

INTERNAL REVENUE BULLETIN



HIGHLIGHTS OF THIS ISSUE

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

Bulletin No. 2023-27
July 3, 2023

EMPLOYEE PLANS

Notice 2023-48, page 1124.

This notice sets forth updates on the corporate bond monthly yield curve, the corresponding spot segment rates for June 2023 used under § 417(e)(3)(D), the 24-month average segment rates applicable for June 2023, and the 30-year Treasury rates, as reflected by the application of § 430(h)(2)(C)(iv).

INCOME TAX

REG-101607-23, page 1127.

This item contains proposed regulations concerning the election under the Inflation Reduction Act of 2022 to treat the amount of certain tax credits as a payment of Federal income tax. The proposed regulations describe rules for the elective payment of these credit amounts in a taxable year, including definitions and special rules applicable to partnerships and S corporations and regarding repayment of excessive payments. In addition, the proposed regulations describe rules related to an IRS pre-filing registration process that would be required. These proposed regulations affect tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and, in the case of three of these credits, certain taxpayers eligible to elect the elective payment of credit amounts in a taxable year. This document also provides notice of a public hearing on the proposed regulations.

REG-101610-23, page 1161.

This item contains proposed regulations concerning the election under the Inflation Reduction Act of 2022 to

transfer certain Federal income tax credits. The proposed regulations describe the proposed rules for the election to transfer eligible credits in a taxable year, including definitions and special rules applicable to partnerships and S corporations and regarding excessive credit transfer or recapture events. In addition, the proposed regulations describe rules related to an IRS pre-filing registration process that would be required. These proposed regulations affect eligible taxpayers that elect to transfer eligible credits in a taxable year and the transferee taxpayers to which eligible credits are transferred.

REG-105595-23, page 1194.

These proposed regulations provide guidance regarding the elective payment election of the advanced manufacturing investment credit under section 48D of the Internal Revenue Code (Code). The proposed regulations reflect changes made by the CHIPS Act of 2022, and supplement the rules proposed in the March 2023 proposed regulations. The section 48D credit may be claimed for qualified investments in an advanced manufacturing facility that manufactures finished semiconductors or finished semiconductor manufacturing equipment.

Rev. Rul. 2023-12, page 1111.

Federal rates; adjusted federal rates; adjusted federal long-term rate, and the long-term tax exempt rate. For purposes of sections 382, 1274, 1288, 7872 and other sections of the Code, tables set forth the rates for July 2023.

T.D. 9975, page 1113.

The temporary regulations, TD 9975, provide mandatory information and pre-filing registration requirements that must be completed before elections available under sections 48D(d), 6417, and 6418 of the Internal Revenue Code (Code) may be made.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned

against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.

This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.

This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.

To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.

This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

The contents of this publication are not copyrighted and may be reprinted freely. A citation of the Internal Revenue Bulletin as the source would be appropriate.

Part I

Section 1274.— Determination of Issue Price in the Case of Certain Debt Instruments Issued for Property

(Also Sections 42, 280G, 382, 467, 468, 482, 483, 1288, 7520, 7872.)

Rev. Rul. 2023-12

This revenue ruling provides various prescribed rates for federal income

tax purposes for July 2023 (the current month). Table 1 contains the short-term, mid-term, and long-term applicable federal rates (AFR) for the current month for purposes of section 1274(d) of the Internal Revenue Code. Table 2 contains the short-term, mid-term, and long-term adjusted applicable federal rates (adjusted AFR) for the current month for purposes of section 1288(b). Table 3 sets forth the adjusted federal long-term rate and the long-term tax-exempt rate described in section 382(f). Table 4 contains the appropriate percentages for determining the

low-income housing credit described in section 42(b)(1) for buildings placed in service during the current month. However, under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, shall not be less than 9%. Table 5 contains the federal rate for determining the present value of an annuity, an interest for life or for a term of years, or a remainder or a reversionary interest for purposes of section 7520. Finally, Table 6 contains the blended annual rate for 2023 for purposes of section 7872.

REV. RUL. 2023-12 TABLE 1				
Applicable Federal Rates (AFR) for July 2023				
	<i>Period for Compounding</i>			
	<i>Annual</i>	<i>Semiannual</i>	<i>Quarterly</i>	<i>Monthly</i>
		<i>Short-term</i>		
AFR	4.80%	4.74%	4.71%	4.69%
110% AFR	5.28%	5.21%	5.18%	5.15%
120% AFR	5.77%	5.69%	5.65%	5.62%
130% AFR	6.25%	6.16%	6.11%	6.08%
		<i>Mid-term</i>		
AFR	3.85%	3.81%	3.79%	3.78%
110% AFR	4.23%	4.19%	4.17%	4.15%
120% AFR	4.62%	4.57%	4.54%	4.53%
130% AFR	5.01%	4.95%	4.92%	4.90%
150% AFR	5.80%	5.72%	5.68%	5.65%
175% AFR	6.78%	6.67%	6.62%	6.58%
		<i>Long-term</i>		
AFR	3.98%	3.94%	3.92%	3.91%
110% AFR	4.38%	4.33%	4.31%	4.29%
120% AFR	4.79%	4.73%	4.70%	4.68%
130% AFR	5.19%	5.12%	5.09%	5.07%

REV. RUL. 2023-12 TABLE 2				
Adjusted AFR for July 2023				
	<i>Period for Compounding</i>			
	<i>Annual</i>	<i>Semiannual</i>	<i>Quarterly</i>	<i>Monthly</i>
Short-term adjusted AFR	3.63%	3.60%	3.58%	3.57%
Mid-term adjusted AFR	2.91%	2.89%	2.88%	2.87%
Long-term adjusted AFR	3.01%	2.99%	2.98%	2.97%

REV. RUL. 2023-12 TABLE 3
Rates Under Section 382 for July 2023

Adjusted federal long-term rate for the current month	3.01%
Long-term tax-exempt rate for ownership changes during the current month (the highest of the adjusted federal long-term rates for the current month and the prior two months.)	3.01%

REV. RUL. 2023-12 TABLE 4
Appropriate Percentages Under Section 42(b)(1) for July 2023

Note: Under section 42(b)(2), the applicable percentage for non-federally subsidized new buildings placed in service after July 30, 2008, shall not be less than 9%.

Appropriate percentage for the 70% present value low-income housing credit	7.91%
Appropriate percentage for the 30% present value low-income housing credit	3.39%

REV. RUL. 2023-12 TABLE 5
Rate Under Section 7520 for July 2023

Applicable federal rate for determining the present value of an annuity, an interest for life or a term of years, or a remainder or reversionary interest	4.60%
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REV. RUL. 2023-12 TABLE 6
Blended Annual Rate for 2023

Section 7872(e)(2) blended annual rate for 2023	4.65%
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Section 42.—Low-Income Housing Credit

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2023. See Rev. Rul. 2023-12, page 1.

Section 467.—Certain Payments for the Use of Property or Services

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2023. See Rev. Rul. 2023-12, page 1.

Section 483.—Interest on Certain Deferred Payments

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2023. See Rev. Rul. 2023-12, page 1.

Section 280G.—Golden Parachute Payments

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2023. See Rev. Rul. 2023-12, page 1.

Section 468.—Special Rules for Mining and Solid Waste Reclamation and Closing Costs

The applicable federal short-term rates are set forth for the month of July 2023. See Rev. Rul. 2023-12, page 1.

Section 1288.—Treatment of Original Issue Discount on Tax-Exempt Obligations

The adjusted applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2023. See Rev. Rul. 2023-12, page 1.

Section 382.—Limitation on Net Operating Loss Carryforwards and Certain Built-In Losses Following Ownership Change

The adjusted applicable federal long-term rate is set forth for the month of July 2023. See Rev. Rul. 2023-12, page 1.

Section 482.—Allocation of Income and Deductions Among Taxpayers

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2023. See Rev. Rul. 2023-12, page 1.

Section 7520.—Valuation Tables

The applicable federal mid-term rates are set forth for the month of July 2023. See Rev. Rul. 2023-12, page 1.

Section 7872.—Treatment of Loans With Below-Market Interest Rates

The applicable federal short-term, mid-term, and long-term rates are set forth for the month of July 2023. See Rev. Rul. 2023-12, page 1.

26 CFR 1.48D-6T: Elective Payment Election; 26 CFR 1.6417-5T: Additional information and registration; 26 CFR 1.6418-4T: Additional information and registration

DEPARTMENT OF THE TREASURY Internal Revenue Service 26 CFR Part 1

T.D. 9975

Pre-Filing Registration Requirements for Certain Tax Credit Elections

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Temporary regulations.

SUMMARY: This document contains temporary regulations setting forth mandatory information and registration requirements for taxpayers planning to make an elective payment election under the Inflation Reduction Act of 2022 and the CHIPS Act of 2022 to treat the amount of certain tax credits as a payment of Federal income tax, or in the case of a partnership or S corporation, to receive a payment in the amount of such credits. This document also contains temporary regulations setting forth mandatory information and registration requirements for taxpayers planning to make an election to transfer certain Federal income tax credits under the Inflation Reduction Act of 2022. These temporary regulations affect tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and, in the case of three credits, certain taxpayers eligible to elect the elective payment of credit amounts in a taxable year under section 6417 of the Internal Revenue Code (Code). These temporary regulations also affect taxpayers eligible to make an elective payment election instead of claiming the advanced manufacturing investment credit under section 48D of the Code. These temporary regulations further affect taxpayers eligible to elect to transfer certain Federal income tax credits under section 6418 of the Code.

DATES: Effective date: This temporary regulation is effective on **June 21, 2023**.

Applicability date: For dates of applicability, see §§1.48D-6T(j), 1.6417-5T(d), and 1.6418-4T(d).

FOR FURTHER INFORMATION CONTACT: Concerning these temporary regulations, Lani M. Sinfield at (202) 317-5871 (not a toll free number).

SUPPLEMENTARY INFORMATION:

Background

I. Overview

This document amends the Income Tax Regulations (26 CFR part 1) to add temporary regulations providing information and registration requirements that must be completed before elections available under sections 48D(d), 6417, and 6418 of the Code may be made.

In accordance with section 7805(e) (1) of the Code, concurrent with the publication of this Treasury Decision, the Department of the Treasury (Treasury Department) and the IRS are publishing in the Proposed Rules section of this issue of the *Federal Register* three notices of proposed rulemaking that contain proposed regulations under §§1.48D-6, 1.6417-5, and 1.6418-4, the text of which is identical to the text of §§1.48D-6T, 1.6417-5T, and 1.6418-4T of the temporary regulations. REG-105595-23 provides proposed regulations under section 48D(d). REG-101607-23 provides proposed regulations under sections 6241 and 6417. REG-101610-23 provides proposed regulations under section 6418.

Interested persons are directed to the **ADDRESSES AND COMMENTS AND PUBLIC HEARING** sections of the preambles to REG-105595-23, REG-101607-23, and REG-101610-23 for information on submitting public comments or the public hearings for the proposed regulations.

II. Sections 48D(d), 6417, and 6418

A notice of proposed rulemaking (REG-105595-23) in the Proposed Rules section in this issue of the *Federal Register* provides a background description of section

48D. A notice of proposed rulemaking (REG-101607-23) in the Proposed Rules section in this issue of the *Federal Register* provides a background description of section 6417. A notice of proposed rulemaking (REG-101610-23) in the Proposed Rules section in this issue of the *Federal Register* provides a background description of section 6418.

Explanation of Provisions

I. Pre-filing Registration Requirements under Section 48D(d)

Temp. Reg. §1.48D-6T(b)(1) provides the mandatory pre-filing registration process that, except as provided in guidance, a taxpayer must complete as a condition of, and prior to, any amount being treated as a payment against the tax imposed under §1.48D-6(a)(1), or an amount paid to a partnership or S corporation pursuant to §1.48D-6(d)(2)(ii)(A). A taxpayer is required to use the pre-filing registration process to register each qualified investment in an advanced manufacturing facility. A taxpayer that does not obtain a registration number or report the registration number on its annual tax return with respect to an advanced manufacturing facility is ineligible to receive any elective payment amount with respect to the amount of any section 48D credit determined with respect to that advanced manufacturing facility. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean that the taxpayer is eligible to receive a payment with respect to the section 48D credits determined with respect to the advanced manufacturing facility.

The pre-filing registration requirements are that a taxpayer:

(1) must complete the registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein, unless otherwise provided in guidance;

(2) must satisfy the registration requirements and receive a registration number prior to making a section 48D(d)(1) elective payment election on the taxpayer's tax return for the taxable year at issue;

(3) is required to obtain a registration number for each qualified investment in

an advanced manufacturing facility with respect to which a section 48D credit will be determined and for which the taxpayer wishes to make a section 48D(d)(1) elective payment election; and

(4) must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer and about the qualified investment in an advanced manufacturing facility, would allow the IRS to prevent duplication, fraud, improper payments, or excessive payments under section 48D. For example, verifying information about the taxpayer would allow the IRS to mitigate the risk of fraud or improper payments to entities that are not eligible taxpayers. Information about the taxpayer's taxable year would allow the IRS to ensure that an elective payment election is timely made on the entity's annual tax return. Information about the advanced manufacturing facility, including its address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date would allow the IRS to mitigate the risk of duplication, fraud, and improper payments for properties that are not advanced manufacturing facilities.

Temp. Reg. §1.48D-6T(b)(7)(i) provides that, after a taxpayer completes pre-filing registration with respect to each qualified investment in an advanced manufacturing facility with respect to which the taxpayer intends to elect a section 48D(d) elective payment election for the taxable year, the IRS will review the information provided and will issue a separate registration number for each qualified investment for which the taxpayer provided sufficient verifiable information.

Temp. Reg. §1.48D-6T(b)(7)(ii) provides that a registration number is valid only for the taxable year for which it is obtained. Temp. Reg. §1.48D-6T(b)(7)(iii) provides that, if an elective payment election will be made with respect to a qualified investment in an advanced manufacturing facility for a taxable year for which a registration number under this section has been obtained for a prior taxable year, the taxpayer must renew the registration each subsequent year in accordance with applicable guidance, including attesting that all the

facts previously provided are still correct or updating any facts that are relevant in calculating the amount of the section 48D credit. Temp. Reg. §1.48D-6T(b)(7)(iv) provides that, if facts change with respect to the qualified investment in an advanced manufacturing facility for which a registration number has been previously obtained, the taxpayer must amend the registration to reflect these new facts. The regulations provide, for example, that if the facility previously registered for an elective payment election undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner would be required to amend the original registration to disassociate its EIN from the advanced manufacturing facility and the new owner must submit an original registration (or if the new owner previously registered other advanced manufacturing facilities, must amend its original registration) to associate the new owner's EIN with the previously registered advanced manufacturing facility.

Lastly, Temp. Reg. §1.48D-6(b)(7)(v) provides that the taxpayer is required to include the registration number of the advanced manufacturing facility on the taxpayer's annual return for the taxable year for an election under Temp. Reg. §1.48D-6(a)(1). The IRS will treat an elective payment election as ineffective with respect to any section 48D credit determined with respect to the advanced manufacturing facility for which the taxpayer does not include a valid registration number on the annual tax return.

II. Pre-filing Registration Requirements and Additional Information under Section 6417

Section 6417(d)(5) provides that, as a condition of, and prior to, any amount being treated as a payment that is made by the taxpayer under section 6417(a) or any payment being made pursuant to section 6417(c), the Secretary may require such information or registration as the Secretary deems necessary or appropriate for purposes of preventing duplication, fraud, improper payments, or excessive payments.

In general, stakeholders requested additional information about this provision and requested that the regulations balance the need to prevent fraud and abuse with the burden on taxpayers. Stakeholders recommended that the information required to be provided to the IRS should be provided in a manner that facilitates automated procedures to help catch potential fraud, discourages abusive or otherwise illegitimate claims, and allows efficient and prompt review (both before payment and through audits). Stakeholders recommended that all required documents and information should be able to be submitted easily via an online portal. Stakeholders recommended that information or registration should be as consistent as possible across sections 48D(d)(1), 6417(d)(5), and 6418(g)(1).

Temp. Reg. §1.6417-5T provides the mandatory pre-filing registration process. Temp. Reg. §1.6417-5T(a) provides an overview of this process and requires an applicable entity or electing taxpayer to satisfy the pre-filing registration requirements as a condition of, and prior to, making an elective payment election. An applicable entity or electing taxpayer is required to use the pre-filing registration process to register itself as intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits as part of the pre-filing submission (or amended submission). An applicable entity or electing taxpayer that does not obtain a registration number and report the registration number on its annual tax return with respect to an applicable credit property is ineligible to make an elective payment election to treat any elective payment amount with respect to the amount of any credit determined with respect to that applicable credit property as a payment of tax. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean that the applicable entity or electing taxpayer will receive a payment with respect to the applicable credits determined with respect to the applicable credit property.

Temp. Reg. §1.6417-5T(b) provides the following pre-filing registration requirements.

First, an applicable entity or electing taxpayer must complete the pre-filing registration process electronically through an IRS electronic portal in accordance with the instructions provided therein, unless otherwise provided in guidance. If the election is by a member of a consolidated group, the member must complete the pre-filing registration process as a condition of, and prior to, making an elective payment election. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

Second, an applicable entity or electing taxpayer must satisfy the registration requirements and receive a registration number prior to making an elective payment election on the applicable entity's tax return for the taxable year at issue.

Third, an applicable entity or electing taxpayer is required to obtain a registration number for each applicable credit property with respect to which an applicable credit will be determined and for which the applicable entity or electing taxpayer intends to make an elective payment election.

Finally, an applicable entity or electing taxpayer must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer, about the applicable credits, and about the applicable credit property, will allow the IRS to prevent duplication, fraud, improper payments, or excessive payments under section 6417. For example, verifying information about the taxpayer will allow the IRS to mitigate the risk of fraud or improper payments to entities that are not applicable entities or electing taxpayers. Information about the taxpayer's taxable year will allow the IRS to ensure that an elective payment election is timely made on the entity's annual tax return. Information about applicable 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 payments for properties that are not applicable credit properties. Information about whether an investment tax credit property was acquired using any Restricted Tax

Exempt Amounts will allow the IRS to prevent improper payments.

Temp. Reg. §1.6417-5T(c) provides information about the required registration number. Temp. Reg. §1.6417-5T(c) (1) provides that, after an applicable entity or electing taxpayer completes the pre-filing registration process as provided in proposed §1.6417-5(b) for the applicable credit properties with respect to which the entity intends to make an elective payment election in the taxable year, the IRS will review the information provided and will issue a separate registration number for each applicable credit property for which the applicable entity or electing taxpayer provided sufficient verifiable information, as provided in guidance.

Temp. Reg. §1.6417-5T(c)(2) provides that a registration number is valid only for the taxable year for which it is obtained. Temp. Reg. §1.6417-5T(c)(3) provides that, if an elective payment election will be made with respect to an applicable credit property for which a registration number under proposed §1.6417-5 has been previously obtained, the applicable entity or electing taxpayer will be required to renew the registration each year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts. Temp. Reg. §1.6417-5T(c)(4) provides that, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained, an applicable entity or electing taxpayer is required to amend the registration (or may need to submit a new registration) to reflect these new facts. For example, one stakeholder asked that, if a taxpayer becomes a party to an internal reorganization under section 368(a) (such as a merger or distribution in a nonrecognition transaction) during the election period, the elective payment election should carry over to the successor entity. The temporary regulations provide that if a facility previously registered for an elective payment election undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner is required to amend the original registration to

disassociate its EIN from the credit property and the new owner must submit an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered credit property.

Lastly, Temp. Reg. §1.6417-5T(c) (5) provides that the applicable entity or electing taxpayer is required to include the registration number of the applicable credit property on their annual tax return for the taxable year. The IRS will treat an elective payment election as ineffective with respect to the portion of a credit determined with respect to an applicable credit property for which the applicable entity or electing taxpayer does not include a valid registration number on the annual tax return.

III. Pre-filing Registration Requirements and Additional Information under Section 6418

Section 6418(g)(1) provides that as a condition of, and prior to, any transfer of any portion of an eligible credit under section 6418, the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section.

In general, consistent with section 6417, stakeholders requested additional information about this provision and requested that the regulations balance the need to prevent fraud and abuse with the burden on taxpayers. Stakeholders recommended a registration system that assigns a transfer number to an eligible taxpayer that can be used by transferee taxpayers to claim transferred credits and allows the IRS to track transfers of eligible credits. Stakeholders also recommended that information or registration requirements should be as consistent as possible across sections 48D(d)(1), 6417(d)(5), and 6418(g)(1). In order to meet the purpose of section 6418(g)(1), the Treasury Department and the IRS have determined that it is necessary to establish a mandatory registration process that is in place before the end of the 2023 calendar year,

which is the first full taxable year during which a transfer election under section 6418 is available.

Temp. Reg. §1.6418-4T generally provides rules requiring that eligible taxpayers register before filing the return on which a transfer election is made and provide information related to each eligible credit property for which the eligible taxpayer intends to transfer a specified credit portion. Temp. Reg. §1.6418-4T(a), consistent with section 6418(g)(1), requires that, as a condition of, and prior to, making an election to transfer a specified credit portion, an eligible taxpayer satisfy the pre-filing registration requirements in Temp. Reg. §1.6418-4T(b). After the required pre-filing registration process is successfully completed, an eligible taxpayer will receive a unique registration number from the IRS for each registered eligible credit property for which the eligible taxpayer intends to transfer a specified credit portion. The Treasury Department and the IRS intend for this pre-filing registration process to occur through an IRS electronic portal (unless otherwise allowed in guidance). An eligible taxpayer that does not obtain a registration number and report the registration number on its return with respect to an eligible credit property is ineligible to make a transfer election. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the eligible taxpayer is eligible to transfer any specified credit portion determined with respect to the eligible credit property. The registration number also must be reported on the eligible taxpayer's return.

Temp. Reg. §1.6418-4T(b) provides the following pre-filing registration requirements.

First, an eligible taxpayer must complete the pre-filing registration process electronically through an IRS electronic portal in accordance with the instructions provided therein, unless otherwise provided in guidance. If the election is by a member of a consolidated group, the member must complete the pre-filing registration process as a condition of, and prior to, making an elective payment election. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

Second, an eligible taxpayer must satisfy the registration requirements and receive a registration number prior to making a transfer election for a specified credit portion on the eligible taxpayer's return for the taxable year at issue.

Third, an eligible taxpayer is required to obtain a registration number for each eligible credit property with respect to which a transfer election of a specified credit portion is made.

Finally, an eligible taxpayer must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer, about the eligible credits, and about the eligible credit property, will allow the IRS to prevent duplication, fraud, improper payments, or excessive transfers under section 6418. For example, 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.

Temp. Reg. §1.6418-4T(c) provides rules related to the registration number that is obtained after the IRS has reviewed and approved the taxpayer's submitted information. First, these rules provide that a registration number is valid for an eligible taxpayer only for the taxable year for which it is obtained, and for a transferee taxpayer's taxable year in which the specified credit portion is taken into account. Second, Temp. Reg. §1.6418-4T(c) provides rules for the renewal of a registration number that has been previously obtained. The eligible taxpayer is required to renew the registration with respect to an eligible credit property each year in accordance with guidance, including attesting that all the facts are still correct or updating any facts. Third, the temporary regulations provide that, if facts change with respect to an eligible credit property for which a registration number has been previously obtained, an eligible taxpayer is required to amend the registration to reflect these new facts. Lastly,

the temporary regulations provide that an eligible taxpayer is required to include the registration number of the eligible credit property on the eligible taxpayer's return for the taxable year, as provided in Temp. Reg. §1.6418-2T(b), for an election to be effective with respect to any eligible credit determined with respect to any eligible credit property. The IRS will treat a transfer election as ineffective with respect to an eligible credit determined with respect to an eligible credit property for which the eligible taxpayer does not include a valid registration number on its return.

A transferee taxpayer is also required to report the registration number received from an eligible taxpayer on its return for the taxable year that the transferee taxpayer takes the transferred eligible credit into account.

Applicability Dates

The temporary regulations under §1.48D-6T apply to taxable years ending on or after **June 21, 2023**. The temporary regulations under §1.48D-6T expire on **June 12, 2026**.

The temporary regulations under §1.6417-5T apply to taxable years ending on or after **June 21, 2023**. The temporary regulations under §1.6417-5T expire on **June 12, 2026**.

The temporary regulations under §1.6418-4T apply to taxable years ending on or after **June 21, 2023**. The temporary regulations under §1.6418-4T expire on **June 12, 2026**.

Special Analyses

I. *Good Cause*

The Administrative Procedure Act (5 U.S.C. Subchapter II) provides an exception to generally applicable rulemaking requirements when an agency makes a finding of good cause (and incorporates the finding and a brief statement of reasons therefor in the rules issued).

The Treasury Department and the IRS find that good cause exists for making these temporary regulations immediately effective without notice and comment. The pre-filing registration process is critical to the implementation of sections 48D, 6417, and 6418. As expressly authorized

by statute to prevent duplication, fraud, and improper or excessive payments, the temporary regulations condition elective payment and transferability on pre-registration with the IRS.¹ Section 48D applies to property placed in service after December 31, 2022, and sections 6417 and 6418 each apply to taxable years beginning after that date. This means that filers will be able to take advantage of these provisions for their 2023 tax years.

The Treasury Department and the IRS believe it is important to immediately put into effect these pre-registration requirements. The pre-registration process collects critical information to minimize fraudulent elections and prevent duplication and improper or excessive payments by ensuring basic eligibility requirements for eligible credits before the election is made. Validating certain information before the annual tax return process will result in more accurate review of the veracity of the information and fewer duplicate, fraudulent, improper, or excessive transfers or payments. In addition, the pre-filing registration requirement is expected to reduce the need for recovering erroneous payments and adjusting return positions via costly, burdensome, and inefficient examination, appeals, and litigation processes (which, in the case of section 6418, could potentially be needed with respect to both parties to the credit transfer transaction). Immediate implementation of these safeguards is important because it is anticipated that there will be an immediate and significant increase in utilization of the tax incentives described in sections 48D(d), 6417, and 6418 by entities that have not historically had return-filing obligations, increasing the risk of the duplicative, fraudulent, and improper or excessive payments that the pre-registration process is intended to mitigate.

The Treasury Department and the IRS find that good cause exists for making these temporary regulations effective without notice and comment because failure to do so would be contrary to the public interest.

Without these temporary regulations, the IRS may not be able to timely and effectively develop and implement a pre-filing registration system. Lack of a pre-registration process would create risk for the public fisc by increasing the likelihood of duplicate, fraudulent, improper, or excessive payments or transfers. The pre-filing registration system also must be developed sufficiently in advance of the filing season for taxpayers to have time to gather the necessary information and complete the registration process and for the IRS to be able to review the submitted information and issue registration numbers. Failing to pre-register taxpayers who have never before filed a tax return with the IRS could significantly delay the processing of those taxpayers' returns because procedures to allow them to file an annual tax return would need to be taken during the middle of filing season. Such delay would harm taxpayers and also potentially result in the IRS owing interest on any refunds due, further damaging the public fisc.

Additionally, it is in the public interest to have certainty regarding the requirements for pre-registration as far before the 2023 filing season as possible to ensure the ability to timely and accurately fulfill the requirements. This certainty is particularly crucial for those filers already or soon to be engaged in an activity that would qualify them to make an elective payment or transfer election. Taxpayer certainty is also especially important for particular populations of affected taxpayers such as entities that have not historically had return-filing obligations because they may need significant time to review and understand the underlying tax law and the pre-filing registration requirements.

The Treasury Department and the IRS also find that good cause exists for making these temporary regulations immediately effective because it would be impracticable to comply with the notice and comments process. The processes established in sections 48D, 6417, and 6418 are novel and complex. Determining how these processes interact with established

tax procedures is complicated and in some aspects very difficult to reconcile. The elections under sections 6417 and 6418 apply to numerous credits, each of which contain different substantive eligibility and other requirements, which had to be separately analyzed to understand what information should be collected as part of the pre-filing registration process. Developing a previously nonexistent registration process, new filing portal, and determining the necessary elements to protect the fisc has been time consuming. The Treasury Department and the IRS have moved quickly to understand these complex Code sections and determine technological elements needed to create the pre-filing registration process and portal.

To accomplish the purpose of the pre-filing registration process, the electronic portal must open by Fall 2023. The Treasury Department and the IRS understand the need to carefully consider all public comments and provide robust responses to all relevant comments. The few months available between the publication of proposed regulations and the opening of the electronic portal is insufficient time to receive, review, and meaningfully respond to public comments. Furthermore, there would not be sufficient time after all comments are considered to then make corresponding changes to the electronic portal, which would require technological development and user testing.

Comments are being solicited in the cross-referenced notices of proposed rulemaking that are in the Proposed Rules section in this issue of the *Federal Register*. Any comments will be considered before final regulations are issued.

