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IRS AND TREASURY RELEASE CREDIT TRANSFER GUIDANCE AIMING TO JUMP START MARKET FOR IRA'S CLEAN TECH INDUSTRY TAX CREDIT SALES

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IRS AND TREASURY RELEASE CREDIT TRANSFER GUIDANCE AIMING TO JUMP START MARKET FOR IRA'S CLEAN TECH INDUSTRY TAX CREDIT SALES

On June 14, 2023, the Internal Revenue Service (IRS) and US Department of the Treasury (Treasury) released temporary regulations (Temporary Regulations) and proposed regulations (Proposed Regulations; collectively with the applicable portions of the Temporary Regulations, the Transferability Guidance) relating to the transfer of certain clean technology industry federal income tax credits pursuant to Section 6418 of the Internal Revenue Code of 1986, as amended (the Code), which was enacted under the Inflation Reduction Act of 2022 (IRA).

The Transferability Guidance sets forth extensive rules addressing credit transfer eligibility and application, including through partnership structures, as well as required registration, filing, and documentation for transferors and transferees to elect and claim a credit transfer. The Transferability Guidance should be welcome by industry and potential investor stakeholders as taxpayer favorable as to certain key issues and as providing needed certainty to unlock the market for credit sale transactions, which had been largely awaiting guidance on credit transferability before transacting. The Transferability Guidance does, however, provide broad requests for stakeholder comments and, in certain respects, leaves some unanswered questions on administrative requirements and on application of certain rules that should be addressed in future guidance.

The Proposed Regulations will apply to taxable years ending on or after the date the final regulations are published in the *Federal Register*. Until then, however, taxpayers may rely on the Proposed Regulations for taxable years beginning after December 31, 2022. Public comments to the Proposed Regulations must be received by August 14, 2023. The Temporary Regulations (governing registration requirements) apply to taxable years ending on or after June 21, 2023.

Concurrent to the release of the Transferability Guidance, Treasury and the IRS released proposed and temporary regulations addressing the refundable or "direct payment" clean tech industry tax credit provisions under Section 6417 of the Code, which was also enacted under the IRA.

See Morgan Lewis's companion LawFlash on those proposed regulations.

BACKGROUND

Section 6418 of the Code, enacted under the IRA, permits certain taxpayers to elect to sell for cash all or a portion of certain clean tech industry investment tax credits (ITCs) and production tax credits (PTCs) (a Transfer Election) and provides that the payments for such sold credits are not included in the gross income of the seller or deductible by the buyer. Specifically, the Transfer Election may be made with respect to the following tax credits (Eligible Credits):

Section 45/45Y – Clean Energy PTC	**Section 45X** – Advanced Manufacturing PTC
Section 48/48E – Clean Energy ITC	**Section 45Z** – Clean Fuel PTC
Section 45Q – Carbon Capture/Sequestration Credit	**Section 48C** – Advanced Manufacturing ITC
Section 45U – Nuclear Power PTC	**Section 30C** – Alternative Fuel/EV Charging Station Credit
Section 45V – Clean Hydrogen PTC	

The Code sets forth some of the basic rules applicable to the sale of credits:

- Generally, any taxpayer that is not included in one of the categories of entities generally eligible to claim a "direct payment" for a credit under Section 6417 of the Code (such as tax-exempt organizations and governmental entities) is eligible to make a Transfer Election (an Eligible Taxpayer).
- Tax credits cannot be sold to related parties. Buyers may not resell tax credits.
- Credits that are carried back or carried forward from another year cannot be sold.
- The Transfer Election is made no later than the due date (including extensions) for the tax return for the taxable year in which the credit is determined. Separate Transfer Elections must be made for each year that PTCs are determined.
- The purchased tax credit is taken into account by the buyer in its first taxable year ending with, or after, the taxable year of the selling taxpayer with respect to which the credit was determined.
- For an eligible facility held by a partnership or S corporation, the election must be made at the entity level, and the entity's receipt of cash is treated as tax exempt income for partnership and S corporation tax accounting purposes.
- Eligible Taxpayers selling ITCs are required to apply the 50% basis reduction rules under Section 50(c).
- A buyer's claim of an excessive credit results in a 20% penalty imposed on the buyer unless the buyer satisfies a reasonable cause exception.

