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IRS and Treasury Issue Proposed and Temporary Regulations Providing Initial Guidance on Transferability of Clean Energy Credits

Client Alert | June 21, 2023

On June 14, 2023, the IRS and Treasury issued proposed Treasury regulations (the "Proposed Regulations") that provide eagerly awaited guidance on the rules for selling certain tax credits pursuant to a new regime introduced in the Inflation Reduction Act of 2022 (the "IRA").[1] Taxpayers are permitted to rely on the Proposed Regulations until final regulations are published. In a separate regulatory package issued on the same date, the IRS and Treasury released a Temporary regulation (the "Temporary Regulation") that implements a registration system (discussed below) with the IRS that parties will need to satisfy before any valid sale of credits; the Temporary Regulations will be effective as of June 21, 2023.[2]

On the same day, the IRS and Treasury also issued proposed and temporary Treasury regulations addressing rules under the IRA that make certain credits refundable under certain circumstances (so-called "direct pay"). We will address the proposed and temporary "direct pay" regulations in a subsequent alert.

The Proposed Regulations and Temporary Regulation are detailed, and a comprehensive discussion of them is beyond the scope of this alert. Instead, this alert begins with some background regarding section 6418[3] (the statutory provision permitting credit transfers), provides a short summary of some of the most important aspects of the Proposed Regulations and Temporary Regulation, and concludes with some observations regarding key implications of the guidance for market participants. The IRS and Treasury received hundreds of taxpayer requests for guidance on these issues, and the regulatory package is commendable for its breadth. As discussed below, some aspects of the guidance are very taxpayer-friendly, including clear guidance that a transferee who acquires a credit at a discount will not be subject to tax based upon that discount. By contrast, there are other aspects that are less taxpayer-friendly, such as a burdensome requirement that each individual energy property must be pre-registered with the IRS on an annual basis in order to transfer credits. We expect market participants will push for adjustments to these less taxpayer-friendly aspects of the Proposed Regulations before they are finalized.

Background

Historically, federal income tax credits associated with the investment in and production of clean energy and carbon capture technologies have been non-refundable,[4] and using non-refundable tax credits has required tax liability against which the credits could be applied. Because developers of clean energy (*e.g.*, wind, solar) and carbon capture projects often earn credits in excess of their tax liability, these developers frequently enter into complex arrangements with third-party investors that have consistent and significant federal income tax liabilities (referred to as tax equity investors), such as banks, to shift entitlement to the project's tax attributes (typically, credits and accelerated tax

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depreciation) to the tax equity investor. These arrangements require significant and costly structuring. Section 6418 is expected to reduce the need for complicated tax equity arrangements because it authorizes a number of eligible credits[5] to be simply sold by an eligible taxpayer to an unrelated third-party for cash.[6]

Transferring a Credit

The Proposed Regulations provide substantial practical guidance on transferability, clarifying who is eligible to transfer, who is effectively able to purchase, what can be transferred, what can be paid for a transfer, how the transfer is treated for income tax purposes by the transferor and transferee, how (administratively) to transfer the credits, which taxpayer is subject to recapture, how excessive credit transfer penalties can be avoided, and how these rules apply to passthrough entities that are transferors or transferees. The subsections below describe some of the most significant aspects of the guidance on these topics.

Who May Transfer Credits

Only "eligible taxpayers" are authorized to transfer eligible tax credits. The IRA broadly defines "eligible taxpayers" to include most U.S. taxpayers,[7] including passthrough entities, but excludes certain "applicable entities" for which the IRA makes credits refundable.[8] The Proposed Regulations confirm that, where a disregarded entity owns the property that generates the tax credit, the "eligible taxpayer" is the regarded owner of the disregarded entity. The Proposed Regulations also impose a strict ownership requirement on transferors that denies transferability in the case of, for example, contractual counterparties who otherwise are allowed the credits under special rules such as section 45Q(f)(3)(B) (election to allow the section 45Q credit to the party that disposes, utilizes, or uses the qualified carbon oxide) or section 50(d)(5) (election to allow lessees to claim the investment tax credit, *i.e.*, inverted leases).