II. Paperwork Reduction Act

The collection of information contained in these temporary regulations has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act. Commenters are strongly encouraged

¹ Sections 48D(d)(2)(E) and 6417(d)(5) authorize the Secretary to require such information or registration as the Secretary deems necessary or appropriate for purposes of preventing duplication, fraud, improper payments, or excessive payments as a condition of, and prior to, any amount being treated as a payment made by or to the taxpayer. Section 6418(g)(1) states that, as a condition of, and prior to, any transfer of any portion of an eligible credit pursuant to section 6418(a), the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6418.

to submit public comments electronically. Submit electronic submissions for the proposed information collection to the IRS via email at pra.comments@irs.gov (indicate REG-101607-23 on the Subject line). Comments on the collection of information should be received by **August 14, 2023**. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collections of information in these temporary regulations contain reporting and recordkeeping requirements. The recordkeeping requirements are considered general tax records under Section 1.6001-1(e). These records are required for IRS to validate that taxpayers have met the regulatory requirements and are entitled to transfer the credits. For PRA purposes, general tax records are already approved by OMB under 1545-0047 for tax-exempt organizations and government entities; under 1545-0074 for individuals; and under 1545-0123 for business entities.

These reporting requirements include a requirement to register with IRS to make the elective payment election or the transfer election in §§1.48D-6T, 1.6417-5T, 1.6418-4T. This pre-filing registration requirement is being submitted to OMB and will be processed in accordance with the PRA as required by 5 CFR 1320.10. This collection of information is necessary to prevent duplication, fraud, improper payments, or excessive payments under sections 48D, 6417 and 6418 of the Code. The IRS is seeking a new OMB control

number (1545-NEW) for the pre-registration requirements. The respondents are:

(1) Under section 48D, taxpayers eligible to elect the elective payment election of the advanced manufacturing investment credit.

Estimated total annual reporting burden is 271 hours.

Estimated average annual burden per respondent is 5.41 hours.

Estimated number of respondents is 50.

(2) Under section 6417, tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and certain taxpayers eligible to elect the elective payment of applicable credits in a taxable year.

Estimated total annual reporting burden is 126,200 hours.

Estimated average annual burden per respondent is 6.31 hours.

Estimated number of respondents is 20,000.

(3) Under section 6418, eligible taxpayers that elect to transfer eligible credits in a taxable year.

Estimated total annual reporting burden is 308,000 hours.

Estimated average annual burden per respondent is 6.16 hours.

Estimated number of respondents is 50,000.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the Office of Management and Budget. Books or records relating to a collection of information must be retained if their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103. The IRS anticipates opening the electronic portal for pre-filing registration in Fall 2023, after approval of the collection of information under the Paperwork Reduction Act.

III. *Regulatory Flexibility Act*

For applicability of the Regulatory Flexibility Act, please refer to the cross-reference notices of proposed rulemaking (REG-105595-23, REG-101607-23, and

REG-101610-23) published elsewhere in this issue of the Federal Register.

IV. *Section 7805(f)*

Pursuant to section 7805(f), these temporary regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

V. *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandate Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars (updated annually for inflation). These temporary regulations do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

VI. *Executive Order 13132: Federalism*

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. These temporary regulations do not have federalism implications and do not impose substantial, direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

VII. *Executive Order 12866*

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

VIII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as a major rule as defined by 5 U.S.C. 804(2). For good cause pursuant to 5 U.S.C. 808(2), see part I of this Special Analyses section.

Drafting Information

The principal author of this temporary regulation is Lani M. Sinfield, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and record-keeping requirements.

Amendments to the Regulations

Accordingly, the Treasury Department and the IRS amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

Paragraph. 1. The authority citation for part 1 is amended by adding the following entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
* * * * *

Section 1.48D-6T also issued under 26 U.S.C. 48D(d)(2)(E) and (6) * * *
* * * * *

Section 1.6417-5T also issued under 26 U.S.C. 6417(d)(5) and (h) * * *
* * * * *

Section 1.6418-4T also issued under 26 U.S.C. 6418(g)(1) and (h) * * *
* * * * *

Par. 2. Section 1.48D-6T is added to read as follows:

§1.48D-6T Elective payment election.

(a) [Reserved]

(b) *Pre-filing registration required—*

(1) *In general.* Pre-filing registration by any taxpayer (including a partnership or an S corporation) in accordance with

this paragraph (b) is a condition that must be successfully completed prior to making an elective payment election under section 48D(d)(1) and this section with respect to qualified property placed in service by the taxpayer as part of an advanced manufacturing facility of an eligible taxpayer. An elective payment election will not be effective with respect to the section 48D credit determined with respect to any such qualified property placed in service by any taxpayer unless the taxpayer received a valid registration number for the taxpayer's qualified investment in the advanced manufacturing facility of an eligible taxpayer in accordance with this paragraph (b) and provided the registration number for each qualified investment in each advanced manufacturing facility on its Form 3800, *General Business Credit*, attached to the tax return in accordance with guidance. For purposes of this section, the term *guidance* means guidance published in the *Federal Register* or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the IRS.gov website. See §§601.601 and 601.602 of this chapter. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the taxpayer is eligible to receive a payment with respect to any section 48D credit determined with respect to the qualified property.

(2) *Manner of registration.* Unless otherwise provided in guidance, a taxpayer must complete the pre-filing registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein.

(3) *Members of a consolidated group.* A member of a consolidated group is required to complete pre-filing registration as a condition of, and prior to, making an elective payment election. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

(4) *Timing of pre-filing registration.* A taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (b)(6) of this section prior to making any elective payment election under this section on the taxpayer's tax return for the taxable year at issue.

(5) *Each qualified investment in an advanced manufacturing facility must have its own registration number.* A taxpayer must obtain a registration number for each qualified investment in an advanced manufacturing facility of an eligible taxpayer with respect to which an elective payment election is made.

(6) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, a taxpayer must provide the following information to the IRS to complete the pre-filing registration process:

(i) The taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity;

(ii) Any additional information required by the IRS electronic portal;

(iii) The taxpayer's taxable year, as determined under section 441 of the Code;

(iv) The type of annual return(s) normally filed by the taxpayer with the IRS;

(v) A list of each qualified investment in an advanced manufacturing facility that the taxpayer intends to use to determine a section 48D credit for which the taxpayer intends to make an elective payment election;

(vi) For each qualified investment in an advanced manufacturing facility listed in paragraph (b)(5)(v) of this section, any further information required by the IRS electronic portal, such as—

(A) The type of qualified investment in the advanced manufacturing facility;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the advanced manufacturing facility);

(C) Any supporting documentation relating to the construction, reconstruction or acquisition of the advanced manufacturing facility (such as, State and local government permits to operate the advanced manufacturing facility, certifications, and evidence of ownership that ties to the land deed, lease, or other documented right to use and access any land upon which the advanced manufacturing facility is constructed or housed);

(D) The beginning of construction date and the placed in service date of any qualified property that is part of the advanced manufacturing facility;

(E) The source of funds the taxpayer used to acquire the qualified property with

respect to which the qualified investment was made; and

(F) Any other information that the taxpayer or entity believes will help the IRS evaluate the registration request;

(vii) The name of a contact person for the taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either possess legal authority to bind the taxpayer or must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative*;

(viii) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant; and

(ix) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(7) *Registration number*—(i) *In general*. The IRS will review the information provided and will issue a separate registration number for each qualified investment in an advanced manufacturing facility of an eligible taxpayer for which the taxpayer making the registration provided sufficient verifiable information.

(ii) *Registration number is only valid for one year*. A registration number is valid only with respect to the taxpayer that obtained the registration number under this section and only for the taxable year for which it is obtained.

(iii) *Renewing registration numbers*. If an elective payment election will be made with respect to any section 48D credit determined with respect to a qualified investment in an advanced manufacturing facility for a taxable year after a registration number under this section has been obtained, the taxpayer must renew the registration for that subsequent year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(iv) *Amendment of previously submitted registration information if a change occurs before the registration number is used*. As provided in instructions to the pre-filing registration portal, if specified

changes occur with respect to a qualified investment in an advanced manufacturing facility for which a registration number has been previously obtained, a taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if an eligible taxpayer that is the owner of an advanced manufacturing facility previously registered for an elective payment election for a section 48D credit determined with respect to that advanced manufacturing facility and the advanced manufacturing facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the advanced manufacturing facility must amend the original registration to disassociate its EIN from the advanced manufacturing facility and the new owner must submit separately an original registration (or if the new owner previously registered other qualified investments or advanced manufacturing facilities, must amend its original registration) to associate the new owner's EIN with the previously registered advanced manufacturing facility.

(v) *Registration number is required to be reported on the return for the taxable year of the elective payment election*. The taxpayer must include the registration number of the qualified investment in the advanced manufacturing facility on the taxpayer's return as provided in paragraph (b) of this section for the taxable year. The IRS will treat an elective payment election as ineffective with respect to a section 48D credit determined with respect to a qualified investment in an advanced manufacturing facility for which the taxpayer does not include a valid registration number on the annual return.

(c) – (i) [Reserved]

(j) *Applicability date for pre-filing registration requirements*. The requirements of paragraph (b) of this section apply to property placed in service on or after December 31, 2022, and during a taxable year ending on or after **June 21, 2023**.

(k) *Expiration date*. The applicability of paragraph (b) of this section expires on **June 12, 2026**.

Par. 3. Section 1.6417-5T is added to read as follows:

§1.6417-5T Additional information and registration.

(a) *Pre-filing registration and election*. An applicable entity or electing taxpayer is required to satisfy the pre-filing registration requirements in paragraph (b) of this section as a condition of, and prior to, making an elective payment election. An applicable entity or electing taxpayer must use the pre-filing registration process to register itself as intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits as part of the pre-filing submission (or amended submission). An applicable entity or electing taxpayer that does not obtain a registration number under paragraph (c)(1) of this section or report the registration number on its annual tax return, as defined in §1.6417-1(b), pursuant to paragraph (c)(5) of this section with respect to an otherwise applicable credit property, is ineligible to receive any elective payment amount with respect to the amount of any credit determined with respect to that applicable credit property. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the applicable entity or electing taxpayer is eligible to receive a payment with respect to the applicable credits determined with respect to the applicable credit property.

(b) *Pre-filing registration requirements*—(1) *Manner of pre-filing registration*. Unless otherwise provided in guidance, an applicable entity or electing taxpayer must complete the pre-filing registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein.

(2) *Pre-filing registration and election for members of a consolidated group*. A member of a consolidated group is required to complete pre-filing registration as a condition of, and prior to, making an elective payment election. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

(3) *Timing of pre-filing registration*. An applicable entity or electing taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (c)

of this section prior to making an elective payment election under §1.6417-2(b) on the applicable entity's or electing taxpayer's annual tax return for the taxable year at issue.

(4) *Each applicable credit property must have its own registration number.* An applicable entity or electing taxpayer must obtain a registration number for each applicable credit property with respect to which it intends to make an elective payment election.

(5) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, an applicable entity or electing taxpayer must provide the following information to the IRS to complete the pre-filing registration process:

(i) The applicable entity's or electing taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity.

(ii) Any additional information required by the IRS electronic portal, such as information regarding the taxpayer's exempt status under section 501(a) of the Code; that the applicable entity is a political subdivision of a State, the District of Columbia, an Indian Tribal government, or a U.S. territory; or that the applicable entity is an agency or instrumentality of a State, the District of Columbia, an Indian Tribal government, or a U.S. territory.

(iii) The taxpayer's taxable year, as determined under section 441 of the Code.

(iv) The type of annual tax return(s) normally filed by the applicable entity or electing taxpayer, or that the applicable entity or electing taxpayer does not normally file an annual tax return with the IRS.

(v) The type of applicable credit(s) for which the applicable entity or electing taxpayer intends to make an elective payment election.

(vi) For each applicable credit, each applicable credit property that the applicable entity or electing taxpayer intends to use to determine the credit for which the applicable entity or electing taxpayer intends to make an elective payment election.

(vii) For each applicable credit property listed in paragraph (b)(4)(vi) of this section, any further information required by the IRS electronic portal, such as—

(A) The type of applicable credit property;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the applicable credit property);

(C) Any supporting documentation relating to the construction or acquisition of the applicable credit property (such as State, District of Columbia, Indian Tribal, U.S. territorial, or local government permits to operate the applicable credit property; certifications; evidence of ownership that ties to a land deed, lease, or other documented right to use and access any land or facility upon which the applicable credit property is constructed or housed; U.S. Coast Guard registration numbers for offshore wind vessels; and the vehicle identification number of an eligible clean vehicle with respect to which a section 45W credit is determined);

(D) The beginning of construction date and the placed in service date of the applicable credit property;

(E) If an investment-related credit property (as defined §1.6417-2(c)(3)), the source of funds the taxpayer used to acquire the property; and

(F) Any other information that the applicable entity or electing taxpayer believes will help the IRS evaluate the registration request.

(viii) The name of a contact person for the applicable entity or electing taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either possess legal authority to bind the applicable entity or electing taxpayer or must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative*.

(ix) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant.

(x) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(c) *Registration number*—(1) *In general.* The IRS will review the information provided and will issue a separate registration number for each applicable credit

property for which the applicable entity or electing taxpayer provided sufficient verifiable information.

(2) *Registration number is only valid for one taxable year.* A registration number is valid only with respect to the applicable entity or electing taxpayer that obtained the registration number under this section and only for the taxable year for which it is obtained.

(3) *Renewing registration numbers.* If an elective payment election will be made with respect to an applicable credit property for a taxable year after a registration number under this section has been obtained, the applicable entity or electing taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(4) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained but not yet used, an applicable entity or electing taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if the owner of a facility previously registered for an elective payment election for applicable credits determined with respect to that facility and the facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the facility must amend the original registration to disassociate its EIN from the applicable credit property and the new owner must submit separately an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered applicable credit property.

(5) *Registration number is required to be reported on the return for the taxable year of the elective payment election.* The applicable entity or electing taxpayer must

include the registration number of the applicable credit property on its annual tax return as provided in §1.6417-2(b) for the taxable year. The IRS will treat an elective payment election as ineffective with respect to an applicable credit determined with respect to an applicable credit property for which the applicable entity or electing taxpayer does not include a valid registration number on the annual tax return.

(d) *Applicability date.* This section applies to taxable years ending on or after **June 21, 2023**.

(e) *Expiration date.* The applicability of this section expires on **June 12, 2026**.

Par. 4. Section 1.6418-4T is added to read as follows:

§1.6418-4T Additional information and registration.

(a) *Pre-filing registration and election.* As a condition of, and prior to, any specified credit portion being transferred by an eligible taxpayer to a transferee taxpayer pursuant to an election under §1.6418-2, or a specified credit portion being transferred by a partnership or S corporation pursuant to §1.6418-3, the eligible taxpayer is required to satisfy the pre-filing registration requirements in paragraph (b) of this section. An eligible taxpayer that does not obtain a registration number under paragraph (c)(1) of this section, and report the registration number on its return pursuant to paragraph (c) (5) of this section, is ineligible to make a transfer election for a specified credit portion under §1.6418-2 or §1.6418-3, with respect to the eligible credit determined with respect to the specific eligible credit property for which the eligible taxpayer has failed to obtain and report a registration number. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the eligible taxpayer is eligible to transfer any specified credit portion determined with respect to the eligible credit property.

(b) *Pre-filing registration requirements—(1) Manner of pre-filing registration.* Unless otherwise provided in guidance, eligible taxpayers must complete the pre-filing registration process electronically through an IRS electronic

portal and in accordance with the instructions provided therein.

(2) *Pre-filing registration and election for members of a consolidated group.* A member of a consolidated group is required to complete pre-filing registration to transfer any eligible credit determined with respect to the member. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

(3) *Timing of pre-filing registration.* An eligible taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (c) of this section prior to making a transfer election under §1.6418-2 or §1.6418-3 for a specified credit portion on the taxpayer's return for the taxable year at issue.

(4) *Each eligible credit property must have its own registration number.* 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.

(5) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, an eligible taxpayer is required to provide the following information to the IRS to complete the pre-filing registration process:

(i) The eligible taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity;

(ii) Any additional information required by the IRS electronic portal, such as information establishing that the entity is an eligible taxpayer;

(iii) The taxpayer's taxable year, as determined under section 441;

(iv) The type of annual tax return(s) normally filed by the eligible taxpayer, or that the eligible taxpayer does not normally file an annual tax return with the IRS;

(v) The type of eligible credit(s) for which the eligible taxpayer intends to make a transfer election;

(vi) Each eligible credit property that the eligible taxpayer intends to use to determine a specified credit portion for which the eligible taxpayer intends to make a transfer election;

(vii) For each eligible credit property listed in paragraph (b)(4)(vi) of this

section, any further information required by the IRS electronic portal, such as—

(A) The type of eligible credit property;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the eligible credit property);

(C) Any supporting documentation relating to the construction or acquisition of the eligible credit property (such as State, Indian Tribal, or local government permits to operate the eligible credit property, certifications, evidence of ownership that ties to a land deed, lease, or other documented right to use and access any land or facility upon which the eligible credit property is constructed or housed, and U.S. Coast Guard registration numbers for offshore wind vessels);

(D) The beginning of construction date, and the placed in service date of the eligible credit property; and

(E) Any other information that the eligible taxpayer believes will help the IRS evaluate the registration request;

(viii) The name of a contact person for the eligible taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either possess legal authority to bind the eligible taxpayer, or must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative*;

(ix) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant; and

(x) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(c) *Registration number—(1) In general.* The IRS will review the registration information provided and will issue a separate registration number for each eligible credit property for which the eligible taxpayer provided sufficient verifiable information.

(2) *Registration number is only valid for one taxable year.* A registration number is valid to an eligible taxpayer only for the taxable year in which the credit is determined for the eligible credit property for which the registration is completed,

and for a transferee taxpayer's taxable year in which the eligible credit is taken into account under §1.6418-2(f).

(3) *Renewing registration numbers.* If an election to transfer an eligible credit will be made with respect to an eligible credit property for a taxable year after a registration number under this section has been obtained, the eligible taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(4) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained but not yet used, an eligible taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if the owner of a facility previously registered for a transfer election under §1.6418-2 or §1.6418-3 for eligible credits determined with respect to that facility and the facility undergoes

a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the facility must amend the original registration to disassociate its EIN from the eligible credit property and the new owner must submit separately an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered eligible credit property.

(5) *Reporting of registration number by an eligible taxpayer and a transferee taxpayer—(i) Eligible taxpayer reporting.* As part of making a valid transfer election under §1.6418-2 or §1.6418-3, an eligible taxpayer must include the registration number of the eligible credit property on the eligible taxpayer's return (as provided in §1.6418-2(b) or §1.6418-3(d)) for the taxable year the specified credit portion was determined. The IRS will treat an election as ineffective if the eligible taxpayer does not include a valid registration number on the return.

(ii) *Transferee taxpayer reporting.* A transferee taxpayer must report the

registration number received (as part of the transfer election statement as described in §1.6418-2(b) or otherwise) from a transferor taxpayer on the Form 3800, *General Business Credit*, as part of the return for the taxable year that the transferee taxpayer takes the transferred specified credit portion into account. The specified credit portion will be disallowed to the transferee taxpayer if the transferee taxpayer does not include the registration number on the return.

(d) *Applicability date.* This section applies to taxable years ending on or after **June 21, 2023**.

(e) *Expiration date.* The applicability of this section expires on **June 12, 2026**.

Douglas W. O'Donnell,
*Deputy Commissioner for Services
and Enforcement.*

Approved: June 5, 2023.

Lily Batchelder,
*Assistant Secretary of the Treasury
(Tax Policy).*

(Filed by the Office of the Federal Register June 14, 2023, 11:15 a.m., and published in the issue of the Federal Register for June 21, 2023, ** FR *****)

Part III

Update for Weighted Average Interest Rates, Yield Curves, and Segment Rates

Notice 2023-48

This notice provides guidance on the corporate bond monthly yield curve, the corresponding spot segment rates used under § 417(e)(3), and the 24-month average segment rates under § 430(h)(2) of the Internal Revenue Code. In addition, this notice provides guidance as to the interest rate on 30-year Treasury securities under § 417(e)(3)(A)(ii)(II) as in effect for plan years beginning before 2008 and the 30-year Treasury weighted average rate under § 431(c)(6)(E)(ii)(I).

YIELD CURVE AND SEGMENT RATES

Section 430 specifies the minimum funding requirements that apply to single-employer plans (except for CSEC plans

under § 414(y)) pursuant to § 412. Section 430(h)(2) specifies the interest rates that must be used to determine a plan's target normal cost and funding target. Under this provision, present value is generally determined using three 24-month average interest rates ("segment rates"), each of which applies to cash flows during specified periods. To the extent provided under § 430(h)(2)(C)(iv), these segment rates are adjusted by the applicable percentage of the 25-year average segment rates for the period ending September 30 of the year preceding the calendar year in which the plan year begins.¹ However, an election may be made under § 430(h)(2)(D)(ii) to use the monthly yield curve in place of the segment rates.

Notice 2007-81, 2007-44 I.R.B. 899, provides guidelines for determining the monthly corporate bond yield curve, and the 24-month average corporate bond segment rates used to compute the target normal cost and the funding target. Consistent with the methodology specified in Notice 2007-81, the monthly corporate bond yield curve derived from May 2023 data is in Table 2023-5 at the end of this notice.

The spot first, second, and third segment rates for the month of May 2023 are, respectively, 4.91, 5.15, and 5.34.

The 24-month average segment rates determined under § 430(h)(2)(C)(i) through (iii) must be adjusted pursuant to § 430(h)(2)(C)(iv) to be within the applicable minimum and maximum percentages of the corresponding 25-year average segment rates. For this purpose, any 25-year average segment rate that is less than 5% is deemed to be 5%. The 25-year average segment rates for plan years beginning in 2022 and 2023 were published in Notice 2021-54, 2021-41 I.R.B. 457, and Notice 2022-40, 2022-40 I.R.B. 266, respectively. The applicable minimum and maximum percentages are 95% and 105% for a plan year beginning in 2022 or 2023.

24-MONTH AVERAGE CORPORATE BOND SEGMENT RATES

The three 24-month average corporate bond segment rates applicable for June 2023 without adjustment for the 25-year average segment rate limits are as follows:

<i>24-Month Average Segment Rates Without 25-Year Average Adjustment</i>			
Applicable Month	First Segment	Second Segment	Third Segment
June 2023	3.03	4.11	4.27

The adjusted 24-month average segment rates set forth in the chart below reflect § 430(h)(2)(C)(iv) of the Code. The

24-month averages applicable for June 2023, adjusted to be within the applicable minimum and maximum percentages of

the corresponding 25-year average segment rates in accordance with § 430(h)(2)(C)(iv) of the Code, are as follows:

<i>Adjusted 24-Month Average Segment Rates</i>				
For Plan Years Beginning In	Applicable Month	First Segment	Second Segment	Third Segment
2022	June 2023	4.75	5.18	5.92
2023	June 2023	4.75	5.00	5.74

30-YEAR TREASURY SECURITIES INTEREST RATES

Section 431 specifies the minimum funding requirements that apply to

multiemployer plans pursuant to § 412. Section 431(c)(6)(B) specifies a minimum amount for the full-funding limitation described in § 431(c)(6)(A), based on the plan's current liability. Section 431(c)

(6)(E)(ii)(I) provides that the interest rate used to calculate current liability for this purpose must be no more than 5 percent above and no more than 10 percent below the weighted average of the rates

¹ Pursuant to § 433(h)(3)(A), the third segment rate determined under § 430(h)(2)(C) is used to determine the current liability of a CSEC plan (which is used to calculate the minimum amount of the full funding limitation under § 433(c)(7)(C)).

of interest on 30-year Treasury securities during the four-year period ending on the last day before the beginning of the plan year. Notice 88-73, 1988-2 C.B. 383, provides guidelines for determining the weighted average interest rate. The rate of interest on 30-year Treasury

securities for May 2023 is 3.86 percent. The Service determined this rate as the average of the daily determinations of yield on the 30-year Treasury bond maturing in February 2053 determined each day through May 10, 2023 and the yield on the 30-year Treasury bond maturing in May

2053 determined each day for the balance of the month. For plan years beginning in June 2023, the weighted average of the rates of interest on 30-year Treasury securities and the permissible range of rates used to calculate current liability are as follows:

For Plan Years Beginning In	<i>Treasury Weighted Average Rates</i>	
	30-Year Treasury Weighted Average	Permissible Range 90% to 105%
June 2023	2.67	2.40 to 2.80

MINIMUM PRESENT VALUE SEGMENT RATES

In general, the applicable interest rates

under § 417(e)(3)(D) are segment rates computed without regard to a 24-month average. Notice 2007-81 provides guidelines for determining the minimum

present value segment rates. Pursuant to that notice, the minimum present value segment rates determined for May 2023 are as follows:

Month	<i>Minimum Present Value Segment Rates</i>		
	First Segment	Second Segment	Third Segment
May 2023	4.91	5.15	5.34

DRAFTING INFORMATION

The principal author of this notice is Tom Morgan of the Office of Associate

Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). However, other personnel from the IRS participated in the development

of this guidance. For further information regarding this notice, contact Mr. Morgan at 202-317-6700 or Tony Montanaro at 626-927-1475 (not toll-free calls).

Table 2023-5
 Monthly Yield Curve for May 2023
 Derived from May 2023 Data

<i>Maturity</i>	<i>Yield</i>								
0.5	5.47	20.5	5.33	40.5	5.35	60.5	5.36	80.5	5.36
1.0	5.26	21.0	5.33	41.0	5.35	61.0	5.36	81.0	5.36
1.5	5.08	21.5	5.33	41.5	5.35	61.5	5.36	81.5	5.36
2.0	4.93	22.0	5.33	42.0	5.35	62.0	5.36	82.0	5.36
2.5	4.83	22.5	5.33	42.5	5.35	62.5	5.36	82.5	5.36
3.0	4.76	23.0	5.33	43.0	5.35	63.0	5.36	83.0	5.36
3.5	4.71	23.5	5.33	43.5	5.35	63.5	5.36	83.5	5.36
4.0	4.69	24.0	5.33	44.0	5.35	64.0	5.36	84.0	5.36
4.5	4.69	24.5	5.33	44.5	5.35	64.5	5.36	84.5	5.36
5.0	4.70	25.0	5.33	45.0	5.35	65.0	5.36	85.0	5.36
5.5	4.72	25.5	5.33	45.5	5.35	65.5	5.36	85.5	5.36
6.0	4.75	26.0	5.33	46.0	5.35	66.0	5.36	86.0	5.36
6.5	4.79	26.5	5.33	46.5	5.35	66.5	5.36	86.5	5.36
7.0	4.83	27.0	5.33	47.0	5.35	67.0	5.36	87.0	5.36
7.5	4.88	27.5	5.33	47.5	5.35	67.5	5.36	87.5	5.36
8.0	4.92	28.0	5.33	48.0	5.35	68.0	5.36	88.0	5.36
8.5	4.97	28.5	5.34	48.5	5.35	68.5	5.36	88.5	5.36
9.0	5.01	29.0	5.34	49.0	5.35	69.0	5.36	89.0	5.36
9.5	5.05	29.5	5.34	49.5	5.35	69.5	5.36	89.5	5.36
10.0	5.09	30.0	5.34	50.0	5.35	70.0	5.36	90.0	5.36
10.5	5.12	30.5	5.34	50.5	5.35	70.5	5.36	90.5	5.36
11.0	5.15	31.0	5.34	51.0	5.35	71.0	5.36	91.0	5.36
11.5	5.18	31.5	5.34	51.5	5.35	71.5	5.36	91.5	5.36
12.0	5.21	32.0	5.34	52.0	5.35	72.0	5.36	92.0	5.36
12.5	5.23	32.5	5.34	52.5	5.35	72.5	5.36	92.5	5.36
13.0	5.25	33.0	5.34	53.0	5.35	73.0	5.36	93.0	5.36
13.5	5.26	33.5	5.34	53.5	5.35	73.5	5.36	93.5	5.36
14.0	5.28	34.0	5.34	54.0	5.35	74.0	5.36	94.0	5.36
14.5	5.29	34.5	5.34	54.5	5.35	74.5	5.36	94.5	5.36
15.0	5.30	35.0	5.34	55.0	5.35	75.0	5.36	95.0	5.36
15.5	5.31	35.5	5.34	55.5	5.35	75.5	5.36	95.5	5.36
16.0	5.31	36.0	5.34	56.0	5.36	76.0	5.36	96.0	5.36
16.5	5.32	36.5	5.34	56.5	5.36	76.5	5.36	96.5	5.36
17.0	5.32	37.0	5.34	57.0	5.36	77.0	5.36	97.0	5.36
17.5	5.32	37.5	5.35	57.5	5.36	77.5	5.36	97.5	5.36
18.0	5.33	38.0	5.35	58.0	5.36	78.0	5.36	98.0	5.36
18.5	5.33	38.5	5.35	58.5	5.36	78.5	5.36	98.5	5.36
19.0	5.33	39.0	5.35	59.0	5.36	79.0	5.36	99.0	5.36
19.5	5.33	39.5	5.35	59.5	5.36	79.5	5.36	99.5	5.36
20.0	5.33	40.0	5.35	60.0	5.36	80.0	5.36	100.0	5.36

Part IV

Notice of Proposed Rulemaking

Section 6417 Elective Payment of Applicable Credits

REG-101607-23

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations concerning the election under the Inflation Reduction Act of 2022 to treat the amount of certain tax credits as a payment of Federal income tax. The proposed regulations describe rules for the elective payment of these credit amounts in a taxable year, including definitions and special rules applicable to partnerships and S corporations and regarding repayment of excessive payments. In addition, the proposed regulations describe rules related to an IRS pre-filing registration process that would be required. These proposed regulations affect tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and, in the case of three of these credits, certain taxpayers eligible to elect the elective payment of credit amounts in a taxable year. This document also provides notice of a public hearing on the proposed regulations.

