August 14, 2023

Internal Revenue Service
CC:PA:LPD:PR (REG-101610-23)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: REG-101610-23—Comments on the Proposed Regulations for the Transfer of Certain Credits

Dear Sir or Madam:

The Energy Infrastructure Council ("EIC") is pleased to submit comments on the proposed regulations promulgated on June 14, 2023 (the "Proposed Regulations") concerning the election to transfer certain federal income tax credits under Section 6418 of the Internal Revenue Code.

The EIC is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure in the United States. As such, the EIC addresses core public policy issues critical to investment in U.S. energy infrastructure. Our members are both public and private traditional and renewable energy infrastructure companies that ensure that energy from a wide variety of sources is delivered efficiently and safely from production facilities and fields to American homes, businesses and communities.

We commend the efforts of the IRS and Treasury to provide taxpayers with guidance on the implementation of Section 6418 and are pleased to offer recommendations that may be of particular interest to our trade association members, including corporations and master limited partnerships (also known as publicly traded partnerships, "MLPs").[1]

I. Summary of Recommendations

a. *Clarify treatment of partnerships with partners that are applicable entities under Section 6417(d)(1)(A) or Proposed Treasury Regulation § 1.6417–1(b)*
    i. Confirm that a partnership is an eligible taxpayer under Section 6418(f)(2), regardless of whether a partner in the partnership is described in Section 6417(d)(1)(A) or Proposed Treasury Regulation § 1.6417–1(b).
    ii. Confirm that a partnership with partners described in Section 6417(d)(1)(A) or Proposed Treasury Regulation § 1.6417–1(b) is entitled to transfer 100% of its eligible credits, without a reduction of the eligible credits allocable to partners described in Section 6417(d)(1)(A) or Proposed Treasury Regulation § 1.6417–1(b).

b. *Eliminate timing restrictions on cash payments*
    i. Eliminate timing restrictions on cash payments to allow for maximum flexibility and for project finance needs.

c. *Permit transfers of eligible credits allowed to an eligible taxpayer under Section 45Q(f)(3)(B) and Section 50(d)(5)*
    i. The requirements under Proposed Treasury Regulation § 1.6418-2(d)(1) requiring an eligible taxpayer to own the underlying eligible

[1] Unless otherwise indicated, all "Section," or "subchapter" references are to the Internal Revenue Code of 1986, as amended (the "Code"). All references to the "IRS" are to the Internal Revenue Service and references to "Treasury" are to the U.S. Department of the Treasury.

credit property or if ownership is not required, otherwise conduct the activities giving rise to the underlying eligible credit should be removed. For eligible credits allowed to a taxpayer pursuant to the election under Section 45Q(f)(3)(B), to the extent the person to whom the credit is allowed is an eligible taxpayer, transfers of such credits should be permitted under Section 6418. For eligible credits allowed to a taxpayer pursuant to the lease pass-through election under Section 50(d)(5) and Treasury Regulation § 1.48-4, to the extent the person to whom the credit is allowed under such election is an eligible taxpayer, transfers of such credits should be permitted under Section 6418.

ii. Additionally, the examples in Proposed Treasury Regulation § 1.6418-2(a)(4)(iii) listing Section 45Q credits allowable to taxpayers under Section 45Q(f)(3)(B) and Section 48 credits allowable to taxpayers under Section 50(d)(5) and Treasury Regulation § 1.48-4 should be deleted. For clarity, the final Treasury Regulations should also provide that such credits are determined with respect to the taxpayer for purposes of the provisions in Proposed Treasury Regulation § 1.6418-2(d)(1).

d. *Add safe harbors for non-cash payments*

i. Include safe harbors or additional examples to mitigate uncertainties and concerns regarding increased scrutiny if there are other relationships between the parties, which the IRS could deem to be additional non-cash consideration.

ii. These should include (i) if the consideration for the transferred eligible credits will be based on market comparisons or would be in the price range of other transfer transactions made by the taxpayer during the taxable year, it will be considered as made only for cash, notwithstanding any other relationship between the parties and (ii) a de minimis non-cash payment will not void the entire transfer arrangement.