Further, a credit may be transferred only once. The preamble clarifies that any arrangement in which the ownership of an eligible credit transfers first from an eligible taxpayer to a dealer or intermediary and then to a transferee taxpayer would violate the single transfer limitation.[9] However, an arrangement using a broker to match eligible taxpayers and transferee taxpayers should not violate this limitation, assuming the arrangement at no time transfers the ownership of the eligible credit to the broker or any taxpayer other than the transferee taxpayer.

Who May Purchase Credits

Taxable C corporations seem likely to make up most of the buy-side market for transferrable credits.[10] The Proposed Regulations will effectively prevent most individuals, trusts, and estates from purchasing credits because the Proposed Regulations provide that, for purposes of the passive activity credit rules (section 469), the transferee taxpayer will be considered to earn eligible credits through the conduct of a trade or business related to the eligible credit but will not materially participate in that trade or business.[11] As a result, individuals would be required to treat the credits as passive activity credits, which (other than in certain limited circumstances) cannot offset tax liabilities attributable to wage income or portfolio income.

What Can be Transferred

As previously noted, the credits that may be transferred include those credits enumerated in section 6418, and the Proposed Regulations make clear that part or all of the credit that otherwise would be available to the transferor (including any "bonus" adder) may be transferred to one or more buyers. Circumscribing this flexible rule, however, is a "vertical slice" restriction, which provides that a taxpayer has to transfer an undivided portion (including all bonus amounts) of the credit generated with respect to a particular energy property (*e.g.*, 1 percent of the total credit).

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In addition, the Proposed Regulations make clear that the credit transferred is determined on an energy-property-by-energy-property basis, meaning taxpayers can choose to transfer credits with respect to one property but not with respect to another property, even if that other property is of the same class (or, apparently, even if the properties are part of the same project).[12]

What Can be Paid for a Credit

Section 6418 states that any amounts paid by a transferee taxpayer in connection with the transfer of an eligible credit must be paid in cash. The Proposed Regulations define "cash" and clarify when a payment needs to be made. A "cash" payment is one made in United States dollars by cash, check, cashier's check, money order, wire transfer, automated clearing house (ACH) transfer, or other bank transfer of immediately available funds. Prepayments had raised several issues (*e.g.*, that time value was invalid consideration for the credits), and the Proposed Regulations include a rule that blesses any payment made within the period beginning on the first day of the taxable year during which the credit is determined and ending on the due date (including extensions) for the transferor's tax return for that year.[13] Moreover, a transferee is permitted to make a contractual commitment to purchase eligible credits in advance of the date the credit is transferred to such transferee taxpayer, as long as all payments comply with the timing rules described in the preceding sentence. If *any* consideration provided by a transferor to a transferee does not satisfy these requirements, the entire payment fails the test, and the credit transfer fails and is invalid for federal income tax purposes.

How the Transferor is Treated for Income Tax Purposes

Section 6418 provides that payments received by a transferor in exchange for a transfer of eligible credits is not included in the transferor's gross income, as long as those amounts are received "in connection with" a transfer election. The Proposed Regulations clarify that an amount paid is "in connection" with a transfer election of an eligible credit (or portion thereof) if: (i) it is paid in cash, (ii) it directly relates to the specified credit portion (discussed below), and (iii) is not related to an excessive credit transfer. Thus, under the Proposed Regulations, it is clear that if a transfer election is ineffective for some reason, or if the actual amount of the credit is less than anticipated, the excess cash paid does not qualify for the gross income exclusion.

How the Transferee is Treated for Income Tax Purposes

Payments made by a transferee "in connection with" a transfer election (under the rules discussed above) are not deductible by the transferee taxpayer. In addition, the Proposed Regulations clarify that the transferee does not recognize gross income if it buys an eligible credit at a discount. The Proposed Regulations make specific note of not yet addressing the income tax treatment of transaction costs (for the transferor or the transferee), or the deductibility of losses incurred by a transferee who ultimately (*i.e.*, after an audit) is determined to have overpaid for a credit, but the Treasury and the IRS note that they are currently developing rules on these general issues and are seeking taxpayer comments.

From a timing standpoint, the transferee takes the transferred credit into account in the first taxable year of the transferee ending with, or after, the taxable year of the transferor in which the credit was generated. If the taxable years of a transferor and transferee end on the same date, the transferee will take the eligible credit into account in that taxable year. If, however, their taxable years end on different dates, the transferee will take the eligible credit into account in the transferee's first taxable year that ends after the taxable year of the transferor in which the credit was determined. Importantly, under the Proposed Regulations, a transferee may take into account a credit that it has purchased, or intends to purchase, when calculating its estimated tax payments.