DATES: Written or electronic comments must be received by August 14, 2023. The public hearing on these proposed regulations is scheduled to be held on August 21, 2023, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by August 14, 2023. If no outlines are received by August 14, 2023, the public hearing will be cancelled. Requests to attend the public hearing must be received

by 5 p.m. ET on August 17, 2023. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the hearing must be received by August 16, 2023.

ADDRESSES: Stakeholders are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG-101607-23) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted, whether electronically or on paper, to the IRS's public docket. Send paper submissions to: CC:PA:LPD:PR (REG-101607-23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION

CONTACT: Concerning the proposed regulations, Jeremy Milton at (202) 317-5665 and James Holmes at (202) 317-5114 (not toll-free numbers); concerning submissions of comments or the public hearing, Vivian Hayes at (202) 317-6901 (not a toll-free number) or by email to publichearings@irs.gov (preferred).

SUPPLEMENTARY INFORMATION:

Background

Section 6417 was added to the Internal Revenue Code (Code) on August 16, 2022, by section 13801(a) of Public Law 117-169, 136 Stat. 1818, 2003, commonly referred to as the Inflation Reduction Act of 2022 (IRA). Section 6417 allows “applicable entities” (including tax-exempt organizations, State and local governments, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, and rural electric cooperatives) to make an election to treat an applicable credit determined with respect to such entity as making a

payment against the tax imposed by subtitle A of the Code (subtitle A), for the taxable year with respect to which such credit was determined, equal to the amount of such credit. Section 6417 also allows certain taxpayers to elect to be treated as applicable entities for limited purposes, as described in part III of this background section. Section 6417 also provides special rules relating to partnerships and S corporations and directs the Secretary of the Treasury or her delegate (Secretary) to provide rules for making elections under section 6417 and to require information or registration necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6417. Section 13801(g) of the IRA provides that section 6417 applies to taxable years beginning after December 31, 2022. This document contains proposed regulations that would amend the Income Tax Regulations (26 CFR part 1) and the Procedure and Administration Regulations (part 301) to implement the statutory provisions of section 6417.

In the Rules and Regulations section of this issue of the *Federal Register*, the Treasury Department and the IRS are issuing temporary regulations under §1.6417-5T that implement the pre-filing registration process described in proposed §1.6417-5 of the proposed regulations. The temporary regulations require applicable entities that want to elect the elective payment of applicable credit amounts to register with the IRS through an IRS electronic portal in advance of the applicable entity filing the return on which the election under section 6417 is made.

I. Overview of Section 6417

Section 6417(a) provides that, in the case of an applicable entity that makes an elective payment election under section 6417 with respect to any applicable credit determined with respect to the applicable entity for the taxable year, the applicable entity is treated as making a payment against the tax imposed by subtitle A, that is, Federal income taxes, for the taxable year with respect to which such credit was determined that is equal to the amount of

such credit (elective payment amount). An election under section 6417 must be made at such time and in such manner as provided by the Secretary.

Section 6417(b) defines the term “applicable credit” to mean each of the following 12 credits:

(1) So much of the credit for alternative fuel vehicle refueling property allowed under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit);

(2) So much of the renewable electricity production credit determined under section 45(a) of the Code as is attributable to qualified facilities that are originally placed in service after December 31, 2022 (section 45 credit);

(3) So much of the credit for carbon oxide sequestration determined under section 45Q(a) of the Code as is attributable to carbon capture equipment that is originally placed in service after December 31, 2022 (section 45Q credit);

(4) The zero-emission nuclear power production credit determined under section 45U(a) of the Code (section 45U credit);

(5) So much of the credit for production of clean hydrogen determined under section 45V(a) of the Code as is attributable to qualified clean hydrogen production facilities that are originally placed in service after December 31, 2012 (section 45V credit);

(6) In the case of a “tax-exempt entity” described in section 168(h)(2)(A)(i), (ii), or (iv) of the Code, the credit for qualified commercial vehicles determined under section 45W of the Code by reason of section 45W(d)(3)¹ (section 45W credit);

(7) The credit for advanced manufacturing production under section 45X(a) of the Code (section 45X credit);

(8) The clean electricity production credit determined under section 45Y(a) of the Code (section 45Y credit);

(9) The clean fuel production credit determined under section 45Z(a) of the Code (section 45Z credit);

(10) The energy credit determined under section 48 of the Code (section 48 credit);

(11) The qualifying advanced energy project credit determined under section 48C of the Code (section 48C credit); and

(12) The clean electricity investment credit determined under section 48E of the Code (section 48E credit).

As described in part II of this Background section, section 6417(d) defines an “applicable entity” and provides generally applicable rules for making elective payment elections. Sections 6417(e) through (h) provide special rules applicable under section 6417 that are described in part II of this Background section. As described in parts III and IV of this Background section, section 6417(c), (d)(1)(B), (C), and (D), and (d) (3) also contain special rules allowing a taxpayer, including for this purpose a partnership or S corporation, that is not an applicable entity (electing taxpayer) to elect to be treated as an applicable entity for the limited purpose of making an elective payment election under section 6417, but only with respect to section 45Q credits, section 45V credits, and section 45X credits. Part V of this Background section describes Notice 2022-50, 2022-43 I.R.B. 325, which, in part, requested feedback from the public on potential issues with respect to the elective payment election provisions under section 6417.

II. *Applicable Entities and General Elective Payment Election Rules*

Section 6417(d)(1)(A) defines the term “applicable entity” to mean:

(1) Any organization exempt from tax imposed by subtitle A;

(2) Any State or political subdivision thereof;

(3) The Tennessee Valley Authority;

(4) An Indian tribal government (as defined in section 30D(g)(9) of the Code);

(5) Any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m))); or

(6) Any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas.

Section 6417(d)(2) provides that, in the case of any applicable entity that makes the election described in section 6417(a), any applicable credit amount is determined (1) without regard to section 50(b)(3) and (4)(A)(i) of the Code (that is, restrictions on property used by tax-exempt organizations and governmental units), and (2) by treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity.

Section 6417(d)(3)(A)(i) provides rules regarding the due date for making any elective payment election. In the case of any government (such as a State, the District of Columbia, an Indian Tribal government, any U.S. territory, or any agency or instrumentality of the foregoing), or political subdivision, described in section 6417(d)(1) and for which no Federal income tax return is required under sections 6011 or 6033(a) of the Code, any election under section 6417(a) cannot be made later than the date as is determined appropriate by the Secretary. In any other case, any election under section 6417(a) cannot be made later than the due date (including extensions of time) for the tax return for the taxable year for which the election is made, but in no event earlier than 180 days after the date of the enactment of section 6417 (that is, in no event earlier than 180 days after August 16, 2022, which is February 13, 2023).

Section 6417(d)(3)(A)(ii) provides that any election under section 6417(a), once made, is irrevocable, and applies (except as otherwise provided in section 6417(d)(3)) with respect to any credit for the taxable year for which the election is made.

Section 6417(d)(3)(B) provides that, in the case of section 45 credits, any election under section 6417(a): (1) applies separately with respect to each qualified facility; (2) must be made for the taxable year in which such qualified facility is originally placed in service; and (3) applies to such taxable year and to any subsequent taxable year that is within the 10-year credit period described in section 45(a)(2)(A)(ii) with respect to such qualified facility.

Section 6417(d)(3)(C) provides that, in the case of section 45Q credits, any

¹The reference should be to 45W(d)(2). This has been corrected in the proposed regulations.

election under section 6417(a): (1) applies separately with respect to the carbon capture equipment originally placed in service by the applicable entity during a taxable year; and (2) applies to such taxable year and to any subsequent taxable year that is within the 12-year credit period described in section 45Q(a)(3)(A) or (4)(A) with respect to such equipment. Section 6417(d)(3)(C)(i)(II)(aa), (d)(3)(C)(ii), and (d)(3)(C)(iii) provides special rules for a taxpayer making the election to be treated as an applicable entity for purposes of section 6417 with respect to the 45Q credit (see part III of this Background section).

Section 6417(d)(3)(D) provides that, in the case of section 45V credits, any election under section 6417(a): (1) applies separately with respect to each qualified clean hydrogen production facility; (2) must be made for the taxable year in which such facility is placed in service (or within the 1-year period subsequent to the date of enactment of section 6417 in the case of facilities placed in service before December 31, 2022); and (3) applies to the taxable year and all subsequent taxable years with respect to such facility. Section 6417(d)(3)(D)(i)(III)(aa), (d)(3)(D)(ii), and (d)(3)(D)(iii) provide special rules for a taxpayer making the election to be treated as an applicable entity for purposes of section 6417 with respect to the 45V credit (see part III of this Background section).

Section 6417(d)(3)(E) provides that, in the case of section 45Y credits, any election under section 6417(a): (1) applies separately with respect to each qualified facility; (2) must be made for the taxable year in which such facility is placed in service; and (3) applies to such taxable year and to any subsequent taxable year that is within the 10-year credit period described in section 45Y(b)(1)(B) with respect to such facility.

Section 6417(d)(4) provides rules regarding when the elective payment is treated as made. Section 6417(d)(4)(A) provides that in the case of any government or political subdivision described

in section 6417(d)(1), and for which no return is required under section 6011 or section 6033(a), the payment described in section 6417(a) is treated as made on the later of the date that a return would be due under section 6033(a) if such government or subdivision were described in section 6033 or the date on which such government or subdivision submits a claim for credit or refund (at such time and in such manner as the Secretary provides). Section 6417(d)(4)(B) provides that, in any other case, the payment described in section 6417(a) is treated as made on the later of the due date (determined without regard to extensions) of the return of tax for the taxable year or the date on which such return is filed with the IRS.

Section 6417(d)(5) provides that, as a condition of, and prior to, any amount being treated as a payment that is made by an applicable entity under section 6417(a), the Secretary may require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6417.

Section 6417(d)(6) provides rules relating to excessive payments. In the case of any amount treated as a payment that is made by the applicable entity under section 6417(a), or the amount of the payment made pursuant to section 6417(c), that is determined to constitute an excessive payment, the tax imposed on such entity by chapter 1 of the Code (chapter 1), regardless of whether such entity would otherwise be subject to chapter 1 tax, for the taxable year in which such determination is made is increased by an amount equal to the sum of (1) the amount of such excessive payment, plus (2) an amount equal to 20 percent of such excessive payment. The increase equal to 20 percent of the excessive payment does not apply if the applicable entity can demonstrate that the excessive payment resulted from reasonable cause.

An excessive payment is defined as, with respect to a facility or property for

which an election is made under section 6417 for any taxable year, an amount equal to the excess of (1) the amount treated as a payment that is made by the applicable entity under section 6417(a), or the amount of the payment made pursuant to section 6417(c), with respect to such facility or property for such taxable year, over (2) the amount of the credit that, without application of section 6417, would be otherwise allowable (as determined pursuant to section 6417(d)(2) and without regard to section 38(c)) with respect to such facility or property for such taxable year.

Section 6417(e) provides a denial of double benefit rule providing that, in the case of an applicable entity making an election under section 6417 with respect to an applicable credit, such credit is reduced to zero and, for any other purpose under the Code, is deemed to have been allowed to such entity for such taxable year.

Section 6417(f) provides a special rule relating to any territory² of the United States with a mirror code tax system (as defined in section 24(k) of the Code). Under this rule, section 6417 will not be treated as part of the income tax laws of the United States for purposes of determining the income tax law of any such U.S. territory unless such U.S. territory elects to have section 6417 be so treated. Currently, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands have mirror code tax systems.

Section 6417(g) provides basis reduction and recapture rules. It states that, except as otherwise provided in section 6417(d)(2)(A),³ rules similar to the rules of section 50 apply for purposes of section 6417.

Section 6417(h) authorizes the Secretary to issue regulations or other guidance as may be necessary to carry out the purposes of section 6417, including guidance to ensure that the amount of the payment or deemed payment made under section 6417 is commensurate with the amount of the credit that would be otherwise allowable (determined without regard to section 38(c)).

² Section 6417(f) uses the term “possession,” but this proposed regulation uses the alternative term “territory.”

³ Section 6417(g) actually states “subsection (c)(2)(A),” but there is no section 6417(c)(2)(A); thus, the proposed regulations correct the reference to state“(d)(2)(A).”

III. Special Rules Relating to Certain Taxpayers Making An Election Under Section 6417(d)(1)(B), (C), or (D) (Electing Taxpayers)

A taxpayer other than an applicable entity under section 6417(d)(1)(A) may make an election under section 6417(d)(1)(B), (C), or (D) at such time and in such manner as the Secretary provides (but no election may be made with respect to any taxable year beginning after December 31, 2032). The election allows the electing taxpayer to be treated as an applicable entity for the limited purpose of making an elective payment election under section 6417 with respect to a section 45V credit, a section 45Q credit, or a section 45X credit, respectively. The special rules for such an election are described in paragraphs III.A, III.B, and III.C of this background section.

A. Electing taxpayers making an election with respect to section 45V credits

Section 6417(d)(1)(B) allows an electing taxpayer to make an elective payment election for any taxable year in which such taxpayer has placed in service a qualified clean hydrogen production facility (as defined in section 45V(c)(3)), but only with respect to a section 45V credit determined in such year with respect to the electing taxpayer. Pursuant to section 6417(d)(3)(D)(i)(III), such electing taxpayer is treated as having made such election for the taxable year with respect to which the election is made and each of the four subsequent taxable years ending before January 1, 2033. Under section 6417(d)(3)(D)(iii), an electing taxpayer may elect to revoke the application of such election, but any such election to revoke, if made, applies to the applicable year specified in such election (but not any prior taxable year) and each subsequent taxable year within the 5-year period and cannot be revoked.

Section 6417(d)(3)(D)(ii) prohibits an electing taxpayer from making a transfer election under section 6418(a) with respect to a section 45V credit for any year for which the electing taxpayer's election under section 6417(d)(1)(B) is in effect.

B. Electing taxpayers making an election with respect to section 45Q credits

Section 6417(d)(1)(C) allows an electing taxpayer to make an elective payment election for any taxable year in which the electing taxpayer has, after December 31, 2022, placed in service carbon capture equipment at a qualified facility (as defined in section 45Q(d)), but only with respect to a section 45Q credit determined in such year with respect to such taxpayer. Pursuant to section 6417(d)(3)(C)(i)(II)(aa), such electing taxpayer is treated as having made such election for the taxable year with respect to which the election is made and each of the four subsequent taxable years ending before January 1, 2033. Under section 6417(d)(3)(C)(iii), an electing taxpayer may elect to revoke the application of such election, but any such election to revoke, if made, applies to the applicable year specified in such election (but not any prior taxable year) and each subsequent taxable year within the 5-year period and cannot be revoked.

Section 6417(d)(3)(C)(ii) prohibits an electing taxpayer from making a transfer election under section 6418(a) with respect to a section 45Q credit for any year for which the electing taxpayer's election under section 6417(d)(1)(C) is in effect.

C. Electing taxpayers making an election with respect to section 45X credits

Section 6417(d)(1)(D) allows an electing taxpayer to make an elective payment election for any taxable year in which the electing taxpayer has, after December 31, 2022, produced eligible components (as defined in section 45X(c)(1)), but only with respect to a section 45X credit determined in such year with respect to such taxpayer. Pursuant to section 6417(d)(1)(D)(ii)(I), such electing taxpayer is treated as having made such election for the taxable year with respect to which the election is made and each of the four subsequent taxable years ending before January 1, 2033. Under section 6417(d)(1)(D)(ii)(II), an electing taxpayer may elect to revoke the application of such election, but any such election to revoke, if made, applies to the applicable year specified in

such election (but not any prior taxable year) and each subsequent taxable year remaining within the 5-year period and cannot be revoked.

Section 6417(d)(1)(D)(iii) prohibits an electing taxpayer from making a transfer election under section 6418(a) with respect to a section 45X credit for any year for which the electing taxpayer's election under section 6417(d)(1)(D) is in effect.

IV. Section 6417 Rules for Partnerships and S corporations

Section 6417(c) provides special rules for partnerships and S corporations that hold directly (as determined for Federal income tax purposes) a facility or property for which an applicable credit is determined. Section 6417(c)(1) provides that, in the case of any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation, any elective payment election must be made by such partnership or S corporation in the manner provided by the Secretary. If such a partnership or S corporation makes an elective payment election with respect to any applicable credit, (1) a payment is made to such partnership or S corporation equal to the applicable credit amount, (2) section 6417(e) is applied with respect to the applicable credit before determining any partner's distributive share, or S corporation shareholder's pro rata share, of such applicable credit, (3) any applicable credit amount with respect to which the election in section 6417(a) is made is treated as tax exempt income for purposes of sections 705 and 1366 of the Code, and (4) a partner's distributive share of such tax exempt income is based on such partner's distributive share of the otherwise applicable credit for each taxable year (an S corporation shareholder's share of tax exempt income is based on the shareholder's pro rata share).

Section 6417(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 section 6417(a) with respect to any applicable credit determined with respect to such facility or property.

V. Notice 2022-50

On October 24, 2022, the Treasury Department and the IRS published Notice 2022-50, 2022-43 I.R.B. 325, to, among other things, request feedback from the public on potential issues with respect to the elective payment election provisions under section 6417 that may require guidance. Over 200 comment letters were received in response to Notice 2022-50. Based in part on the feedback received, the Treasury Department and the IRS are issuing these proposed regulations regarding the elective payment election provisions under section 6417. The major areas with respect to which public stakeholders provided letters are discussed in the following Explanation of Provisions.

Explanation of Provisions

I. General Rules and Definitions

A. Applicable entity

Section 6417(d)(1) defines “applicable entity” as (1) any organization exempt from the tax imposed by subtitle A, (2) any State or political subdivision thereof, (3) the Tennessee Valley Authority, (4) an Indian tribal government (as defined in section 30D(g)(9)), (5) any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m))), or (6) any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas. Proposed §1.6417-1(c) would clarify these statutory definitions pursuant to the Secretary’s authority under section 6417(h) to issue regulations necessary to carry out the purposes of section 6417, as discussed below.

1. Any organization exempt from the tax imposed by subtitle A

Stakeholders asked for clarification on the scope of the phrase “any organization

exempt from the tax imposed by subtitle A” for purposes of determining whether a taxpayer is an applicable entity. Entities may be exempt from tax or have their income exempt from tax under various authorities. For example, an organization could be exempt from taxation by section 501(a) of the Code or by other provisions of the Code. An organization could also have its income excluded from taxation by section 115.

The Treasury Department and the IRS propose to define the term “any organization exempt from the tax imposed by subtitle A” to include all organizations exempt from the tax imposed by subtitle A by section 501(a) of the Code, commonly referred to as “tax-exempt organizations.”

Several stakeholders requested clarification that tax-exempt entities in the U.S. territories are eligible to make an election under section 6417. Under these proposed regulations, such entities would be considered organizations exempt from the tax imposed by subtitle A as long as they are exempt from taxation by section 501(a) and as long as they meet the requirements to claim an applicable credit (such as being an appropriate owner of an investment credit property under sections 50(b)(1)(B) and 168(g)(4)(G)).⁴

Stakeholders also asked whether an entity classified as a nonprofit under State law but that does not have Federal tax-exempt status would be described in section 6417(d)(1)(A). Such an entity would not be described in section 6417(d)(1)(A) because it is not exempt from the tax imposed by subtitle A (unless it met the requirements of another type of applicable entity discussed below, such as a state instrumentality).

Stakeholders also specifically sought clarification as to whether governments of U.S. territories would be treated as applicable entities, based on their unique status and the importance of their energy security. These stakeholders noted that the renewable energy credits generally may be claimed for activities in

the U.S. territories provided the underlying requirements are met, including the specific ownership requirements for investment tax credits.⁵ In response, the proposed regulations would interpret the term “organization exempt from the tax imposed by subtitle A” as used in section 6417(d)(1)(A) to include the governments of the U.S. territories. Since section 115(2) excludes the income accruing to the government of any territory of the United States, or any political subdivision thereof, from gross income, it effectively exempts these governments from the tax imposed by subtitle A. In addition, these governments may properly be viewed as organizations.⁶ Accordingly, proposed §1.6417-1(c)(1)(ii) would provide that the government of any U.S. territory, or a political subdivision thereof, is an applicable entity for purposes of section 6417 or provisions of law referencing section 6417(d)(1)(A).

The Treasury Department and the IRS request comments on this definition of any organization exempt from the tax imposed by subtitle A, including as to whether the term should encompass the United States, federal agencies, or other organizations beyond those listed in these proposed rules.

2. Any State or political subdivision thereof

Section 6417(d)(1)(A)(ii) states that “any State or political subdivision thereof” is an applicable entity for purposes of section 6417.

The Treasury Department and the IRS note that section 7701(a)(10) provides that the term “State” must be construed to include the District of Columbia where such construction is necessary to carry out provisions of Title 26, and thus propose that the definition of State would include the District of Columbia. The Treasury Department and the IRS request comments on whether additional clarification is needed.

⁴Section 50(b)(1) provides that no investment tax credit can be determined with respect to property used predominantly outside of the United States, but section 50(b)(1)(B) provides an exception for property described in section 168(g)(4). In the case of entities, section 168(g)(4)(G) describes property which is owned by a domestic corporation and which is used predominantly in a U.S. territory by such a corporation, or by a corporation created or organized in, or under the law of, a U.S. territory.

⁵See footnote 2.

⁶The Code and the regulations under 26 CFR part 1 occasionally refer to governmental entities as organizations. For example, section 509(a)(1) refers to “an organization described in section 170(b)(1)(A),” which includes a governmental unit described in sections 170(b)(1)(A)(v) and 170(c)(1). See corresponding rules in §1.170A-9(a) and (e).

3. Indian tribal governments

Section 6417(d)(1)(A)(iv) states that an applicable entity includes an Indian tribal government (as defined in section 30D(g)(9)). To provide Indian tribal governments parity with state governments, proposed §1.6417-1(c)(3) would include subdivisions of Indian tribal governments in this definition.

Section 30D(g)(9) provides that “the term “Indian tribal government” means the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the list published most recently as of the date of enactment of this subsection pursuant to section 104 of the Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131). Thus, proposed §1.6417-1(k) would incorporate this definition into the 6417 regulations. See Rev. Proc. 2008-55, 2008-39 I.R.B. 768 (generally providing that an Indian tribal entity that appears on the most recent list published by the Department of the Interior in the *Federal Register* pursuant to the requirements of the List Act is designated an Indian tribal government for purposes of section 7701(a)(40)).

The Treasury Department and the IRS request comments regarding the definitions in proposed §1.6417-1(c)(3) and (k), including as to whether any further clarification would be warranted. The Treasury Department and the IRS further request comments on whether the proposed definitions encompass the entity structures that Indian tribal governments employ in activities that would give rise to elective payments, including entities with partial Indian tribal government ownership.

4. Alaska Native Corporations

Section 6417(d)(1)(A)(v) provides that an applicable entity for purposes of section 6417(a) includes “any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)).” A “Native Corporation” is defined in 43 U.S.C. 1602(m) to mean “any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation,” which are

organized under the laws of the State of Alaska. Although 43 U.S.C. 1606(d) provides that a Regional Corporation is incorporated to conduct business for profit, each of a Village Corporation, Urban Corporation, and Group Corporation may be organized as a business for profit or nonprofit corporation to hold rights and assets for Native villages, urban communities of Natives, or members of a Native group.

A few stakeholders requested that a Settlement Trust (within the meaning of 43 U.S.C. 1602(t)) that is established by an Alaska Native Corporation (ANC) for the benefit of its shareholders also be treated as an applicable entity. The stakeholders stated that an ANC is a separate legal entity that is required to be a C corporation for Federal income tax purposes, and as such, it is an entity different from the Settlement Trust established by the ANC. However, the beneficiaries of the ANC Settlement Trust are typically the same Native individuals as the shareholders of the ANC. The stakeholders thus asked that an ANC Settlement Trust be added as an applicable entity in cases in which the Settlement Trust is directly affiliated with an applicable ANC.

Unlike the case of the statutory definitions of “Indian Tribal government,” the statutory definition of ANC is not ambiguous. Accordingly, the proposed regulations would not treat Settlement Trusts as ANCs. However, Settlement Trusts could themselves be applicable entities not based on their relationship with an ANC if they qualified for exempt status under section 501(a) and applied for and received a determination letter from the IRS recognizing any such tax-exempt status.

Separately, an ANC may be the common parent of a consolidated group of corporations (ANC-parented group) that, in many ways, is treated similarly to a single taxpayer for Federal income tax purposes by the consolidated return regulations (§§1.1502-1, et seq.). For example, the members of a consolidated group report their consolidated taxable income on a single Federal income tax return that the common parent files with the IRS as the agent for the group under §1.1502-77. In this regard, some stakeholders have inquired whether non-ANC members of an ANC-parented group

may separately make an elective payment election with respect to a section 45V credit, a section 45Q credit, or section 45X credit determined with respect to such member. The concern appears to be that, by reason of their affiliation with an ANC common parent, the non-ANC members might be prevented from making an election under section 6417(d)(1)(B), (C), or (D).

The proposed regulations would clarify that a non-ANC member of an ANC-parented group may qualify as an electing taxpayer eligible to make elections under section 6417(d)(1)(B), (C), or (D), based on its own corporate status. See —As with any other electing taxpayer, a non-ANC member of an ANC-parented group would be required to —section 6417(d)(1)(B), (C), or (D) —

The Treasury Department and the IRS request comments regarding the definition in proposed §1.6417-1(c)(4) and whether additional guidance is necessary regarding consolidated groups with ANC common parents.

5. Tennessee Valley Authority

As per section 6417(d)(1)(A)(iii), the Tennessee Valley Authority would be an applicable entity under proposed §1.6417-1(c)(5).

6. Rural Electrical Co-ops

Section 6417(d)(1)(A)(vi) provides that “any corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas” is an applicable entity. These proposed regulations do not elaborate on this definition, but request comments on whether further clarification of the definition in proposed §1.6417-1(c)(6) is necessary.

Stakeholders asked that any payment under section 6417(a) not be considered income for purposes of the 85-percent income test under section 501(c)(12) for electric cooperatives. Because the section 6417(a) election results in a credit being treated as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credit was determined, any such payment that results in a refund being issued by the IRS to an electric cooperative under section 6417(a)

will not affect the application of the 85-percent income test determined with respect to the electric cooperative.

The Treasury Department and the IRS request comments on whether additional guidance is necessary to address any uncertainty that may exist regarding the application of section 6417 in the context of a consolidated group with members that are cooperatives subject to the rules of subchapter T of chapter 1.

7. *Agencies and instrumentalities*

Based on feedback from stakeholders, the Treasury Department and the IRS believe that, in many instances, States, Indian tribal governments, U.S. territories, or political subdivisions thereof are likely to make investments or engage in activities that qualify for applicable credits through their agencies and instrumentalities. Multiple stakeholders requested that State and local government agencies and instrumentalities be included as applicable entities under a variety of theories, including cross-references to sections 50(b)(4)(A)(i) and 168(h)(2)(A)(i) in section 6417, the fact that the income of an instrumentality is generally excluded from tax by section 115 of the Code, and the authority provided by section 6417(h) to issue regulations necessary to carry out the purposes of section 6417. In particular, stakeholders stated that the term “Indian tribal government” should be defined to include, in part, economic subdivisions of a tribe (such as a utility, housing authority, energy division or authority, or other enterprise) regardless of how the entity is formed (whether by Federal, Tribal or State law).

It would be administratively burdensome, both for stakeholders and for the IRS, to determine what is part of a State, Indian tribal government, U.S. territory, or political subdivision, on the one hand, and what is an agency or instrumentality thereof on the other hand.⁷ For example, stakeholders expressed uncertainty about whether certain entities, such as school districts, public utility districts, and special purpose entities established by governments (such as joint action agencies,

economic development corporations, and joint powers authorities) would qualify as political subdivisions or would be viewed as agencies or instrumentalities. Stakeholders also noted that the status of such entities as political subdivisions may turn on differences in state law, such as whether a school district has taxing authority.

In addition, different States may structure ownership of relevant property differently (for example, a school district or the county of the school district may own the electric school buses), and it would be inequitable for entities to be eligible or ineligible for elective payment on the basis of such differences in ownership structures. Furthermore, if agencies and instrumentalities were not specifically listed as applicable entities, States and political subdivisions may decide to create new entities or reorganize the administration of their activities to perform applicable credit eligible activities directly, which would be administratively burdensome without a commensurate public benefit. For these reasons, and to promote uniform treatment throughout the United States, proposed §1.6417-1(c)(7) would provide that applicable entities include any agency or instrumentality of any State, the District of Columbia, Indian tribal government, U.S. territory, or political subdivision thereof.

The Treasury Department and the IRS request comments on this approach to defining applicable entities and on whether further guidance is necessary.

8. *Electing taxpayers*

Certain taxpayers may make an election to be treated as an applicable entity with respect to applicable credit property giving rise to the section 45Q credit, section 45V credit, or section 45X credit, as described in part III of this Explanation of Provisions. Proposed §1.6417-1(g) defines an “electing taxpayer” as any taxpayer that is not an applicable entity, but makes an election in accordance with proposed §§1.6417-2(b), 1.6417-3, and, if applicable, 1.6417-4, to be treated as an applicable entity for a taxable year with respect to

applicable credits determined with respect to an applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7). Section 7701(a)(14) defines a “taxpayer” as any person subject to any internal revenue tax, including income taxes, employment taxes, and excise taxes.

