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Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Federal Register No. 2023-12799: Section 6418 Transfer of Certain Credits under Internal Revenue Service

The Securities Industry and Financial Markets Association ("SIFMA")[1] provides comments on the proposed regulations under section 6418 of the Internal Revenue Code (the "Code").[2] SIFMA welcomes the guidance and clarification provided in the proposed regulations with respect to the election to transfer eligible credits and related registration and reporting requirements. SIFMA recommends that final regulations provide for a taxpayer-level (or, alternatively, a project-level) approach for the registration of eligible credit property and requests that Treasury and the IRS further clarify certain matters regarding commitments and financing. We also provide our views on the tax treatment of transaction expenses.

I. One Registration Number for All Eligible Credits for Greater Administrability

SIFMA supports the IRS' efforts to obtain necessary information to prevent duplication, fraud, improper payments, or excessive transfers through the proposed registration process. Given how typical energy projects operate (as described below), this objective would be best accomplished by requiring that a taxpayer obtain one registration number for all of its eligible

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

[2] Section 6418 Transfer of Certain Credits, 88 Fed. Reg. 40496 (June 1, 2023).

credits under an applicable Code section rather than requiring registration on an individual equipment-by-equipment level.

Proposed Regulations section 1.6418-4(b)(4) provides that "[a]n 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." (Emphasis added.) Proposed Regulations section 1.6418-1(d) provides that eligible credit property means, *inter alia*, (i) for section 45 production tax credits, a *qualified facility* described in section 45(d), and (ii) for section 48 investment tax credits, *energy property* described in section 48.[3] This would generally require registration at the level of each individual set of integrated equipment capable of producing energy (although the Preamble to the Proposed Regulations contemplates the possibility, for section 48 property, to register for an energy project under forthcoming guidance).[4]

We recommend that final regulations allow a taxpayer to obtain a single registration number for each credit type it generates; i.e., one registration number for all its section 45 credits, another for all its section 48 credits, etc. By reducing the total number of registrations and tying to information already reported by a taxpayer on tax returns, the registration system will be more administrable for both the IRS and taxpayers.

A single wind project that generates section 45 production tax credits, for example, commonly comprises of 50 or more wind turbines and is owned by an entity that is a partnership for tax purposes (or disregarded entity owned by a partnership). The partnership reports the total section 45 credits generated by the project (from all turbines) for a year in a single line on Form 8835. This aggregate reporting,[5] in addition to being a logical way to report on a tax return, naturally flows from how a wind project operates, since output from a project is typically measured on an aggregate basis at a single meter or point of interconnection to the power grid. In addition to being consistent with how a taxpayer reports information today, a single registration approach will be much easier to administer than requiring such a partnership to complete 50 or more registrations, and track the credits attributable to each individual turbine for this purpose. In turn, this will require the IRS to track and trace all those registrations and credits on audit (even though the same specified portion of credits from *all* a project's turbines are very likely to be sold to a single buyer). To help enable the IRS to easily trace transfers, we recommend that, along with obtaining a single registration number for each credit type, a selling taxpayer be required, in a form accompanying its annual tax return, to list all tax credits it generated in the year by credit type, the total amount of those tax credits it sold, a schedule of

[3] While this comment letter focuses on section 45 and 48 credits, and on wind and solar projects, for illustrative purposes, we believe its recommendations are equally applicable to all types of eligible credits.

[4] For section 45 property, Revenue Ruling 94-31, 1994-1 C.B. 16 provides guidance for wind energy, defining a qualified facility as a single wind turbine (together with its tower and supporting pad); for section 48 equipment, see Notice 2018-59 and the Preamble to the proposed regulations (an energy property generally means all components of property that are functionally-interdependent, even if within a larger energy project).

[5] Other credits are similarly reported by a taxpayer in the aggregate (e.g., section 48 credits are reported in the aggregate on Form 3468).

projects to which the sold credits relate[6] and the parties to whom it sold, and the remaining credits it retained.

As an alternative to -- or in addition to -- this taxpayer-level registration approach, taxpayers could be permitted to elect to register at the project-level. The definition of a single project in Notice 2013-29, 2013-1 C.B. 1085, section 4.04(2) (for purposes of determining when construction of a facility has begun) can be readily applied in the registration context for typical utility-scale projects, and that registration at the project-level would also serve to facilitate due diligence and address administrability concerns for such utility-scale projects.