How (Administratively) to Transfer Credits

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The Temporary Regulation prescribes several detailed requirements that must be complied with in order to file an election to transfer credits. In addition to prescribing the information that transferors and transferees must include on their tax returns in order to make the transfer election,[14] there are several other significant administrative requirements under the Temporary Regulation.

Pre-Filing Registration Process. Would-be transferors must complete a pre-filing registration process and obtain a registration number for each eligible credit property with respect to which a transfer election is expected to be made. A substantial amount of information is required to be submitted to obtain a registration number, and a registration number must be obtained for each energy property. An eligible taxpayer who 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. This 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, in the case of transferees, for a transferee's taxable year in which the eligible credit is taken into account.[15]

Transfer Election Statement. The transferor and transferee must agree to a "transfer election statement," which is a written document that describes the transfer of the eligible credit entered into between a transferor and transferee. The detailed statement must be completed before the transferor files the tax return for which the eligible credit is determined and before the transferee files a tax return for the year in which the eligible credit is taken into account, and is required to comply with a substantial number of requirements laid out in the Temporary Regulations.[16]

How to Avoid Excessive Credit Transfer Penalties

Under the IRA, a tax is imposed on credit transferees equal to any "excessive credit transfer" (generally, a redetermination of the initial credit amount not arising from a post-determination recapture event). In addition, a 20-percent penalty tax will apply unless the transferee shows "reasonable cause" for the excessive credit transfer.

The Proposed Regulations state that reasonable cause will be determined based on the relevant facts and circumstances, but that generally the most important factor is the extent of the transferee's efforts to determine that the amount of the credit to be transferred is not excessive and has not already been transferred to another taxpayer by the transferor. These efforts may be shown by reviewing records and reasonably relying on third-party expert reports and representations by the transferor that the credit is not excessive and has not been transferred to another taxpayer.

Which Taxpayer Is Subject to Recapture

Some of the credits that are eligible to be transferred (*e.g.*, the investment tax credit) are subject to recapture upon the occurrence of certain events. The Proposed Regulations clarify that, in general, regular credit recapture rules apply to the transferee, even in a circumstance in which the recapture is caused solely by an action of the transferor. An exception applies to recapture resulting from certain actions that occur at the partner or shareholder level with respect to partnership or S corporation transferors (discussed below). The preamble makes clear that taxpayers can contract for indemnities for recapture events, without jeopardizing a transfer.

How the Rules Apply to Passthrough Entities

The Proposed Regulations provide detailed and extensive rules with respect to passthrough entities that are transferors or transferees. Although the Proposed Regulations confirm that passthrough entities may be both transferors and transferees, they also clarify that any partner or S corporation shareholder is prohibited from further transferring any credits allocated to it by a partnership or S corporation, as applicable, that directly holds (including via a disregarded entity) the credit-generating property. Consistent

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with the single transfer requirement, partners and shareholders in a transferee passthrough entity are not permitted to transfer credits that are allocated to them; importantly, however, the Proposed Regulations make clear that an allocation of credits by a transferee passthrough entity to its partners or shareholders does not constitute a transfer that runs afoul of the single transfer requirement. The Proposed Regulations contain additional rules (discussed below) designed to prevent partnerships, including tiered partnerships, from being used to avoid the single transfer requirement.

Notably, the rules clarify that certain characteristics of a transferor passthrough entity's owners do not limit the amount of credits that a transferor passthrough entity is able to transfer. Most importantly, passthrough entity transferors will not be limited by the application of the passive activity credit rules (which apply at the partner or shareholder level).[17] There are, however, several exceptions to this general proposition. First, passthrough entities are required to apply the "at-risk" rules of section 49 based on how those rules would apply to the passthrough entities' partners or shareholders, as applicable. Second, in the case of partnerships transferring certain credits (*e.g.*, investment tax credits), the tax-exempt use property limitations will continue to reduce the amount of credits that can be transferred by certain partnerships with tax-exempt partners.

