

Response to Notice 2022-50
Request for Comments on Elective Payment of Applicable Credits and
Transfer of Certain Credits
October 26, 2022

I am only responding to selected items on the information request as shown preceding my response

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

(4) With respect to an election under § 6417(a) made by a partnership or S corporation pursuant to § 6417(c)(1) for any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation:

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues? I am directing my comments directly to partnerships, but the same issues apply to S Corporations that are treated as partnerships for income tax purposes. According to the law, the partnership can apply for and the IRS must pay for qualifying direct pay tax credits, but partnerships are likely to contain both applicable entities and other entities that are not considered applicable entities under the law. Applicable entities may own anywhere 1% to 99% of the capital and have income(loss) allocation in these partnerships that mirror those percentages or not. Also, applicable entities in partnerships may receive special allocations of tax benefits generated by the partnership that result in a different allocation of tax benefits, including direct payment of tax credits, to those companies than their capital or income(loss) allocations indicate. This is very common in the renewable energy space currently and will likely continue to be in the future. In addition, partners (both applicable and non-applicable entities) may enter, leave or change their ownership percentages throughout the year. As a result, if the partnership desires to receive less than 100% of the qualifying tax credit direct payments for allocation to applicable entity partners, there needs to be a mechanism to split the tax credits into direct pay and non-direct pay amounts as this would make the initial application accurate. This would enable direct pay tax credit allocations for applicable entities to be passed through in cash and other non-cash tax credits can be passed through on K-1s as is current practice. In addition, a mechanism needs to be in place to inform the IRS of changes in applicable entity allocations after the initial application. Finally, instead of having an annual filing mechanism, it would be more advantageous for the direct pay tax credit allocations to be applied for and paid quarterly as there does not seem to be a limit on frequency of payments. This would make investment by applicable entities even more attractive to them because they would be able to apply direct payment of their allocation of tax credits to their capital accounts instead is

having to advance cash. These investments are usually quite expensive and anything that can be done to decrease out of pocket cash while waiting on direct payment of tax would aid in further expansion of these qualifying projects, which is the point of the program in the first place.

(b) Is guidance needed to clarify the treatment of a payment made pursuant to § 6417(c)(1)(A) to the electing partnership or S corporation? If so, what clarification is needed? *No response.*

(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? *Even though an Alaska Native Corporation (“ANC”) is specifically listed as an applicable entity, most ANCs also have an ANC Settlement Trust established under IRC 247. The ANC is a separate legal entity that is required to be a C-Corp for income tax purposes, as such, it is not an ANC Settlement Trust. However, the trustees are the same people as the shareholders of the ANC. As such, it would seem that an ANC Settlement Trust should be added as an applicable entity when it is directly affiliated with an applicable ANC. Currently, ANCs can make tax deductible contributions to their ANC Settlement trusts of both cash and non-cash items, so the ANC could make a contribution of its interest in a partnership that is receiving direct payment of tax credits. It therefore should be able to keep receiving direct payments after the interest in partnership is contributed to the ANC settlement trust. ANC settlement trusts also can make cash minority investments in partnerships that qualify for direct payment of tax credits. For the same reasons, the ANC settlement trust should be able to invest cash in partnership interests that are eligible to receive direct payments for tax credits. Finally, ANCs are often the parent company in a consolidated group of companies that may contain other C-corps, DREs and partnerships, so C-Corps that are part of the consolidated federal group should be able to hold partnership interests or whole investments in qualifying direct pay tax credit receiving projects and just because a C-corp other than the ANC parent owns the investment or interest in a partnership, it should not be disqualified from receiving direct payments for tax credits.*

(b) What types of structures are anticipated to be used by applicable entities, and taxpayers who have elected to be treated as applicable entities under § 6417(d)(1)(B), (C), or (D), when seeking to apply § 6417(a)? *We are an Alaska Native Corporation (ANC) and for us, we typically use an investment in a limited partnership for tax purposes, especially in a tax equity role, but the actual holder of the investment could be an LLC, a C-Corp or even an ANC Settlement Trust. As mentioned above, many ANCs are the parent company in a consolidated filing group that has other C-Corps in the group.*

The filing group could contain many other DREs, greater than 80% interests in C-Corps, and partnership interests, any of which should qualify for direct payment for tax credits if they are part of a consolidated filing group.