At the time of passage of the IRA, the ability to sell credits was hailed as a revolutionary way to incentivize investment in and construction of clean technology industry projects. This novel ability to sell tax credits would allow developers and investors to streamline tax credit monetization in a "pure play" credit sale through a simplified purchase contract rather than through engaging in the complicated "tax equity" investment structures otherwise customarily adopted. While interest in tax credit transfers has remained robust since the enactment of the IRA, the market has largely awaited governmental guidance before executing tax credit sales given the uncertainty over the eligibility and implementation requirements for validly claiming a tax credit transfer under the text of the Code.

TRANSFERABILITY GUIDANCE

The below provides a high-level discussion of the Transferability Guidance, as well as associated observations, relating to certain significant features adding onto, or filling gaps left by, the text of Code Section 6418.

GENERAL RULES OF APPLICATION AND ELIGIBILITY

Each item of credit-generating property (an Eligible Credit Property) must be separately registered (as described further below) and subject to a separate Transfer Election (for example, for the Section 45 energy production credit, on a facility-by-facility basis each year), although transferors have the option to aggregate Code Section 48 energy properties constituting an "energy project." In a rule supportive of the view set forth in the Code Section 6417 proposed regulations that tax exempts and other Section 6417-eligible entities may be eligible for direct pay for credits in a manner generally prohibited through a partnership structure, the Transferability Guidance treats an Eligible Taxpayer as owning an undivided

share of Eligible Credit Property held through a tenancy-in-common for tax purposes or through an organization validly electing out of partnership tax treatment under the Code.

An Eligible Taxpayer may elect to sell a proportionate share (including all) of the credits determined with respect to each Eligible Credit Property (a Specified Credit Portion). Eligible Taxpayers may not separately sell credits attributable to bonus credit amounts or "adders" (for example, the energy community and domestic content adders).

An Eligible Credit may be transferred to multiple buyers so long as the cumulative amount of Specified Credit Portions transferred with respect to each Eligible Credit Property does not exceed the total amount of the Eligible Credit. Credits cannot be sold through dealers that take ownership (even temporarily) of the credit, as this violates the single transfer rule. They can, however, be sold in an arrangement using a broker to match sellers and buyers, so long as ownership of the credits is transferred only once.

The cash payment for sold credits must be made between the first day of the seller's tax year in which the relevant credit is determined and the date that either the seller's or buyer's tax return claiming such credit sale is filed (whichever is earlier). Although the preamble to the Proposed Regulations describes this payment timing rule as a "safe harbor," the text of the Proposed Regulations establishes this payment timing as an absolute requirement, thereby negating the ability of a transferee to prepay for a transferor's future year credits. However, the Transferability Guidance confirms that a preexisting contractual commitment to purchase credits does not violate this rule so long as the associated cash payments are actually made within this payment timeframe.

The Transferability Guidance also makes clear that a buyer does not recognize taxable income if it pays an amount of cash that is less than the Specified Credit Portion purchased. The Transferability Guidance does not address and solicits comments as to whether a buyer should recognize a loss if the amount paid for a credit exceeds the amount of credit the buyer can ultimately claim. Additionally, the Proposed Regulations reserve for possible future guidance on the treatment of transaction costs to sellers or buyers (for example, whether such costs may be deducted or capitalized).

The preamble to the Proposed Regulations confirms that a buyer may take tax credits it has purchased, or intends to purchase, into account when calculating its estimated tax payments. Additionally, the Transferability Guidance clarifies that buyers may carry back purchased credits three years and carry them forward 22 years (not to be confused with credits that have been carried back or forward by an Eligible Taxpayer, which cannot be sold).

