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Internal Revenue Service
1111 Constitution Ave. N.W.
Washington, D.C. 20224

Via electronic submission

RE: TEI Comments on REG–101610–23

Dear Sir or Madam:

President Biden signed the Inflation Reduction Act[1] ("IRA") into law on August 16, 2022, which, among other things, added section 6418 to the Code.[2] Section 6418 allows "eligible taxpayers" to elect to transfer certain credits to unrelated taxpayers rather than using the credits against their Federal income tax liabilities. Section 6418 also grants the U.S. Department of the Treasury ("Treasury") the authority to promulgate regulations or other guidance "as may be necessary to carry out the purposes of" section 6418.

Treasury and the Internal Revenue Service (the "IRS," and together with Treasury, the "Government") published REG-101610-23 (the "Proposed Regulations") in the Federal Register on June 21, 2023.[3] The Proposed Regulations describe the proposed rules for the election to transfer eligible credits in a taxable year and for an IRS pre-filing registration process that would be required. These Proposed Regulations affect eligible taxpayers that elect to transfer eligible credits

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[1] Pub. L. No. 117-169.

[2] All "section" references are to the Internal Revenue Code of 1986, as amended (the "Code").

[3] 88 F.R. 40496. The Government also published temporary regulations on June 21, 2023. T.D. 9975, 88 F.R. 40086. Temporary § 1.6418-4T provides mandatory information and pre-filing registration requirements that must be completed before an election available under section 6418 can be made. Where the rules overlap in the temporary regulations and Proposed Regulations, comments in this letter may apply to both rules. However, this letter solely addresses the Proposed Regulations.

in a taxable year and the transferee taxpayers to which the eligible credits are transferred.

On behalf of Tax Executives Institute, Inc. ("TEI"), I am pleased to present TEI's comments on the Proposed Regulations.

About Tax Executives Institute, Inc.

TEI was founded in 1944 to serve the needs of business tax professionals.[4] Today, the organization has 56 chapters in North and South America, Europe, and Asia. As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 6,000 individual members represent over 2,900 of the leading companies around the world.

TEI is dedicated to the development of sound tax policy, compliance with and uniform enforcement of tax laws, and minimization of administration and compliance costs to the benefit of both government and taxpayers. These goals can be attained only through the members' voluntary actions and their adherence to the highest standards of professional competence and integrity. TEI is committed to fostering a tax system that works—one that is administrable and with which taxpayers can comply in a cost-efficient manner. The diversity, professional training, and global viewpoints of our members enable TEI to bring a balanced and practical perspective to issues related to the transferability of credits.

TEI Comments

Registration and Election Requirements

In order to make a valid transfer election under the Proposed Regulations, an eligible taxpayer as part of filing a return (or a return for a short year within the meaning of section 443 of the Code), generally would be required to include (a) a properly completed relevant source credit form for the eligible credit; (b) a properly completed Form 3800, *General Business Credit* (or its successor), including reporting the registration number received during the required pre-filing registration (as described in proposed § 1.6418–4); (c) a schedule attached to the

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[4] TEI is organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. Federal Income Tax under section 501(c)(6) of the Code.

Form 3800 (or its successor) showing the amount of eligible credit transferred for each eligible credit property; (d) a transfer election statement prepared by the eligible taxpayer; and (e) any other information related to the election specified in guidance (as defined in proposed § 1.6418–1(e)). A transferee taxpayer also must report the registration number received (as part of the transfer election statement as described in proposed § 1.6418–2(b) or otherwise) from a transferor taxpayer on the Form 3800, *General Business Credit*, and must attach the transfer election statement to its return for the taxable year that the transferee taxpayer takes the transferred specified credit portion into account.

To obtain the required registration number, the pre-filing registration process requires, among other things, that an eligible taxpayer provide information about the taxpayer, about the eligible credits, and about the eligible credit property in order to allow the Government to prevent duplication, fraud, improper payments, or excessive transfers under section 6418. "For example, [the preamble to the Proposed Regulations posits that] verifying information about the taxpayer will allow the IRS to mitigate the risk of fraud or improper transfers. Information about eligible credit properties, including their address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date will allow the IRS to mitigate the risk of duplication, fraud, and improper transfers for properties that are not eligible credit properties."

