

CLEARPATH

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ClearPath Response to the Department of Treasury Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

Request for Comment title and reference number:

Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits (Notice 2022-50)

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Introduction:

ClearPath appreciates the opportunity to respond to the Department of the Treasury Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits.

ClearPath's mission is to develop and advance policies that accelerate breakthrough innovations to reduce emissions in the energy and industrial sectors. An entrepreneurial, strategic 501(c)(3) nonprofit, ClearPath collaborates with public and private sector stakeholders on nuclear energy, carbon capture, natural gas, hydropower, geothermal, energy storage, hydrogen, and heavy industry to enable private-sector deployment of critical technologies.

The Department of the Treasury has a critical role in implementing many of the provisions passed in the Inflation Reduction Act of 2022. Some of the tax credits enacted or amended through this legislation have a history of bipartisan support to promote innovation in clean energy technologies. In their prior form, these credits have spurred tremendous growth in clean energy technologies over the past two decades. With the new credit structure, project developers now turn their attention to forthcoming Treasury guidance to resolve new statutory uncertainties. In our responses below, we detail several areas that will need clear and specific guidance from the Treasury for these credits to be durable and predictable for the private sector.

Thank you for the opportunity to provide a response. Please do not hesitate to reach out for additional information.

Sincerely,

Matthew Mallioux
Policy Advisor
ClearPath

Response to Questions on Elective Payment of Applicable Credits and Transfer of Certain Credits -- implement the elective payment provisions under § 6417 and the elective credit transfer provisions under § 6418

.01 Elective Payment of Applicable Credits (§ 6417).

(5) With respect to the definition of the term “applicable entity” in § 6417(d)(1):

(a) What, if any, guidance is needed to clarify which entities are applicable entities for purposes of § 6417(d)(1)(A), and which taxpayers may elect to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D) for purposes of § 6417?

Response: Treasury should issue clear guidance to define entities eligible for the purposes of § 6417(d)(1)(A). Guidance will be especially important to define the meaning of clause (vi) “any corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas.” The Treasury should establish clear guidelines for organizations that meet these criteria.

(6) With respect to the elections under § 6417(d)(1)(B), (C), or (D):

(a) What, if any, issues could arise when an entity makes an election under § 6417(d)(1)(B), (C), or (D) and what, if any, guidance is needed with respect to such issues?

Response: Treasury should issue guidance with respect to credits that extend beyond the allowable five year period where an entity makes an election under § 6417(d)(1).

In the case for credits claimed under Section 45Q, Treasury should provide clear guidance that a taxpayer described under Section 6417(d)(1)(B) may elect direct pay for up to five years under Section 6417 and thereafter elect to transfer credits under Section 6418 for the remainder of the 12-year credit period provided for under Section 45Q. If an entity does not elect to take direct pay, the entity would remain eligible to transfer credits under Section 6418 for the entire 12-year credit period provided for under Section 45Q.

(d) Is guidance needed to clarify the prohibition of a transfer described in § 6418(a) by a taxpayer who has made an election under § 6417(d)(1)(B), (C), or (D)? If so, what clarification is needed?

Response: Taxpayers that make an election under Section 6417(d)(1)(B), (C), or (D) are prohibited from making a transfer as described in Section 6418(a). Section 6418(a) addresses only transfers to a taxpayer who is not related “within the meaning of section 267(b) or 707(b)(1)”. Treasury should issue guidance to clarify whether and the manner in which a taxpayer making an election under Section 6417(d)(1)(B), (C), or (D) are eligible to transfer credits to a related entity.

(7) Section 6417(d)(3)(A)(i)(I) provides that, in the case of any government, or political subdivision, described in § 6417(d)(1), and for which no return is required under § 6011 or 6033(a), any election made by these applicable entities under § 6417(a) must be made no later than such date as is determined appropriate by the Secretary. What factors should the Treasury Department and the IRS consider when providing guidance on the due date of the election for these applicable entities?

Response: The Secretary should establish a uniform deadline under Section 6417(d)(3)(A)(i)(I) for any government, or political subdivision, described in Sections 6417(d)(1), and for which no return is required under Sections 6011 or 6033(a) to provide the necessary information to determine the value of any payment under subsection (a). This deadline should be not sooner than 180 days after the end of each fiscal year (in lieu of a defined taxable year) for the specific applicable entity.