The amount of credit eligible to be sold with respect to a facility is determined at the facility level unimpacted by the owner's individual limitations on the ability to monetize such credit. Consequently, the Code Section 49 rules (relating to "at-risk" limitations generally applying to non-corporate taxpayers funding facility expenditures from the proceeds of nonrecourse loans) and Section 50(b) rules (for example, "tax-exempt use property" limitation) with respect to a facility owner that determine the actual amount of ITC generated by the project can impact the amount of ITC that may be transferred. And Code Section 469 (passive activity loss and credit limitation generally applying to non-corporate taxpayers) and Section 38(c) (limitation on use of general business credits to offset tax) do not limit the amount credit that may be sold. The Transferability Guidance's position on not limiting credit sales attributable to a seller's passive activity loss and credit limitation profile has the potential to incentivize investments by individuals in clean tech industry facilities to benefit from tax credits in a way that would not be possible without transferring, although these individuals would still be subject to such limitations with respect to depreciation from the facilities.

In contrast, the Transferability Guidance provides that a transferee's ability to benefit from a purchased tax credit to apply against its taxes depends on its own individual tax profile rather than the tax profile of the project or the transferor. This results in the potential application of the passive activity loss and credit limitation rules and general business credit limitation rules to curtail a buyer's ability to utilize purchased tax credits. In particular, for Section 469 passive activity loss and credit limitation purposes, the Transferability Guidance treats a purchased credit as arising in a trade or business for which the transferee cannot actively participate and cannot group with any other activities. This generally anticipated restriction significantly limits the ability of any persons subject to the Code Section 469 passive activity loss and credit limitation, such as individuals, from benefitting from purchased credits.

When Things Go Wrong – Recapture, Excessive Credits, and Anti-Abuse Rule

As expected, the Transferability Guidance confirms the text of the Code and the Joint Committee on Taxation's report on the IRA that recapture of transferred ITCs attributable to a project-level recapture event (caused by the underlying facility being disposed of or ceasing to be ITC-eligible property during the five-year period after the facility is placed in service) is imposed on the buyer. The seller must provide notice to the buyer of a recapture event, and the buyer must in turn provide notice to the seller of the recapture amount, each in time to reflect on the taxpayers' applicable returns.

The Transferability Guidance also expands on the text of Code Section 6418 to apply to recapture of the Code Section 45Q carbon capture and sequestration credit (e.g., in the event of a release of sequestered qualified carbon oxide during the Code Section 45Q recapture period), and imposes such recapture liability on the credit buyer. Notice requirements similar to those described above for ITC recapture apply.

The Transferability Guidance expressly permits credit-transferring counterparties to cause the economic risk of recapture to be borne by the credit seller, such as through a contractual indemnity, which is expected to be the predominant market practice for credit sales where recapture is possible.

Separately, the Code and Transferability Guidance impose a 20% penalty on the credit buyer for any "excessive credit transfers." An excessive credit transfer is the excess of the amount of a Specified Credit Portion claimed by a buyer (or buyers) with respect to an Eligible Credit Property for a taxable year over the amount of Eligible Credit that is properly available in respect of the Eligible Credit Property in such taxable year. The Regulations make clear that recapture events do not result in an excessive credit transfer.

The Code provides that this 20% penalty does not apply if the buyer demonstrates to the satisfaction of the IRS that the excessive credit transfer resulted from reasonable cause. The Transferability Guidance establishes that this reasonable cause exception applies on a facts-and-circumstances basis, with the most important factor being the extent of the buyer's efforts to determine that the amount of Specified Credit Portion transferred by the Eligible Taxpayer is not excessive and that such credit has not been transferred to any other taxpayer. The Proposed Regulations note that circumstances indicating reasonable cause may include independent diligence of the Eligible Credit determination, reasonable reliance on third-party expert reports, reasonable reliance on seller representations, and review of audited financials. In doing so, it appears that Treasury and the IRS may not consider the buyer's receipt and review of the transfer election statement (which includes "required minimum documentation" as detailed below) and receipt of a registration number that had been issued and approved by the IRS (as detailed below) sufficient to prove reasonable cause.

