election for eligible credit property for which it is the tax owner.

The regulations would clarify that no election is allowed when eligible credits are not “determined with respect to an eligible taxpayer.” For this purpose, an eligible credit is determined with respect to an eligible taxpayer in cases where the eligible taxpayer owns the underlying eligible credit property or, if ownership is not required, otherwise conducts the activities giving rise to the underlying eligible credit. This means that a credit allowable to a lessee of ITC property using a lease passthrough election is not transferable under Section 6418. Similarly, a Section 45Q credit allowable to a person that disposes or utilizes qualified carbon oxide, or uses qualified carbon oxide as a tertiary injectant, due to an election made under Section 45Q(f)(3)(B) is not transferable. However, the buyer-lessor in a sale-leaseback can elect to transfer eligible credits because the buyer-lessor owns the property and places it in service.

- This seems like a strained and unnecessarily narrow interpretation of the meaning of “determined with respect to” and was perhaps driven by administrability concerns. Given the vagueness of the term “determined with respect to an eligible taxpayer,” the policy considerations, which favor a broader interpretation, arguably should have prevailed to allow transfer of credits in combination with the lease passthrough election and the Section 45Q(f)(3)(B) election.

### Time and Manner for Making the Election

An eligible taxpayer may make multiple transfer elections to transfer multiple specified credit portions to multiple transferee taxpayers. For example, a transferor could transfer 40% of a credit to one transferee and 60% to another.

The regulations would require that an eligible taxpayer make separate transfer elections with respect to each eligible credit property and (for the PTC and Section 45Q credit) for each taxable year. However, Treasury and the IRS have asked for comments as to whether more specific guidance with respect to eligible credit property is needed to allow eligible taxpayers to make the election as required and whether to adopt a grouping rule that allows taxpayers to make an election with respect to certain groups of eligible credit properties.

- This rule is likely motivated by the registration mechanics, which require separate registrations for separate eligible credit property. However, there will be circumstances (e.g., large wind farms) where the ability to group elections would be helpful.

To make a transfer election, an eligible taxpayer would be required to include the following on its tax return: (1) a properly completed relevant source credit form for the eligible credit; (2) a properly completed Form 3800,

including reporting the registration number received during the required pre-filing registration; (3) a schedule attached to the Form 3800 showing the amount of eligible credit transferred for each eligible credit property; (4) a transfer election statement; and (5) any other information related to the election specified in guidance.

The transfer election statement is a written document that describes the transfer of a specified credit portion between an eligible taxpayer and transferee taxpayer. The statement must be signed under penalties of perjury by an individual with authority to legally bind the eligible taxpayer and must include the written consent of an individual with authority to legally bind the transferee taxpayer. The statement also must be completed before the eligible taxpayer files the tax return for which the specified credit portion is determined and before the transferee taxpayer files a tax return for the year in which the specified credit portion is taken into account. The statement generally must include: (1) information related to the transferee taxpayer and the eligible taxpayer; (2) a statement that provides the necessary information and amounts to allow the transferee taxpayer to take into account the specified credit portion with respect to the eligible credit property; (3) a statement that the parties are not related (within the meaning of Section 267(b) or 707(b)(1)); (4) a representation from the eligible taxpayer that it has complied with all relevant requirements to make a transfer election; (5) a statement from the eligible taxpayer and the transferee taxpayer acknowledging the notification of recapture requirements (if applicable); and (6) a statement or representation from the eligible taxpayer that the eligible taxpayer has provided the required minimum documentation to the transferee taxpayer.

The required minimum documentation is information to validate the existence of the eligible credit property, any bonus credits amounts, and the evidence of credit qualification. The regulations specifically include evidence of the eligible taxpayer's qualifying costs in the case of a transfer of an ITC or the amount of qualifying production activities and sales amounts, as relevant, in the case of a production-based credit. The regulations require that the transferee taxpayer retain the required minimum documentation for as long as it may be material in the administration of any internal revenue law.

- These requirements, which require the buyer and seller of the tax credits to retain diligence materials, are clearly motivated by the statutory flexibility given to Treasury and the IRS to prevent “duplication, fraud, improper payments, or excessive “
- These requirements can be handled by deliverables that would be common in M&A deals or tax equity financing transactions, such as IE reports, appraisals, and cost segregation reports.

The election must be filed on an original return and may not be revised on an amended return or an administrative adjustment request. No late-filing relief is available. Once made, a transfer election is irrevocable.

### **Treatment of Multiple Transfers and Syndications**

Consistent with Section 6418(e)(2), the proposed regulations would prohibit a transferee taxpayer of any specified credit portion from making a second transfer of such transferred credit.