e. *Permit registration and reporting on a project wide basis*

    i. The EIC recommends that taxpayers be allowed to register eligible credit property on a "project" wide basis.

f. *The annual election and separate determination of each partner's eligible credit amount to be transferred under Section 6418 or retained and allocated to such partner, and related allocations of tax-exempt income, can be made or revised at any time during the taxable year in which the credit is generated up to the due date of the partnership return for the taxable year*
    i. To provide flexibility and the ability to optimize the value of credits to partners, the EIC recommends that the final Treasury Regulations add clarifying language and an example showing that the varying annual election and separate determination of each partner's eligible credit amount to be transferred under Section 6418 and the portion of each partner's eligible credit amount to be retained and allocated to such partner and related allocations of tax exempt income can be made or revised at any time during the taxable year the tax credit is generated and the following tax year up to the due date of the partnership return for the taxable year under Section 706 and Section 761.

g. *Provide relief for clerical or administrative errors, including late filing relief in the event a taxpayer unwittingly fails to satisfy the various registration and reporting requirements*
    i. The final Treasury Regulations should provide relief for clerical or administrative errors, including late filing relief in the event a taxpayer unwittingly fails to satisfy the various registration and reporting requirements (absent fraud or intentional disregard of the rules).

h. *Allow transaction costs to be deducted or capitalized over the relevant period and indemnity payments to be treated as deductible at the time the credit is lost consistent with the general principles of Section 165*

i. *Transferee taxpayers should not be subject to the Section 469 passive activity loss limitation rules*

II. Discussion of Recommendations

a. Clarify treatment of partnerships with partners that are applicable entities under Section 6417(d)(1)(A)

Section 6417 of the Code allows certain entities ("applicable entities") to elect to treat certain credits as a direct payment rather than a credit against their federal income tax liabilities. Applicable entities are listed in Section 6417(d)(1)(A) and generally include tax-exempt and governmental entities.

Section 6418 of the Code allows certain taxpayers ("eligible taxpayers") to transfer all or any portion of an eligible credit to another taxpayer that is not related (within the meaning of Section 267(b) or Section 707(b)(1)). An eligible taxpayer is any taxpayer which is not described in Section 6417(d)(1)(A).

Proposed regulations under Section 6417 provide that partnerships are not applicable entities.[2] This rule applies regardless of how many partners are themselves applicable entities, including if all the partnership's partners are applicable entities.[3]

Because the proposed regulations under Section 6417 prohibit an elective payment election pursuant to Section 6417 if a partnership is owned in whole or in part by the applicable entities, it should be clarified that in such ownership scenario, (i) a partnership is an eligible taxpayer under Section 6418(f)(2), regardless of whether a partner in the partnership is described in Section 6417(d)(1)(A) or Proposed Treasury Regulation § 1.6417–1(b) and (ii) a partnership with partners described in Section 6417(d)(1)(A) or Proposed Treasury Regulation § 1.6417–1(b) is entitled to transfer 100% of its eligible credits, without a reduction of the eligible credits allocable to partners described in Section 6417(d)(1)(A) or Proposed Treasury Regulation § 1.6417–1(b). Any other interpretation would leave partnerships with partners that are applicable entities unable to make elective payment elections under Section 6417 and unable to make transfer

[2] Proposed Treasury Regulation § 1.6417-2(a)(1)(iv).

[3] Proposed Treasury Regulation § 1.6417-2(a)(1)(iv).

elections under Section 6418, which would significantly reduce the ability of applicable entities to effectively own or invest in renewable energy projects.

b. Eliminate timing restrictions on cash payments

Proposed Treasury Regulation § 1.6418-1(f)(2) provides that cash paid by a transferee in connection with the transfer of a specified credit must be paid to the transferor within the period beginning on the first day of the transferor's taxable year during which a specified credit portion is determined and ending on the due date for completing a transfer election statement.