Members of a consolidated group that is not an ANC-parented group also may make an election to be treated as an applicable entity with respect to the section 45Q credit, section 45V credit, or section 45X credit. A member of the consolidated group would be required to — The Treasury Department and the IRS request comments regarding the application of section 6417 to consolidated groups with electing taxpayers (for example, whether special rules are necessary for consolidated groups under proposed §1.6417-2(e)(2) (the *denial of double benefit* rule).

B. *Entities formed by an applicable entity or by an electing taxpayer*

1. *Disregarded entities*

Several stakeholders asked whether an entity disregarded as separate from its owner (disregarded entity) is described in section 6417(d)(1)(A) if its owner is described in section 6417(d)(1)(A). Since a disregarded entity is disregarded for Federal income tax purposes and its attributes are attributed to the owner regarded for Federal income tax purposes, the disregarded entity’s activities would be attributed to the owner and the owner could claim the credit as long as the owner is described in section 6417(d)(1)(A). This would also include property that an electing taxpayer that is a partnership or S corporation holds through a disregarded entity or multiple disregarded entities, including tiers of multiple disregarded entities owned through chains of ownership. Thus, proposed §§1.6417-2(a)(1)(ii) and -2(a)(2)(iv) would provide that, if an applicable entity or electing taxpayer is the owner (directly or indirectly) of a disregarded entity that directly holds an applicable credit property, the applicable entity may make an elective payment election for applicable credits determined with

⁷The definitions of political subdivision under §1.103-1(b) and of instrumentality under Rev. Rul. 57-128, 1957-1 C.B. 311, are frequently cited for Federal tax purposes.

respect to the applicable credit property held directly by the disregarded entity.

2. Taxable C corporations

Stakeholders also asked whether an entity described in section 6417(d)(1)(A) could create an entity that is a taxable C corporation to perform the applicable credit activity and still qualify for the section 6417 election. Because a taxable C corporation is an entity separate from its owner, proposed §1.6417-1(c)(1) would not include a C corporation that is not itself an applicable entity described in proposed §1.6417-1(c)(1), even if its owner is an applicable entity described in proposed §1.6417-1(c)(1). However, an electing taxpayer may include a taxable C corporation (including a member of a consolidated group).

3. Undivided ownership interests

Stakeholders also asked whether entities such as unincorporated joint ventures could provide applicable entities access to earning applicable credits available for an elective payment election, including by partnering with other applicable entities or with for-profit entities. Proposed §1.6417-2(a)(1)(iii) would provide that, if an applicable entity is a co-owner of an applicable credit property through an ownership arrangement treated as a tenancy-in-common or pursuant to a joint operating arrangement that has properly elected out of subchapter K of chapter 1 of the Code (subchapter K) under section 761, then each owner is considered to own an undivided interest in or share of the underlying applicable credit property and thus, any applicable credits are determined separately with respect to each owner. As a result, an applicable entity may make an elective payment election under section 6417(a) in the manner provided in paragraph (b) with respect to its share of the applicable credits determined with respect to its undivided ownership interest in or share of the underlying applicable credit property.

4. Partnerships

Many stakeholders questioned whether a partnership that contains

partners described in section 6417(d)(1)(A) could make an elective payment election under section 6417 with respect to those partners, pointing to the “determined with respect to such entity” language in section 6417(a). Stakeholders stated that clarity around the treatment of these partnerships is of particular importance as many applicable entities choose to partner with non-applicable entities in investment and development of credit generating projects, that applicable entities may not have the expertise or resources to own such projects outright, and that the ability to partner is key to their meaningful participation in the energy transition.

The Treasury Department and the IRS believe that the better interpretation of the “determined with respect to such entity” language in section 6417(a), as well as the rules in sections 6417(c), is to apply entity-specific rules under section 6417. Section 6417(c) refers to a credit determined with respect to any facility or property “held directly by a partnership or S corporation,” meaning that the partnership or S corporation, not its owners, is the relevant entity for these purposes. Additionally, section 6417(c) provides that the partnership or S corporation, not the partners or shareholders, makes the section 6417 election. Furthermore, because section 6417 elections are made for a particular applicable credit property, allowing a section 6417 election for a portion of an applicable credit property would be contrary to section 6417(a) and, if permitted, would be difficult to administer, particularly in tiered partnership structures.

Thus, proposed §1.6417-2(a)(1)(iv) would provide that partnerships and S corporations are not applicable entities described in section 6417(d)(1)(A) and proposed §1.6417-1(c). This proposed rule would apply no matter how many of the partners or shareholders are described in section 6417(d)(1)(A) and proposed §1.6417-1(c), including if all partners or shareholders are described in section 6417(d)(1)(A) and proposed §1.6417-1(c). However, because section 6418(f)(2) defines “eligible taxpayer” as any taxpayer that is not described in section 6417(d)(1)(A) (and thus not in proposed §1.6417-1(c)), such a partnership would

be an eligible taxpayer described in section 6418(f)(2).

In addition, as described in part I.B.3. of this Explanation of Provision, an applicable entity may engage with other entities, including with for-profit partners, in an ownership arrangement that has properly elected out of subchapter K and make an elective payment election under section 6417(a) with respect to its share of the applicable credits determined with respect to its share of the underlying applicable credit property. This type of arrangement provides some flexibility for tax-exempt and government entities to participate in section 6417 with other entities. The Treasury Department and the IRS request comments on whether any additional rules are needed. Comments are also requested regarding whether any entity described in section 6417(d)(1)(A)(i)-(vi) or proposed §1.6417-1(c) could include an entity organized as a partnership for Federal tax purposes.

As described in part IV of this Explanation of Provisions, an electing taxpayer may include a partnership or S corporation.

C. Applicable credit

Section 6417(b) lists the applicable credits for which a section 6417(a) election is available. Proposed §1.6417-1(d) lists those credits, with minor changes to account for erroneous cross-references in the statute.

Stakeholders asked for clarification on the scope of the credit for qualified commercial vehicles. Section 6417(b)(6) states that the term “applicable credit” includes the credit for qualified commercial vehicles determined under section 45W by reason of subsection (d)(2)⁸ thereof, “in the case of a tax-exempt entity described in clause (i), (ii), or (iv) of section 168(h)(2)(A).” In order to qualify for elective pay for the section 45W credit, an entity would need to be both be an applicable entity, as defined in proposed §1.6417-1(c), and a tax-exempt entity described in clause (i), (ii), or (iv) of section 168(h)(2)(A) (in other words, an organization exempt from the tax imposed by subtitle A by reason of section 501(a) of the Code; a State, the District of Columbia, a political

subdivision thereof, or any agency or instrumentality of any of the foregoing; a U.S. territory, a political subdivision thereof, or any agency or instrumentality of any of the foregoing; or an Indian tribal government, a subdivision thereof, or any agency or instrumentality of any of the foregoing), and would also need to otherwise qualify for the section 45W credit.

One stakeholder asked whether the elective payment election applies to both the applicable credit and any eligible bonus credit amounts. The amount of applicable credit is determined, in part, under the Code by including any eligible bonus credit amounts. The entire amount of any applicable credit is eligible under the Code for the elective payment election, assuming all the relevant requirements are met.

Several stakeholders asked whether the applicable entity could treat the applicable credits arising during a quarter as a payment against quarterly estimated tax (assuming such an amount was due). These proposed regulations do not contain a special rule because taxpayers can determine, based on their projected tax liability, the correct amount of estimated tax to pay in order to avoid a section 6654 or section 6655 estimated tax penalty at the end of the year.

Because registration must be made with respect to each facility or property giving rise to an applicable credit, proposed §1.6417-1(e) defines “applicable credit property” for purposes of each of the applicable credits, and the section 6417 regulations use the term “applicable credit property” throughout for clarity.

D. Definitions pertaining to the election

Proposed §1.6417-1(i) would provide that the “elective payment election” is the election provided in proposed §1.6417-2(b). Proposed §1.6417-1(h) would provide that the “elective payment amount” means, with respect to an applicable entity or an electing taxpayer that is not a partnership or an S corporation, the applicable credit(s) for which an applicable entity or

electing taxpayer makes an elective payment election to be treated as making a payment against the tax imposed by subtitle A for the taxable year, which would be equal to the sum of (1) the amount (if any) of the current year applicable credit(s) allowed as a general business credit (GBC) under section 38 for the taxable year, and (2) the amount (if any) of unused current year applicable credits which would otherwise be carried back or carried forward from the unused credit year under section 39 and that are treated as a payment against tax. With respect to an electing taxpayer that is a partnership or an S corporation, the term “elective payment amount” would mean the sum of the applicable credit(s) for which the partnership or S corporation makes an elective payment election and results in a payment to such partnership or S corporation equal to the amount of such credit(s) (unless the partnership or S corporation owes a Federal tax liability, in which case the payment may be reduced by such tax liability).

E. Guidance

Interpretations and procedures pertaining to section 6417 and the section 6417 regulations may be issued through guidance, as appropriate. Proposed §1.6417-1(j) would define “guidance” for purposes of these regulations as guidance published in the *Federal Register* or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the IRS.gov website.

F. Annual Tax Return

To avoid any confusion about where the elective payment election should be made, proposed §1.6417-1(b) would define “annual tax return,” for purposes of the section 6417 regulations, as follows: (1) for any taxpayer normally required to file an annual tax return with the IRS, such annual return (including the Form 1065, “U.S. Return of Partnership Income,” for partnerships and the Form

990-T for organizations with unrelated business income tax or a proxy tax under section 6033(e)); (2) for any taxpayer that is not normally required to file an annual tax return with the IRS (such as taxpayers located in the U.S. territories), the return they would be required to file if they were located in the United States, or, if no such return is required (such as for State, District of Columbia, local, or Indian tribal governmental entities), the Form 990-T; and (3) for short tax year filers, the short year tax return. For example, an individual in a U.S. territory would file a Form 1040, “U.S. Individual Income Tax Return,” a corporation in a U.S. territory would file a Form 1120, “U.S. Corporation Income Tax Return,” and the U.S. territory itself would file Form 990-T, “Exempt Organization Business Income Tax Return (and proxy tax under section 6033(e).” Similarly, a tax-exempt entity would file the Form 990-T even if not otherwise required to file the Form 990-T.

II. Rules for Making Elective Payment Elections

A. In general

Proposed §1.6417-2 would provide general rules for an applicable entity or electing taxpayer to make an elective payment election under section 6417 in accordance with the rules of proposed §1.6417-2(b) with respect to any applicable credit determined with respect to such entity.

Proposed §1.6417-2(a)(1) would provide the rules for applicable entities making elective payment elections. An applicable entity that makes an elective payment election in the manner described in Part II.B. of this Explanation of Provisions would be treated as making a payment against the Federal income taxes imposed by subtitle A, for the taxable year with respect to which an applicable credit was determined, in the amount of such credit as determined under the rules discussed in Part II.C. of this Explanation of Provisions. Proposed

⁸ While section 6417(b)(6) refers to section 45W(d)(3), the reference should be to section 45W(d)(2). This has been corrected in the proposed regulations

§1.6417-2(d)(1) would provide that the payment described in proposed §1.6417-2(a)(1) is treated as made (1) in the case of an entity for which no return is required under sections 6011 or 6033(a), on the later of the date that a return would be due under section 6033(a) (determined without regard to extensions) if such entity were described in that section, or the date on which such entity submits a claim for credit or refund, and (2) in any other case, on the later of the due date (determined without regard to extensions) of the return of tax for the taxable year, or the date on which such return is filed.

Special rules are provided in proposed §1.6417-2(a)(1)(ii) through (v) that would apply for applicable entities if the election is made for applicable credit property held by a disregarded entity; if the applicable entity is a co-owner in an applicable credit property through an ownership arrangement properly treated as a tenancy-in-common, or pursuant to a joint operating arrangement that has properly elected out of subchapter K under section 761; and for members of a consolidated group of which an Alaska Native Corporation is the common parent.

As discussed in Part I.B.4 of this Explanation of Provisions, partnerships and S corporations would not be applicable entities described in proposed §1.6417-1(c)(1), and thus would not be eligible to make an elective payment election unless the partnership or S corporation is an electing taxpayer.

Proposed §1.6417-2(a)(2) would provide the rules for electing taxpayers making an elective payment election. An electing taxpayer other than a partnership or an S corporation that has made an elective payment election in accordance with proposed §§1.6417-3 and §1.6417-2(b) would be treated as making a payment against the Federal income taxes imposed by subtitle A for the taxable year with respect to which the applicable credit is determined in the amount determined under proposed §1.6417-2(c). Proposed §1.6417-2(d)(1) would provide that the payment described in proposed §1.6417-2(a)(2) is treated as made at the same time as made by an applicable entity. However, in the case of an electing taxpayer that is a partnership or S corporation that has made

an elective payment election in accordance with proposed §§1.6417-3, 1.6417-4, and 1.6417-2(b), the IRS will make a payment to such partnership or S corporation equal to the amount of such credit determined under proposed §§1.6417-2(b) and 1.6417-4(d)(3) (unless the partnership or S corporation owes any Federal income tax liability, in which case the payment may be reduced by such tax liability).

Proposed §1.6417-2(a)(2) also provides special rules for electing taxpayers that would apply if the election is made for applicable credit property held by a disregarded entity; if the applicable entity is a co-owner in an applicable credit property through an ownership arrangement properly treated as a tenancy-in-common, or pursuant to a joint operating arrangement that has properly elected out of subchapter K under section 761; and for members of a consolidated group.

Proposed §1.6417-2(a)(3)(i)-(iv) would address the special rules with regard to the election for credits under section 45, 45V, 45Q, or 45Y, as provided in section 6417(d)(3). However, the special rules in section 6417(d)(3) that relate to electing taxpayers are set forth in proposed §1.6417-3, for clarity.

Consistent with the special rule for electing taxpayers that may elect to be treated as an applicable entity for purposes of section 6417 for up to five years with respect to a facility placed in service that produces eligible components (as defined in section 45X(c)(1)), proposed §1.6417-2(a)(3)(v) would clarify that a section 45X election is made, for purposes of section 6417, with respect to a facility (whether the facility existed on or before, or after, December 31, 2022) at which a taxpayer produces, after December 31, 2022, eligible components as defined in section 45X(c)(1) during the taxable year.

B. Manner of making the election

Section 6417(a) provides that the elective payment election is made “at such time and in such manner as the Secretary may provide,” and proposed §1.6417-2(b) would provide those rules. First, proposed §1.6417-2(b)(1) provides that an applicable entity or electing taxpayer would make an elective payment election on the applicable entity’s or electing taxpayer’s

annual tax return, as defined in §1.6417-1(b), in the manner prescribed by the IRS in guidance, along with any required completed source credit form(s) with respect to the applicable credit property, a completed Form 3800, *General Business Credit*, (or its successor), and any additional information, including supporting calculations, required in instructions to the relevant forms.

Proposed §1.6417-2(b)(1)(iv) would provide that an elective payment election may only be made on an original return (including any revisions on a superseding return) filed not later than the due date (including extensions of time) for the original return for the taxable year for which the applicable credit is determined. No elective payment election may be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There also would be no relief available under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations (26 CFR part 301) for an elective payment election that is not timely filed.

Second, proposed §1.6417-2(b)(2) would specify that pre-filing registration—is a condition of any amount being treated as a payment that is made by an applicable entity under section 6417(a). An elective payment election will not be effective with respect to applicable credits determined with respect to an applicable credit property unless the applicable entity or electing taxpayer received a valid registration number for the applicable credit property and provided the registration number for each applicable credit property on its Form 3800 (or its successor) attached to the tax return in accordance with guidance.

Third, proposed §1.6417-2(b)(3) would provide the due date for the election under section 6417(a). In the case of any entity for which no Federal income tax return is required under sections 6011 or 6033(a) of the Code (such as a governmental entity), the elective payment election must be made no later than the due date (including an extension of time) for the original return that would be due under section 6033(a) if such applicable entity were described in that section. Under section 6072(e), that date is the 15th day of the fifth month after the

taxable year determined by section 441 of the Code. Subject to issuance of guidance that specifies the manner in which an entity for which no Federal income tax return is required under sections 6011 or 6033(a) of the Code could request an extension of time to file, an automatic paperless six-month extension from the original due date is deemed to be allowed.

In the case of any taxpayer that is not normally required to file an annual tax return with the IRS (such as those located in the U.S. territories), the elective payment election must be made no later than the due date (including extensions of time) that would apply if the taxpayer was located in the United States (such as the 15th day of the fourth month after the end of the year for individuals filing Form 1040 or for corporations filing Form 1120). For example, an individual in a U.S. territory would be required to make the elective payment election on or before the 15th day of April following the close of the calendar year, or, if they filed an extension, on or before the 15th day of October following the close of the calendar year.

In any other case, the elective payment election must be made no later than the due date (including extensions of time) for the original return for the taxable year for which the election is made, but in no event earlier than February 13, 2023.

Fourth, proposed §1.6417-2(b)(4) would provide that any election under section 6417(a), once made, is irrevocable and applies with respect to any applicable credit for the taxable year for which the election is made.

Under section 6417, the election period applies for a period of years with respect to certain applicable credits. Specifically, for the section 45 credit or section 45Y credit, the election applies to the 10-year period beginning on the date the facility was originally placed in service. For the section 45Q credit, the election applies to the 12-year period beginning on the date the equipment was originally placed in service. For the section 45V credit, the election applies to all subsequent taxable years with respect to the facility.

Electing taxpayers make the election for one five-year period per applicable credit property, but are allowed one

revocation per applicable credit property, as provided in section 6417(d)(1)(D) and (d)(3)(C) and (D), and would be provided in proposed §1.6417-3 (as described in part III of this Explanation of Provisions).

Fifth, proposed §1.6417-2(b)(5) would provide that an elective payment election applies to the entire amount of applicable credit(s) determined with respect to each applicable credit property that was properly registered for the taxable year, resulting in an elective payment amount that is the entire amount of applicable credit(s) determined with respect to the applicable entity or electing taxpayer for a taxable year.

C. Determination of Applicable Credit

Proposed §1.6417-2(c) would provide three rules relating to the determination of any applicable credit.

1. Special rules for tax-exempt organizations and government entities

In accordance with section 6417(d)(2), proposed §1.6417-2(c)(1) would provide that, in the case of any applicable entity that makes the election described in section 6417(a), any applicable credit is determined (1) without regard to the restrictions regarding use of property by tax-exempt organizations and government entities found in sections 50(b)(3) and (4)(A)(i), and (2) by treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity.

Proposed §1.6417-2(c)(2) elaborates on the effect of the “trade or business” rule in section 6417(d)(2) and proposed §1.6417-2(c)(1)(ii). First, the rule would allow tax-exempt and government entities to take advantage of applicable credits even outside of the unrelated business taxable income context (provided other requirements are met) by allowing the entity to treat an item of property as if it is of a character subject to an allowance of depreciation (such as under sections 30C and 45W); to produce items “in the ordinary course of a trade or business of the taxpayer” (such as in sections 45V and 45X); and to state that an item of property is one for which depreciation (or amortization in lieu of depreciation)

is allowable (such as in sections 48, 48C, and 48E).

Second, the rule allows the entity to apply the capitalization and accelerated depreciation rules (such as sections 167, 168, 263 and 263A) that apply to determining the basis and the depreciation allowance for property used in a trade or business.

Third, the rule makes applicable general limitations on the use of credits by those persons engaged in the conduct of a trade or business, such as section 49 in the context of investment tax credits, and section 469 for all applicable credits. For section 49 to apply for purposes of section 6417, the property must be placed in service by an applicable entity or electing taxpayer described in section 465(a)(1) (that is, an individual or a C corporation with respect to which the stock ownership requirements of section 542(a)(2) are met). For section 469 to apply for purposes of section 6417, the applicable entity or electing taxpayer would need to be described in section 469(a)(2) (that is, an individual, estate or trust, a closely held C corporation, or a personal service corporation). Thus, for any applicable entity or electing taxpayer for which section 49 or 469 generally applies, those sections apply with respect to the determination of applicable credits under section 6417. The Treasury Department and the IRS request comments on whether any additional clarification is needed regarding the application of sections 49 and 469 to applicable entities or electing taxpayers determining the amount of an applicable credit.

Lastly, the rule does not create any presumption that the trade or business is related (or unrelated) to a tax-exempt entity’s exempt purpose.

2. Special rule for investment-related credit property acquired with income, including income from certain grants and forgivable loans, that is exempt from taxation under subtitle A

Multiple stakeholders asked that regulations clarify whether an applicable entity that funded the purchase of an investment credit property with income, including income from certain grants and forgivable loans, that is exempt from

taxation under subtitle A (Tax-Exempt Amounts⁹) can include those amounts in the basis of the property for purposes of calculating the amount of the investment tax credit. Stakeholders also noted that in some cases the full cost of the investment credit property can be paid through Tax-Exempt Amounts.

Generally, the basis of property is the cost of such property. See section 1012 of the Code. However, for a taxable entity, cost basis in property may need to be reduced if Tax-Exempt Amounts are used for the purpose of purchasing, constructing, or otherwise acquiring such property. See for example, sections 118(a) and 362(c)(2) of the Code. However, grants and forgivable loans received by taxable entities are generally taxable, and thus generally do not result in a reduction in basis. See generally section 61 of the Code.

For tax-exempt and government entities, for which grants, forgivable loans, and other amounts are generally exempt from taxation under subtitle A, the treatment of such Tax-Exempt Amounts with respect to basis in property is less clear. Because these entities may acquire investment credit properties eligible for the section 6417(a) election, in whole or in part, with Tax-Exempt Amounts, if such amounts were not included in the basis of the investment credit property (that is, they resulted in a reduction in the basis of the investment credit property), the applicable entity may have little or no basis with respect to which to calculate the credit, which would frustrate Congressional intent to provide the section 6417(a) election for investment credit properties owned by such entities. However, as stakeholders noted, allowing an elective payment for an applicable tax credit when the investment credit property was fully purchased with Tax-Exempt Amounts subject to donor restrictions for that purpose would result in an aggregate benefit to the applicable entity in excess of the cost of the property. As a result, a few stakeholders suggested that local, State, and Federal government grants received as Tax-Exempt Amounts by applicable entities specifically for acquisition of investment credit property should not be included in the basis of such

property for purposes of calculating the applicable credit for the elective payment under section 6417.

Proposed §1.6417-2(c)(3) would provide a special rule for investment credit property acquired with Tax-Exempt Amounts and would expand the rule to other credits that are determined on the basis of property. The rule states that, for purposes of 6417, any Tax-Exempt Amounts used to purchase, construct, reconstruct, erect, or otherwise acquire an applicable credit property described in sections 30C, 45W, 48, 48C, or 48E (investment-related credit property) are included in basis for purposes of computing the applicable credit amount determined with respect to the investment-related credit property, regardless of whether basis is required to be reduced (in whole or in part) by such amounts under other provisions of the Code.

However, to prevent an excessive benefit, proposed §1.6417-2(c)(3) would provide that, if an applicable entity receives Tax Exempt Amounts for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment credit property (Restricted Tax Exempt Amount), and the Restricted Tax-Exempt Amount plus the applicable credit otherwise determined with respect to that investment-related credit property exceeds the cost of the investment-related credit property, then the amount of the applicable credit is reduced so that the total amount of applicable credit plus the amount of any Restricted Tax Exempt Amount equals the cost of investment credit property.

Proposed §1.6417-2(c)(5) contains three examples illustrating these rules.

3. Credits must be determined with respect to the applicable entity or electing taxpayer

Multiple stakeholders asked that regulations clarify whether applicable entities may “chain” an election under section 6417(a) for credits obtained from other sources. For example, stakeholders questioned whether an applicable entity may make an elective payment election under

section 6417(a) with respect to purchased credits under section 6418(a) or credits allowable to the applicable entity because of an election under section 45Q(f)(3)(B) or former section 48(d) (pursuant to section 50(d)(5)). Stakeholders also asked whether an applicable entity may make an elective payment election in the case of a third-party ownership arrangement, such as an energy project owned by a for-profit developer but developed by a government entity.

The Treasury Department and the IRS propose that such chaining will not be permissible and seek further comment on the issue. Proposed §1.6417-2(c)(4) would state that any credits for which an election is made under section 6417(a) must have been determined with respect to the applicable entity or electing taxpayer, meaning that the applicable entity or electing taxpayer owns the underlying eligible credit property or, if ownership is not required, otherwise conducts the activities giving rise to the underlying eligible credit.¹⁰ This proposed rule, which is consistent with the proposed regulations under section 6418, would mean that no election may be made under section 6417(a) for credits purchased pursuant to section 6418, transferred pursuant to section 45Q(f)(3), acquired by a lessee from a lessor by means of an election to pass through the credit to a lessee under former section 48(d) (pursuant to section 50(d)(5)), owned by a third party, or otherwise not determined directly with respect to the applicable entity or electing taxpayer.

Stakeholders noted several administrative and practical reasons why making an elective payment election with respect to credits transferred under section 6418 would present challenges. For example, stakeholders noted that businesses electing to be treated as applicable entities with respect to applicable credit property giving rise to section 45V, 45Q, or 45X credits must do so in the taxable year in which such taxpayer has placed in service such property, and the election generally lasts through the following four taxable years, whereas the duration of the section 6418 transfer election is limited to the tax year.

⁹For this purpose, “Tax-Exempt Amounts” do not include the proceeds of loans, which are not included in income as long as they need to be repaid.

¹⁰The section 45X credit requires that the taxpayer produce eligible components. Thus, an applicable entity or electing taxpayer must produce eligible components to claim the credit.

In addition, any credit determined with respect to an electing taxpayer that is a partnership or S corporation must be determined with respect to only applicable credit property held directly by the partnership or S corporation. Allowing a partnership or S corporation to make an elective payment election with respect to transferred credits would conflict with this rule. Furthermore, the elective payment election under section 6417 with respect to a section 45 credit or section 45Q credit only applies to applicable credit property that is originally placed in service after December 31, 2022, and the elective payment election under section 6417 with respect to a section 45V credit only applies to clean hydrogen attributable to applicable credit property that is originally placed in service after December 31, 2012, whereas there are no such restrictions under section 6418. In addition, stakeholders contended that section 6417(d)(3)(ii)'s requirement that a section 6417(a) election be "irrevocable" would seem to prohibit an applicable entity from making a section 6417(a) election with respect to any transferred credit for which the 6417(a) election spans more than one year (such as credits determined under sections 45, 45Q, 45V, 45Y, and, for electing taxpayers only, under section 45X), because elections to transfer all or a portion of eligible credits under section 6418(a) are annual and the transferee does not own the property or engage in the activities that originally gave rise to the eligible credits. Finally, stakeholders noted that a transferee may purchase only a portion of a credit determined with respect to an eligible credit property pursuant to section 6418(a), which they argued is inconsistent with the requirement under section 6417(a) that the elective payment election be with respect to the entire applicable credit determined with respect to applicable credit property for a taxable year.

These administrative and practical reasons have informed the proposed conclusion of the Treasury Department and the IRS that sections 6417 and 6418 are best interpreted to not allow an applicable entity under section 6417 to make an elective payment election for a transferred credit under section 6418. Furthermore, the pre-filing registration process

contemplated by section 6417(d)(5) and by section 6418(g)(1) is not currently designed to allow an applicable entity purchasing eligible credits under section 6418 to make an elective payment election under section 6417.

Other stakeholders have suggested that the Code may allow a transferee taxpayer under section 6418 to make an elective payment election under section 6417 for a transferred credit because section 6418(a) provides that "the transferee taxpayer specified in such election (and not the eligible taxpayer) shall be treated as the taxpayer for purposes of this title with respect to such credit." These stakeholders argue the transferee taxpayer steps into the shoes of the eligible taxpayer transferring the credit, such that a transferee taxpayer may be viewed as the taxpayer earning the credit for purposes of section 6417 and therefore is able to make an elective payment election with respect to such credit. They further noted that section 6417 does not expressly prohibit an applicable entity from making an elective payment election with respect to a transferred credit and that allowing applicable entities to make an elective payment election with respect to a transferred credit may further the policy goals of the IRA by expanding the financing methods available to renewable energy projects.

The Treasury Department and the IRS agree with stakeholders who noted that there is no restriction on who can be a transferee under section 6418, other than that the transferee cannot be related (within the meaning of section 267(b) or 707(b)(1) of the Code) to the eligible taxpayer transferring the credit. Thus, an applicable entity could be transferred credits under 6418, at least to offset any Federal income tax liability. However, the statute does not address whether an applicable entity can make an elective payment election under section 6417 with respect to transferred credits. Based on the reasons previously discussed in this part II.C.3. of this Explanation of Provisions, the Treasury Department and the IRS believe that a transferred credit is not properly interpreted as an applicable credit that is "determined with respect to" an applicable entity or electing taxpayer under section 6417(a) because the credit is not determined with respect to

underlying applicable credit property owned by the applicable entity or electing taxpayer, or, if ownership is not required, activities otherwise conducted by the applicable entity or electing taxpayer. Section 6418(a) and the proposed regulations under section 6418 provide that a transferred credit is determined with respect to the eligible taxpayer transferring the credit. Although the transferee taxpayer uses the credit, the proposed regulations under section 6418 provide that the transferee taxpayer is not considered to have owned an interest in the underlying eligible credit property or have otherwise conducted any of the activities that give rise to the credit.