However, an allocation of a transferred specified credit portion to a direct or indirect owner of a passthrough entity would not be considered a transfer under Section 6418 and therefore would be allowed.

- Although not explicitly addressed by the regulations, a transfer of a contractual commitment to purchase eligible credits that occurs before a transfer election arguably is not an impermissible second transfer.

In addition, the preamble clarifies that the regulations preclude “dealer” transactions but permit “broker” transactions. In other words, if an intermediary acquires federal income tax ownership of a specified credit portion and purports to transfer that specified credit portion to another buyer, the transfer would be disallowed. But if an intermediary arranges a purchase and sale between an eligible taxpayer and a transferee taxpayer and the intermediary does not acquire federal income tax ownership of the specified credit portion, the transfer would be allowed.

- It is not clear how to apply federal income tax principles to the ownership of a federal income tax credit. As tax credit marketplaces develop, the distinction between “dealers” and “brokers” could play a significant role.

### **Determining the Eligible Credit**

The regulations would clarify how to determine the amount of an eligible credit that is transferable. They would draw a distinction between rules that impact the amount of credit determined or the credit base (and thus, the amount of eligible credit that can be transferred) and rules that impact a taxpayer’s ability to claim a particular eligible credit against its tax liability (but do not affect the amount that can be transferred). The limitations in Section 49 concerning nonrecourse financing (which apply to individuals and other taxpayers subject to the at-risk rules) and Section 50(b) (including the tax-exempt use property limitations) affect the amount of eligible credit that can be transferred. The passive activity rules in Section 469 do not affect the amount of eligible credit that can be transferred (but, as discussed below, do affect the amount of credit that can be utilized by the transferee taxpayer).

- The distinction between the treatment of Section 49 and Section 469 is highly technical and formalistic. From a policy perspective, the distinction is hard to defend.

The regulations would impose information-gathering requirements on all partnerships and S corporations directed toward the Section 49 limitations. The proposed regulations would provide that a transferor partnership or transferor S corporation that transfers any specified credit portion with respect to an investment credit property must request from each of its partners or shareholders, respectively, that is subject to Section 49, the amount of such partner’s or shareholder’s nonqualified nonrecourse financing with respect to the investment credit property as of the close of the taxable year in which the property is placed in service. Additionally, the transferor partnership or transferor S corporation would attach to its tax return for the taxable year in which the property is placed in service the amount of each partner’s or shareholder’s Section 49 limitation with respect to any specified credit portion transferred with respect to the investment credit property.

- Partnerships and S corporations will need to evaluate whether to include mechanisms in their operative agreements that will ensure they can collect this information from their owners.
- It is not entirely clear why the regulations impose information-gathering requirements for Section 49 but not for the tax-exempt use property limitations in Section 50(b)(3) and (4).

### **Treatment of Payments Made in Connection With Transfer**

Amounts paid to an eligible taxpayer by a transferee taxpayer “in connection with” a transfer election with respect to a specified credit portion are not includible in the gross income of an eligible taxpayer and are not deductible by



the transferee taxpayer. The regulations would provide that an amount paid by a transferee taxpayer to an eligible taxpayer is “in connection with” a specified credit portion only if the amount is paid in cash directly relates to the specified credit portion, and is not related to an excessive credit transfer. General tax rules would apply to payments of amounts that do not meet these requirements. The preamble to the proposed regulations clarifies that these requirements would not be met if a specified credit portion is not ultimately transferred to a transferee taxpayer.

The regulations also would include an anti-abuse provision that would disallow the election and transfer of an eligible credit, or otherwise would recharacterize a transaction’s income tax consequences, in circumstances where the parties to the transaction have engaged in the transaction or a series of transactions with the principal purpose of avoiding tax liability beyond the intent of Section 6418.

The regulations do not address, and Treasury and the IRS seek comments on, (1) the federal income tax treatment of transaction costs for the eligible taxpayer and the transferee taxpayer, and (2) whether a transferee taxpayer is permitted to deduct a loss if the amount paid to an eligible taxpayer exceeds the amount of the eligible credit that the transferee taxpayer can ultimately claim.

### **Transferee Treatment of an Eligible Credit**

The preamble restates the rule in Section 6418(d) that the eligible credit is taken into account in the first taxable year of the transferee taxpayer ending with, or after, the taxable year of the eligible taxpayer with respect to which the credit was determined. Accordingly, if the taxable years of an eligible taxpayer and a transferee taxpayer end on the same date, the transferee taxpayer will take the specified credit portion into account in that taxable year. If their taxable years end on different dates, the transferee taxpayer will take the specified credit portion into account in the transferee taxpayer’s first taxable year that ends after the taxable year of the eligible taxpayer. The preamble notes that the transferee taxpayer may claim a specified credit portion on an amended return or, if applicable, a request for administrative adjustment. A transferee taxpayer may also take into account a specified credit portion that it has purchased, or intends to purchase, when calculating its estimated tax payments.

