



Internal Revenue Service
United States Department of the Treasury
Ben Franklin Station
P.O. Box 7604, Room 5203
Washington D.C., 20044

November 4, 2022

RE: Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits, Notice 2022-50

Dear Secretary Yellen and Commissioner Rettig:

Thank you for the opportunity to provide input on elective payments of applicable credits and transfer of certain credits. The following pages provides comments on behalf of Fairstead, a purpose-driven, vertically integrated real estate developer specializing in creating sustainable, high-quality housing. Comments were specifically derived from the significant in-house expertise brought to us by our dedicated energy and sustainability team.

Fairstead's national footprint includes more than \$6 billion in assets and identified pipeline. With offices in New York, Maryland, and South Carolina, Fairstead's team manages 90+ communities across the country and runs its comprehensive real estate platform, which includes acquisitions and development, venture capital investments in prop tech, design and construction, energy and sustainability, property management, marketing, and leasing. Our firm also administers one of the industry's most proactive community impact programs to provide on-site support services to residents.

Should you have any questions or wish to discuss anything in this document further, please contact Chris Manning, Vice President of Community Impact and Government Affairs, at chris.manning@fairstead.com or Katelyn Andrews, Manager of Community Impact and Government Affairs, at katelyn.andrews@fairstead.com.

Sincerely,

Fairstead

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.01 Elective Payment of Applicable Credits (§ 6417)

(2) With respect to the Secretary's discretion to determine the time and manner for making an election under § 6417(a):

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

Minimizing a delay in receiving the elective payment, either due to a time gap between when the system is placed in service and when the applicable entity elects to receive the elective payment will be very important regarding whether this provision will help spur non-profit-owned solar development. Additionally, if an applicable entity is also applying for an allocation of environmental justice credit (as defined in IRC 48(e)), then consideration should be given to whether the applicable entity can make the election for elective payment at that time and get pre-certified prior to construction, to speed up the ultimate payment of the credit amount.

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?

Further guidance and clarification will be helpful regarding whether an applicable entity (ie. a non-profit) can be in a partnership with a for-profit entity and still elect to receive the elective payment of the credit. We recommend that these partnerships be allowable, as partnerships between non-profit organizations and experienced solar developers, for-profit entities and investors will help promote further solar development in line with the legislative intent of this provision.

.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?

We believe that the purchase of tax credits (without any ownership interest in the actual solar project) should be considered portfolio income rather than passive income for income tax purposes.

- a. Under IRC 469(C)(1)(A), passive activity is defined as an activity "which involves the conduct of any trade or business"
 - i. In the example of an individual purchaser of a solar investment tax credit (ITC), if they only purchase the credit and are not a partner in a partnership that owns and actively manages a solar energy generation and distribution business (ie. a "trade or business"), we believe that this should be considered portfolio income (as it is more in-line with other investment related income).
 1. As a practical matter, the "Transfer of Certain Credits" provision, as described in Section 6418 of the Inflation Reduction Act, is particularly beneficial for smaller renewable energy projects. Due to the burdensome requirements surrounding the investment tax credit only being able to offset passive activity income (for taxpayers outside of widely held C-Corporations), the traditional tax equity marketplace has largely shut out individuals from participating. Classifying the purchase of a tax credit as portfolio income (and thus allowing an individual to offset other portfolio income (ie. interest, dividends, etc) closely mirrors the intent of this new

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Transfer of Certain Credits provision - to incentivize the development of smaller projects and to create a robust and resilient tax equity marketplace for renewable energy transactions.

(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?

See our response to Section 4: We recommend that the purchase of tax credits (without any ownership interest in the actual solar project) be considered portfolio income for income tax purposes.

(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?

Simplifying the recapture risk and ultimate payment back to the IRS will greatly increase the number of transactions that occur using the transfer of tax credits, particularly for smaller projects benefitting affordable housing complexes and residents. Further guidance regarding who is ultimately responsible for any recaptured amount (whether it is the purchaser of the tax credit, or the system owner who sold the tax credit) will be very helpful in creating a usable marketplace.