The Proposed Regulations provide that income received as consideration for transferred credits is treated as tax exempt and generally is allocated to each passthrough entity owner based on the amount of the underlying credit that would have been allocated to that passthrough entity owner in the absence of a transfer. This rule applies through tiers of partnerships. Thus, if a partnership (a lower-tier partnership) allocates tax-exempt income to a partner that is itself a partnership (an upper-tier partnership), the upper-tier partnership must allocate the tax-exempt income to its partners in the same manner that the credit would have been allocated to its partners absent the transfer election.

With respect to transferor partnerships that transfer less than all of their transfer-eligible credits, the Proposed Regulations allow income to be allocated to those partners that wished to transfer their share of the credits so long as (1) the amount of credits allocated to any partner does not exceed the amount of credits such partner would have received if no transfer were made and (2) the amount of tax-exempt income allocated to any partner does not exceed the partner's "proportionate share of tax-exempt income." A partner's proportionate share of tax-exempt income is determined based on the amount of credits a partner would have received if the entire credit was transferred, adjusted for any credits actually allocated to the partner. The Proposed Regulations provide an example illustrating this rule and calculating the amount of credits and tax-exempt income allocated to each partner.

On the transferee partnership side, the rules clarify that purchased credits will be treated as "extraordinary items" within the meaning of Treas. Reg. § 1.706-4(e)(2). This treatment generally will prevent the allocation of purchased credits to partners who are not partners in a partnership on the first day that the transferee partnership makes a cash payment for the credit.[18] Purchased credits will be allocated among a partnership's partners in proportion to their shares of the nondeductible expenses used to fund the purchase of the credits that year.

The Proposed Regulations also provide specific recapture guidance for passthrough entities. Under those rules, a transfer of an interest in a transferor partnership or S corporation (that, in the absence of a credit transfer, would have caused recapture of tax credits allocated to the transferring partner or shareholder, as applicable) *will* trigger recapture for the transferring partner or shareholder. However, the transfer *will not* trigger recapture for the transferee if the transfer of the interest in the transferor partnership or S corporation did not cause the property in the hands of the transferor partnership to cease to be eligible property (*e.g.*, depending on the terms of the transferor's partnership agreement, the transferee may still suffer recapture on the sale by a partner of its interest in the transferor partnership if the buyer is a tax-exempt entity).[19]

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Commentary

Many aspects of the Proposed Regulations are taxpayer friendly and will help facilitate credit transfer transactions, but other aspects of the guidance are less taxpayer friendly and could be adjusted to better promote Congressionally intended transfer transactions. Numerous new rules with the potential for complete "cliff effect" disqualification of intended transfers will require great care in structuring unless those rules are modified when the Proposed Regulations are finalized.

- *No Inverted Lessee Transferors.* The rule allowing only the actual owner of the underlying property to transfer credits will prevent lessees in "inverted lease" structures from transferring credits. In an inverted lease structure (which dates to the 1962 origins of the investment tax credit), the lessor and the lessee elect for investment tax credit purposes to treat the lessee as having acquired the energy property for its fair market value. Market participants had been hopeful that the transferability rules would allow these lessees to transfer the investment tax credit, but the Proposed Regulations do not allow this. That said, the IRS and Treasury's stated rationale for denying transferability in inverted lease structures is likely to meet meaningful criticism.
- *Partnership Syndications.* The Proposed Regulations make clear that a partnership can be a transferee, which should make it feasible to functionally transfer the credits broadly with a single transfer election. However, the "extraordinary item" rules impose a significant limitation that will require careful consideration in structuring payments for credits.
- *No Selling Bonus Credits Separately.* The Proposed Regulations authorize transferors to transfer some or all of their eligible credits, authorize transfers to an unlimited number of transferees, and make it feasible to transfer on an energy-property-by-energy-property basis. While these rules combine to provide substantial flexibility, they do not permit a transferor to transfer anything other than a vertical slice of a credit. Many tax credits that are eligible to be transferred include both a base credit amount and various bonus adders (*g.*, energy community bonus, domestic content bonus). Taxpayers had requested to be able to transfer some or all of these bonus adders (which may bear more risk because of ongoing eligibility issues) separately from the base amount, but the Proposed Regulations make clear that this is not feasible.
- *Cash Consideration Requirement – Some Flexibility, with Limits*.
    - The Proposed Regulations make clear that the only consideration that may be paid to a transferor is cash consideration. A peppercorn of noncash consideration will invalidate the entire transfer—a huge trap for the unwary.
    - The Proposed Regulations provide some limited flexibility in terms of when payments may be made, but essentially limit payments so they are quasi-contemporaneous with the generation of the credits. The Proposed Regulations do authorize advance contractual commitments to purchase eligible credits, as long as actual payments are made in the prescribed regulatory window (which could be as long as 21-1/2 months). This advance contractual commitment authorization will be essential to securing bridge financing and to the orderly functioning of the burgeoning brokerage market, but still will impose some potentially significant limitations on sponsors seeking to monetize a stream of tax credits (*g.*, production tax credits under section 45) over time, likely putting the transferability rules at a further disadvantage to traditional tax equity financing (which allows for a significant up-front payment based on both anticipated depreciation *and* tax credits). Additional authorization for advance commitments coupled with substantial prepayments would help close this gap between traditional tax equity and transferability.
- *Tax-Free Discount Purchases.* Market participants had been concerned about