The regulations would provide that there is no gross income to a transferee taxpayer when claiming an eligible credit if the amount paid for the eligible credit is less than the amount of the eligible credit transferred and claimed.

The regulations provide that a transferee taxpayer subject to the passive activity limitations of Section 469 would be required to treat the credits making up the specified credit portion as passive activity credits to the extent the specified credit portion exceeds passive tax liability.

- Unfortunately for the masses of potential individual tax credit buyers waiting on the sidelines, this settles the speculation (and lively debate) as to whether individuals and other entities otherwise subject to the passive activity rules, but without meaningful passive activity income, could participate as tax credit buyers.

### **Partnerships**

The regulations would clarify that a partnership may qualify as an eligible taxpayer or a transferee taxpayer, assuming all other relevant requirements in Section 6418 are met.

Stakeholders requested clarification as to whether a disposition of a partner's interest in a partnership would result in recapture of transferred investment tax credits to a transferee taxpayer. Existing regulations provide that a partner's allocable share of an ITC is subject to recapture during the recapture period if the partner's interest in the general profits of the partnership is reduced by a certain percentage. The proposed regulations would clarify that these "indirect" dispositions would not result in recapture tax liability to a transferee taxpayer under Section 6418 but would result in recapture tax liability to the disposing partner. Any recapture to a disposing partner would be calculated based on the partner's share of the basis of the ITC property with respect to which the eligible credits were determined.

- Tax credit sellers and back-leverage lenders have been grappling with the lenders' desire to be able to foreclose on direct or indirect interests in projects during the ITC recapture period. Some had hoped that Treasury and the IRS would conclude that recapture did not apply to dispositions of indirect interests in projects on the theory that a limitation on such transfers is arguably at odds with a transferable credit. The regulations did not adopt this view. Although buyers of tax credits will appreciate being relieved of one potential cause of recapture, sellers of tax credits will have to structure their transactions creatively to get their lenders comfortable.

The regulations provide partnerships with the flexibility to determine, separately with respect to each partner, whether to sell any of the credits otherwise allocable to the partner, and if so, how much. Section 6418(c)(1) provides that the consideration received by a partnership for a transfer of eligible credits is treated as tax-exempt income, and a partner's allocable share of such tax-exempt income is based on such partner's distributive share of the otherwise eligible credit. Under the regulations, the partnership first must determine each partner's distributive share of the otherwise eligible credits (partner's eligible credit amount). The partnership then must determine the portion of each partner's eligible credit amount to be transferred, and the portion of each partner's eligible credit amount to be retained and allocated to such partner. Finally, the partnership may allocate to each partner its share of eligible credits and/or tax-exempt income resulting from the receipt of consideration for the specified credit portion as long as (1) the amount of eligible credits allocated to each partner does not exceed such partner's eligible credit amount, and (2) each partner is allocated its proportionate share of tax-exempt income resulting from the transfer. Each partner's proportionate share is equal to the total amount of tax exempt income resulting from the transfer of the specified credit portion by the partnership multiplied by a fraction, (1) the numerator of which is such partner's eligible credit amount minus the amount of eligible credits actually allocated to such partner with respect to the eligible credit property for the taxable year, and (2) the denominator of which is the specified credit portion transferred by the partnership with respect to the eligible credit property for the taxable year. The regulations provide rules governing tiered partnerships.

The preamble clarifies that the regulations do not limit what a transferor partnership does with the cash payment for a transferred credit and, in particular, do not require that the partnership distribute the cash to the partners who are allocated the tax-exempt income from the cash payment.

As noted above, the regulations clarify that an allocation of a transferred specified credit portion to a direct or indirect owner of a passthrough entity is not considered a transfer under Section 6418. Each partner's distributive share of any transferred specified credit portion is based on such partner's distributive share of the Section 705(a)(2)(B) expenditures used to fund the purchase of such transferred specified credit portion. Each partner's distributive share of the Section 705(a)(2)(B) expenditures used to fund the purchase of any transferred specified credit portion is determined by the partnership agreement (or, if the partnership agreement does not explicitly



address these expenditures, then each partner's distributive share is based on the transferee partnership's general allocation of nondeductible expenditures). The regulations would include timing rules intended to prevent avoidance of the no-additional-transfer rule through transfers of interests in transferee partnerships.