Tax credits and the new direct pay and transferability regime were created to incentivize and facilitate investments into the renewable energy sector. The ability to transfer tax credits under Section 6418 will accelerate private sector financing and unlock capital for renewable and alternative energy projects by expanding the base of potential investors. Transferability can also simplify structures of these projects and mitigate cash flow shortfalls for projects in the absence of a tax equity investor.

Under the Proposed Regulations, cash payments for tax credits transferred under Section 6418 would be received, at the earliest, in the year the project is placed in service. Tax equity investors typically make their investment in the year in which the property is placed in service, with funds being used to pay off construction debt. Therefore, for investment tax credit projects, this timing aligns with tax equity financing. For projects eligible for the production tax credit or Section 45Q credit, the requirement in the Proposed Regulations that the cash consideration for transferred credits not be paid earlier than the year in which the credits are generated means project developers would not be able to fund projects up front by transferring credits. To maximize flexibility for projects and investors and to provide financing beyond the limited supply of tax equity dollars or for new energy technologies that may not attract tax equity investors, the EIC recommends that timing restrictions on cash payments be eliminated. For example, cash payments made prior to the taxable year during which a specified credit portion or lump sum payments for future year transfers of anticipated tax credit amounts should be allowed.

c. Permit transfers of eligible credits allowed to an eligible taxpayer under Section 45Q(f)(3)(B) and Section 50(d)(5)

Under Section 6418, eligible taxpayers can elect to transfer all or a portion of an eligible credit determined with respect to such taxpayer for any taxable year to an unrelated person. There is no prohibition on a transfer of eligible credits allowed to an eligible taxpayer under other provisions of the Code. Although Section 6418(e)(2) provides a "one-time transfer" limitation, this limitation applies only to credits which had been previously transferred to such taxpayer pursuant to Section 6418.

The Proposed Regulations provide that no transfer election is allowed for eligible credits that are not determined with respect to an eligible taxpayer. For a credit to be determined with respect to a taxpayer, the taxpayer must own the underlying credit property or if ownership is not required, otherwise conduct the activities giving rise to the underlying credit.[4] Examples of credits not determined with respect to a taxpayer include (i) a Section 45Q credit allowable to a taxpayer because of an election made under Section 45Q(f)(3)(B), and (ii) a Section 48 credit allowable to a taxpayer because of an election made under Section 50(d)(5) and Treasury Regulation § 1.48-4.[5]

i. Determined with respect to an eligible taxpayer

The Proposed Regulations impose additional requirements on transfers that are not found in the statute. Absent clear statutory language indicating that ownership of underlying eligible credit property or conducting activities giving rise to the underlying eligible credit is a prerequisite to transferability, these requirements should not be imposed.

Furthermore, it is the understanding of the EIC members that many carbon capture projects have already been undertaken in which the parties have agreed that the compensation of the sequestering party will include Section 45Q credits pursuant to a Section 45Q(f)(3)(B) election. In striking these deals, however, the parties never expected

---

[4] Proposed Treasury Regulation § 1.6418-2(d)(1).

[5] Proposed Treasury Regulation § 1.6418-2(a)(4)(iii).

that the party that stores the carbon oxides (the "sequesterer") would be prohibited from monetizing the credit via a transfer or a direct pay election. It has been the assumption of participants in such arrangements that the credit would have all the same attributes in the hands of the sequesterer as it would have had in the hands of the capturer. To now, after Section 45Q(f)(3)(B) has been available and in use for several years, undercut the ability of the sequesterer to monetize the credit, seems quite at odds with the legislative intent of the Section 45Q(f)(3)(B) election, that is, to provide a way to compensate the sequesterer with the Section 45Q credit.

ii. Examples of credits not determined with respect to an eligible taxpayer

Although we believe the requirements under Proposed Treasury Regulation § 1.6418-2(d)(1) should be removed, each of the Section 45Q credit allowable under Section 45Q(f)(3)(B) and the Section 48 credit allowable under Section 50(d)(5) and Treasury Regulation § 1.48-4 meets the requirements under the Proposed Regulations to be "determined with respect to an eligible taxpayer."