Finally, the Transferability Guidance establishes an anti-abuse rule authorizing the IRS to disallow a transfer of an Eligible Credit under Code Section 6418, or otherwise 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 Code

Section 6418 (although the Proposed Regulations also set forth an "a" principal purpose test in a portion of the anti-abuse rule text). The Proposed Regulations' text and examples most clearly are intended to address situations in which credit transfer parties artificially overcharge or undercharge for credits or for other concurrent transactions or services in order to allow for the transferor to avoid gross income or for the transferee to increase a deduction. Interestingly, the Proposed Regulations' examples only involve the IRS recharacterizing transactions in a way that does not invalidate the credit transfer, but instead redetermines the amount paid for the credit transfer as compared to the other property or services at issue.

Application to Partnerships

One of the most anticipated set of issues to be addressed by guidance was how transferable credits would operate for project owners and credit purchasers in partnership structures. The Transferability Guidance responds by applying both partnership-as-an-aggregate-of-its-partners and partnership-as-an-entity theories of partnership taxation in different situations.

Transferor Partnership

Consistent with the approach taken in the Code Section 6417 "direct pay" proposed regulations, the Transferability Guidance generally treats a partnership owning the facility as an entity without regard to the separate tax profile of its partners. Specifically, the Transferability Guidance generally treats a partnership as an Eligible Taxpayer for the transfer of credits without reference to whether its own partners would be Eligible Taxpayers if they individually owned the underlying facility. Additionally, consistent with the general credit transfer eligibility rules discussed above, a partner's status under Code Section 38(c) (limitation on use of general business credits to offset tax) and Section 469 (passive activity loss/credit limitation) does not limit the amount of credits generated by the partnership's facility that are eligible to be sold. However, also consistent with this approach, any partner-level tax profile impact on the amount of the credit determined at the partnership- and project-level is taken into account (Code Section 49 (at-risk limitation) and Section 50(b) (e.g., tax-exempt use property limitation)).

Under this transferor-partnership-as-an-entity approach, the Transferability Guidance treats partnership- or project-level ITC or Section 45Q recapture events as resulting in a transferee recapture liability. But the Transferability Guidance also accordingly (and generally unexpectedly) treats "indirect" ITC recapture events attributable to partner-level dispositions from a transfer of partnership interests or a reduction in a partner's proportionate interest in partnership profits as *not* resulting in a transferee recapture liability. The recapture liability is instead imposed on the disposing partner.

However, one issue left unclear by the Transferability Guidance is the nature of the disposing partner's recapture liability. One reading is that the disposing partner incurs a dollar-for-dollar recapture liability associated with the credit amount that would have been claimed absent the partnership's credit transfer. This view is supported by the language in the preamble of the Proposed Regulations that "recapture tax liability resulting from the reduction of an S corporation shareholder's interest or a partner's interest in general profits *should continue to result* in recapture to the applicable disposing shareholder or partner" and the text of the Proposed Regulations measuring the recapture by the disposing partner's "*share of the basis (or cost) of the section 38 property* to which the Eligible Credits were determined in accordance with §1.46-3(f)." Other initial views have been that this recapture should only apply with respect to the credit transfer proceeds (e.g., based on allocations of tax exempt income from the credit transfer) or that the recapture should be recognized as taxable income rather than a dollar-for-dollar liability.

With regard to a transferor partnership's allocation of tax exempt income from the transfer of credits, the Transferability Guidance affords partners wide flexibility in the way hoped by the market. The Transferability Guidance provides that a partner's distributive share of tax exempt income resulting from

the receipt of cash by a transferor partnership is based on the partner's proportionate distributive share of the otherwise Eligible Credit. In other words, the tax exempt income is allocated among the partners in the same way as if the credit were not transferred, thereby preserving flexibility in how the tax exempt income is allocated in a way consistent with existing practice (for example, confirming that tax exempt income does not need to be allocated in accordance with the partners' relative interests in partnership capital).

The Transferability Guidance also provides a taxpayer-friendly rule for partial credit transfer situations that allows partners to agree among each other as to which partners will receive allocations of the retained credits and which partners will receive allocations of tax exempt income attributable to the partnership's credit transfer.

The Transferability Guidance characterizes tax exempt income as arising from an investment activity and not from a Code Section 469 trade or business. As a result, this tax exempt income is not treated as passive income to any partners, thereby limiting the potential for a partner's tax exempt income allocations to free up utilization of losses or depreciation otherwise subject to limitation under Code Section 469.