(c) Is guidance needed to clarify the application of any Code provision other than § 6417 to an applicable entity, or a taxpayer electing to be treated as an applicable entity, that makes an election under § 6417(a)? If so, what is the Code provision and what clarification is needed? *No Response.*

(d) Are there specific issues that the Treasury Department and the IRS should address for applicable entities that are subject to non-tax legal requirements or other rules that may affect such entities' ability to make an election under § 6417(a)? *No Response.*

(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? *As stated previously, the Alaska Native Corporation (ANC) is typically the reporting parent company of the consolidated filing group for federal income tax purposes, with any number of C-Corporations being included with their respective DREs. For each of these subsections of 6417(d)(1) should include any of the legal entities included in the consolidated filing group of the ANC.*

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election? *Normally, the original due date of the income tax return that includes the tax credits for which direct pay will be elected would be a determiner, but the election should be able to be made any time prior to the extended due date of the tax return that includes the tax credits for which the election is being made. If, however, the IRS decides to make the direct payment of tax credits a quarterly event, then the election would be made prior to the due date for the quarterly application for direct payment. In any case, an online election form should be available in order to initiate the direct payment of tax credits as soon as possible. There are no requirements that the direct payment application for tax credits or their payment are to be an annual and making them a quarterly event would serve to put even more investments into the market, which was the point of the credits in the first place.*

(c) What, if any, issues could arise when an entity revokes an election made under § 6417(d)(1)(B), (C), or (D) and what, if any, guidance is needed with respect to such issues? *Revocation of the election would need to be communicated to the taxpayer and there would also need to be an appeal process in order to afford due process to the taxpayer. Clear details for the revocation need to be disclosed to the taxpayer in order for the taxpayer to provide proper evidence if they are contesting the revocation. Revocation*

would also not be proper without at least a 60-day notice period being tolled before the credits elections are revoked by the IRS.

(d) Is guidance needed to clarify the prohibition of a transfer described in 18 § 6418(a) by a taxpayer who has made an election under § 6417(d)(1)(B), (C), or (D)? If so, what clarification is needed? *No Response*

.02 Transfer of Certain Credits (§ 6418).

(1) What, if any, guidance is needed to clarify the meaning of certain terms in § 6418, such as eligible credit, eligible taxpayer, and excessive credit transfer? Is there any term not defined in § 6418 that should be defined in guidance? If so, what is the term and how should it be defined? *No Response*

(2) Section 6418(c)(1) provides that, in the case of any eligible credit determined with respect to any facility or property held directly by a partnership or S corporation, the Secretary determines the manner in which such partnership or S corporation makes an election under § 6418(a) with respect to such credit.

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6418(a) and what, if any, guidance is needed with respect to such issues? *No Response*

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election? *No Response*

(3) Section 6418(c)(2) provides that, in the case of any facility or property held directly by a partnership or S corporation, no election by any partner or shareholder is allowed under § 6418(a) with respect to any eligible credit determined with respect to such facility or property. If the election is made, what issues should be considered regarding the transfer of any portion of an eligible credit and what, if any, guidance is needed with respect to such issues? Further, what, if any, guidance is needed on allocating any amount received as consideration for transferring any portion of an eligible credit? *No Response*

(4) What, if any, guidance is needed with respect to parameters or limitations on a transferee taxpayer's eligibility to claim the credit? *No Response*

(5) For purposes of § 6418(d), what, if any, guidance is required to determine the proper taxable year in which to claim any credit that was transferred pursuant to an election made under § 6418(a)? *No Response*

(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? *No Response*

(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? *No Response*

(8) For purposes of preventing duplication, fraud, improper payments, or excessive credit transfers under § 6418, what information, including any documentation created in or out of the ordinary course of business, or registration, should be required by the IRS as a condition of, prior to, or after any transfer of any portion of an eligible credit pursuant to § 6418(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 for all eligible credits? If not, how should the information or registration differ between eligible credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive credit transfers under § 6418? *No Response*

(9) What, if any, guidance is needed to clarify the application of the excessive credit transfer provisions of § 6418? What factors should be taken into account in determining whether reasonable cause exists for purposes of § 6418(g)(2)(B)? What guidance is needed to calculate the excessive credit transfer amount? *No Response*

(10) For purposes of § 6418(g)(3), what, if any, guidance is needed to clarify the application of § 50 for purposes of credit recapture, basis adjustments, and eligibility related to § 50(b)(3)? Pursuant to § 6418(g)(3)(B)(i), an eligible taxpayer must notify the transferee taxpayer if, during any taxable year, the applicable investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period. What factors should be considered in determining the form and manner of this notice? Likewise, pursuant to § 6418(g)(3)(B)(ii), the transferee taxpayer must notify the eligible taxpayer of the recapture amount. What factors should be considered in determining the form and manner of this notice? *No Response*

(11) Is guidance needed to clarify the application of § 6418(g)(4) regarding progress expenditures? If so, what clarification is needed? *No Response*

(12) Please provide comments on any other topics that may require guidance. *It is not specifically stated if an applicable company as defined in the code may sell any eligible credits that are either held by or transferred to it by an unrelated party. As it is not stated in the negative in the law, it would seem appropriate to have it stated in the positive in any guidance issued by Treasury. In addition, if the applicable entity sold eligible credits to unrelated parties, how would the income be treated by the applicable entity? Again, in lack of negative treatment in the law, it would seem appropriate to have it stated that the income is not taxable to an applicable entity in the event of a transaction.*