The Section 45Q credit is for carbon oxides captured and disposed of/sequestered or utilized by the taxpayer. Thus, carbon capture projects have three main components (i) capturing and separating carbon oxides from other gases, (ii) transporting the captured and compressed carbon oxides to the storage or sequestration site, and (iii) injecting the carbon oxides in underground geological reservoirs (disposal) or using the carbon oxides as a tertiary injectant for oil and gas recovery projects or for other commercial uses (utilization). These activities are fundamentally different, can occur in various industrial sectors and oftentimes involve more than one participant. The statute provides that the Section 45Q credit is attributable to the person that owns the carbon capture equipment and either physically or contractually ensures the capture and disposal, utilization or use as a tertiary injectant. The statute recognizes the potential for multiple participants and also provides an election to allow the Section 45Q credit to be taken by the person that disposes of or utilizes the carbon oxides.[6] Thus, ownership is not required under Section

[6] Section 45(Q)(f)(3).

45Q and an eligible taxpayer who is allowed a credit under Section 45Q(f)(3)(B) is conducting a portion of the activities giving rise to the underlying eligible credit. The Section 45Q credit allowed under Section 45Q(f)(3)(B) is determined with respect to that taxpayer.

Under pre-1990 Revenue Reconciliation Act Section 48(d) as currently made applicable by Section 50(d)(5), the owner of property eligible for the investment credit subject to a lease may elect, with the lessee's consent, to pass the investment credit with respect to the leased property through to the lessee. Treasury regulations thereunder provide that the lessee shall be treated as though the lessee were the actual owner of all or a portion of the property for purposes of the credit.[7] Therefore, an eligible taxpayer who is allowed a credit under Section 50(d)(5) is treated as owning the underlying eligible credit property and the Section 48 credit is allowed under Section 50(d)(5) is determined with respect to that taxpayer.

iii. Recommendation

The requirements under Proposed Treasury Regulation § 1.6418-2(d)(1) requiring an eligible taxpayer to own the underlying eligible credit property or if ownership is not required, otherwise conduct the activities giving rise to the underlying eligible credit should be removed. For eligible credits allowed to a taxpayer pursuant to the election under Section 45Q(f)(3)(B), to the extent the person to whom the credit is allowed under such election is an eligible taxpayer, transfers of such credits should be permitted under Section 6418. For eligible credits allowed to a taxpayer pursuant to the lease pass-through election under Section 50(d)(5) and Treasury Regulation § 1.48-4, to the extent the person to whom the credit is allowed under such election is an eligible taxpayer, transfers of such credits should be permitted under Section 6418.

Additionally, the examples in Proposed Treasury Regulation § 1.6418-2(a)(4)(iii) listing Section 45Q credits allowable to taxpayers under Section 45Q(f)(3)(B) and Section 48 credits allowable to taxpayers under Section 50(d)(5) and Treasury Regulation § 1.48-

[7] Treasury Regulation § 1.48-4(a)(1).

4 should be deleted. For clarity, the final Treasury Regulations should also provide that such credits are determined with respect to the taxpayer for purposes of the provisions in Proposed Treasury Regulation § 1.6418-2(d)(1).

d. Add safe harbors for non-cash payments

Proposed Treasury Regulation § 1.6418-2(e)(4) provides helpful examples relating to the recharacterization of certain transactions by showing that recharacterizations under the anti-abuse rules will not void the entire transfer arrangement. The EIC recommends that the final Treasury Regulations also include safe harbors or additional examples to mitigate uncertainties and concerns regarding increased scrutiny if there are other relationships between the parties, which the IRS could deem to be additional non-cash consideration. These should include (i) if the consideration for the transferred eligible credits will be based on market comparisons or would be in the price range of other transfer transactions made by the taxpayer during the taxable year, it will be considered as made only for cash, notwithstanding any other relationship between the parties, and (ii) a de minimis non-cash payment will not void the entire transfer arrangement.