Furthermore, an eligible taxpayer must obtain a registration number for *each* eligible credit property with respect to which a transfer election of a specified credit portion is made under proposed § 1.6418–4(b), and the registration number is valid for the eligible taxpayer *only* for the taxable year for which it is obtained, and for transferee taxpayer's taxable year in which the specified credit portion is taken into account pursuant to proposed § 1.6418–4(c). Finally, proposed § 1.6418–2(a)(2) allows an eligible taxpayer to transfer one or more specified credit portion(s) to multiple transferee taxpayers, provided that the aggregate amount of the specified credit portions transferred with respect to a single eligible credit property does not exceed the amount of the eligible credit determined with respect to the eligible credit property; however, a separate transfer election must be made for each transfer to a different transferee.

While we understand and appreciate the Government's goal to prevent duplication, fraud, improper payments, or excessive transfers, TEI implores the Government to adopt a less administratively burdensome approach. The current system will prove challenging for taxpayers. Of particular concern are (1) the

requirement that a separate registration must be obtained and a separate transfer election be made for each property, which could be a fraction of a larger project in certain circumstances (for example, separate facilities in a larger wind farm), and (2) the requirements that a separate election be completed for a project on a yearly basis and for each different transferee for a portion of the same credit. TEI recommends an aggregate approach for the elections for each property. One potential model would be to require an election for each unit, with definitions consistent with those provided in the tangible property regulations.[5]

In addition, to ease the burdens of registration on distributed generation service providers (which install large volumes of small credit properties), TEI requests that the Government adopt a registration portal that would permit a taxpayer to upload a spreadsheet (or other preferred "flat file" format) with assembled data for all of the taxpayer's projects that then would enable the portal to extract that data and auto-populate an application form for each project listed in the spreadsheet. This automated system offers several advantages; it would (1) avoid thousands of hours of manual data transfer, (2) reduce the risk of manual errors committed during that data entry, and (3) promote fairness. A utility-scale solar farm that generates five megawatts of power and a distributed generation solar developer that places in service 1,000 five-kilowatt systems should not face disparate administrative burdens in registering credit properties.

Finally, with regard to the pre-registration process, if the IRS electronic portal for the registration process is not complete until the end of the 2023 calendar year, TEI requests guidance for eligible taxpayers on how to obtain registration numbers prior to the implementation of the portal process outlined in the Proposed Regulations. TEI also requests an online mechanism that would enable a transferee taxpayer to verify the legitimacy of a registration by providing the eligible taxpayer's pre-filing registration information, including a truncated TIN.

<u>Separate Transfers of Bonus Credits</u>

Credits can only be sliced vertically; the Proposed Regulations do not allow for a separate transfer of a base credit and the various bonus adders (energy community, domestic content, low-income community). Proposed § 1.6418-1(h) provides that a specified credit portion of an eligible credit must

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[5] T.D. 9636, 78 F.R. 57710. *See* § 1.263(a)-3(e).

reflect a proportionate share of each bonus credit amount that is taken into account in calculating the entire amount of eligible credit determined with respect to a single eligible credit property. The preamble to the Proposed Regulations explains that, because section 6418 does not contemplate such a transfer, the Proposed Regulations do not permit such a transfer.

While we respect the Government's efforts to adhere to the statute, TEI does not believe the statute should be read so narrowly. The statute does not specifically address bonus credit amounts and, therefore, does not constrain their transferability. Allowing horizontal slicing and transfers actually is more consistent with Congressional intent. Section 6418 was enacted to expand the energy credit market in order to encourage investment in renewable energy projects.[6] Only allowing vertical slicing and transfers likely will significantly reduce the market. Buyers will need to have the expertise to evaluate the entire vertical slice, rather than just the base credit or a specific adder. While large developers and financial institutions may have this ability, it will limit smaller buyers/investors with less experience and lower risk tolerance. The inability to separate these bonus adders from the base credit amount also creates more risk for taxpayers that may accidentally trip the excessive credit transfer rules due to issues arising out of bonus credit qualification. Horizontal transfers also should allow for greater administrability and more efficient tax audits as exam teams can focus on a particular credit or adder. For all of these reasons, TEI recommends that the Government reconsider its position on the portion of a credit that can be transferred.