Consistent with the response to Question 10, an applicable entity should furnish data to the Secretary at the time a qualifying facility or eligible property is placed in service regarding the expected amount of any applicable credit for each future tax year where an election has been made under this section. The applicable entity should then be required to furnish data verified by a third party to determine the actual amount of such credit in each fiscal year (in lieu of a defined taxable year). This action should occur consistent with the deadline determined by the Secretary under Section 6417(d)(3)(A)(i)(I).

(9) For purposes of preventing duplication, fraud, improper payments, or excessive payments under § 6417, what information, including any documentation created in or out of the ordinary course of business, or registration, should the IRS require as a condition of, and prior to, any amount being treated as a payment made by an applicable entity under § 6417(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required? Should the IRS require the same documentation or registration as a condition of, and prior to, any amount being treated as a payment made by both an applicable entity as well as a taxpayer who is treated as an applicable entity after making an election under § 6417(d)(1)(B), (C), or (D)? Should the IRS require the same documentation or registration for all applicable credits? If not, how should the information or registration differ between applicable credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive payments under § 6417?

Response: The IRS should create a uniform pre-registration process across all applicable credits to the extent feasible. The IRS should require pre-registration and documentation for any applicable entity as a condition of, and prior to, any amount being treated as a payment made by both an applicable entity as well as a taxpayer who is treated as an applicable entity after making an election under Sections 6417(d)(1)(B), (C), or (D).

Each applicable credit will require somewhat different information to determine the amount of such credit to be treated as making a payment against tax. The IRS should compile standard forms that include the necessary information to determine the expected credit value for each credit listed under subsection (b) for which an applicable entity has made an election under this section. The applicable entity should be required to provide any relevant necessary information to determine the credit value, potentially including but not limited to: the actual or expected nameplate capacity, capture rate, capacity factor, or other quantitative output metric that is instructive to calculate the amount of each credit under subsection (b).

During the taxable year where a qualifying facility or eligible property is placed in service, the applicable entity should be required to register such facility or property and provide an estimate of the amount of any applicable credit for future taxable years where an election will apply. These estimates should then be compared on an annual basis with documentation from the applicable entity that has been verified by a third party to determine whether any excessive payment exists. To the extent the initial estimate provided by the applicable entity at the time the facility or property is placed in service, the applicable entity should file documentation explaining the cause for the variance. The Secretary should use such documentation to determine whether the provisions of paragraph (6) under this Section would apply.

(10) What, if any, guidance is needed to clarify the application of the excessive payment provisions of § 6417? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6417(d)(6)(B)? What, if any, guidance is needed to calculate the excessive payment amount under § 6417(d)(6)(C)?

Response: Future guidance should clarify how the Secretary will interpret the excessive payment calculation described in paragraph 6. An applicable entity making an election under Section 6417 should be required to furnish the expected value of the amount of such credit for each current and future taxable year at the time of the election. The applicable entity should then be required to annually report the actual amount of such credit each taxable year thereafter based on production data verified by a third party. Any annual deviation from the initial forecast should be clearly explained for each tax year at the time of filing.

This requirement will provide a clear methodology to determine any amount of an excessive payment in a given tax year. In this format, applicable entities would have a clear opportunity to explain any deviation and identify whether the provisions of paragraph (6)(B) should apply to avoid the additional penalty determined under paragraph (6)(A)(ii).

The Secretary should determine a “reasonable cause” for an instance where the actual amount of such credit is determined to be less than the amount treated as a payment, when the excessive payment is attributable to one or more factors that are beyond the

control of an applicable entity. The applicable entity would have the opportunity to describe these on at least an annual basis.

(13) Please provide comments on any other topics that may require guidance.

Response: With the establishment of the direct pay provisions in section 6417, Treasury should consider establishing an expedited process for refundability of the applicable credits under this section. Treasury should issue payments on a regular basis, at least quarterly, to provide certainty and predictability for applicable entities and reduce the cost of capital for projects electing direct pay.