e. Permit registration and reporting on a project wide basis

The EIC recommends that taxpayers be allowed to register eligible credit property on a "project" wide basis in addition to the unit of property basis. For example, pursuant to Section 45(c)(3) and Rev. Rul. 94-31, each wind turbine (together with its tower and supporting pad) in a wind facility is considered a separate qualified facility. As such, the proposed regulations could be interpreted as requiring a separate registration and transfer election for each wind turbine, rather than for the entire project.

f. The annual election and separate determination of each partner's eligible credit amount to be transferred under Section 6418 or retained and allocated to such partner, and related allocations of tax-exempt income, can be made or revised at any time during the taxable year in which the credit is generated up to the due date of the partnership return for the taxable year

The Proposed Regulations allow partnerships and their partners significant flexibility to determine the portion of each partner's distributive share of eligible credits to be transferred and the portion of each partner's distributive share of eligible credits to be retained and allocated to such partner each year, and to allocate tax exempt income to the partners in accordance with such determination.[8] The Proposed Regulations provide much needed clarity on transfers of eligible credits by partnerships. Under these rules, partnerships may change their allocations of eligible credits and tax-exempt income each year.

Current rules under Section 706 and Section 761 govern allocations of partnership income and loss and changes in allocations among partners who are members of the partnership for the entire taxable year. Section 706(d) provides that if, during any taxable year, a partner's interest in the partnership changes, the partnership must take into account the varying interests of the partners during the year in determining each partner's distributive share of any partnership item (the "varying interest rule"). This rule was intended to prevent partners from making retroactive allocations of income and loss to partners that were partners for only part of the partnership tax year. However, the varying interest rule does not apply to changes in the allocation of partnership income or loss to partners that were partners in the partnership for the entire taxable year, provided the change in allocation is not attributable to capital contributions made by any of the partners whose interests are changed, or to any distributions made by the partnership to any partner, and the allocations resulting from the modifications satisfy the requirements of Section 704(b) and the Treasury Regulations thereunder.[9] Under Section 761(c), a partnership may modify its partnership agreement, including changing their income and loss allocations, provided that the changes are made prior to the due date of the partnership return for the taxable year of the adjustments, all the partners agree to the changes, and the allocations satisfy Section 704(b).

---

[8] Proposed Treasury Regulation § 1.6418-3(b).

[9] Treasury Regulation § 1.706-4(b)(1).

As noted above, under the Proposed Regulations, partnerships may change their allocations of eligible credits and tax-exempt income each year. Partners may not have sufficient information prior to the start of the taxable year to determine the portion of their eligible credit amount they wish to transfer and what portion they wish to retain. To provide flexibility and the ability to optimize the value of credits to partners, the EIC recommends that the final Treasury Regulations add clarifying language and an example showing that the varying annual election and separate determination of each partner's eligible credit amount to be transferred under Section 6418 and the portion of each partner's eligible credit amount to be retained and allocated to such partner and related allocations of tax exempt income can be made or revised at any time during the taxable year the tax credit is generated and the following tax year up to the due date of the partnership return for the taxable year under Section 706 and Section 761.

g. Provide relief for clerical or administrative errors, including late filing relief in the event a taxpayer unwittingly fails to satisfy the various registration and reporting requirements

The Proposed Regulations contain registration and reporting requirements which must be completed each year. The final Treasury Regulations should provide relief for clerical or administrative errors, including late filing relief in the event a taxpayer unwittingly fails to satisfy the various registration and reporting requirement (absent fraud or intentional disregard of the rules).

h. Allow transaction costs to be deducted or capitalized over the relevant credit period and indemnity payments to be treated as deductible at the time the credit is lost consistent with the general principles of Section 165

The Proposed Regulations do not address (i) the federal income tax treatment of transaction costs, either for the eligible taxpayer or the transferee taxpayer, and (ii) 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.

We acknowledge that under principles of statutory interpretation, tax law should not be interpreted to allow the practical equivalent of a double benefit absent a clear declaration of intent by Congress. However, Congress was clear in its intent regarding deductibility of payments made in connection with the transfer of eligible credits under Section 6418. Section 6418(b)(3) provides that consideration paid by a transferee taxpayer shall not be deductible by that taxpayer. Therefore, Congress considered the tax treatment of payments made in connection with a transfer and specifically denied deductions for certain payments. Any additional limitations on deductibility are contrary to Congress' clear intent.