The preamble to the Proposed Regulations also confirms that the cash proceeds from a sale of credits is treated like any cash flow of the partnership that may be distributed as agreed among the partners without any restriction under the credit transfer rules.

Transferee Partnership

In contrast to the approach taken for transferor partnerships, the Transferability Guidance generally treats a transferee partnership as an aggregate of its partners. Accordingly, project- and entity-level credit eligibility issues do not impact the amount of credit that can be purchased, but a transferee partner's individual tax profile impacts its ability to benefit from the transferred credit (such as under Code Section 38(c) (general business credit limitation) and Section 469 (passive activity loss and credit limitation)). As mentioned above, the Transferability Guidance treats a purchased credit as arising in a trade or business for which the transferee (or transferee partner) cannot actively participate and cannot group with any other activities for passive activity loss and credit limitation purposes.

The Transferability Guidance provides flexibility for a transferee partnership to determine allocations of purchased credits among its partners in accordance with the partners' relative share of the partnership's non-deductible expenditures used to fund the credit purchase price. The Transferability Guidance also includes rules for transferee partnerships designed to preserve the integrity of the no multiple transfer of credits prohibition. These rules generally require the credit to be allocated to the partners in the transferee partnership as of the time the credit is purchased by the partnership.

Transfer Election Administrative Requirements

Prefiling Registration Requirements – The Temporary Regulations

Congress provided specific authority for Treasury to require taxpayers to register as a condition to transfer Eligible Credits as necessary "for purposes of preventing duplication, fraud, improper payments, or excessive payments." For these registrations to be enforceable as soon as possible, Treasury and the IRS issued the Temporary Regulations in addition to issuing such rules in proposed form (the Temporary Regulations are identical to the relevant Proposed Regulations).

The Temporary Regulations provide that as a condition of, and prior to, making an election to transfer an Eligible Credit (or portion thereof), an Eligible Taxpayer must satisfy certain prefiling registration requirements. An Eligible Taxpayer must register through an electronic IRS portal (to be established by

fall 2023) in accordance with instructions provided therein (and receive a registration number for each Eligible Credit Property).

To register, a transferring taxpayer must provide certain identifying information with respect to the registered credits, including information about the transferring taxpayer, the type of Eligible Credit, a description of the Eligible Credit Property and supporting documentation relating thereto, and the beginning of construction and placed in service dates of such property, among other requirements. The registration and receipt of the registration number must be completed prior to making the requisite Transfer Election. Importantly, registration is not a one-time event if an election to transfer an Eligible Credit is made for multiple years with respect to an Eligible Credit Property (as in the case of the sale of PTCs)—the taxpayer must renew the registration each year.

Both the Eligible Taxpayer and the buyer must report the registration number. The Eligible Taxpayer reports the number on its return for the taxable year the credit was determined, and the buyer reports the number on Form 3800 filed as part of its return for the year the credit is taken into account.

How to Make the Election

A transferor taxpayer must make an election to transfer Specified Credit Portions for each year, and must include, as part of filing a return for the year, (1) a properly completed relevant source credit form for the Eligible Credit; (2) a properly completed Form 3800, General Business Credit (or its successor), including reporting the registration number received during the required prefiling registration; (3) a schedule attached to the Form 3800 (or its successor) showing the amount of Eligible Credit transferred for each Eligible Credit Property; (4) a transfer election statement (described below); and (5) any other information related to the election specified in forthcoming guidance.

A transfer election statement is a written document completed by both the seller and the buyer that describes the transfer of the credit between the seller and the buyer. The statement must, among other things, contain required minimum documentation validating the existence of the Eligible Credit Property, any bonus credits amounts and the evidence of credit qualifications. The transfer election statement must be completed and provided to the transferee before the earlier of the filing of the transferor's or the transferee's return reporting the Transfer Election.

The Transfer Election must be made on made on an original return of the transferring taxpayer no later than the due date (including extensions) for such return for the taxable year the Eligible Credit is determined. Similar reporting requirements are imposed on a transferee. No election will be allowed on a revised or amended return and no Section 9100 relief will be granted for a late election. A Transfer Election is irrevocable.