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whether a purchase by a transferee at a discount to the face amount of the credit would result in the transferee recognizing taxable income on the difference. The Proposed Regulations follow the position previously articulated by the Joint Committee on Taxation and make clear that this discount is not income.[20] This rule is favorable to all stakeholders and will avoid transferees "grossing down" credit prices.

- *Burdensome Transfer Requirements*. Various aspects of the transfer regime in the Proposed Regulations likely will prove administratively burdensome, making it more challenging for taxpayers to avail themselves of the rules.
    - For example, a separate transfer election must be made for each property (with a potential exception for the transfer of the investment tax credit, which may be able to be made on a project-wide basis). This requirement could be construed to require, for example, a separate election for each wind turbine comprising a wind facility. Adding to this complexity is the fact that, for a production tax credit-eligible project, transfers must be made on a yearly basis. And where there are multiple buyers, separate transfer elections must be made for each of them. Taken together, the specificity of these requirements could mean that a large number of elections may need to be made with respect to a single project. We appreciate and support the government's efforts to eliminate fraud or other duplication of credits, but we think these objectives could be achieved with rules that allow for a smaller number of transfer elections (*g.*, allowing aggregation of all facilities in a wind farm using "single project" factors similar to those that have been used in earlier "begun construction" guidance).
    - In addition to potentially having to make numerous transfer elections with respect to a single project, the Proposed Regulations also impose a requirement for potential transferors to register the credits they intend to transfer before transferring them, prescribing a process that will require the submission of substantial information to obtain pre-registration. The rules also require that transferors and transferees agree upon a transfer election statement with detailed requirements and further prescribe a host of other tax return requirements, mandating yearly transfer elections. These requirements will serve as a barrier for all but the most sophisticated and well-financed taxpayers, limiting the reach and benefit of the transfer rules. In light of the fact that the rules in section 6418 were intended to eliminate the complexity and cost inherent in tax equity financing transactions, we are hopeful that the IRS and Treasury will consider ways to reduce the administrative complexity for would-be transferors in order to maximize the reach of the tax credit transfer rules.
- *Recapture Risk.* A number of market participants had been hopeful that recapture risk for credit transferees would be substantially limited, but the Proposed Regulations make clear that buyers generally bear recapture risk, although buyers are authorized to obtain contractual protection to reallocate this risk. The Proposed Regulations do provide, however, that where the tax credit transferor is a partnership, transfers by the partners of interests in that partnership generally do not cause recapture to a credit transferee as long as the transfer of the partnership interest does not cause the partnership's property to cease to be credit eligible (*g.*, as long as transferee of the partnership interest does not cause tax-exempt use property issues). As time goes on, the continued application of the tax-exempt use rules to transferor partnerships is likely to serve as a trap for the unwary because their application is counterintuitive (and even counter-policy) after the enactment of IRA. That is, the tax-exempt use rules were designed to prohibit tax-exempt entities from monetizing their tax-exempt status; those rules serve an uncertain (at best) role in this IRA credit regime in which tax-exempt entities are effectively treated as taxpayers for all purposes relevant to such credits.
- *Useful Allocation Rules for Transferor Partnerships*. The Proposed Regulations

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provide taxpayer-friendly rules that will be particularly useful for sponsors wishing to transfer the credits that are allocated to them in tax equity partnerships. Under a typical tax equity partnership, the bulk of the tax credits (usually 99 percent) are allocated to the tax equity investor until it achieves its "flip yield," with the remaining 1 percent of the credits being allocated to the sponsor, who may not be able to use those credits. The Proposed Regulations authorize a tax equity partnership to transfer a single partner's share of the otherwise applicable credits and specially allocate the income from that transfer (this income is tax exempt) to that partner. This should allow for more efficient credit monetization by sponsors, particularly given that the regulations make clear that the cash generated by a tax credit sale by a partnership can be used in whatever manner the partners decide.