Cash Payments

Section 6418(b) requires that the transferee taxpayer pay the eligible taxpayer in cash for the transferred credit. The Proposed Regulations define the term "paid in cash;" however, they do not provide clarity on situations in which the transferee taxpayer pays for the credit in cash but also purchases other assets or services from the transferee taxpayer. For example, if a transferee taxpayer directly purchases from the eligible taxpayer any electricity or intangible assets, such as renewable energy certificates, produced at an eligible credit property, a question arises as to whether that purchase of electricity or intangible assets

[6] 168 CONG. REC. S4166 (2022) (statement by Sen. Cardin).

violates the “paid in cash” requirement. TEI requests clarification that a separate purchase of such items (in which there is reasonable cash consideration paid for the credit separate from any other consideration paid for the electricity or intangible assets) does not undermine the “paid in cash” requirement, even if the purchase is included in the same legal agreement or is part of the same overall transaction.

Passive Activity Rules

The Proposed Regulations would permit transferee taxpayers subject to section 469 (including individuals, estates, trusts, closely held C corporations, and personal service corporations) to use an eligible credit *only* against tax imposed on net passive income within the meaning of section 469. Even if such taxpayers are engaged in the renewable energy industry, they could not use the credits to offset their income from such activities because they would not be treated as materially participating in the trade or business of the eligible taxpayer. This treatment of transferee taxpayers is problematic in that it would exclude a large portion of taxpayers from this transferable credit regime. The restriction that a transferee taxpayer use the credit *only* against tax imposed on net passive income should be modified in order to allow more taxpayers (beyond Subchapter C corporations) access to the credit marketplace and provide credit sellers with more potential buyers.

Inverted Lease Structures

The Proposed Regulations allow *only* the owner of the eligible credit property (or, if ownership is not required, the taxpayer conducting the activities giving rise to the underlying eligible credit) to elect to transfer eligible credits. The Proposed Regulations give two examples where a credit is allowable to an eligible taxpayer, but the eligible taxpayer is not permitted to elect to transfer the credit under this rule. In both situations, the taxpayer does not own the eligible credit property and only can claim the credit due to an election by the taxpayer that does own the eligible credit property. The first example is related to a section 45Q credit allowable to a taxpayer due to a section 45Q(f)(3)(B) election. The second example is a section 48 credit allowable to a lessee of property under

section 50(d)(5) due to an election under § 1.48–4 (colloquially referred to as an "inverted lease" structure).

Inverted lease structures are common tax equity structures for solar energy projects. Under these structures, the lessor and lessee elect to treat the lessee as having acquired the energy property for its fair market value for investment tax credit purposes and allow the tax credit to pass to the qualified lessee. Because those rules treat the lessee as having acquired the energy property, taxpayers were hopeful that the Proposed Regulations would allow such lessees to transfer otherwise eligible credits. However, the Proposed Regulations specifically preclude taxpayers from using such structures to avail themselves of the transferability rules. In the preamble to the Proposed Regulations, the Government contrasts a lessee in an inverted lease structure with the lessor in a sale-leaseback arrangement where the purchaser/lessor owns the underlying property for an eligible credit, and, therefore, can transfer such credits.

As these structures are common for wind and solar tax equity financing transactions, this treatment likely will limit the taxpayers able to take advantage of the transferable credit regime. TEI implores the Government to consider allowing a taxpayer to receive a tax credit through such an election and then transfer the credit under these rules in order to achieve the policy objective behind section 6418 of broadening the scope of those who can use these credits.