The Treasury Department and the IRS seek comments on limited situations where exceptions to this proposed rule may be appropriate because it is consistent with the text, design, and intent of the IRA, while also ensuring that such exceptions are not subject to fraud or abuse. Stakeholders could consider appropriate limitations such as (1) the type of applicable entity that may be allowed to make an elective payment election with respect to credits transferred under section 6418, such as a government entity; (2) the involvement of the transferee taxpayer in the project's development; (3) the level of due diligence conducted by the transferee taxpayer regarding whether the project qualifies for the applicable credit and any bonus credits and whether the amount of transferred credits was properly determined with respect to the eligible taxpayer transferring the credit; (4) the fact that the transferee taxpayer is paying close to the face value of the credit (and what minimum percentage of face value should be required); and (5) there are no other special financial arrangements between the parties. Stakeholders should address legal considerations, as well as practical and administrative challenges, to any such exception to the proposed rule.

D. Denial of Double Benefit

Section 6417(a) allows an applicable entity or electing taxpayer other than a partnership or S corporation to be treated as making a payment against the tax imposed by subtitle A for the taxable year with respect to which such credit was

determined equal to the amount of such credit. Section 6417(c)(1)(A) provides that, for an electing taxpayer that is a partnership or S corporation, the Secretary will make a payment to such partnership or S corporation with respect to a credit determined with respect to applicable credit property held directly by the partnership or S corporation equal to the amount of such credit. Sections 6417(e) and 6417(c)(1)(B) each provide that such credit is reduced to zero and, for any other purposes of the Code, is deemed to have been allowed to such entity for such taxable year. Section 6417(h) provides that the Secretary must issue guidance necessary to carry out the purposes of section 6417, including guidance to ensure that the amount of the payment (in the case of an electing taxpayer that is a partnership or S corporation) or deemed payment (in the case of all other electing taxpayers and applicable entities) made under section 6417 is commensurate with the amount of the credit that would be otherwise allowable (determined without regard to section 38(c)).

Proposed §1.6417-2(e)(2) and (3) would address the methodology for determining the amount of the elective payment election, reducing the elective payment election amount to zero, and treating the applicable credit as a credit allowed for the taxable year for all other purposes of the Code with respect to applicable entities and electing taxpayers other than partnerships or S corporations. The methodology with respect to a payment made to a partnership or S corporation is provided in proposed §1.6417-4(c), as described in part IV of this Explanation of Provisions.

An applicable entity or electing taxpayer (other than an electing taxpayer that is a partnership or S corporation) making an elective payment election applies section 6417(e) by taking the following steps. First, the taxpayer would compute the amount of the Federal income tax liability (if any) for the taxable year, without regard to the GBC, that is payable on the due date of the return (without regard to extensions), and the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on amount of tax under section 38. Second, the taxpayer would compute the allowed amount of GBC carryforwards carried to

the taxable year plus the amount of current year GBCs (including current applicable credits) allowed for the taxable year under section 38 (that is, in accordance with all the rules in section 38, including the ordering rules provided in section 38(d)). Since the election would be required to be made on an original return, any business credit carrybacks would not be considered when determining the elective payment amount for the taxable year. Third, the taxpayer would apply the GBCs allowed for the taxable year as computed in step 2, including those attributable to applicable credits as GBCs, against the tax liability computed in step 1. Fourth, the taxpayer would identify the amount of any excess or unused current year business credit, as defined under section 39, attributable to current year applicable credit(s) for which the applicable entity is making an elective payment election. The amount of such unused applicable credits would be treated as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credits are determined (rather than having them available for carryback or carryover) (net elective payment amount). Fifth, the taxpayer would reduce the applicable credits for which an elective payment election is made by the amount (if any) allowed as a GBC under section 38 for the taxable year, as provided in step 3, and by the net elective payment amount (if any) that is treated as a payment against tax, as provided in step 4, which results in the applicable credits being reduced to zero.

The proposed regulations would provide, consistent with section 6417(e), that the full amount of the applicable credits for which an elective payment election is made is deemed to have been allowed for all other purposes of the Code, including, but not limited to, the basis reduction and recapture rules imposed by section 50 and calculation of any underpayment of estimated tax under sections 6654 and 6655 of the Code. The proposed regulations would give several examples illustrating these rules.

The Treasury Department and the IRS request comments on whether future guidance should expand or clarify the methodology that an applicable entity follows to compute the amount of its elective payment. Comments are also requested

on additional Code sections under which it may be necessary to consider the applicable credit to have been deemed to have been allowed for the taxable year in which an elective payment election is made.

III. *Elective Payment Election by Electing Taxpayers*

Section 6417(d)(1)(B), (C), and (D) provides that a taxpayer that is not an applicable entity described in section 6417(d)(1)(A) and that, with respect to any taxable year, places in service applicable credit property that qualifies for the section 45V credit or the section 45Q credit, or, with respect to any taxable year in which such taxpayer has, after December 31, 2022, produced eligible components (as defined in section 45X(c)(1)), respectively, may elect to be treated as an applicable entity for purposes of section 6417 for such taxable year, but only with respect to the applicable credit property and only with respect to the credit under section 45V(a), 45Q(a), or 45X(a), respectively. Proposed §1.6417-1(g) would define such a taxpayer as an “electing taxpayer.”

The special rules for electing taxpayers are found in section 6417(d)(1) and (d)(3). Proposed §1.6417-3 would combine these rules for clarity.

Proposed §1.6417-3(b), (c), and (d) would provide the specific rules regarding the election under section 6417(d)(1)(B), (C), or (D). Proposed §1.6417-3(e) would provide the rules relating to the election for electing taxpayers. Proposed §1.6417-4 would provide additional rules for electing taxpayers that are partnerships or S corporations.

Proposed §1.6417-3(b) would provide that an electing taxpayer that has placed in service a qualified clean hydrogen production facility as defined in section 45V(c)(3) during the taxable year may make an elective payment election for such taxable year (or by August 16, 2023, in the case of facilities placed in service before December 31, 2022), but only with respect to the qualified clean hydrogen production facility, only with respect to the section 45V credit, and only if the pre-filing registration process that would be required by proposed §1.6417-5 was properly completed. An electing taxpayer

that elects to treat qualified property that is part of a specified clean hydrogen production facility as energy property under section 48(a)(15) would not be able to make an elective payment election with respect to such facility.

Proposed §1.6417-3(c) would provide that an electing taxpayer that has, after December 31, 2022, placed in service a single process train described in §1.45Q-2(c)(3) at a qualified facility (as defined in section 45Q(d)) during the taxable year may make an elective payment election for such taxable year, but only with respect to the single process train, only with respect to the section 45Q credit, and only if the pre-filing registration process that would be required by proposed §1.6417-5 was properly completed.

Proposed §1.6417-2(a)(3)(v) and -3(d) would provide that an electing taxpayer that produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at a facility during the taxable year may make an elective payment election for such taxable year, but only with respect to the facility at which the eligible components are produced by the electing taxpayer in that year, only with respect to the section 45X credit, and only if the pre-filing registration process that would be required by proposed §1.6417-5 was properly completed.

Proposed §1.6417-3(e) would provide rules on how the electing taxpayer makes the elective payment election. First, if an electing taxpayer makes an elective payment election under proposed §1.6417-2(b) with respect to any taxable year in which the electing taxpayer places in service a qualified clean hydrogen production facility for which a section 45V credit is determined, places in service a single process train at a qualified facility for which a section 45Q credit is determined, or produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at a facility, respectively, the electing taxpayer will be treated as an applicable entity for purposes of making an elective payment election for such taxable year and during the election period described in proposed §1.6417-3(e)(3), but only with respect to the applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7), respectively, that is the subject of the election. The

taxpayer would be required to otherwise meet all requirements to earn the credit in the electing year and in each succeeding year during the election period described in proposed §1.6417-3(e)(3).

Second, the election would be made separately for each applicable credit property, which is, respectively, a qualified clean hydrogen production facility placed in service for which a section 45V credit is determined, a single process train placed in service at a qualified facility for which a section 45Q credit is determined, or a facility in which eligible components are produced for which a section 45X credit is determined. Only one election may be made with respect to any specific applicable credit property.

Third, the elective payment election generally would apply for an election period consisting of the taxable year in which the election is made and each of the four subsequent taxable years that end before January 1, 2033. The election period would not be able to be less than a taxable year but may be made for a taxable period of less than 12 months within the meaning of section 443 of the Code.

However, an electing taxpayer may, during a subsequent year of the election period, revoke the elective payment election with respect to an applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7) in accordance with forms and instructions. Any such revocation, if made, applies to the taxable year in which the revocation is made (which cannot be less than a taxable year but may be made for a taxable period of less than 12 months within the meaning of section 443 of the Code) and each subsequent taxable year within the election period. Any such revocation may not be subsequently revoked.

An electing taxpayer would not be able to make a transfer election under section 6418(a) with respect to any applicable credit under proposed §1.6417-1(d)(3), (5), or (7) determined with respect to applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7) during the election period for that applicable credit property. However, if the election period is no longer in effect with respect to an applicable credit property, any credit determined with respect to such applicable credit property would be able

to be transferred pursuant to a transfer election under section 6418(a), as long as the taxpayer meets the requirements of section 6418 and the 6418 regulations.

IV. Elective Payment Election for Partnerships and S corporations

A. Overview

Section 6417(c)(1) provides that, in the case of any applicable credit determined with respect to any applicable credit property held directly by a partnership or S corporation, any election under section 6417(a) is made by such partnership or S corporation. These proposed regulations would clarify that partnerships or S corporations are not applicable entities described in section 6417(d)(1)(A); thus, any partnership or S corporation making an elective payment election must be an electing taxpayer, and as such, the only applicable credits with respect to which the partnership or S corporation can make an elective payment election are a section 45V credit, a section 45Q credit, and a section 45X credit.

If a partnership or S corporation makes an election under section 6417(a) and proposed §1.6417-2(b), the special rules of section 6417(c)(1)(A) through (D) apply. In that regard, proposed §1.6417-4(c) would provide that (1) the IRS will make a payment to such partnership or S corporation equal to the amount of such credit; (2) before determining any partner's distributive share, or shareholder's pro rata share, of such credit, such credit is reduced to zero and is, for any other purposes under this title, deemed to have been allowed solely to such entity (and not allocated by such entity, or otherwise allowed, to any partner or shareholder) for such taxable year (for example, if a partnership pays a Federal tax liability to the IRS in a year for which an elective payment election is made and cash is received, it treats the payment to the IRS as if it paid the liability with the same amount of underlying credit for which the elective payment election is made); (3) any amount with respect to which the election under section 6417(a) is made is treated as tax exempt income for purposes of sections 705 and 1366; and (4) a partner's distributive share of such tax exempt income is

equal to such partner's distributive share of the otherwise applicable credit for each taxable year as determined under §1.704-1(b)(4)(ii). The tax exempt income would be taken into account by the partnership or S corporation at the same time as the underlying credit would have been taken into account by the partnership or S corporation absent an elective payment election. The proposed regulations provide an example illustrating this rule. Because it is the applicable credits, and not the tax exempt income, that arise from the conduct of the trade or business, the proposed regulations would treat the tax exempt income resulting from an elective payment election by a partnership or an S corporation as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, the tax exempt income would not be treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

As requested by stakeholders, the Treasury Department and the IRS clarify here that there are no restrictions imposed under section 6417 or the section 6417 regulations on how a partnership or S corporation that receives a payment from the IRS pursuant to an elective payment election may use the cash payments in its operations (including on when it makes distributions to its partners or shareholders).

Section 6417(h) requires that the Secretary issue regulations or other guidance to ensure that the amount of the payment to a partnership or S corporation is commensurate with the amount of the credit that would otherwise be allowable (without regard to section 38(c)). Therefore, proposed §1.6417-4(d)(1) would provide that, in determining the applicable credit amount that will result in a payment to a partnership or S corporation, the partnership or S corporation must compute the amount of the applicable credit allowable (without regard to section 38(c)) as if an elective payment election were not made. Because a partnership or S corporation is not subject to section 469

(that is, section 469 applies at the partner or shareholder level), the amount of an applicable credit determined with respect to an applicable credit property held directly by a partnership or S corporation is not subject to limitation by section 469. In addition, because the credits to which a partnership or S corporation may make the elective payment election (that is, section 45V, 45Q, and 45X) are not investment tax credits under section 46, sections 49 and 50 do not apply to limit the amount of the credits.

B. *BBA partnerships*

Many partnerships are subject to the centralized partnership audit regime found in subchapter C of chapter 63 of the Code as amended by the Bipartisan Budget Act of 2015 (BBA).¹¹ In connection with the implementation of section 6417, the Treasury Department and the IRS identified several areas of the BBA regulations that require updates to administer section 6417 in the case of a partnership subject to the BBA (BBA Partnership). Section 6221 of the Code provides that any adjustment to a partnership-related item with respect to a BBA Partnership, and any tax attributable thereto, is assessed and collected at the partnership-level except to the extent provided under the BBA. The BBA outlines centralized audit procedures which generally must be followed before the IRS can adjust a partnership-related item (as defined in §301.6241-1). In order to implement section 6417, the Treasury Department and the IRS propose updates to the regulations under §§301.6241-1 and 301.6241-7.

1. *Partnership-related Items*

Under §301.6241-1(a)(6)(ii), a partnership-related item is any item or amount that is, with respect to the BBA Partnership, relevant in determining the tax liability of any person under chapter 1. Because the partnership-related item definition is based on relevance to the chapter 1 liability of any person, the liability could belong to the BBA

Partnership or its partners. While partnerships do not typically pay chapter 1 tax pursuant to section 701 of the Code, a BBA Partnership is eligible to be an electing taxpayer under section 6417 and is thus subject to the excessive payment rule under section 6417(d)(6), which could result in a chapter 1 tax liability to the BBA Partnership. In addition, if a partnership makes an election under section 6417, the partnership must reduce its applicable credit under section 6417(e), which would impact the amount of credit and tax exempt income that the partners would be allocated, thereby affecting the partners' chapter 1 liability. Because the application of section 6417 may be relevant in determining the chapter 1 liabilities of a BBA Partnership and its partners, any item or amount relevant to section 6417 that is "with respect to the partnership" would be a partnership-related item as defined under §301.6241-1(a)(6)(ii).

Section 301.6241-1(a)(6)(iii) provides that an item or amount is "with respect to the partnership" if the item or amount is shown or reflected, or required to be shown or reflected, on a return of the partnership under section 6031 of the Code or is required to be maintained in the partnership's books and records. Because the definition of a partnership-related item is based on the item's relevance to the chapter 1 tax liability of any person, this definition ensures that the definition of a partnership-related item is not so broad as to include items that are wholly unrelated to a BBA Partnership, such as a partner's unrelated income. While the limitation in this definition works well to ensure partner-level items are not inadvertently swept into the definition of a partnership related item, this definition may inadvertently exclude a chapter 1 liability of a BBA Partnership if, for instance, the liability is not required to be shown or reflected on the BBA Partnership's return. The BBA Partnership's own chapter 1 tax liability, in contrast with a partner's liability, is undoubtedly "with respect to the partnership" and a partnership-related item.

Accordingly, these proposed regulations propose to add a sentence to §301.6241-1(a)

¹¹ See section 1101 of the BBA, Public Law 114-74, 129 Stat. 584, 625-638 (2015), as amended by section 411 of the Protecting Americans from Tax Hikes Act of 2015, Public Law 114-113, 129 Stat. 2242, 3121 (2015), and sections 201 through 207 of the Tax Technical Corrections Act of 2018, Public Law 115-141, 132 Stat. 348, 1171-1183 (2018).

(6)(iii) (regarding items or amounts with respect to a BBA Partnership) to provide that any chapter 1 tax that is the liability of the BBA Partnership is an item with respect to the BBA Partnership regardless of whether that chapter 1 tax is required to be reflected or shown on the partnership return or required to be maintained in the BBA Partnership's books and records.

2. Special enforcement rule for the elective payment election

As noted in part IV.B.1. of this Explanation of Provisions, the BBA's centralized partnership audit regime requires the IRS to follow certain procedures before adjusting partnership-related items of a BBA Partnership. Under section 6241(11), in the case of partnership-related items that the Secretary determines involve a special enforcement matter, the Secretary is authorized to prescribe regulations pursuant to which the BBA audit procedures do not apply, and such partnership-related items are subject to special rules (including rules related to assessment and collection) as the Secretary determines necessary for the effective and efficient enforcement of the Code. Section 6241(11)(A). Section 6241(11)(B) provides a list of certain "special enforcement matters," including the failure to comply with information reporting obligations of tiered partnerships, jeopardy assessments of tax in exigent circumstances, and matters involving foreign partners and partnerships. Sections 6241(11)(B)(i), (ii), and (v). Section 6241(11)(B)(vi) also provides a grant of authority to the Secretary for "other matters that the Secretary determines by regulation present special enforcement considerations."

Proposed §1.6417-2(b) would provide that the elective payment election must be made on an original return and that the election may not be made on an amended return or administrative adjustment request. Under the existing BBA regulations, a BBA Partnership's elective payment election under section 6417 is a partnership-related item because the existence of the election is relevant in determining chapter 1 tax and because the election is required to be made on the BBA Partnership's return. Because the elective payment election

is a partnership-related item, the only way for the IRS to make an adjustment upon the determination of an ineffective election would be to follow the audit procedures of the centralized partnership audit regime. To prevent duplication, fraud, improper payments, or excessive payments in an effective manner, the IRS must be able to determine whether a BBA Partnership's elective payment election is ineffective in an expeditious manner. The procedural requirements of the BBA would require the IRS to treat BBA Partnerships that have made an ineffective election payment election differently from other electing taxpayers that are not subject to the centralized partnership audit regime but that are otherwise similarly situated. The Treasury Department and the IRS are proposing that, due to the unique nature of the section 6417 election, which, pursuant to proposed §1.6417-2(d), would result in a payment treated as having been made on the later of the due date of the return or the date the return was filed, the special enforcement matters described in section 6241(11) would apply, and the BBA centralized partnership audit regime should not apply to adjustments with respect to partnership-related items that affect the amount or existence of a payment to the BBA Partnership, or credit or refund of a payment to the BBA Partnership under section 6417. Accordingly, these proposed regulations would add new paragraph (j) to §301.6241-7 to provide that an election by a BBA Partnership under section 6417 can be adjusted outside of the BBA audit rules. These proposed regulations also would redesignate existing paragraph (j) (regarding applicability dates) to a new paragraph (k) and update that paragraph (k) to reflect an applicability date for these proposed regulations.

V. Pre-filing Registration Requirements and Additional Information

Section 6417(d)(5) provides that as a condition of, and prior to, any amount being treated as a payment that is made by the taxpayer under section 6417(a) or any payment being made pursuant to section 6417(c), the Secretary may require such information or registration as the Secretary deems necessary or appropriate

for purposes of preventing duplication, fraud, improper payments, or excessive payments.

In general, stakeholders requested additional information about this provision and requested that the regulations balance the need to prevent fraud and abuse with the burden on taxpayers. Stakeholders recommended that the information required to be provided to the IRS should be provided in a manner that facilitates automated procedures to help catch potential fraud, discourages abusive or otherwise illegitimate claims, and allows efficient and prompt review (both before payment and through audits). Stakeholders recommended that all required documents and information should be able to be submitted easily via an online portal. Stakeholders recommended that information or registration should be as consistent as possible across sections 48D(d)(1), 6417(d)(5), and 6418(g)(1).

Proposed §1.6417-5 would provide the mandatory pre-filing registration process that, except as provided in guidance, an applicable entity or electing taxpayer would be required to complete as a condition of, and prior to (1) any amount being treated as a payment against the tax imposed by subtitle A that is made by an applicable entity or electing taxpayer (other than a partnership of S corporation) under proposed §§1.6417-2(a)(1)(i) or -2(a)(2)(i), or (2) any amount being paid to a partnership or S corporation pursuant to proposed §1.6417-2(a)(2)(ii).

Proposed §1.6417-5(a) provides an overview of this process and would require an applicable entity or electing taxpayer to satisfy the pre-filing registration requirements as a condition of, and prior to, making an elective payment election. An applicable entity or electing taxpayer would be required to use the pre-filing registration process to register itself as intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits as part of the pre-filing submission (or amended submission). An applicable entity or electing taxpayer that does not obtain a registration number and report the registration number on its annual tax return with respect to an applicable credit property would be ineligible to make an elective payment election

to treat any credit determined with respect to that applicable credit property as a payment of tax. However, completion of the pre-filing registration requirements and receipt of a registration number would not, by itself, mean that the applicable entity or electing taxpayer would receive a payment with respect to the applicable credits determined with respect to the applicable credit property.

Proposed §1.6417-5(b) would provide the following pre-filing registration requirements.

First, an applicable entity or electing taxpayer must complete the pre-filing registration process electronically through an IRS electronic portal in accordance with the instructions provided therein, unless otherwise provided in guidance. If the election is by a member of a consolidated group, the member must complete the pre-filing registration process as a condition of, and prior to, making an elective payment election. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

Second, an applicable entity or electing taxpayer must satisfy the registration requirements and receive a registration number prior to making an elective payment election on the applicable entity's tax return for the taxable year at issue.

Third, an applicable entity or electing taxpayer is required to obtain a registration number for each applicable credit property with respect to which an applicable credit will be determined and for which the applicable entity or electing taxpayer intends to make an elective payment election.

Finally, an applicable entity or electing taxpayer must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer, about the applicable credits, and about the applicable credit property, would allow the IRS to prevent duplication, fraud, improper payments, or excessive payments under section 6417. For example, verifying information about the taxpayer would allow the IRS to mitigate the risk of fraud or improper payments to entities that are not applicable entities or electing taxpayers. Information about the taxpayer's taxable year would allow

the IRS to ensure that an elective payment election is timely made on the entity's annual tax return. Information about applicable credit properties, including their address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date would allow the IRS to mitigate the risk of duplication, fraud, and improper payments for properties that are not applicable credit properties. Information about whether an investment tax credit property was acquired using any Restricted Tax Exempt Amounts would allow the IRS to prevent improper payments.

Proposed §1.6417-5(c) would provide information about the required registration number. Proposed §1.6417-5(c)(1) would provide that, after an applicable entity or electing taxpayer completes the pre-filing registration process as provided in proposed §1.6417-5(b) for the applicable credit properties with respect to which the entity intends to make an elective payment election in the taxable year, the IRS will review the information provided and will issue a separate registration number for each applicable credit property for which the applicable entity or electing taxpayer provided sufficient verifiable information, as provided in guidance.

Proposed §1.6417-5(c)(2) would provide that a registration number is valid only for the taxable year for which it is obtained. Proposed §1.6417-5(c)(3) would provide that, if an elective payment election will be made with respect to an applicable credit property for which a registration number under proposed §1.6417-5 has been previously obtained, the applicable entity or electing taxpayer would be required to renew the registration each year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts. Proposed §1.6417-5(c)(4) would provide that, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained but not yet used, an applicable entity or electing taxpayer would be required to amend the registration (or may need to submit a new registration) to reflect these new facts. For example, one stakeholder asked that, if a

taxpayer becomes a party to an internal reorganization under section 368(a) (such as a merger or distribution in a nonrecognition transaction) during the election period, the elective payment election should carry over to the successor entity. The proposed regulations would provide that if a facility previously registered for an elective payment election undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner would be required to amend the original registration to disassociate its EIN from the credit property and the new owner must submit an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered credit property.

Lastly, proposed §1.6417-5(c)(5) would provide that the applicable entity or electing taxpayer would be required to include the registration number of the applicable credit property on their annual tax return for the taxable year. The IRS will treat an elective payment election as ineffective with respect to the portion of a credit determined with respect to an applicable credit property for which the applicable entity or electing taxpayer does not include a valid registration number on the annual tax return.

The corresponding temporary regulations under §1.6417-5T published in the Rules and Regulations section of this edition of the *Federal Register* apply rules to taxable years ending on or after **June 21, 2023**, that are identical to those that would apply under proposed §1.6417-5. The temporary regulations under §1.6417-5T expire on **June 12, 2026**.

VI. *Special Rules*

Proposed §1.6417-6 would provide special rules relating to excessive payment as well as basis reduction and recapture.

A. *Excessive payment*

Pursuant to 6417(d)(6), proposed §1.6417-6 would provide that the IRS may

determine that an amount treated as a payment made by an applicable entity under proposed §1.6417-2(a)(1)(i) or an electing taxpayer under proposed §1.6417-2(a)(2)(i), or the amount of the payment made pursuant to proposed §1.6417-2(a)(2)(ii), constitutes an excessive payment. Proposed §1.6417-6(a) would provide that in the case of an excessive payment determined by the IRS, the amount of chapter 1 tax imposed on the applicable entity or electing taxpayer for the taxable year in which the excessive payment determination is made will be increased by an amount equal to the sum of (1) the amount of such excessive payment, plus (2) an amount equal to 20 percent of such excessive payment (additional 20-percent chapter 1 tax). This would be the case even if the applicable entity or electing taxpayer is otherwise not subject to chapter 1 tax. The additional 20-percent chapter 1 tax amount would not apply if the applicable entity or electing taxpayer demonstrates to the satisfaction of the IRS that the excessive payment resulted from reasonable cause. If the additional 20-percent chapter 1 tax is applicable, it would apply in addition to any penalties, additions to tax, or other amounts applicable under the Code. The Treasury Department and the IRS anticipate that existing standards of reasonable cause will inform the determination by the IRS of whether reasonable cause has been demonstrated for this purpose.

The term “excessive payment” is proposed to be defined as an amount equal to the excess of (1) the amount treated as a payment under proposed §1.6417-2(a)(1)(i) or -2(a)(2)(i), or the amount of the payment made pursuant to proposed §1.6417-2(a)(2)(ii), with respect to such facility or property for such taxable year, over (2) the amount of the credit that, without application of section 6417, would be otherwise allowable (as described in part II.C and II. D. or IV. of this Explanation of Provisions and without regard to section 38(c)) under the Code with respect to such facility or property for such taxable year.

Several stakeholders asked that the term “excessive payment” be determined without any tax credit utilization rules, such as those found in sections 38, 49, and 469. Because the statute provides that the

amount of the credit should not exceed the amount “otherwise allowable” (without application of sections 38(c), without regard to sections 50(b)(3) and (4)(A)(i), and by treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity), the Treasury Department and the IRS are proposing that all other relevant code sections, including sections 38 (but not 38(c)), 49, and 469, would apply to the amount treated as a payment that is made by the applicable entity or electing taxpayer as described in part II of this Explanation of Provisions. Thus, if an applicable entity or electing taxpayer is an individual, trust, closely held corporation, or other taxpayer subject to the rules of section 469, or if an applicable credit is an investment tax credit that is determined including the rules of section 49, then those rules would apply. However, proposed §1.6417-2(c) would provide additional rules relating to the determination of applicable credits, such as the special rule for investment credit property acquired by a tax-exempt or government entity using nontaxable grants or other nontaxable proceeds, as described in part II.C. of this Explanation of Provisions.

In contrast, the amount of the payment to partnerships and S corporations described in part IV of this Explanation of Provisions has different proposed rules. As discussed in part IV of this Explanation of Provisions, in determining the applicable credit amount that will result in a payment to a partnership or S corporation, the partnership or S corporation would be required to compute the amount of the applicable credit allowable (without regard to section 38(c)) as if an elective payment election were not made. However, because a partnership or S corporation is not subject to section 469 (that is, section 469 applies at the partner or shareholder level), the amount of the credit determined by a partnership or S corporation would not be subject to limitation by section 469. In addition, because the only applicable credits for which a partnership or S corporation may make the elective payment election are the section 45V credit, section 45Q credit, and section 45X credit, which are production tax credits, sections 49 and 50 (applicable to investment tax credits)

would not apply to limit these applicable credit amounts.

Stakeholders asked for clarification on how the excessive payment would be determined and in which year the adjustment applies. The Treasury Department and the IRS anticipate that excessive payments may arise in a variety of situations, such as an improperly claimed bonus credit amount, an error in calculating a credit, inflated basis, failure to apply the section 38(d) ordering rules, or a misapplication of the credit utilization rules, among other things. The statute provides that the tax is imposed on the applicable entity in the year the determination of the excessive payment is made, despite the fact that this is a later year than the year in which the credit was allowable. The Treasury Department and the IRS request comments on whether additional guidance on excessive payments is needed.

B. Basis reduction and recapture

Proposed §1.6417-6(b) would provide rules similar to the rules of section 50 (without regard to section 50(b)(3) and (4)(A)(i)) apply for purposes of section 6417. (Section 6417(g) erroneously refers to section 6417(c)(2)(A), a provision that does not exist, and it is evident that such reference was intended to be to section 6417(d)(2)(A). That error is accounted for in these proposed regulations.)

One stakeholder asked how entities that don't normally file tax returns should report recapture events. The stakeholder asked that the reporting and payment of the recapture amount should be consistent with the rules applicable to taxable entities (that is, no reporting or payment due until a tax return would be due for the related calendar year). Proposed §1.6417-6(b)(2) would clarify that any reporting of recapture is made on the taxpayer's annual tax return in the manner prescribed by the IRS in future guidance, along with supplemental forms such as Form 4255, *Recapture of Investment Credit*.