Such a project-level approach, however, is not well-suited for partnerships that invest in residential rooftop solar equipment. Residential rooftop partnerships will generally own energy property on thousands of rooftops, thus potentially requiring thousands of individual registrations even if a project-level (as opposed to equipment-level) approach is adopted applying the standards of Notice 2013-29. The rooftop solar example informs our overall recommendation for adopting a taxpayer-level registration approach, if coupled with annual information reporting described above, would be as effective a tracing tool as project-level registration, while significantly easing administrative burdens on both taxpayers and the IRS.[7]

II. Clarifications with respect to Commitments and Financing

a. Commitments: SIFMA appreciates the guidance provided in Proposed Regulations section 1.6418-1(f)(3) with respect to a buyer/ transferee's ability to contractually commit to purchase eligible credits in advance of the date a specified credit portion is transferred to such transferee as long as the requirements of (f)(1) and (f)(2) are met. Based on the proposed regulations, it appears clear that a prospective buyer is able to assign its contractual commitment to purchase eligible credits to another party before the tax credits are generated (e.g., prior to the period that production tax credits are actually generated or when an investment tax credit property is placed-in-service), provided the requirements of Proposed Regulations section 1.6418-1(f)(1) and (f)(2) continue to be satisfied. It is arguably less clear, however, whether contractual commitments can be assigned or transferred to a different buyer/transferee after credits are generated by the seller but before the purchase itself is actually completed. To help facilitate a robust market, the final regulations should provide that contractual commitments to

[6] In the Preamble to the Proposed Regulations, the Treasury and the IRS request comments as to whether to adopt a grouping rule that allows taxpayers to make an election with respect to certain groups of eligible properties. We recommend that such a grouping rule be permitted for multiple energy properties that are part of a single project (as defined under the principles in Notice 2013-29, section 4.04(2), Notice 2016-31, section 5.04(2) and Notice 2018-59, section 7.01(2)), given that, as noted in the text, credits are most naturally tracked and measured at a project-level. In the case of a single wind project consisting of multiple wind turbines, for example, the grouping rule could provide that a taxpayer is transferring a specified credit portion of each eligible credit property that is part of the single wind project. In the case of residential rooftop solar equipment, a broader grouping or broader definition of project is recommended for the reasons noted later in this section.

[7] If a project-level registration election is adopted, we recommend a broader grouping standard (i.e., broader than the single project definition in Notice 2013-29) be permitted in the specific case of residential rooftop partnerships; for example, permitting registration for all rooftop projects placed into service in a year by a taxpayer in a particular state.

purchase credits can be assigned any time prior to the actual transfer of cash to the seller (and prior to the filing of the transfer election statement specifying the buyer).

b. Financing: We also note that sellers in the market will often require construction or other financing. Lenders will typically request that a seller/taxpayer pledge all its assets as security, raising the question of whether such security arrangements could impact tax credit transfer commitments entered into by a seller/taxpayer. For example, if a buyer contractually commits to purchase 100 USD of production tax credits for 90 USD over a 10 year period from a seller (with cash paid annually), a third party lender should be able to provide an otherwise arms-length loan to the seller that is secured by the buyer's commitment without the loan being treated as an upfront payment under the purchase and sale transaction or otherwise recharacterized. Similarly, can the buyer (or an affiliate) provide an otherwise arms-length loan to the seller that is secured by buyer's commitment to purchase the production tax credits in the future without the loan being treated as an upfront payment under the purchase and sale transaction or otherwise recharacterized? Given the capital-intensive nature of renewable energy projects, and the associated need for, and common use of, construction and other project financing, the final regulations should clarify that loans including such security arrangements (whether extended by a third-party or buyer), provided they are on arm's length terms, not be treated as advance payments.

III. Views on Transaction Expenses

We expect sellers (and partners in a selling partnership), as well as buyers, will incur transaction expenses in connection with tax credit transfers. We itemize broad categories of expenses below and express a view on the tax treatment of those items:

a. Legal and Consulting Fees: Any payment for services in such a transaction (e.g., legal fees for documentation or consulting services for diligence) generally will result in taxable income for the service providers. Thus, a corresponding deduction seems appropriate and should not raise "double benefit" concerns. In terms of the timing of deductibility of transaction expenses, current deductibility is warranted for expenses related to the sale of current year credits, but deductions should only be taken over time for expenses related to a commitment for long term purchases of annual credit deliveries. That is, the deductions (for both buyer and seller) should follow the cash paid for the credits over time. Should a prospective buyer assign a commitment (e.g., a ten-year production tax credit commitment), we would expect the buyer to deduct any remaining portion of capitalized expenses when the commitment is assigned.

b. Success-based fees: The 70/30 safe harbor split in Revenue Procedure 2011-29 should apply, such that 70% of success-based fees such as brokers' fees are expensed and 30% are capitalized and recovered with a similar timing as facilitative costs.

c. Tax insurance: Premiums should be expensed as if they were any other business expense. The analogy is that a seller insuring the availability of its tax credits for itself would be permitted to deduct tax insurance premiums, so there should not be a different result when the credits are transferred or if buyer purchases the tax insurance.

d. Indemnity payments: As noted in the Preamble to the Proposed Regulations, section 6418 does not prohibit contracts covering the transfer of tax credits from including indemnity protections. Any indemnity payment by the seller to the buyer regarding the value of a credit that is ultimately adjusted should generally be considered a purchase price adjustment, non-deductible to the seller and as non-includible as income to the buyer up to the amount of the purchase price.

Thank you for considering our recommendations. If you have questions and would like to discuss these matters, please do not hesitate to contact me at paustin@sifma.org

Respectfully submitted,

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