



November 4, 2022

The Honorable Janet Yellen
Secretary
United States Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Re: Avisen Legal P.A. Comment in Response to IRS Notice 2022-50: Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

Dear Secretary Yellen:

Avisen Legal, P.A. welcomes the opportunity to provide comments to the Treasury Department in furtherance of the goals of the Inflation Reduction Act (the “Act”) and the clear intention of Congress and the Department to expand deployment of low-carbon technologies, with a particular focus on certain communities, including but not limited to energy communities, environmental justice communities, identified low-income census tracts as authorized by Section 45D of the Internal Revenue Code and other underserved market segments.

Avisen Legal’s Impact Counsel practice leaders have decades of experience structuring, deploying and closing project finance investments in low-carbon technologies across a variety of technologies included in the Inflation Reduction Act’s expanded definition of energy properties. My own practice includes representing and advising dozens of community-based organizations, investors, developers and participating beneficiaries in projects less than 1.0 MW capacity rating; community solar project developers and investors and multiple lenders and developers working to bring clean energy technologies to nonprofit organizations and to Indian Country, across the United States of America.

2022-50.02– Transfer of Certain Credits §6418

(4) What, if any, guidance is needed with respect to parameters or limitations on a transferee taxpayer’s eligibility to claim the credit?

(6) In determining the amount of eligible credit transferred under § 6418(a), is guidance needed to clarify the application of any other Code provision? If so, what is the Code provision and what clarification is needed?

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(7) *Is guidance needed to clarify how any other Code provision applies to an eligible taxpayer or a transferee taxpayer when an election is made under § 6418? If so, what is the Code provision and what clarification is needed?*

Avisen Legal urges Treasury and the IRS to provide guidance on transferee taxpayer eligibility to purchase and claim the credit in such a manner that provides the greatest expansion possible for credit participation.

In the Act, Congress specifically adopted multiple measures, incentives, credit bonuses and other mechanisms explicitly intended to expand the speed and scale of energy technologies in underserved communities, from urban to rural to Indian lands.

Were Treasury and the IRS to provide guidance that limit transferees only to those with passive activity losses under Section 469 of the Code, Treasury would no doubt be frustrating Congress' clear intention of the Act. Since the adoption of the Investment Tax Credit, Avisen Legal Impact Counsel lawyers have been working to attract new tax credit claimants to markets that have traditionally been shut out of traditional tax credit investment, due to perceived credit risk and to the smaller capacity of each individual community-based project, even if packaged within a larger portfolio of projects.

In short, the tax credit investor market is inherently limited by a broad application of Section 469 passive activity requirements.

Avisen Legal urges Treasury and the IRS to make every effort possible to expand the market size of potential transferees, including, if feasible, providing guidance that specifies when a tax credit transferee would not be subject to passive activity limitations under Section 469.

Avisen Legal recognizes that Treasury and the IRS cannot *sua sponte* adopt guidance or regulations that are inconsistent with the Code.

However, Treasury and the IRS can and should identify circumstances under which community-scale project transferors would not implicate Section 469 passive activity rules, particularly those projects that comply with the requirements to secure energy communities; environmental justice communities; low-income projects and low-income participants.

As examples:

- 1) Where a project entity includes an ownership interest held by the building host, rather than participating only as landlord to an otherwise unaffiliated solar tenant, under which circumstances could such a project owner and credit transferor sell the energy tax credit to a transferee that would not be subject to Section 469 limitations?
- 2) In what additional activities might a project entity engage such that a § 6418 credit transferee would not be subject to Section 469 limitations, because the transferor is

providing community services beyond the delivery of energy through a lease or power purchase agreement?

- 3) Under what other circumstances would a transferee not be subject to 469 passive activity limitations?

In Avisen Legal's work with existing § 48 tax credit participants since the date of enactment of the Act, we believe that the § 6418 expansion of the energy credit market will be much more limited than Congress intended it to be. We also believe that the energy credit market will continue to be dominated by credit purchasers and investors focused on those projects rated, investment-grade credit offtakers and sponsors. Community-based projects will continue to have to compete for a tiny fraction of the energy credit investment, leaving Congress' intent frustrated and unfulfilled.

Avisen Legal believes that Treasury and the IRS have the authority and flexibility to expand the credit market by taking the actions recommended herein.

Thank you for your public service and your attention to these critical questions.

Very truly yours,



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