Stakeholders asked whether recapture is considered an excessive payment event. The excessive payment rules operate separately from the recapture rules. The excessive payment rules apply where the credit amount reported

on the original credit source form by the applicable entity or electing taxpayer was excessive. Recapture of a tax credit occurs when the original tax credit reported would have been correct without the occurrence of a subsequent recapture event. Thus, recapture events, including recapture events under sections 45Q(f)(4) or 50(a), do not result in an excessive payment.

Stakeholders asked that the proposed regulations clarify that basis reduction and recapture applies only to the investment tax credits. The section 50 rules, including basis reduction and recapture, only apply to investment tax credits so no clarification on this point is required.

Stakeholders also asked that guidance be provided in the form of examples that illustrate the manner in which section 50 will be applied for purposes of basis reduction and recapture. Proposed §1.6417-6(b)(3) would provide an example.

Proposed Applicability Dates

Each of proposed §§1.6417-1 through 1.6417-6 is proposed to apply to taxable years ending on or after the date the Treasury decision adopting these regulations as final regulations is published in the *Federal Register*. Entities may rely on these proposed regulations for elective payments of applicable credit amounts after December 31, 2022, in taxable years ending before the date the Treasury decision adopting these regulations as final regulations is published in the *Federal Register*, provided the entities follow the proposed regulations in their entirety and in a consistent manner with respect to all elections made under section 6417. Sections 301.6241-1 and 301.6241-7 are proposed to apply to taxable years ending on or after the date these proposed regulations are published in the *Federal Register*.

Special Analyses

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (“PRA”) generally requires that a federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such

collection of information is mandatory, voluntary, or required to obtain or retain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in these proposed regulations contain reporting and recordkeeping requirements. The recordkeeping requirements mentioned within these proposed regulations are considered general tax records under Section 1.6001-1(e). These records are required for the IRS to validate that taxpayers have met the regulatory requirements and are entitled to make an elective payment election. For PRA purposes, general tax records are already approved by OMB under 1545-0047 for tax-exempt organizations and government entities; 1545-0074 for individuals; and under 1545-0123 for business entities.

These proposed regulations also mention reporting requirements related to making elections as detailed in §§1.6417-2 and 1.6417-3 and calculating the claim amounts as detailed in §§1.6417-2 and 1.6417-4. These elections will be made by taxpayers on Forms 990-T, 1040, 1120-S, 1065, and 1120; and credit calculations will be made on Form 3800 and supporting forms. These forms are approved under 1545-0047 for tax-exempt organizations and governmental entities; 1545-0074 for individuals; and 1545-0123 for business entities.

These proposed regulations also mention recapture procedures as detailed in §1.6417-6. These recaptures are performed using Form 4255. This form is approved under 1545-0047 for tax-exempt organizations and governmental entities; 1545-0074 for individuals; and 1545-0123 for business entities. These proposed regulations are not changing or creating new collection requirements not already approved by OMB.

These proposed regulations mention a requirement to register with the IRS to be able to elect payments as detailed in §1.6417-5. For further information concerning the registration, where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the corresponding temporary regulations

(T.D. 9975) published in the Rules and Regulations section of this issue of the *Federal Register*. These proposed regulations are not changing or creating new collection requirements beyond the requirements that are being reviewed and approved by OMB under the temporary regulations.

II. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Treasury Department and the IRS have not determined whether the proposed rule, when finalized, will likely have a significant economic impact on a substantial number of small entities. This determination requires further study. However, because there is a possibility of significant economic impact on a substantial number of small entities, an IRFA is provided in these proposed regulations. The Treasury Department and the IRS invite comments on both the number of entities affected and the economic impact on small entities.

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

1. Need for and Objectives of the Rule

The proposed regulations would provide greater clarity to taxpayers that intend to take advantage of section 6417’s credit monetization mechanism. It provides needed definitions, the time and manner to make the election, and information about the pre-filing registration process, among other items. The Treasury Department and

the IRS intend and expect that giving taxpayers guidance that allows them to use section 6417 will beneficially impact various industries, delivering benefits across the economy, and reduce economy-wide greenhouse gas emissions.

In particular, section 6417 allows applicable entities to treat an applicable credit as a payment against Federal income taxes and defines applicable entities to include many entities that may not have any tax liability. Allowing entities without sufficient federal income tax liability to use a business tax credit to instead make an election to receive a refund of any overpayment of taxes created by the elective payment election will increase the incentive for taxpayers to invest in clean energy projects that generate eligible credits because it will increase the amount of cash available to those entities, thereby reducing the amount of financing needed for clean energy projects.

2. Affected Small Entities

The RFA directs agencies to provide a description of, and where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The Small Business Administration's Office of Advocacy estimates in its 2023 Frequently Asked Questions that 99.9 percent of American businesses meet its definition of a small business. The applicability of these proposed regulations does not depend on the size of the business, as defined by the Small Business Administration. As described more fully in the preamble to this proposed regulation and in this IRFA, section 6417 and these proposed regulations may affect a variety of different entities across several different industries as there are 12 different applicable credits for which an elective payment election may be made. Further, the elective payment election for 3 of the applicable credits may be made both by applicable entities and by taxpayers other than applicable entities. Although there is uncertainty as to the exact number of small businesses within this group, the current estimated number of respondents to these proposed rules is 20,000 taxpayers, as described in the Paperwork Reduction Act section of the preamble.

The Treasury Department and the IRS expect to receive more information on the impact on small businesses through comments on this proposed rule and again when taxpayers start to make the elective payment election using the guidance and procedures provided in these proposed regulations.

3. Impact of the Rules

The proposed regulations provide rules for how taxpayers can take advantage of the section 6417 credit monetization regime. Taxpayers that elect to take advantage of section 6417 will have administrative costs related to reading and understanding the rules as well as recordkeeping and reporting requirements because of the pre-filing registration and tax return requirements. The costs will vary across different-sized entities and across the type of project(s) in which such entities are engaged.

The pre-filing registration process requires a taxpayer to register itself as intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits. This process must be completed to receive a registration number for each applicable credit property with respect to which the applicable taxpayer intends to make an elective payment election. To make the elective payment election and claim the credit, the taxpayer must file an annual tax return. The reporting and recordkeeping requirements for that return would be required for any taxpayer that is claiming a general business credit, regardless of whether the taxpayer was making an elective payment election under section 6417.

Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of the preamble.

4. Alternatives Considered

The Treasury Department and the IRS considered alternatives to the proposed

regulations. For example, in adopting the pre-filing registration requirements, the Treasury Department and the IRS considered whether such information could be obtained at the filing of the relevant annual tax return. However, the Treasury Department and the IRS decided that such an option would increase the opportunity for duplication fraud, improper payments, or excessive payments under section 6417 as well as potentially delaying payments to qualifying taxpayers. Section 6417(d)(5) specifically authorizes the IRS to require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6417 as a condition of, and prior to, any amount being treated as a payment which is made by an applicable entity under section 6417. As described in the preamble to these proposed regulations, these proposed rules carry out that Congressional intent as pre-filing registration allows for the IRS to verify certain information in a timely manner and then process the annual tax return with minimal delays. Having a distinction between applicable entities or electing entities that are small businesses versus others making an elective payment election would create a scenario where a subset of taxpayers seeking to make an elective payment election would not have been verified or received registration numbers, potentially delaying payment not only to them but to other taxpayers seeking to use section 6417.

Additionally, when considering how taxpayers should claim the credits and make the elective payment election, the Treasury Department and the IRS considered creating an election system outside of the tax return filing system. However, it was determined that such a process would not be an efficient use of resources, especially given the statutory due date to make an election, which is the return filing date for the taxpayers with a filing obligation (which would include small business taxpayers). The Treasury Department and the IRS decided that the most efficient and reliable method is to use the existing method for claiming business tax credits; that is, the filing of the annual tax return. To create a different method for small businesses making

an elective payment election than for a small business claiming the credit (or a larger business making an elective payment election or claiming the credit) would create an additional burden for both small businesses and the IRS, without any commensurate benefit.

Comments are requested on the requirements in the proposed regulations, including specifically whether there are less burdensome alternatives that do not increase the risk of duplication, fraud, improper payments, or excessive payments under section 6417.

5. Duplicative, Overlapping, or Conflicting Federal Rules

The proposed rule would not duplicate, overlap, or conflict with any relevant Federal rules. As discussed above, the proposed rule would merely provide procedures and definitions to allow taxpayers to take advantage of the ability to make an elective payment election. The Treasury Department and the IRS invite input from interested members of the public about identifying and avoiding overlapping, duplicative, or conflicting requirements.

IV. *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Indian tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). This proposed rule does not include any Federal mandate that may result in expenditures by State, local, or Indian tribal governments, or by the private sector in excess of that threshold.

V. *Executive Order 13132: Federalism*

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required

by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive Order.

VI. *Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) prohibits an agency from publishing any rule that has Tribal implications if the rule either imposes substantial, direct compliance costs on Indian tribal governments, and is not required by statute, or preempts Tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive Order. This proposed rule does not have substantial direct effects on one or more federally recognized Indian tribes and does not impose substantial direct compliance costs on Indian tribal governments within the meaning of the Executive Order.

Nevertheless, on November 28, 2022, and November 29, 2022, the Treasury Department and the IRS held consultations with Tribal leaders requesting assistance in addressing questions related to the elective payment election under section 6417. Consultation was also held with Alaska Native Corporations on December 2, 2022. These consultations informed the development of these proposed regulations.

The Treasury Department and the IRS will hold additional consultations with Tribal leaders and Alaska Native Corporations after providing an opportunity for review of the proposed regulations and early in the process of publishing final regulations under section 6417.

VII. *Regulatory Planning and Review*

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the

requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

Comments and Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in this preamble under the ADDRESSES section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and any paper comments submitted, will be made available at <https://www.regulations.gov> or upon request.

Announcement 2023-16, 2023-20 I.R.B. 854 (May 15, 2023), provides that public hearings will be conducted in person, although the IRS will continue to provide a telephonic option for individuals who wish to attend or testify at a hearing by telephone. Any telephonic hearing will be made accessible to people with disabilities.

A public hearing is scheduled to be held in person on August 21, 2023, beginning at 10:00 a.m. ET, unless no outlines are received by August 14, 2023. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to comment by telephone at the hearing must submit written or electronic comments and an outline of the topics to be discussed as well as the time to be devoted to each topic by August 14, 2023, as prescribed in the preamble under the ADDRESSES section.

A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available at <https://www.regulations.gov>, search IRS and REG-101607-23. Copies

of the agenda will also be available by emailing a request to *publichearings@irs.gov*. Please put “REG-101607-23 Agenda Request” in the subject line of the email.

Individuals who want to testify in person at the public hearing must send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG-101607-23 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG-101607-23.

Individuals who want to testify by telephone at the public hearing must send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-101607-23 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG-101607-23.

Individuals who want to attend the public hearing in person without testifying must also send an email to *publichearings@irs.gov* to have your name added to the building access list. The subject line of the email must contain the regulation number REG-101607-23 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG-101607-23. Requests to attend the public hearing must be received by 5:00 p.m. EST on August 17, 2023.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to *publichearings@irs.gov* to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-101607-23 and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG-101607-23. Requests to attend the public hearing must be received by 5:00 p.m. EST on August 17, 2023.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel

(Procedure and Administration) by sending an email to *publichearings@irs.gov* (preferred) or by telephone at (202) 317-6901 (not a toll-free number) at least August 16, 2023.

Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

Drafting Information

The principal authors of these proposed regulations are Jeremy Milton and James Holmes, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and record-keeping requirements.

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR parts 1 and 301 as follows:

PART—1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *
* * * * *

Par. 2. Sections 1.6417-0 through 1.6417-6 are added under the undesignated

heading “Abatements, Credits, and Refunds” to read as follows:

§1.6417-0 Table of contents

This section lists the table of contents for §§1.6417-1 through 1.6417-6.

§1.6417-1 Elective Payment of Applicable Credits.

- (a) In general.
- (b) Annual tax return
- (c) Applicable entity.
- (d) Applicable credit.
- (e) Applicable credit property.
- (f) Disregarded entity.
- (g) Electing taxpayer.
- (h) Elective payment amount.
- (i) Elective payment election.
- (j) Guidance.
- (k) Indian tribal government.
- (l) Partnership.
- (m) S corporation.
- (n) Section 6417 regulations.
- (o) Statutory references.
- (p) U.S. territory.
- (q) Applicability date.

§1.6417-2 Rules for making elective payment elections.

- (a) Elective payment elections.
- (b) Manner of making election.
- (c) Determination of applicable credit.
- (d) Timing of payment.
- (e) Denial of double benefit.
- (f) Applicability date.

§1.6417-3 Special rules for electing taxpayers.

- (a) In general.
- (b) Election with respect to credit for production of clean hydrogen.
- (c) Election with respect to credit for carbon oxide sequestration.
- (d) Election with respect to the advanced manufacturing production credit.
- (e) Election for electing taxpayers.
- (f) Applicability date.

§1.6417-4 Elective payment election for electing taxpayers that are partnerships or S corporations.

- (a) In general.

- (b) Elections.
- (c) Effect of election.
- (d) Determination of amount of the credit.
- (e) Partnerships subject to subchapter C of chapter 63.
- (f) Applicability Date.

§1.6417-5 Additional information and registration.

- (a) Pre-filing registration and election.
- (b) Pre-filing registration requirements.
- (c) Registration number.
- (d) Applicability date.
- (e) Expiration date.

§1.6417-6 Special rules.

- (a) Excessive payment.
- (b) Basis reduction and recapture.
- (c) Mirror code territories.
- (d) Partnerships subject to subchapter C of chapter 63 of the Code
- (e) Applicability date.

§1.6417-1 Elective payment election of applicable credits.

(a) *In general.* An applicable entity may make an elective payment election with respect to any applicable credit determined with respect to such applicable entity in accordance with section 6417 of the Code and the section 6417 regulations. Paragraphs (b) through (p) of this section provide definitions. See §1.6417-2 for rules and procedures under which all elective payment elections must be made, rules for determining the amount and the timing of payments, and statutory rules denying double benefits. See §1.6417-3 for special rules pertaining to electing taxpayers. See §1.6417-4 for special rules pertaining to electing taxpayers that are partnerships or S corporations. See §1.6417-5 for pre-filing registration requirements and other information required to make any elective payment election effective. See §1.6417-6 for special rules related to excessive payments, basis reduction and recapture, any U.S. territory with a mirror code tax system, and payments made to partnerships subject to subchapter C of chapter 63 of the Code.

(b) *Annual Tax Return.* The term *annual tax return* means, for purposes of section 6417 and the section 6417 regulations, the following returns (and for each, any successor return)—

(1) For any taxpayer normally required to file an annual tax return with the IRS, such annual return (including the Form 1065 for partnerships and the Form 990-T for organizations with unrelated business income tax or a proxy tax under section 6033(e));

(2) For any taxpayer that is not normally required to file an annual tax return with the IRS (such as taxpayers located in the U.S. territories), the return they would be required to file if they were located in the United States, or, if no such return is required (such as for governmental entities), the Form 990-T; and

(3) For short tax year filers, the short year tax return.

(c) *Applicable entity.* The term *applicable entity* means—

(1) Any organization exempt from the tax imposed by subtitle A—

(i) By reason of section 501(a) of the Code; or

(ii) Because it is the government of any U.S. territory or a political subdivision thereof;

(2) Any State, the District of Columbia, or political subdivision thereof;

(3) An Indian tribal government or a subdivision thereof;

(4) Any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act, 43 U.S.C. 1602(m));

(5) The Tennessee Valley Authority;

(6) Any corporation operating on a cooperative basis that is engaged in furnishing electric energy to persons in rural areas; and

(7) An agency or instrumentality of any applicable entity described in paragraphs (1)(ii), (2), or (3).

(d) *Applicable credit.* The term *applicable credit* means each of the following:

(1) So much of the credit for alternative fuel vehicle refueling property determined under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit);

(2) So much of the renewable electricity production credit determined under section

45(a) as is attributable to qualified facilities that are originally placed in service after December 31, 2022 (section 45 credit);

(3) So much of the credit for carbon oxide sequestration determined under section 45Q(a) as is attributable to carbon capture equipment that is originally placed in service after December 31, 2022 (section 45Q credit);

(4) The zero-emission nuclear power production credit determined under section 45U(a) (section 45U credit);

(5) So much of the credit for production of clean hydrogen determined under section 45V(a) as is attributable to qualified clean hydrogen production facilities that are originally placed in service after December 31, 2012 (section 45V credit);

(6) In the case of a tax-exempt entity described in section 168(h)(2)(A)(i), (ii), or (iv) of the Code, the credit for qualified commercial vehicles determined under section 45W by reason of section 45W(d)(2) (section 45W credit);

(7) The credit for advanced manufacturing production determined under section 45X(a) (section 45X credit);

(8) The clean electricity production credit determined under section 45Y(a) (section 45Y credit);

(9) The clean fuel production credit determined under section 45Z(a) (section 45Z credit);

(10) The energy credit determined under section 48 (section 48 credit);

(11) The qualifying advanced energy project credit determined under section 48C (section 48C credit); and

(12) The clean electricity investment credit determined under section 48E (section 48E credit).

(e) *Applicable credit property.* The term *applicable credit property* means each of the following units of property with respect to which the amount of an applicable credit is determined:

(1) In the case of a section 30C credit, a *qualified alternative fuel vehicle refueling property* described in section 30C(c).

(2) In the case of a section 45 credit, a *qualified facility* described in section 45(d).

(3) In the case of a section 45Q credit, a *single process train* described in §1.45Q-2(c)(3).

(4) In the case of a section 45U credit, a *qualified nuclear power facility* described in section 45U(b)(1).

(5) In the case of a section 45V credit, a *qualified clean hydrogen production facility* described in section 45V(c)(3).

(6) In the case of a section 45W credit, a *qualified commercial clean vehicle* described in section 45W(c).

(7) In the case of a section 45X credit, a facility that produces eligible components, as described in guidance under sections 48C and 45X.

(8) In the case of a section 45Y credit, a *qualified facility* described in section 45Y(b)(1).

(9) In the case of a section 45Z credit, a *qualified facility* described in section 45Z(d)(4).

(10) *Section 48 credit property*—(i) *In general*. In the case of a section 48 credit and except as provided in paragraph (d)(10)(ii) of this section, an *energy property* described in section 48.

(ii) *Pre-filing registration and elections*. At the option of an applicable entity or electing taxpayer, and to the extent consistently applied for purposes of the pre-filing registration requirements of §1.6417-5 and the elective payment election requirements of §§1.6417-2 through 1.6417-4, an *energy project* as described in section 48(a)(9)(A)(ii) and defined in guidance.

(11) In the case of a section 48C credit, an *eligible property* described in section 48C(c)(2).

(12) In the case of a section 48E credit, a *qualified facility* described in section 48E(b)(3) or, in the case of a section 48E credit relating to a qualified investment with respect to energy storage technology, an *energy storage technology* described in section 48E(c)(2).

(f) *Disregarded entity*. The term *disregarded entity* means an entity that is disregarded as an entity separate from its owner for Federal income tax purposes.

(g) *Electing taxpayer*. The term *electing taxpayer* means any taxpayer that is not an applicable entity described in paragraph (b) of this section but makes an election in accordance with §§1.6417-2(b), 1.6417-3, and, if applicable, 1.6417-4, to be treated as an applicable entity for a taxable year with respect to applicable credits determined with respect to an applicable credit property described in §1.6417-1(e)(3), (5), or (7).

(h) *Elective payment amount*—(1) *In general*. The term *elective payment*

amount means, with respect to an applicable entity or an electing taxpayer that is not a partnership or an S corporation, the applicable credit(s) for which an applicable entity or electing taxpayer makes an elective payment election to be treated as making a payment against the tax imposed by subtitle A for the taxable year, which is equal to the sum of—

(i) The amount (if any) of the current year applicable credit(s) allowed as a general business credit under section 38 for the taxable year, as provided in §1.6417-2(e)(2)(iii), and

(ii) The amount (if any) of unused current year applicable credits which would otherwise be carried back or carried forward from the unused credit year under section 39 and that are treated as a payment against tax, as provided in §1.6417-2(e)(2)(iv).

(2) *Elective payment amount with respect to partnerships and S corporations*. With respect to an electing taxpayer that is a partnership or an S corporation, the term *elective payment amount* means the sum of the applicable credit(s) for which the partnership or S corporation makes an elective payment election and that results in a payment to such partnership or S corporation equal to the amount of such credit(s) (unless the partnership owes a Federal tax liability, in which case the payment may be reduced by such tax liability).

(i) *Elective payment election*. The term *elective payment election* means an election made in accordance with §1.6417-2(b) for applicable credit(s) determined with respect to an applicable entity or electing taxpayer.

(j) *Guidance*. The term *guidance* means guidance published in the **Federal Register** or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the IRS.gov website. See §§601.601 and 601.602 of this chapter.

(k) *Indian tribal government*. The term *Indian tribal government* means the recognized governing body of any Indian or Alaska Native tribe, band, nation, pueblo, village, community, component band, or component reservation, individually identified (including parenthetically) in the most recent list published by the Department of the Interior in the **Federal Register** pursuant to section 104 of the

Federally Recognized Indian Tribe List Act of 1994 (25 U.S.C. 5131).

(l) *Partnership*. The term *partnership* has the meaning provided in section 761 of the Code.

(m) *S corporation*. The term *S corporation* has the meaning provided in section 1361(a)(1) of the Code.

(n) *Section 6417 regulations*. The term *section 6417 regulations* means §§1.6417-1 through 1.6417-6.

(o) *Statutory references*—(1) *Chapter 1*. The term *chapter 1* means chapter 1 of the Code.

(2) *Code*. The term *Code* means the Internal Revenue Code.

(3) *Subchapter K*. The term *subchapter K* means subchapter K of chapter 1.

(4) *Subtitle A*. The term *subtitle A* means subtitle A of the Code.

(p) *U.S. territory*. The term *U.S. territory* means the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(q) *Applicability date*. This section applies to taxable years ending on or after date of publication of final rule.

§1.6417-2 Rules for making elective payment elections.

(a) *Elective payment elections*—(1) *Elections by applicable entities*—(i) *In general*. An applicable entity that makes an elective payment election in the manner provided in paragraph (b) of this section will be treated as making a payment against the Federal income taxes imposed by subtitle A for the taxable year with respect to which an applicable credit is determined in the amount determined under paragraph (c) of this section.

(ii) *Disregarded entities*. If an applicable entity is the owner (directly or indirectly) of a disregarded entity that directly holds an applicable credit property, the applicable entity may make an elective payment election in the manner provided in paragraph (b) of this section for applicable credits determined with respect to the applicable credit property held directly by the disregarded entity.

(iii) *Undivided ownership interests*. If an applicable entity is a co-owner in an applicable credit property through an arrangement properly treated as a

tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code to be excluded from the application of subchapter K, then the applicable entity's undivided ownership share of the applicable credit property will be treated as a separate applicable credit property owned by such applicable entity, and the applicable entity may make an elective payment election in the manner provided in paragraph (b) of this section for the applicable credits determined with respect to such applicable credit property.

(iv) *Partnerships and S corporations not applicable entities.* Partnerships and S corporations are not applicable entities described in §1.6417-1(c), and thus are not eligible to make any election under paragraph (b) of this section, unless the partnership or S corporation is an electing taxpayer. This is the case no matter how many of the partners of a partnership are described in §1.6417-1(c)(1), including if all of a partnership's partners are so described.

(v) *Members of a consolidated group of which an Alaska Native Corporation is the common parent*—a consolidated group (as defined in §1.1502-1) the common parent of which is an Alaska Native Corporation, any member that is an electing taxpayer may —

(2) *Electing taxpayers*—(i) *Electing taxpayers that are not partnerships or S corporations.* An electing taxpayer other than a partnership or an S corporation that has made an elective payment election in accordance with §1.6417-3 and paragraph (b) of this section will be treated as making a payment against the Federal income taxes imposed by subtitle A for the taxable year with respect to which the applicable credit is determined in the amount determined under paragraph (c) of this section.

(ii) *Electing taxpayers that are partnerships or S corporations.* In the case of an electing taxpayer that is a partnership or S corporation that has made an elective payment election in accordance with §§1.6417-3 and 1.6417-4 and paragraph (b) of this section, the Internal Revenue Service will make a payment to such partnership or S corporation equal to the amount of such credit determined under paragraph (c) of this section and

§1.6417-4(d) (unless the partnership owes any Federal income tax liability, in which case the payment may be reduced by such tax liability).

(iii) *Partners and S corporation shareholders prohibited from making any elective payment election.* Under section 6417(c)(1) of the Code, any elective payment election with respect to applicable credit property held directly by a partnership or S corporation must be made by the partnership or S corporation. As provided under section 6417(c)(2) of the Code, no partner in a partnership, or shareholder of an S corporation, may make an elective payment election with respect to any applicable credit determined with respect to such applicable credit property.

(iv) *Disregarded entities.* If an electing taxpayer is the owner (directly or indirectly) of a disregarded entity that directly holds any applicable credit property, the electing taxpayer may make an elective payment election in the manner provided in paragraph (b) of this section for applicable credits determined with respect to the applicable credit property held directly by the disregarded entity.

(v) *Undivided ownership interests.* If an electing taxpayer is a co-owner in an applicable credit property through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code to be excluded from the application of subchapter K, then the electing taxpayer's undivided ownership interest in or share of the applicable credit property will be treated as a separate applicable credit property owned by such electing taxpayer, and the electing taxpayer may make an elective payment election in the manner provided in paragraph (b) of this section for the applicable credits determined with respect to such applicable credit property.

(vi) *Members of a consolidated group*—

(3) *Special rules for certain credits*—(i) *Renewable electricity production credit.* Any election under this paragraph (a) with respect to a section 45 credit—

(A) Applies separately with respect to each qualified facility;

(B) Must be made in the manner provided in paragraph (b) of this section for

the taxable year in which such qualified facility is originally placed in service; and

(C) Applies to such taxable year and to any subsequent taxable year that is within the period described in section 45(a)(2)(A)(ii) with respect to such qualified facility.

(ii) *Credit for carbon oxide sequestration.* Except as provided in §1.6417-3(c), which provides a special rule for electing taxpayers, any election under this paragraph (a) with respect to a section 45Q credit—

(A) Applies separately with respect to the carbon capture equipment originally placed in service by the applicable entity during a taxable year;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such qualified facility is originally placed in service; and

(C) Applies to such taxable year and to any subsequent taxable year that is within the period described in section 45Q(3)(A) or (4)(A) with respect to such equipment.

(iii) *Credit for production of clean hydrogen.* Except as provided in §1.6417-3(b), which provides a special rule for electing taxpayers, any election under this paragraph (a) with respect to a section 45V credit—

(A) Applies separately with respect to each qualified clean hydrogen production facility;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such facility is placed in service (or within the 1-year period after August 16, 2022, for facilities placed in service before December 31, 2022); and

(C) Applies to such taxable year and all subsequent taxable years with respect to such facility.

(iv) *Clean electricity production credit.* Any elective payment election with respect to a section 45Y credit—

(A) Applies separately with respect to each qualified facility;

(B) Must be made in the manner provided in paragraph (b) of this section for the taxable year in which such facility is placed in service; and

(C) Applies to such taxable year and to any subsequent taxable year which is within the period described in section 45Y(b)(1)(B) with respect to such facility.

(v) *Advanced manufacturing production credit.* Any elective payment election with respect to a section 45X credit applies separately with respect to each facility (whether the facility existed on or before, or after, December 31, 2022) at which a taxpayer produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) during the taxable year.

(b) *Manner of making election—(1) In general—(i) Election is made on the annual tax return.* An elective payment election is made on the annual tax return, as defined in §1.6417-1(b), in the manner prescribed by the IRS in guidance, along with any required completed source credit form(s) with respect to the applicable credit property, a completed Form 3800, *General Business Credit*, (or its successor), and any additional information, including supporting calculations, required in instructions.

(ii) *Election must be made on original return.* An election must be made on an original return (including any revisions on a superseding return) filed not later than the due date (including extensions of time) for the original return for the taxable year for which the applicable credit is determined. No elective payment election may be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There is no relief available under §§301.9100-1 through 301.9100-3 of this chapter for an elective payment election that is not timely filed.

(2) *Pre-filing registration required.* Pre-filing registration in accordance with §1.6417-5 is a condition for making an elective payment election. An elective payment election will not be effective with respect to credits determined with respect to an applicable credit property unless the applicable entity or electing taxpayer received a valid registration number for the applicable credit property in accordance with §1.6417-5(c) and provided the registration number for each applicable credit property on its Form 3800 (or its successor) attached to the tax return, in accordance with guidance.

(3) *Due date for making the election.* To be effective, an elective payment election must be made no later than:

(i) In the case of any taxpayer for which no Federal income tax return is required under sections 6011 or 6033(a) of the Code, the due date (including an extension of time) for the original return that would be due under section 6033(a) if such applicable entity were described in that section. Under section 6072(e), that date is the 15th day of the fifth month after the taxable year determined by section 441 of the Code. Subject to issuance of guidance that specifies the manner in which an entity for which no Federal income tax return is required under sections 6011 or 6033(a) of the Code could request an extension of time to file, an automatic paperless six-month extension from the original due date is deemed to be allowed.

(ii) In the case of any taxpayer that is not normally required to file an annual tax return with the IRS (such as taxpayers located in the U.S. territories), the due date (including extensions of time) that would apply if the taxpayer was located in the United States.

(iii) In any other case, the due date (including extensions of time) for the original return for the taxable year for which the election is made, but in no event earlier than February 13, 2023.