The final Treasury Regulations should allow transaction costs incurred by the eligible taxpayer or the transferee taxpayer to be deducted or capitalized and deducted over the relevant credit period (e.g., 5 years for the ITC, 10 years for the PTC, 12 years for Section 45Q credits or the period for which the transferred credits relate) and indemnity payments to be treated as deductible at the time the credit is lost consistent with the general principles of Section 165.

i. Transferee taxpayers should not be subject to the Section 469 passive activity loss limitation rules

The Proposed Regulations provide that a transferred specified credit portion is subject to the passive activity limitation rules in Section 469. The Proposed Regulations further provide that a transferee taxpayer (or a direct or indirect owner of a transferee taxpayer) that is subject to Section 469 is not, as a result of a transfer election, considered to have owned an interest in the eligible taxpayer's business (as required for material participation in Treasury Regulation § 1.469–5(f)(1)) and cannot change the characterization of the transferee taxpayer's participation with respect to generation of the transferred specified credit portion by using any of the grouping rules in Treasury Regulation § 1.469–4(c). As a result, taxpayers in most instances will not be able to meet the material participation tests under Section 469, and individuals, estates or trusts, closely held C corporations and personal service corporations will only be allowed to utilize transferred credits to offset tax from passive income. If the transferee taxpayer is an MLP, the ability of MLP's partners who are subject to Section 469 to utilize transferred credits is even more limited, and such credits will be allowed to offset tax only from passive income generated by the MLP. Limiting transferee taxpayers' abilities to utilize purchased credits under Section 469 will exclude a large portion of potential investors from participating in the tax credit market, which is contrary to the intent of the transferability rules.

Furthermore, Rev. Rul. 2010-16 supports the position that transferred tax credits are not disallowed by Section 469 where the acquisition of the tax credit was not in connection with an investor's trade or business (or in anticipation of the investor's trade or business), and whether the tax credit is disallowed under Section 469 is not dependent on whether the taxpayer materially participates in the business generating the tax credit.

In Rev. Rul. 2010-16, the IRS ruled that the new markets tax credit under Section 45D was not disallowed by Section 469 where an investor's equity investment giving rise to the tax credit was not in connection with the investor's trade or business (or in anticipation of the investor's trade or business). The new markets tax credit program provides tax credits to taxpayers making equity investments in small businesses or loans or equity to borrowers in low-income communities. Under the program, a qualified community development entity ("CDE") would receive capital from investors, use that capital to make equity investments in small businesses or provide loans to specified borrowers, and provide tax credits to such investors. Allowance of the new markets tax credit is predicated on acquiring an equity investment in the CDE. The CDE does not pass through the new markets tax credit to the investor. Rather, the amount of the new markets tax credit is determined based on a percentage of the amount paid to the CDE for the equity investment at its original issue. The ruling correctly recognized that, since the new markets tax credit resulted from an investor's investment in the CDE, as opposed to being allocated from the CDE, the investor's nature of or participation in the CDE's business was irrelevant and the new markets tax credit was not a passive activity credit under Section 469 to either individual or partnership investors.

The approach taken in Rev. Rul. 2010-16 is consistent with the legislative intent of Section 45D, which is to incentivize and promote investment in low-income communities. Likewise, the legislative intent of Section 6418 is to incentivize and promote investment in renewable and alternative energy projects. EIC recommends that the final Treasury Regulations provide that a transferred specified credit portion is not subject to the passive activity limitation rules in Section 469.

If you have any questions, please do not hesitate to contact our external advisors on this letter: Angela T. Richards at arichards@sidley.com or 713-495-4514 and Hagai Zaifman at hagai.zaifman@sidley.com or 212-839-5754.

Sincerely,

Lori E. L. Ziebart
President & CEO
Energy Infrastructure Council
300 New Jersey Avenue, NW
Suite 900
Washington, DC 20001