Note that a buyer must retain the required minimum documentation provided by the seller for "as long as may become material in the administration of any internal revenue law."

ADDITIONAL TAKEAWAYS

OPENING THE TRANSFERABILITY MARKETPLACE

The long-awaited Transferability Guidance should be welcome by green tech industry and potential credit buyer market participants as generally providing flexible and taxpayer-favorable guidance that will hopefully spur the market to begin more-widely executing credit transfers.

However, there remain uncertainties that may further delay widespread execution of credit transfers. Principal among these is the delay in opening of the IRS portal to be able to satisfy the prefiling registration requirements needed to be able to validly elect to transfer credits. Although the IRS and Treasury may not intend this registration process to require a significant amount of supporting documentation and a rigorous or lengthy approval process, the Transferability Guidance is not clear on these aspects of the prefiling registration process. Accordingly, some in the market may prefer to delay transacting until certainty is provided through the opening of the IRS portal and the transferor's receipt of a registration number.

BALANCING COMPETING INTERESTS OF EASE OF TRANSFER AND PROTECTION AGAINST ABUSES

While the government continues to laud the relative simplicity of and streamlined process for monetizing credits through transferability as compared to traditional tax equity transactions, the potential amount of documentation to be provided to the IRS and transferees does appear to approximate the amount of project-level documentation that would otherwise be provided to a tax equity investor in a tax equity transaction. Although this may have otherwise generally occurred in the market in practice (at least as between buyers and sellers), it is interesting that the Transferability Guidance may require something more than is required by the Code Section 6418 election rules to avoid a 20% excessive credit penalty.

That is, notwithstanding that the Transferability Guidance requires significant amounts of information to be provided to the IRS in the registration process and that similar information be provided to buyers in the transfer election statement, the Transferability Guidance still appears to require that buyers go above and beyond in their diligence with respect to transferred credits to avoid the excessive credit transfer penalty. While Treasury's and the IRS's wariness regarding the validity of transferred credits may be merited especially in light of well-publicized taxpayer abuses under the prior "Section 1603 cash grant" program, it appears that this additional level of diligence contradicts one of the stated policy goals of Code Section 6418.

Pathway for Partnerships with Tax-Exempts Shut Out of Direct Pay?

Code Section 6418 excludes a tax-exempt entity (whether subject to tax on "unrelated business taxable income" or not (a "super tax-exempt")) from being able to transfer credits. However, under its general transferor-partnership-as-an-entity approach, the Eligible Guidance appears to treat a partnership as eligible to sell credits regardless of the makeup of its partners. If so, while there may still be limitations on a partnership with tax-exempt partners to be able to sell ITCs under the tax-exempt use property limitation under Code Section 50(b)(3), partnerships with tax-exempt partners should be able to benefit from the sale of PTCs. In such a scenario, although a tax-exempt partner could impact the underlying facility's eligibility for accelerated depreciation, this may prove to be a viable strategy pursued by tax exempts for monetizing IRA-enacted or IRA-enhanced tax credits if the general restriction on partnerships from receiving refundable credits set forth in the Code Section 6417 proposed regulations remains in place in final regulations.

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Guidance Needed for Partner-Level 'Indirect' ITC Recapture

One of the generally unexpected rules in the Transferability Guidance is that "indirect" ITC recapture attributable partner-level dispositions would be imposed on the disposing partner rather than on the taxpayer purchasing credits from the partnership. This is welcome news to potential tax credit purchasers, as well as "back-leverage" lenders seeking to obtain a security interest in facility-owning partnership equity without agreeing to an ITC-recapture-period forbearance to foreclosing on partnership equity without risking a partnership-level indemnity obligation to the ITC purchaser.

Correspondingly, persons owning beneficial interests in ITC-selling partnerships (directly or through tiered partnership structures) will need to continue to be sensitive to actual or deemed dispositions of partnership interests during the five-year ITC-recapture period. As mentioned above, the Transferability Guidance is not entirely clear as to the nature and size of this partner-level recapture liability. Hopefully, forthcoming guidance will explicitly address this issue.

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