(4) *Election is not revocable—(i) In general.* Except as provided in subparagraphs (ii) and (iii) of this paragraph, any elective payment election, once made, is irrevocable and applies with respect to any applicable credit for the taxable year for which the election is made.

(ii) *Election lasts for a period of years for certain credits.* For elective payment elections with respect to section 45 credits described in §1.6417-1(d)(2) or section 45Y credits described in §1.6417-1(d)(8), the election applies to each taxable year in the 10-year period provided in section 45(a)(2)(A)(ii) or 45Y(b)(1)(B), respectively, beginning on the date the facility was originally placed in service. For elective payment elections with respect to section 45Q credits described in §1.6417-1(d)(3), the election applies to each taxable year in the 12-year period provided in section 45Q(a)(3)(A) or (4)(A) beginning on the date the carbon capture equipment was originally placed in service. For elective payment elections with respect to section 45V credits described in §1.6417-1(d)(5), the

election applies to the taxable year in which the qualified clean hydrogen production facility was originally placed in service and all subsequent taxable years.

(iii) *Electing taxpayers.* For electing taxpayers who make an elective payment election, the election applies for one five-year period per applicable credit property, but such election may be revoked once per applicable credit property, as provided in §1.6417-3.

(5) *Scope of election.* An elective payment election applies to the entire amount of applicable credit(s) determined with respect to each applicable credit property that was properly registered for the taxable year, resulting in an elective payment amount that is the entire amount of applicable credit(s) determined with respect to the applicable entity or electing taxpayer for a taxable year.

(c) *Determination of applicable credit—(1) In general.* In the case of any applicable entity making an elective payment election, any applicable credit is determined—

(i) Without regard to section 50(b)(3) and (4)(A)(i) of the Code, and

(ii) By treating any property with respect to which such credit is determined as used in a trade or business of the applicable entity.

(2) *Effect of trade or business rule.* The trade or business rule in paragraph (c)(1)(ii) of this section—

(i) Allows the applicable entity to treat an item of property as if it is of a character subject to an allowance of depreciation (such as under sections 30C and 45W); to produce items in the ordinary course of a trade or business of the taxpayer (such as in sections 45V and 45X); and to state that an item of property is one for which depreciation (or amortization in lieu of depreciation) is allowable (such as in sections 48, 48C, and 48E);

(ii) Allows the applicable entity to apply the capitalization and accelerated depreciation rules (such as sections 167, 168, 263, and 263A of the Code) that apply to determining the basis and the depreciation allowance for property used in a trade or business;

(iii) Makes applicable general credit limitations by those persons engaged in the conduct of a trade or business and to which such limitations apply, such as

section 49 in the context of investment tax credits and section 469 for all applicable credits; and

(iv) Does not create any presumption that the trade or business is related (or unrelated) to a tax-exempt entity's exempt purpose.

(3) *Special rule for investment-related credit property acquired with income, including income from certain grants and forgivable loans, that is exempt from taxation.* For purposes of section 6417, income, including income from certain grants and forgivable loans, that is exempt from taxation under subtitle A and used to purchase, construct, reconstruct, erect, or otherwise acquire an applicable credit property described in sections 30C, 45W, 48, 48C, or 48E (investment-related credit property) are included in basis for purposes of computing the applicable credit amount determined with respect to the applicable credit property, regardless of whether basis is required to be reduced (in whole or in part) by such amounts under general tax principles. However, if an applicable entity receives a grant, forgivable loan, or other income exempt from taxation under subtitle A for the specific purpose of purchasing, constructing, reconstructing, erecting, or otherwise acquiring an investment-related credit property (Restricted Tax Exempt Amount), and the Restricted Tax Exempt Amount plus the applicable credit otherwise determined with respect to that investment-related credit property exceeds the cost of the investment-related credit property, then the amount of the applicable credit is reduced so that the total amount of applicable credit plus the amount of any Restricted Tax Exempt Amount equals the cost of investment-related credit property.

(4) *Credits must be determined with respect to the applicable entity or electing taxpayer.* Any credits for which an elective payment election is made must have been determined with respect to the applicable entity or electing taxpayer. An applicable credit is determined with respect to an applicable entity or electing taxpayer in cases where the applicable entity or electing taxpayer owns the underlying eligible credit property or, if ownership is not required, otherwise conducts the activities giving rise to the underlying eligible credit. Thus, no election may be made under this

section for any credits purchased pursuant to section 6418, transferred pursuant to section 45Q(f)(3), acquired by a lessee from a lessor by means of an election to pass through the credit to a lessee under former section 48(d) (pursuant to section 50(d)(5)), owned by a third party, or otherwise not determined with respect to the applicable entity or electing taxpayer.

(5) *Examples.* The following examples illustrate the rules of this paragraph (c).

(i) *Example 1.* School district A receives a tax exempt grant in the amount of \$400,000 from the Environmental Protection Agency to purchase electric school bus B. A purchases B for \$400,000. A's basis in B is \$400,000. B qualifies for the maximum section 45W credit, \$40,000. However, because the amount of the restricted tax exempt grant plus the amount of the section 45W credit exceeds the cost of B, A's section 45W credit is reduced by the amount necessary so that the total amount of the section 45W credit plus the restricted tax exempt amount equals the cost of B. A's section 45W credit is therefore reduced by \$40,000 to zero.

(ii) *Example 2.* Assume the same facts as in paragraph (c)(5)(i) of this section (Example 1), except that the grant is in the amount of \$300,000. A purchases B using the grant and \$100,000 of A's unrestricted funds. A's basis in B is \$400,000 and A's section 45W credit is \$40,000. Since the amount of the restricted tax exempt grant plus the amount of the section 45W credit (\$340,000) is less than the cost of B, A's 45W credit under section 6417(b)(6) is not reduced.

(iii) *Example 3.* Public charity B receives a \$60,000 grant from a private foundation to build energy property, P, a qualified investment credit property that costs \$80,000. B uses \$20,000 of its own funds plus the \$60,000 grant to build P. B's basis in P is \$80,000. Based upon acquisition cost, B can earn a section 48 investment credit (with bonus credit amounts) of \$40,000 (50% of basis). However, because the amount of the restricted tax exempt grant (\$60,000) plus the section 48 credit (\$40,000) exceeds P's cost by \$20,000, B's section 48 applicable credit is reduced by \$20,000 so that the total amount of the section 48 investment credit plus the restricted tax exempt grant equals the cost of P.

(iv) *Example 4.* Taxpayer Q is engaged in the business of capturing carbon oxide. Q properly elects to be treated as an applicable entity with respect to the section 45Q credit determined with respect to single process trains A, B, and C for 2024. In the same year, Q also purchases section 45Q credits under section 6418 from an unrelated taxpayer and has section 45Q credits transferred to itself pursuant to section 45Q(f)(3). Q can make an elective payment election only with respect to section 45Q applicable credits determined with respect to A, B, and C. Q cannot make an elective payment election with respect to any credits transferred to Q pursuant to sections 6418 and 45Q(f)(3).

(d) *Timing of payment.* Except as provided in §1.6417-4(d) (relating to payments to partnerships and S corporations),

the elective payment amount will be treated as made—

(1) In the case of any taxpayer for which no return is required under sections 6011 or 6033(a), on the later of—

(i) The date that a return would be due under section 6033(a) (determined without regard to extensions) if the taxpayer were described in that section, or

(ii) The date on which such taxpayer submits a claim for credit or refund in accordance with paragraph (b) of this section.

(2) In any other case, on the later of—

(i) The due date (determined without regard to extensions) of the return for the taxable year, or

(ii) The date on which such return is filed.

(e) *Denial of double benefit—(1) In general.* Under section 6417(e), in the case of an applicable entity or electing taxpayer making an elective payment election with respect to an applicable credit, such credit is reduced to zero and is, for any other purposes of the Code, deemed to have been allowed as a credit to such entity or taxpayer for such taxable year. Paragraphs (e)(2) and (e)(3) of this section explain the application of the section 6417(e) denial of double benefit rule to an applicable entity or electing taxpayer (other than a partnership or S corporation). The application of section 6417(e) for an electing taxpayer that is a partnership or S corporation is provided in §1.6417-4(c)(1)(ii).

(2) *Application of the Denial of Double Benefit Rule.* An applicable entity or electing taxpayer (other than an electing taxpayer that is a partnership or S corporation) making an elective payment election applies section 6417(e) by taking the following steps:

(i) Compute the amount of the Federal income tax liability (if any) for the taxable year, without regard to the GBC, that is payable on the due date of the return (without regard to extensions), and the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on amount of tax under section 38.

(ii) Compute the allowed amount of GBC carryforwards carried to the taxable year plus the amount of current year GBCs (including current applicable credits)

allowed for the taxable year under section 38 (including, for clarity purposes, the ordering rules in section 38(d)). Because the election is made on an original return for the taxable year for which the applicable credit is determined, any business credit carrybacks are not considered when determining the elective payment amount for the taxable year.

(iii) Apply the GBCs allowed for the taxable year as computed under paragraph (e)(2)(ii) of this section, including those attributable to applicable credits as GBCs, against the tax liability computed in paragraph (e)(2)(i) of this section.

(iv) Identify the amount of any excess or unused current year GBC, as defined under section 39, attributable to current year applicable credit(s) for which the applicable entity is making an elective payment election. Treat the amount of such unused applicable credits as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credits are determined (rather than having them available for carryback or carryover) (net elective payment amount).

(v) Reduce the applicable credits for which an elective payment election is made by the amount (if any) allowed as a GBC under section 38 for the taxable year, as provided in paragraph (e)(2)(iii) of this section, and by the net elective payment amount (if any) that is treated as a payment against tax, as provided in paragraph (e)(2)(iv) of this section, which results in the applicable credits being reduced to zero.

(3) *Use of applicable credit for other purposes.* The full amount of the applicable credits for which an elective payment election is made is deemed to have been allowed for all other purposes of the Code, including, but not limited to, the basis reduction and recapture rules imposed by section 50 and calculation of any underpayment of estimated tax under sections 6654 and 6655 of the Code.

(4) *Examples.* The following examples illustrate the rules of this paragraph (e).

(i) *Example 1.* U is a tax-exempt university described in section 501(c)(3) whose fiscal year runs from July 1 to June 30. U places in service P, energy property eligible for a section 48 credit, in June 2024. P is an asset used in connection with its unrelated business. U completes the pre-filing registration in accordance with §1.6417-5 as an applicable entity that has placed P into service and intends to make an elective payment election with respect to section 48 credits determined with

respect to P. U timely files its 2024 Form 990-T on November 15, 2024. On its return, U properly determines that it has \$500,000 of Unrelated Business Income Tax (UBIT) under section 512. On its Form 3800 attached to its return, U calculates its limitation of GBC under section 38(c) (simplified) is \$375,000 (paragraph (e)(2)(i) of this section). U attaches Form 3468 to claim a section 48 credit of \$100,000 with respect to P (its GBC for the taxable year) (paragraph (e)(2)(ii) of this section). Under paragraph (e)(2)(iii) of this section, the section 48 credit reduces U's UBIT liability to \$400,000. U pays its \$400,000 tax liability on November 15, 2024. Because there is no unused current year applicable credit, paragraph (e)(2)(iv) of this section does not apply. Under paragraph (e)(2)(v) of this section, the \$100,000 of section 48 credit is reduced by the \$100,000 of applicable credits claimed as GBCs for the taxable year, which results in the applicable credits being reduced to zero. However, the \$100,000 of current year section 48 credit is deemed to have been allowed to U for 2024 for all other purposes of the Code (paragraph (e)(3) of this section).

(ii) *Example 2.* Assume the same facts as in paragraph (e)(4)(i) of this section (*Example 1*), except that U has \$80,000 of Unrelated Business Income Tax (UBIT) under section 512, and calculates its limitation of GBC under section 38(c) (simplified) is \$60,000 (paragraph (e)(2)(i) of this section). U uses \$60,000 of its \$100,000 of section 48 credit against its tax liability (paragraph (e)(2)(iii) of this section). U's net elective payment amount is \$40,000 (paragraph (e)(2)(iv) of this section). U reduces its applicable credit by the \$60,000 claimed against tax in paragraph (e)(2)(iii) of this section and by the \$40,000 net elective payment amount determined in paragraph (e)(2)(iv) of this section, resulting in the applicable credit being reduced to zero (paragraph (e)(2)(v) of this section). When the IRS processes U's 2024 Form 990-T, the net elective payment amount results in a \$40,000 refund to U. However, for other purposes of the Code, the \$100,000 section 48 credit is deemed to have been allowed to U for 2024 (paragraph (e)(3) of this section).

(iii) *Example 3.* V is a city located in the United States that never has Federal income tax liability, so paragraph (e)(2)(i) of this section does not apply. V timely completes pre-filing registration in accordance with §1.6417-5 as an applicable entity that will be eligible to make an elective payment election, with regard to its annual accounting period ending in 2024, for the credit determined under section 30C(a) from properties A, B, and C; the credit determined under section 45(a) for facility D; the credit determined under section 45U(a) for facility E; the credit determined under section 45W(a) with respect to vehicles F, G, and H; and the credit determined under section 48(a) with respect to property I and J. V timely files its 2024 Form 990-T. V properly completes and attaches the relevant source credit forms and Form 3800 with registration numbers and all required information in the instructions, properly making the elective payment election for all of the credits, and properly determining that the amount of applicable credits determined with respect to A, B, C, D, E, F, G, H, I, and J is \$500,000 (its GBC for the taxable year) (paragraph (e)(2)(ii) of this section).

Paragraph (e)(2)(iii) of this section does not apply. Under paragraph (e)(2)(iv) of this section, the entire \$500,000 is a net elective payment amount. When the IRS processes V's 2024 Form 990-T, the net elective payment amount results in a \$500,000 refund to V. V's elective payment amount is reduced by the net elective payment amount, so all applicable credits for 2024 are reduced to zero. However, for other purposes of the Code, the \$500,000 of applicable credits are deemed to have been allowed to V for its annual accounting period ending in 2024 (paragraph (e)(3) of this section).

(iv) *Example 4.* W is a business taxpayer engaged in the manufacturing of components, including eligible components as defined in section 45X(c)(1) at facility F. W completes pre-filing registration in accordance with §1.6417-5 stating that it intends to elect to be treated as an applicable entity with respect to eligible components produced at F in 2024. In 2024, W timely files its 2024 return electing to be treated as an applicable entity, calculating its federal income tax before GBCs of \$125,000 and that its limitation of GBC under section 38(c) (simplified) is \$100,000 (paragraph (e)(2)(i) of this section). W attaches Form 7207 to claim a current section 45X credit of \$50,000 with respect to eligible components produced at F (its applicable credits). W also attaches Form 5884 to claim a current work opportunity tax credit (WOTC) of \$50,000 (WOTC is not an applicable credit). W also completes and attaches Form 3800 which shows the amount of each current credit, including current section 45X credit with registration number, and business credit carryforwards of \$25,000 (its GBC for the taxable year) (paragraph (e)(2)(ii) of this section). Using the ordering rules in sections 38(d), W is allowed \$25,000 of the carryforwards, \$50,000 of WOTC plus only \$25,000 of section 45X credit against net income tax, as defined under section 38(c)(1)(B), leaving \$25,000 of tax liability (paragraph (e)(2)(iii) of this section). The \$25,000 of unused section 45X credit is the net elective payment amount that results in a \$25,000 payment against tax by W (paragraph (e)(2)(iv) of this section). On its return, W shows net tax liability of \$25,000 (\$125,000 - \$100,000 allowed GBC) and the net elective payment of \$25,000 which W applied to net tax liability, resulting in zero tax owed on the return. Under paragraph (e)(2)(v) of this section, W's applicable credit is reduced by the \$25,000 of section 45X credit claimed as a GBC for the taxable year, as provided in paragraph (e)(2)(iii) of this section, as well as by the \$25,000 net elective payment amount determined in paragraph (e)(2)(iv) of this section, resulting in the \$50,000 of applicable credit being reduced to zero. However, for all other purposes of the Code, the \$50,000 of 45X applicable credits are deemed to have been allowed to W for 2024 (paragraph (e)(3) of this section).

(v) *Example 5.* Assume the same facts as in paragraph (e)(4)(iv) of this section (*Example 4*), except W filed the return on a timely filed extension after the due date of the return (without extensions). Even though W did not owe tax after applying the net elective payment amount against its net tax liability, W may be subject to the section 6655 penalty for failure to pay estimated income tax. The net elective payment is not an estimated tax installment, rather, it is treated as a payment made at the filing of the return.

(f) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§1.6417-3 Special rules for electing taxpayers.

(a) *In general.* This section relates to the election available to electing taxpayers. An electing taxpayer that makes an elective payment election in accordance with this section is treated as an applicable entity for the duration of the election period, but only with respect to the applicable credit property described in proposed §1.6417-1(e)(3), (5), or (7), respectively, that is the subject of the election. See paragraphs (b), (c), and (d) of this section for the specific rules regarding taxpayers making an election under section 6417(d)(1)(B), (C), or (D), respectively. See paragraph (e) for rules relating to the making of the election. See §1.6417-4 for special rules related to electing taxpayers that are partnerships or S corporations.

(b) *Elections with respect to the credit for production of clean hydrogen.* An electing taxpayer that has placed in service applicable credit property described in §1.6417-1(e)(5) (in other words, a qualified clean hydrogen production facility as defined in section 45V(c)(3)) during the taxable year may make an elective payment election for such taxable year (or by August 16, 2023, in the case of facilities placed in service before December 31, 2022), but only with respect to the qualified clean hydrogen production facility, only with respect to the applicable credit described in §1.6417-1(d)(5) (in other words, the section 45V credit), and only if the pre-filing registration required by §1.6417-5 was properly completed. An electing taxpayer that elects to treat qualified property that is part of a specified clean hydrogen production facility as energy property under section 48(a)(15) may not make an elective payment election with respect to such facility.

(c) *Election with respect to the credit for carbon oxide sequestration.* An electing taxpayer that has, after December 31, 2022, placed in service applicable credit property described in §1.6417-1(e)(3) (in other words, a single process train described in §1.45Q-2(c)(3) at a qualified facility (as defined in section 45Q(d))

during the taxable year may make an elective payment election for such taxable year, but only with respect to the single process train, only with respect to the applicable credit described in §1.6417-1(d)(3) (in other words, the section 45Q credit), and only if the pre-filing registration required by §1.6417-5 was properly completed.

(d) *Election with respect to the advanced manufacturing production credit.* An electing taxpayer that produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at an applicable credit property described in §1.6417-1(e)(7) during the taxable year (whether the facility existed on or before, or after, December 31, 2022) may make an elective payment election for such taxable year, but only with respect to the facility at which the eligible components are produced by the electing taxpayer in that year, only with respect to the applicable credit described in §1.6417-1(d)(7) (in other words, the section 45X credit), and only if the pre-filing registration required by §1.6417-5 was properly completed.

(e) *Election for electing taxpayers—*
(1) *In general.* If an electing taxpayer makes an elective payment election under 1.6417-2(b) with respect to any taxable year in which the electing taxpayer places in service a qualified clean hydrogen production facility for which a section 45V credit is determined, places in service a single process train at a qualified facility for which a section 45Q credit is determined, or produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at a facility, respectively, the electing taxpayer will be treated as an applicable entity for purposes of making an elective payment election for such taxable year and during the election period described in paragraph (e)(3) of this section, but only with respect to the applicable credit property described in §1.6417-1(e)(3), (5), or (7), as applicable, that is the subject of the election. The taxpayer must otherwise meet all requirements to earn the credit in the electing year and in each succeeding year during the election period described in paragraph (e)(3) of this section.

(2) *Election is per applicable credit property.* An elective payment election under §1.6417-2(b) is made separately for

each applicable credit property, which is, respectively, a qualified clean hydrogen production facility placed in service for which a section 45V credit is determined, a single process train placed in service at a qualified facility for which a section 45Q credit is determined, or a facility at which eligible components are produced for which a section 45X credit is determined. Only one election may be made with respect to any specific applicable credit property.

(3) *Election period—*(i) *In general.* Except as provided in paragraph (e)(3) (ii) of this section, if an electing taxpayer makes an elective payment election under §1.6417-2(b) with respect to applicable credit property described in §1.6417-1(e)(3), (5), or (7) for which an applicable credit is determined under §1.6417-1(d)(3), (5), or (7), the election period during which such election applies includes the taxable year in which the election is made and each of the four subsequent taxable years that end before January 1, 2033. The election period cannot be less than a taxable year but may be made for a taxable period of less than 12 months within the meaning of section 443 of the Code.

(ii) *Revocation of election.* An electing taxpayer may, during a subsequent year of the election period described in paragraph (e)(3)(i) of this section, revoke the elective payment election with respect to an applicable credit property described in §1.6417-1(e)(3), (5), or (7), in accordance with forms and instructions. See §601.602 of this chapter. Any such revocation, if made, applies to the taxable year in which the revocation is made (which cannot be less than a taxable year but may be made for a taxable period of less than 12 months as described in section 443 of the Code) and each subsequent taxable year within the election period. Any such revocation may not be subsequently revoked.

(4) *No transfer election under section 6418(a) permitted while an elective payment election is in effect.* No transfer election under section 6418(a) may be made by an electing taxpayer with respect to any applicable credit under §1.6417-1(d)(3), (5), or (7) determined with respect to applicable credit property described in §1.6417-1(e)(3), (5), or (7) during the election period for that applicable credit

property. However, if the election period is no longer in effect with respect to an applicable credit property, any credit determined with respect to such applicable credit property can be transferred pursuant to a transfer election under section 6418(a), as long as the taxpayer meets the requirements of section 6418 and the 6418 regulations.

(f) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§1.6417-4 Elective payment election for electing taxpayers that are partnerships or S corporations.

(a) *In general.* In the case of any applicable credit determined with respect to any applicable credit property described in §1.6417-1(e)(3), (5), or (7) that is held directly (or treated as held directly because it is held by a disregarded entity) by an electing taxpayer that is a partnership or S corporation, any elective payment election under §1.6417-2(b) must be made by the partnership or S corporation.

(b) *Elections.* If an electing taxpayer that is a partnership or S corporation makes an elective payment election under §1.6417-2(b) with respect to any taxable year in which the electing taxpayer places in service applicable credit property described in §1.6417-1(e)(3) or (5), or produces, after December 31, 2022, eligible components (as defined in section 45X(c)(1)) at an applicable credit property described in §1.6417-1(e)(7), the electing taxpayer will be treated as an applicable entity for purposes of making an elective payment election for such taxable year and during the election period described in §1.6417-3(e)(3), but only with respect to the applicable credit property described in §1.6417-1(e)(3), (5), or (7), respectively, that is the subject of the election. In addition, the taxpayer must otherwise meet all requirements to earn the credit in the electing year and in each succeeding year during the election period described in §1.6417-3(e)(3).

(c) *Effect of election—(1) In general.* If a partnership or S corporation electing taxpayer makes an elective payment election, with respect to the section 45V, 45Q, or 45X credit—

(i) The Internal Revenue Service will make a payment to such partnership or

S corporation equal to the amount of such credit, determined in accordance with paragraph (d) of this section (unless the partnership or S corporation owes a Federal tax liability, in which case the payment may be reduced by such tax liability);

(ii) Before determining any partner's distributive share, or S corporation shareholder's pro rata share, of such credit, such credit is reduced to zero and is, for any other purposes under the Code, deemed to have been allowed solely to such entity (and not allocated or otherwise allowed to its partners or shareholders) for such taxable year;

(iii) Any amount with respect to which such election is made is treated as tax exempt income for purposes of sections 705 and 1366 of the Code;

(iv) A partner's distributive share of such tax exempt income is equal to such partner's distributive share of the otherwise applicable credit for each taxable year, as determined under §1.704-1(b)(4) (ii);

(v) An S corporation shareholder's pro rata share (as determined under section 1377(a) of the Code) of such tax exempt income for each taxable year (as determined under sections 444 and 1378(b) of the Code) is equal to the S corporation shareholder's pro rata share (as determined under section 1377(a)) of the otherwise applicable credit for each taxable year; and

(vi) Such tax exempt income resulting from such election is treated as received or accrued, including for purposes of sections 705 and 1366 of the Code, as of the date the applicable credit is determined with respect to the partnership or S corporation. (such as, for investment credit property, the date the property is placed in service).

(2) *Electing partnerships in tiered structures.* If a partnership (upper-tier partnership) is a direct or indirect partner of a partnership that makes an elective payment election (electing partnership) and directly or indirectly receives an allocation of tax exempt income resulting from the elective payment election made by the electing partnership, the upper-tier partnership must determine its partners' distributive shares of such tax exempt income in proportion to the partners'

distributive shares of the otherwise applicable credit as provided in paragraph (c)(1)(iv) of this section.

(3) *Character of tax exempt income.* Tax exempt income resulting from an elective payment election by an S corporation or a partnership is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, the tax exempt income is not treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

(d) *Determination of amount of the credit—(1) In general.* In determining the amount of an applicable credit that will result in a payment under paragraph (c)(1)(i) of this section, the partnership or S corporation must compute the amount of the applicable credit allowable as if an elective payment election were not made. Because a partnership or S corporation is not subject to sections 38(b) and (c) and 469 (that is, those sections apply at the partner or S corporation shareholder level), the amount of applicable credit determined by a partnership or S corporation is not subject to limitation by those sections. In addition, because the only applicable credits with respect to which a partnership or S corporation may make an elective payment election are not investment credits under section 46, sections 49 and 50 do not apply to limit the amount of the applicable credits.

(2) *Example.* The rules of this paragraph (d) are illustrated in the following example. A and B each contributed cash to P, a calendar-year partnership, for the purpose of manufacturing clean hydrogen at V, a qualified clean hydrogen facility that meets the definition of section 45V(c)(3). The partnership agreement provides that A and B share equally in all items of income, gain, loss, deduction and credit of P. P completes the pre-filing registration process with respect to the section 45V credit at V for 2023 in accordance §1.6417-5. P places V in service in 2023. P timely files its 2023 Form 1065 and properly makes the elective payment election in accordance with §§1.6417-2(b), 1.6417-3, and 1.6417-4. On its Form 1065, P properly determined that the amount of the section 45V credit with respect to the clean hydrogen produced at V for 2023 is \$100,000. The IRS processes P's return and makes a \$100,000 payment to P. Before determining A's and B's distributive shares, P reduces the credit to zero. While the \$100,000 section 45V credit is deemed to have been allowed to P for 2023 for any other purpose under this title, the credit is not allocated or otherwise allowed to its partners. The \$100,000 is

treated as tax exempt income for purposes of section 705, and is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). P allocates the tax exempt income from the elective payment election proportionately among the partners based on each partner's distributive share of the otherwise eligible section 45V credit as determined under §1.704-1(b)(4)(ii). Under that section, if partnership receipts or expenditures give rise to a credit, the partner's interest in the partnership with respect to such credit is in the same proportion as such partners' distributive shares of such receipt, loss, or deduction. Section 45V credits arise based on the amount of clean hydrogen produced at a facility. Under the partnership agreement, A and B share all items equally. Thus, A and B will each be allocated \$50,000 of tax exempt income for 2023. P will continue to be treated as an applicable entity with respect to V for taxable years 2024-2027 unless P revokes its election in accordance with §1.6417-3(e)(3)(ii). At the end of 2023, A and B increase their respective tax bases in their partnership interest and capital accounts by \$50,000 each (that is, their share of the \$100,000 of tax exempt income).

(e) *Partnerships subject to subchapter C of chapter 63.* For the application of subchapter C of chapter 63 of the Code to section 6417, see §301.6241-7 of this chapter.

(f) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§1.6417-5 Additional information and registration.

(a) *Pre-filing registration and election.* An applicable entity or electing taxpayer is required to satisfy the pre-filing registration requirements in paragraph (b) of this section as a condition of, and prior to, making an elective payment election. An applicable entity or electing taxpayer must use the pre-filing registration process to register itself as intending to make the elective payment election, to list all applicable credits it intends to claim, and to list each applicable credit property that contributed to the determination of such credits as part of the pre-filing submission (or amended submission). An applicable entity or electing taxpayer that does not obtain a registration number under paragraph (c)(1) of this section or report the registration number on its annual tax return, as defined in §1.6417-1(b), pursuant to paragraph (c)(5) of this section with

respect to an otherwise applicable credit property, is ineligible to receive any elective payment amount with respect to the amount of any credit determined with respect to that applicable credit property. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the applicable entity or electing taxpayer is eligible to receive a payment with respect to the applicable credits determined with respect to the applicable credit property.

(b) *Pre-filing registration requirements—(1) Manner of pre-filing registration.* Unless otherwise provided in guidance, an applicable entity or electing taxpayer must complete the pre-filing registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein.

(2) *Pre-filing registration and election for members of a consolidated group.* A member of a consolidated group is required to complete pre-filing registration as a condition of, and prior to, making an elective payment election. —

(3) *Timing of pre-filing registration.* An applicable entity or electing taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (c) of this section prior to making an elective payment election under §1.6417-2(b) on the applicable entity's or electing taxpayer's annual tax return for the taxable year at issue.

(4) *Each applicable credit property must have its own registration number.* An applicable entity or electing taxpayer must obtain a registration number for each applicable credit property with respect to which it intends to make an elective payment election.

(5) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, an applicable entity or electing taxpayer must provide the following information to the IRS to complete the pre-filing registration process:

(i) The applicable entity's or electing taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity.