- The rule for determining a partner's distributive share of a transferred specified credit portion is a welcome clarification that should be relatively straightforward to apply in the case of well-advised partnerships. This should help facilitate the syndication of transferred credits, subject to the observation below.
- There are unanswered questions concerning the use of a partnership to syndicate transferred credits, including whether such a partnership will be respected as a partnership and the partners will be respected as partners, and whether a partner could be treated as having purchased the transferred credit from the partnership (which would run afoul of the one-transfer limitation). However, Example 5 in Proposed Regulation Section 1.6418-3(e) contemplates that it might work.

It was an open question as to how to treat partnerships with both eligible taxpayers (who are eligible to transfer credits pursuant to Section 6418 but generally ineligible for direct payments pursuant to Section 6417) and applicable entities (who are ineligible to transfer credits but eligible for direct payments). Unfortunately, the proposed regulations under Section 6417 take the position that partnerships generally are not eligible for direct payments, except for partnerships claiming credits under Section 45Q, 45V, or 45X. However, because partnerships generally are not eligible for direct payments, the preamble to the proposed regulations under Section 6417 provides that they may be eligible taxpayers for purposes of transferring credits.

## Registration

Section 6418(g)(1) provides that as a condition of, and prior to, any transfer of any portion of an eligible credit, the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments.

The regulations generally would require that before filing the return on which a transfer election is made, an eligible taxpayer register and provide information related to each eligible credit property for which the eligible taxpayer intends to transfer a specified credit portion. An eligible taxpayer must complete the pre-filing registration process electronically through an IRS electronic portal in accordance with the instructions provided therein, unless otherwise provided in guidance. After the required pre-filing registration process described below is successfully completed, an eligible taxpayer will receive a unique registration number from the IRS for each registered eligible credit property for which the eligible taxpayer intends to transfer a specified credit portion. An eligible taxpayer that does not obtain a registration number and report the registration number on its return with respect to an eligible credit property is ineligible to make a transfer election.

- It is unclear when the electronic portal will be ready. But the preamble states that Treasury and the IRS believe that it is necessary to establish a mandatory registration process that is in place before the end of the 2023 calendar year.

Unless modified in future guidance (which for this purpose includes administrative guidance, such as forms, instructions, publications, or other guidance on IRS.gov in addition to guidance published in the *Federal Register*), an eligible taxpayer must provide the following information to the IRS to complete the pre-filing registration process:

1. The eligible taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity;
  2. Any additional information required by the IRS electronic portal, such as information establishing that the entity is an eligible taxpayer;
  3. The taxpayer's taxable year, as determined under Section 441;
  4. The type of annual tax return(s) normally filed by the eligible taxpayer, or that the eligible taxpayer does not normally file an annual tax return with the IRS;
  5. The type of eligible credit(s) for which the eligible taxpayer intends to make a transfer election;
  6. Each eligible credit property that the eligible taxpayer intends to use to determine a specified credit portion for which the eligible taxpayer intends to make a transfer election;
  7. For each eligible credit property, any further information required by the IRS electronic portal, such as (A) the type of eligible credit property, (B) the physical location (e., address and coordinates (longitude and latitude) of the eligible credit property), (C) any supporting documentation relating to the construction or acquisition of the eligible credit property, (D) the beginning of construction date, and the placed in service date of the eligible credit property, and (E) any other information that the eligible taxpayer believes will help the IRS evaluate the registration request;
  8. The name of a contact person for the eligible taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either possess legal authority to bind the eligible taxpayer or provide a properly executed power of attorney;
  9. A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant; and
  10. Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments that is provided in guidance.
- The scope of the IRS's review has been a key question since the enactment of Section 6418. Would the process be relatively ministerial, or would it resemble the months-long back-and-forth that the Section 1603 grant applications process became? Clause (x) leaves the possibilities very open.
  - The guidance does not appear to address how long the registration will take.

A registration number is valid only for the taxable year in which the credit is determined for the eligible credit property for which the registration is completed and for a transferee taxpayer's taxable year in which the eligible credit is taken into account. If an election to transfer an eligible credit will be made with respect to an eligible credit property for a taxable year after a registration number has been obtained, the eligible taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts. In addition, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained, but not yet used, an eligible taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts.

### **Excessive Credit Transfers**

Section 6418(g)(2)(A) provides that if any specified credit portion transferred to a transferee taxpayer is determined by the Secretary to constitute an excessive credit transfer, the tax imposed on the transferee taxpayer will be increased by the amount of the excessive credit transfer, plus a penalty equal to 20% of such excessive credit transfer. The regulations define "excessive credit transfer" to mean the excess of (1) the amount of the

specified credit portion claimed by the transferee taxpayer with respect to an eligible credit property for a taxable year over (2) the amount of the eligible credit that, without application of Section 6418, otherwise would be allowable with respect to the credit property for such taxable year in the hands of the eligible taxpayer.