Effective Date

Taxpayers may rely on these Proposed Regulations for taxable years beginning after December 31, 2022 and before the date the final regulations are published. The Temporary Regulation (*i.e.*, the pre-filing registration regime) is effective for any taxable year ending on or after June 21, 2023.

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[1] As was the case with the so-called Tax Cuts and Jobs Act, the Senate's reconciliation rules prevented Senators from changing the Act's name, and the formal name of the so-called Inflation Reduction Act is actually "An Act to provide for reconciliation pursuant to title II of S. Con. Res. 14."

[2] The text of the Temporary Regulation was also included in the Proposed Regulations.

[3] Unless indicated otherwise, all section references are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treas. Reg. §" or "Prop. Treas. Reg. §" references are to the Treasury regulations or proposed Treasury regulations, respectively, promulgated under the Code.

[4] The investment tax credit for energy property was briefly refundable at its inception (1978-1980) and was effectively payable as a cash grant for projects that began construction in 2009-2011.

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

[6] The terms "transferee," "transferees," and "transferee taxpayer" mean any taxpayer that is not related (within the meaning of sections 267(b) or 707(b)(1)) to the eligible taxpayer making the transfer election to which an eligible taxpayer transfers a specified credit portion of an eligible credit.

[7] U.S. taxpayers include those with employment or excise tax liability, not just those with income tax liability.

[8] The term "applicable entity" means (i) any tax-exempt organization exempt from the tax imposed by subtitle A (a) by reason of section 501(a) or (b) because such organization is the government of any U.S. territory or a political subdivision thereof, (ii) any State, the

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District of Columbia, or political subdivision thereof, (iii) the Tennessee Valley Authority, (iv) an Indian tribal government or subdivision thereof (as defined in section 30D(g)(9)), (v) any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)), (vi) any corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas, or (vii) any agency or instrumentality of any applicable entity described in (i)(b), (ii), or (iv). For the purposes of this client alert, the term "passthrough" or "passthrough entity" means a partnership or an S corporation, unless otherwise noted.

[9] Unless otherwise stated, all references to the "preamble" are to the preamble to the Proposed Regulations.

[10] Importantly, the new federal corporate alternative minimum tax (commonly referred to as "CAMT"), also enacted by the IRA, can be wholly offset by transferrable credits.

[11] The rule also will limit the utility of credit purchases by certain closely held personal service corporations.

[12] This approach deviates from the general class-by-class approach that applies for purposes of electing out of "bonus" depreciation under section 168(k).

[13] This rule is described in the preamble as safe harbor but operates as a requirement.

[14] Note that the transferor must make the election on its original return, including extensions (no late-election relief is available), and no transfer election may be made or revised on an amended return or on a partnership administrative adjustment request.

[15] Transferees are also required to report the registration number received from a transferor taxpayer on Form 3800 as part of the return for the taxable year with respect to which the transferee taxpayer takes the transferred specified credit portion into account.

[16] For example, an eligible taxpayer that determines eligible credits with respect to two properties would need to make a separate election with respect to each property. For production-based credits that are available over a 10- or 12-year period, the election would need to be made each taxable year that the transferor elects to transfer credits.

[17] As discussed above, the passive activity credit rules will apply to credit transferees.

[18] If the transferee partnership and the transferor have different taxable years, the credit will be allocated only to partners in the transferee partnership as of the date that is the later of (i) the first day that the transferee partnership makes a cash payment for the credit and (ii) the first date the transferee partnership takes the credit into account under section 6418(d).

[19] The passthrough transferor is not required to provide notice of such transfers to the transferee.

[20] Joint Committee on Taxation, *Description of Energy Tax Changes Made by Public Law 117-169*, JCX-5-23, 97 (April 17, 2023).

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