Reasonable Cause Exception for Excessive Credit Transfers

The Proposed Regulations would provide that the 20 percent penalty related to an excessive credit transfer does not apply if the transferee taxpayer demonstrates to the satisfaction of the IRS that the excessive credit transfer resulted from reasonable cause. Reasonable cause generally would be determined based on the relevant facts and circumstances of a transaction. The Proposed Regulations further provide that the determination of reasonable cause includes an evaluation of a transferee taxpayer's efforts to determine that the amount of eligible credit transferred by the eligible taxpayer to the transferee taxpayer (1) is not more than the eligible credit that was determined with respect to the eligible credit property for the taxable year in which the eligible credit was determined and (2) has not been transferred to any other taxpayer. The Proposed Regulations also provide a list of factors that a transferee taxpayer could show to demonstrate reasonable cause. The list includes a review of the

eligible taxpayer's records with respect to the determination of the eligible credit (including documentation evidencing eligibility for bonus credit amounts).

While TEI applauds the Government for carving out an exception for excessive credit transfers in cases where the transferee taxpayer reasonably would not have known the transfer was excessive, TEI requests greater clarity for the exception. It is important to note that the purchase of a tax credit is a low margin financing transaction. Moreover, many transferee taxpayers will not be experts in the renewable energy area; rather they may be purchasing credits to meet their tax, treasury and/or sustainability goals. This lack of clarity and the resulting necessary and costly due diligence for transferee taxpayers on top of the already low margin likely will disincentivize potential tax credit purchasers.

The Government also should consider protecting the transferee taxpayer from situations in which the eligible taxpayer provides material, false or misleading information on which the transferee taxpayer relies. In order to protect an unsophisticated buyer and promote an active renewable energy credit marketplace, the Government should provide additional requirements for eligible taxpayers that can serve as the backbone of the reasonable cause exception. The Proposed Regulations provide that one relevant circumstance may be the reasonable reliance on representations from the eligible taxpayer that the total specified credit portion transferred does not exceed the total eligible credit determined with respect to the eligible credit property for the taxable year. Similarly, future regulations could take into account representations that the eligible taxpayer has met all of the requirements for a valid credit transfer. Rather than merely a relevant circumstance, however, future regulations could require the eligible taxpayer to certify in writing as part of the transaction that it has met (or will meet) the requirements for a qualifying transfer under the regulations. This requirement would provide a bright line for testing whether the reasonable cause exception has been satisfied.

Audit Procedures and Enforcement

TEI requests greater clarity surrounding the audit procedures for these elections and potential enforcement mechanisms. In particular, TEI requests guidance on whether the IRS will audit the eligible taxpayer first and then inform the transferee taxpayer of the results; or conversely, if the IRS plans to

audit the transferee taxpayer with regard to the credits as section 6418 provides that the credits are deemed generated by the transferee taxpayer for tax purposes.

Furthermore, TEI requests clarification on any penalties or other enforcement mechanisms that will apply to eligible taxpayers that knowingly or negligently provide false or misleading information to transferee taxpayers.

Filing Issues

Proposed § 1.6418-2(f) addresses the taxable year in which a credit is taken into account, specifying that if the year-end of an eligible taxpayer and a transferee taxpayer occur on different dates, the transferee taxpayer will take the credit into account in the first taxable year after the taxable year of the eligible taxpayer. With a 52/53 week year-end, the 2023 year-end is 12/29 rather than the 12/31 calendar year-end. If an eligible taxpayer has a calendar year-end, it could mean that a transferee taxpayer with a 52/53 week year end may not be eligible to utilize a credit until 2024. TEI does not believe this potential reading is compatible with the purposes of section 6418 and requests a clarification or an exception for this circumstance as the ramifications may be significant.

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TEI appreciates the opportunity to comment on the Proposed Regulations. TEI's comments were prepared under the aegis of its Federal Tax Committee, whose chair is Julia Lagun. Should you have any questions regarding TEI's comments, please do not hesitate to contact Julia Lagun at jlagun@comerica.com or TEI tax counsel Kelly Madigan at kmadigan@tei.org or (202) 470-3600.

Respectfully submitted,

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TAX EXECUTIVES INSTITUTE