The regulations would provide that the 20% penalty does not apply if the transferee taxpayer demonstrates to the satisfaction of the IRS that the excessive credit transfer resulted from reasonable cause, which would be determined based on the relevant facts and circumstances of a transaction. The reasonable cause determination includes an evaluation of the transferee taxpayer's efforts to determine that the amount of eligible credit transferred to the transferee taxpayer does not exceed the eligible credit determined with respect to the eligible credit property for the taxable year and has not been transferred to another taxpayer. The regulations include a non-exhaustive list of factors a transferee taxpayer could show to demonstrate reasonable cause, including a review of the eligible taxpayer's records with respect to the determination of the eligible credit (including eligibility for bonus amounts), reasonable reliance on third-party expert reports, reasonable reliance on representations of the eligible taxpayer with respect to the total credit portion transferred, and review of audited financial statements provided to the SEC.

- The factors supporting reasonable cause — diligence, third-party expert reports, representations from the seller concerning the transfer, etc. — suggest a conservative road map for buyers to follow in tax credit transfer deals.

The regulations would provide that if there are multiple transferees, all transferee taxpayers are considered one transferee for calculating whether there was an excessive credit transfer and the amount of the excessive credit transfer. The amount of excessive credit transferred to a specific transferee taxpayer is equal to the total excessive credit transferred multiplied by the transferee's portion of the total credit transferred to all transferees.

The regulations clarify that because the excessive credit transfer rules apply where the credit amount reported on the original credit source form by the eligible taxpayer and transferred to a transferee taxpayer was excessive, recapture events under Section 45Q(f)(4) or Section 50(a) do not result in an excessive credit transfer.

## **Recapture**

The regulations clarify that if there is an ITC or Section 45Q recapture event, the recapture amount is calculated and taken into account by the transferee taxpayer (except with respect to the "indirect" dispositions described above). However, the regulations also indicate that there is no prohibition for an eligible taxpayer and a transferee taxpayer to contract for indemnification of the transferee taxpayer with respect to a recapture event.

- Section 6418 created a great deal of confusion about how ITC and 45Q recapture rules would apply in the context of a transferred credit, given that Section 6418(a) provides that a transferee taxpayer is treated as the taxpayer for purposes of the Code with respect to a transferred credit, and Section 6418(g)(3)(B)(ii) requires the transferee taxpayer to provide notice of an ITC recapture amount to the eligible taxpayer. The statute does not specifically address recapture under Section 45Q. The regulations helpfully clarify where the recapture risk lies in the absence of indemnification obligations.

The regulations also provide guidance on the notifications required to be provided by the eligible taxpayer and the transferee taxpayer after a recapture event, as follows:

1. The eligible taxpayer is required to provide notification of a recapture event to the transferee taxpayer (including

all information necessary for the transferee taxpayer to calculate the recapture amount) in a timely manner so that the transferee taxpayer can calculate the recapture amount by the due date of the transferee taxpayer's return (without extensions) for the taxable year of the recapture event.

2. Consistent with Section 6418(g)(3)(B)(ii), the transferee taxpayer is required to notify the eligible taxpayer of the recapture amount in sufficient time to allow the eligible taxpayer to calculate any basis adjustment with respect to the investment credit property by the due date of the eligible taxpayer's return (without extensions) for the taxable year of the recapture event.

With respect to Section 45Q, the regulations clarify that the recapture rules apply to a transferee taxpayer to the extent any eligible Section 45Q credit is transferred under Section 6418. The regulations include notice requirements similar to those described above for ITC recapture, but with required information specific to the Section 45Q credit.

The notification requirements in the regulations set forth the minimum information required to be provided and the outer limits of time periods for such notifications. Parties may agree to other terms related to the notifications, as needed.

### **Carrybacks and Carryforwards**

The regulations confirm that a transferee taxpayer can use Section 39(a)(4), which allows a three-year carryback period, in the case of a specified credit portion for any applicable credit.

### **Conclusion**

Potential buyers and sellers have been standing ready to execute and close tax credit transfer deals subject to the issuance of guidance. Unfortunately for the industry, it may be the case that some transactions will not close until the registration portal is up and running, and some investors may be hesitant to sign definitive documents before we have seen how the registration process operates in practice. However, the proposed regulations should greatly reduce the areas of uncertainty with respect to tax credit transfer deals, and we expect to see the tax credit transfer market take rapid steps forward in the meantime.

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