(ii) Any additional information required by the IRS electronic portal, such as information regarding the taxpayer's exempt status under section 501(a) of the Code; that the applicable entity is a political subdivision of a State, the District of Columbia, an Indian Tribal government, or a U.S. territory; or that the applicable entity is an agency or instrumentality of a State, the District of Columbia, an Indian Tribal government, or a U.S. territory.

(iii) The taxpayer's taxable year, as determined under section 441 of the Code.

(iv) The type of annual tax return(s) normally filed by the applicable entity or electing taxpayer, or that the applicable entity or electing taxpayer does not normally file an annual tax return with the IRS.

(v) The type of applicable credit(s) for which the applicable entity or electing taxpayer intends to make an elective payment election.

(vi) For each applicable credit, each applicable credit property that the applicable entity or electing taxpayer intends to use to determine the credit for which the applicable entity or electing taxpayer intends to make an elective payment election.

(vii) For each applicable credit property listed in paragraph (b)(4)(vi) of this section, any further information required by the IRS electronic portal, such as—

(A) The type of applicable credit property;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the applicable credit property);

(C) Any supporting documentation relating to the construction or acquisition of the applicable credit property (such as State, District of Columbia, Indian Tribal, U.S. territorial, or local government permits to operate the applicable credit property; certifications; evidence of ownership that ties to a land deed, lease, or other documented right to use and access any land or facility upon which the applicable credit property is constructed or housed; U.S. Coast Guard registration numbers for offshore wind vessels; and the vehicle identification number of an eligible clean vehicle with respect to which a section 45W credit is determined);

(D) The beginning of construction date and the placed in service date of the applicable credit property.

(E) If an investment-related credit property (as defined §1.6417-2(c)(3)), the source of funds the taxpayer used to acquire the property; and

(F) Any other information that the applicable entity or electing taxpayer believes will help the IRS evaluate the registration request.

(viii) The name of a contact person for the applicable entity or electing taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either (1) possess legal authority to bind the applicable entity or electing taxpayer or (2) must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative*.

(ix) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant.

(x) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(c) *Registration number*—(1) *In general*. The IRS will review the information provided and will issue a separate registration number for each applicable credit property for which the applicable entity or electing taxpayer provided sufficient verifiable information.

(2) *Registration number is only valid for one taxable year*. A registration number is valid only with respect to the applicable entity or electing taxpayer that obtained the registration number under this section and only for the taxable year for which it is obtained.

(3) *Renewing registration numbers*. If an elective payment election will be made with respect to an applicable credit property for a taxable year after a registration number under this section has been obtained, the applicable entity or electing taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts

previously provided are still correct or updating any facts.

(4) *Amendment of previously submitted registration information if a change occurs before the registration number is used*. As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained but not yet used, an applicable entity or electing taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if the owner of a facility previously registered for an elective payment election for applicable credits determined with respect to that facility and the facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the facility must amend the original registration to disassociate its EIN from the applicable credit property and the new owner must submit separately an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered applicable credit property.

(5) *Registration number is required to be reported on the return for the taxable year of the elective payment election*. The applicable entity or electing taxpayer must include the registration number of the applicable credit property on its annual tax return as provided in §1.6417-2(b) for the taxable year. The IRS will treat an elective payment election as ineffective with respect to an applicable credit determined with respect to an applicable credit property for which the applicable entity or electing taxpayer does not include a valid registration number on the annual tax return.

(d) *Applicability date*. This section applies to taxable years ending on or after date of publication of final rule.

§1.6417-6 Special rules.

(a) *Excessive payment*—(1) *In general*. In the case of any elective payment amount

which the IRS determines constitutes an excessive payment, the tax imposed on such entity by chapter 1, regardless of whether such entity or taxpayer would otherwise be subject to chapter 1 tax, for the taxable year in which such determination is made will be increased by an amount equal to the sum of—

(i) The amount of such excessive payment, plus

(ii) An amount equal to 20 percent of such excessive payment.

(2) *Reasonable cause*. The amount described in paragraph (a)(1)(ii) of this section will not apply to an applicable entity or electing taxpayer if the applicable entity or electing taxpayer demonstrates to the satisfaction of the IRS that the excessive payment resulted from reasonable cause.

(3) *Excessive payment defined*. For purposes of this section, the term *excessive payment* means, with respect to an applicable credit property for which an elective payment election is made under §1.6417-2(b) for any taxable year, an amount equal to the excess of—

(i) The amount treated as a payment under §1.6417-2(a)(1)(i) or (a)(2)(i), or the amount of the payment made pursuant to §1.6417-2(a)(2)(ii), with respect to such applicable credit property for such taxable year, over

(ii) The amount of the credit which, without application of this section, would be otherwise allowable under the Code (as determined pursuant to §1.6417-2(c) and (e) or §1.6417-4(d)(1) and (3), and without regard to the limitation based on tax in section 38(c)) with respect to such applicable credit property for such taxable year.

(4) *Example*. This example illustrates the principles of this paragraph (a). B, an instrumentality of state M, places in service in 2023 facility F, which is eligible for the energy credit determined under section 48. B properly completes the pre-filing registration as an applicable entity that will earn the energy credit from F in accordance with §1.6417-5, and receives a registration number for F. B timely files its 2023 Form 990-T, properly providing the registration number for F and otherwise complying with §1.6417-2(b). On its Form 990-T, B calculates that the amount of energy credit determined with respect to F is \$100,000 and that the net elective payment amount is \$100,000. B receives a refund in the amount of \$100,000. In 2025, the IRS determines that the amount of energy credit

properly allowable to B in 2023 with respect to F (as determined pursuant to §1.6417-2(c) and (e) and without regard to the limitation based on tax in section 38(c)) was \$60,000. B is unable to show reasonable cause for the difference. The excessive payment amount is \$40,000 (\$100,000 treated as a payment - \$60,000 allowable amount). In 2025, the tax imposed under chapter 1 on B is increased in the amount of \$48,000 (\$40,000 + (20% * \$40,000).)

(b) *Basis reduction and recapture*—(1) *In general*. Rules similar to the rules of section 50 (without regard to section 50(b)(3) and (4)(A)(i)) apply for purposes of this section.

(2) *Reporting recapture*. Any reporting of recapture is made on the annual tax return of the applicable entity or electing taxpayer in the manner prescribed by the IRS in any guidance, along with supplemental forms such as Form 4255, *Recapture of Investment Credit*.

(3) *Example*. This example illustrates the principles of this paragraph (b). In December 2023, G, a government entity, places in service P, which is energy property eligible for the energy credit determined under section 48 (section 48 credit). G properly completes the pre-filing registration in accordance with §1.6417-5 as an applicable entity to make an election under section 6417 for 2023. G timely files its 2023 Form 990-T in 2024, properly making the elective payment election in accordance with §1.6417-2 for a section 48 energy credit determined with respect to P. On its Form 990-T, G properly determines that the amount of section 48 credit determined with respect to P is \$100,000 and that its net elective payment amount is \$100,000. The IRS sends G a \$100,000 refund. Pursuant to section 50(c), G reduces its basis in P by \$50,000. In July 2025, P ceases to be investment credit property with respect to G. Because this occurs before the close of the recapture period set forth in section 50, section 50(a)(1)(A) provides that the tax under chapter 1 for 2025 is increased by the recapture percentage of the aggregate decrease in the credits allowed under section 38 for all prior taxable years which would have resulted solely from reducing to zero any credit determined under subpart E of part IV of subchapter A of chapter 1 with respect to such property. Because P ceased to be investment credit property within 2 full years after P was placed in service, section 50(a)(1)(B) provides that the recapture percentage is 80%. G must properly report the recapture event in 2025, paying an \$80,000 tax. Because G is a government entity, G reports the recapture event on a Form 990-T or any Form provided in further guidance, along with supplemental forms such as Form 4255, *Recapture of Investment Credit*. G's basis in P is increased by \$40,000.

(c) *Mirror code territories*. Pursuant to section 6417(f) of the Code, section 6417 and the section 6417 regulations are not treated as part of the income tax laws of

the United States for purposes of determining the income tax law of any U.S. territory with a mirror code tax system (as defined in section 24(k) of the Code), unless such U.S. territory elects to have section 6417 and the section 6417 regulations be so treated. The applicable territory tax authority for a U.S. territory determines whether such an election has been made.

(d) *Partnerships subject to subchapter C of chapter 63 of the Code*. See §301.6241-7(j) of this chapter for rules applicable to payments made to partnerships subject to subchapter C of chapter 63 of the Code for a partnership taxable year.

(e) *Applicability date*. This section applies to taxable years ending on or after date of publication of final rule.

PART 301—PROCEDURE AND ADMINISTRATION

Par. 3. The authority citation for part 301 is amended by adding entries in numerical order for §§301.6241-1 and 301.6241-7 to read in part as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 301.6241-1 also issued under sections 48D(d), 6241, and 6417.

* * * * *

Section 301.6241-7 also issued under sections 48D(d), 6241, and 6417.

* * * * *

Par. 4. Section 301.6241-1 is amended by:

1. Adding a sentence after the second sentence of paragraph (a)(6)(iii); and
2. Adding a sentence to the end to the end of paragraph (b)(1).

The additions and revisions read as follows:

§301.6241-1 Definitions

(a) * * *

(6) * * *

(iii) * * * Notwithstanding the previous two sentences, any tax, penalty, addition to tax, or additional amount imposed on the partnership under chapter 1 is an item or amount with respect to the partnership.* * *

(b) * * *

(1) * * *The third sentence of paragraph (a)(6)(iii) applies to partnership taxable years ending on or after **June 21, 2023**. * * *

* * * * *

Par. 5. Section 6241-7 is amended by:

1. Redesignating paragraph (j) as paragraph (k);
2. Adding new paragraph (j);
3. Revising the first sentence of newly redesignated paragraph (k)(1); and
4. Adding paragraph (k)(3).

The additions and revisions read as follows:

§301.6241-7 Treatment of special enforcement matters

* * * * *

(j) *Elections resulting in payments to a partnership*. The IRS may adjust any election that results or could result in a payment to the partnership in lieu of a Federal tax credit or deduction without regard to subchapter C of chapter 63. The IRS may also make determinations, without regard to subchapter C of chapter 63, about the payment itself as well as any partnership-related item relevant to adjusting the election or the payment.

* * * * *

(k) *Applicability date*—(1) *In general*. Except as provided in paragraph (k) (2) (relating to paragraph (b) of this section) and paragraph (k)(3) of this section (relating to paragraph (j) of this section), this section applies to partnership taxable years ending on or after November 20, 2020.* * *

* * * * *

(3) *Elections resulting in payments to a partnership*. Paragraph (j) of this section applies to taxable years ending on or after **June 21, 2023**.

Douglas W. O'Donnell,
*Deputy Commissioner for Services
and Enforcement.*

(Filed by the Office of the Federal Register June 14, 2023, 11:15 a.m., and published in the issue of the Federal Register for June 21, 2023, ** FR *****)

Notice of Proposed Rulemaking

Section 6418 Transfer of Certain Credits

REG-101610-23

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations concerning the election under the Inflation Reduction Act of 2022 to transfer certain Federal income tax credits. The proposed regulations describe the proposed rules for the election to transfer eligible credits in a taxable year, including definitions and special rules applicable to partnerships and S corporations and regarding excessive credit transfer or recapture events. In addition, the proposed regulations describe rules related to an IRS pre-filing registration process that would be required. These proposed regulations affect eligible taxpayers that elect to transfer eligible credits in a taxable year and the transferee taxpayers to which eligible credits are transferred.

DATES: Written or electronic comments must be received by August 14, 2023. The public hearing on these proposed regulations is scheduled to be held on August 23, 2023, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by August 14, 2023. If no outlines are received by August 14, 2023, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. ET on August 21, 2023. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the hearing must be received by August 18, 2023.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate

IRS and REG-101610-23) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted, whether electronically or on paper, to the IRS's public docket. Send paper submissions to: CC:PA:LPD:PR (REG-101610-23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington DC 20044.

FOR FURTHER INFORMATION

CONTACT: Concerning these proposed regulations, Jeremy Milton at (202) 317-5665 and James Holmes at (202) 317-5114 (not a toll-free number); concerning submissions of comments and requests for a public hearing, Vivian Hayes at (202) 317-6901 (not a toll-free number) or by email to publichearings@irs.gov (preferred).

SUPPLEMENTARY INFORMATION:

Background

Section 6418 was added to the Internal Revenue Code (Code) on August 16, 2022, by section 13801(b) of Public Law 117-169, 136 Stat. 1818, 2009, commonly referred to as the Inflation Reduction Act of 2022 (IRA). 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 provides special rules relating to partnerships and S corporations and directs the Secretary of the Treasury or her delegate (Secretary) to provide rules for making elections under section 6418 and to require information or registration necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6418. Section 13801(g) of the IRA provides that section 6418 applies to taxable years beginning after December 31, 2022. This document contains proposed regulations that would amend the Income Tax Regulations (26 CFR part 1) to implement the statutory provisions of section 6418.

In the Rules and Regulations section of this issue of the *Federal Register*,

the Treasury Department and the IRS are issuing temporary regulations under §1.6418-4T that implement the pre-filing registration process described in §1.6418-4 of the proposed regulations. The temporary regulations require eligible taxpayers that want to elect to transfer eligible credits under section 6418 to register with the IRS through an IRS electronic portal in advance of the eligible taxpayer filing the return on which the election under section 6418 is made.

I. Overview of section 6418

Section 6418(a) provides that, in the case of an eligible taxpayer that elects to transfer to an unrelated transferee taxpayer all (or any portion specified in the election) of an eligible credit determined with respect to the eligible taxpayer for any taxable year, the transferee taxpayer specified in such election (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to such credit (or such portion thereof). Under section 6418(b), any amount of consideration paid by the transferee taxpayer to the eligible taxpayer for the transfer of such credit (or such portion thereof) is (1) required to be paid in cash, (2) not included in the eligible taxpayer's gross income, and (3) not allowed as a deduction to the transferee taxpayer under any provision of the Code.

Section 6418(f)(2) defines the term “eligible taxpayer” to mean any taxpayer that is not described in section 6417(d)(1) (A).

Section 6418(f)(1)(A) defines the term “eligible credit” to mean each of the following 11 credits:

(1) So much of the credit for alternative fuel vehicle refueling property allowed under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit);

(2) The renewable electricity production credit determined under section 45(a) of the Code (section 45 credit);

(3) The credit for carbon oxide sequestration determined under section 45Q(a) of the Code (section 45Q credit);

(4) The zero-emission nuclear power production credit determined under section 45U(a) of the Code (section 45U credit);

(5) The clean hydrogen production credit determined under section 45V(a) of the Code (section 45V credit);

(6) The advanced manufacturing production credit determined under section 45X(a) of the Code (section 45X credit);

(7) The clean electricity production credit determined under section 45Y(a) of the Code (section 45Y credit);

(8) The clean fuel production credit determined under section 45Z(a) of the Code (section 45Z credit);

(9) The energy credit determined under section 48 of the Code (section 48 credit);

(10) The qualifying advanced energy project credit determined under section 48C of the Code (section 48C credit); and

(11) The clean electricity investment credit determined under section 48E of the Code (section 48E credit).

Under section 6418(f)(1)(B), an election to transfer a section 45 credit, section 45Q credit, section 45V credit, or section 45Y credit is made separately with respect to each facility and for each taxable year during the credit period of the respective credit. Pursuant to section 6418(f)(1)(C) an eligible credit does not include any business credit carryforward or business credit carryback. Section 6418(g)(4) provides that an eligible taxpayer may not make an election to transfer credits for progress expenditures.

Pursuant to section 6418(e)(1), an eligible taxpayer must make an election to transfer any portion of an eligible credit on its original tax return for the taxable year for which the credit is determined by the due date of such return (including extensions of time) but such an election cannot be made earlier than 180 days after the date of the enactment of section 6418 by section 13801(b) of the IRA (that is, in no event earlier than 180 days after August 16, 2022, which is February 13, 2023). An eligible taxpayer may not revoke an election to transfer any portion of a credit. Pursuant to section 6418(d), a transferee taxpayer takes the transferred eligible credit into account in its first tax year ending with, or after, the eligible taxpayer's tax year with respect to which the transferred eligible credit was determined. Section 6418(e)(2) provides that a transferee taxpayer may not make any additional transfers of a transferred eligible credit under section 6418.

II. *Section 6418 rules for partnerships and S corporations*

Pursuant to section 6418(c), in the case of a partnership or an S corporation that directly holds a facility or property for which an eligible credit is determined: the election to transfer an eligible credit is made at the entity level and no election by any partner or shareholder is allowed with respect to such facility or property; any amount received as consideration for a transferred eligible credit is treated as tax exempt income for purposes of sections 705 and 1366 of the Code; and a partner's distributive share of the tax exempt income is based on the partner's distributive share of the transferred eligible credit.

III. *Special rules*

Section 6418(g) provides special rules regarding the elective transfer of certain credits. Section 6418(g)(1) provides that, as a condition of, and prior to, any transfer of any portion of an eligible credit pursuant to section 6418(a), the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6418.

Pursuant to section 6418(g)(2), if the Secretary determines that there is an excessive credit transfer to a transferee taxpayer, then the tax imposed on the transferee taxpayer by chapter 1 of the Code (chapter 1) (regardless of whether such entity would otherwise be subject to tax under chapter 1) is increased in the year of such determination by the amount of the excessive credit transfer plus 20 percent of such excessive credit transfer. The additional amount of 20 percent of the excessive credit transfer does not apply if the transferee taxpayer demonstrates to the satisfaction of the Secretary that the excessive credit transfer resulted from reasonable cause. An excessive credit transfer is defined in section 6418(g)(2)(C) as, with respect to a facility or property for which an election is made under section 6418(a) for any taxable year,

an amount equal to the excess of (i) the amount of the eligible credit claimed by the transferee taxpayer with respect to such facility or property for such taxable year; over (ii) the amount of the eligible credit that, without application of section 6418, would be otherwise allowable under the Code with respect to such facility or property for such taxable year.

Pursuant to section 6418(g)(3), if a section 48 credit, section 48C credit, or section 48E credit is transferred, the basis reduction rules of section 50(c) apply to the applicable investment credit property as if the transferred eligible credit was allowed to the eligible taxpayer. Further, if 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 as described in section 50(a)(1), then certain notification requirements apply. The eligible taxpayer must notify the transferee taxpayer of a recapture event in such form and manner as the Secretary may provide. In addition, the transferee taxpayer must notify the eligible taxpayer of the recapture amount, if any, in such form and manner as the Secretary may provide.

Section 6418(h) directs the Secretary to issue regulations or other guidance as may be necessary to carry out the purposes of section 6418, including guidance providing rules for determining a partner's distributive share of the tax exempt income described in section 6418(c)(1).

IV. *Notice 2022-50*

On October 24, 2022, the Treasury Department and the IRS published Notice 2022-50, 2022-43 I.R.B. 325, to, among other things, request feedback from the public at large on potential issues with respect to the transfer election provisions under section 6418 that may require guidance. Over 200 comment letters were received in response to Notice 2022-50. Based in part on the feedback received, the Treasury Department and the IRS are issuing these proposed regulations regarding the transfer election provisions under section 6418. The major areas with respect to which public stakeholders provided letters are discussed in the following Explanation of Provisions.

Explanation of Provisions

I. Transfers of Eligible Credits

Proposed §1.6418-1(a) would provide generally that an eligible taxpayer may make a transfer election under proposed §1.6418-2 to transfer any specified portion of an eligible credit determined with respect to any eligible credit property of such eligible taxpayer for any taxable year to a transferee taxpayer in accordance with section 6418 of the Code and §§1.6418-1 through 1.6418-5 (“the section 6418 regulations”). The remainder of proposed §1.6418-1 would then provide definitions for terms used throughout the section 6418 regulations, including definitions of eligible taxpayer, eligible credit, eligible credit property, paid in cash, specified credit portion, transferred specified credit portion, transfer election, transferee taxpayer, transferee partnership, transferee S corporation, transferor partnership, and transferor S corporation.

Proposed §1.6418-1(b) would define the term “eligible taxpayer” to mean any taxpayer (as defined in section 7701(a)(14) of the Code), other than one described in section 6417(d)(1)(A) and proposed §1.6417-1(b). The term “taxpayer” in section 7701(a)(14) means “any person subject to any internal revenue tax” and generally, includes entities that have a United States employment tax or excise tax obligation even if they do not have a United States income tax obligation.

Proposed §1.6418-1(c) would define the term “eligible credit” consistent with section 6418(f)(1)(A), and include all 11 of the credits listed in such section. Further, the definition would include a rule that an eligible credit does not include any business credit carryforward or business credit carryback determined under section 39 of the Code, which is consistent with section 6418(f)(1)(C). The regulations also would clarify that the entire amount of any eligible credit is separately determined with respect to each single eligible credit property of the eligible taxpayer and includes any bonus credit amounts (described in proposed §1.6418-2(c)(3)) determined

with respect to that single eligible credit property.

Consistent with the proposed rules described later in this Explanation of Provisions related to the manner of making the transfer election, proposed §1.6418-1(d) would generally define the term “eligible credit property” as the unit of property of an eligible taxpayer with respect to which the amount of an eligible credit is determined. While the proposed regulations reference the statutory rules for each eligible credit to determine the appropriate unit of measurement for section 6418 registrations and election, the following additional information is relevant for each of the 11 eligible credits:

(1) For the section 30C credit, a taxpayer would be required to register and make an election on a property-by-property basis. For this purpose, a property means a “qualified alternative fuel vehicle refueling property” as defined in section 30C(c).¹

(2) For the section 45 credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means a “qualified facility” as defined in section 45(d).

(3) For the section 45Q credit, a taxpayer would be required to register and make an election on the basis of a unit of carbon capture equipment. The regulations under §1.45Q-2(c)(3) state that all components that make up an independently functioning process train capable of capturing, processing, and preparing carbon oxide for transport (single process train) will be treated as a single “unit of carbon capture equipment.”

(4) For the section 45U credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means a “qualified nuclear power facility” as defined in section 45U(b)(1).

(5) For the section 45V credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means a “qualified clean hydrogen production facility” as defined in section 45V(c)(3).

(6) For the section 45X credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means one that produces eligible components, as described in guidance under sections 48C and 45X.

(7) For the section 45Y credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means a “qualified facility” as defined in section 45Y(b)(1).

(8) For the section 45Z credit, a taxpayer would be required to register and make an election on a facility-by-facility basis. For this purpose, a facility means a “qualified facility” as defined in section 45Z(d)(4).

(9) For the section 48 credit, a taxpayer would be required to register and make an election on a property-by-property basis. For this purpose, a property means an energy property, which generally includes all components of property that are functionally interdependent (unless such equipment is an addition or modification to an energy property). See Notice 2018-59, 2018-28 I.R.B. 196. Components of property are functionally interdependent if the placing in service of each component is dependent upon the placing in service of each of the other components in order to generate electricity. Functionally-interdependent components of property that can be operated and metered together and can begin producing electricity separately from other components of property within a larger energy project will be considered an energy property. See *Id.* (Section 7.01 of Notice 2018-59 describes energy property generally and also cites Rev. Rul. 94-31, 1994-1 C.B. 16.) Energy property is comprised of all components of property necessary to generate electricity up to the point of transmission or distribution. However, an eligible taxpayer would have the option, to the extent consistently applied for purposes of the pre-filing registration requirements of proposed §1.6418-4 and the election requirements of proposed §§1.6418-2 through 1.6418-3, to make the section 6418 registrations

¹ These proposed regulations under section 6418 do not impact the ability of tax-exempt entities to transfer a section 30C credit to the seller of the qualified alternative fuel vehicle refueling property under section 30C(e)(2).

and election for an energy project, as defined in forthcoming guidance. See section 48(a)(9)(A)(ii).

(10) For the section 48C credit, a taxpayer would be required to register and make an election on a property-by-property basis. For this purpose, a property means an “eligible property” as defined in section 48C(c)(2).

(11) For the section 48E credit, a taxpayer would be required to register and make an election on a facility-by-facility basis if the credit relates to a qualified investment with respect to a qualified facility. For this purpose, a facility means a “qualified facility” as defined in section 48E(b)(3). However, a taxpayer would be required to register and make an election with respect to the section 48E credit on a property-by-property basis if the credit relates to a qualified investment with respect to energy storage technology. For this purpose, a property means a unit of “energy storage technology” as defined in section 48E(c)(2).

Proposed §1.6418-1(j) would define the term “transfer election” as an election under section 6418(a) of the Code to transfer to a transferee taxpayer a specified portion of an eligible credit determined with respect to an eligible credit property in accordance with the section 6418 regulations. This term would be consistent with the references in section 6418(a) to a taxpayer “elect[ing] to transfer” and transferring “all (or any specified portion in the election)” of an eligible credit.

Also consistent with the language in section 6418(a) requiring the portion of the credit transferred to be specified, proposed §1.6418-1(h) would define a “specified credit portion” to mean a proportionate share (including all) of an entire eligible credit determined with respect to an eligible credit property of the eligible taxpayer that is specified in a transfer election. A specified credit portion of an eligible credit would be required to reflect a proportionate share of each bonus credit amount that is taken into account in calculating the entire amount of the eligible credit determined with respect to a single eligible credit property. In defining this term, the Treasury Department and the IRS considered questions from stakeholders asking whether it is possible to transfer bonus credit amounts related to an eligible

credit separately from the “base” eligible credit determined with respect to the relevant eligible credit property. As section 6418 does not contemplate such a transfer, the proposed regulations would not permit this type of transfer. Thus, an eligible taxpayer would not be permitted to divide an eligible credit from a single eligible credit property into the portion from the qualified activity or investment credit property and one or more bonus amounts of the eligible credit. Instead, an eligible taxpayer would be permitted to transfer the entire eligible credit (or portion of the entire eligible credit, which would include a proportionate amount of any component part of the entire eligible credit) determined with respect to a single eligible credit property.

Proposed §1.6418-1(p) would define the term “transferred specified credit portion” to mean the specified credit portion that is transferred from an eligible taxpayer to a transferee taxpayer pursuant to a transfer election.

Section 6418(b)(1) and proposed §1.6418-2(a)(4)(ii) (disallowing transfer elections for non-cash consideration) and proposed §1.6418-2(e)(1) (treatment of payments made in connection with a transfer election) would require that any amounts paid by a transferee taxpayer in connection with the transfer of a specified credit portion be paid in cash. Proposed §1.6418-1(f) would define “paid in cash” as a payment made in United States dollars. The definition of “paid in cash” contemplates limiting the manner in which United States dollars may be transferred in connection with a transfer election to payments by cash, check, cashier’s check, money order, wire transfer, ACH transfer, or other bank transfer of immediately available funds. The proposed regulations also would provide a safe harbor timing rule to allow for certainty as to the treatment of such payments of United States dollars made during a prescribed time period. The proposed regulations would provide that a payment does not violate the paid in cash requirement if the cash payment is made within the period beginning on the first day of the eligible taxpayer’s taxable year during which a specified credit portion is determined and ending on the due date for completing a transfer election statement (as provided in

proposed §1.6418-2(b)(5)(iii)). The proposed regulations also address an issue raised by stakeholders regarding advanced commitments and would provide that a contractual commitment to purchase eligible credits in advance of the date a specified credit portion is transferred satisfies the paid in cash requirement, so long as all cash payments are made during the time period described in proposed §1.6418-1(f)(1)(ii).

Proposed §1.6418-1(m) would define the term “transferee taxpayer” by incorporating the requirement in section 6418(a) that an eligible taxpayer only transfer eligible credits to a taxpayer that is not related (within the meaning of section 267(b) or 707(b)(1)) to the eligible taxpayer. Thus, the proposed regulations would define a transferee taxpayer as any taxpayer that is not related (within the meaning of section 267(b) or 707(b)(1) of the Code) to the eligible taxpayer making the transfer election to which the eligible taxpayer transfers a specified credit portion of an eligible credit. Further, consistent with the proposed definitions of transferee taxpayer and eligible taxpayer, proposed §1.6418-1(k), (l), (n), and (o) would define the terms “transferee partnership,” “transferee S corporation,” “transferor partnership,” and “transferor S corporation,” respectively.

II. Rules for Making Transfer Elections

The rules in proposed §1.6418-2 would describe the general requirements for making a transfer election, including clarifying when a transfer election can be made in certain ownership situations, situations where no transfer election may be made, the manner and due date for the election, limitations related to a transfer election, the determination of an eligible credit, the treatment of payments related to a transfer of eligible credits, and the treatment of a transferred specified credit portion by a transferee taxpayer.

A. Transfer elections in general

Proposed §1.6418-2(a) would provide rules generally applicable to a transfer election. Consistent with the language in section 6418(a), the proposed rules would provide that if a valid transfer election is

made by an eligible taxpayer for any taxable year, the transferee taxpayer specified in such election (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to the specified credit portion.

Proposed §1.6418-2(a)(2) would clarify the rule related to multiple transfer elections. Stakeholders requested clarification on whether an eligible taxpayer can make multiple elections to transfer an eligible credit to multiple transferees. Proposed §1.6418-2(a)(2) would provide that an eligible taxpayer may make multiple transfer elections to transfer one or more specified credit portion(s) to multiple transferee taxpayers, provided that the aggregate amount of 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. In other words, section 6418 does not, and therefore these proposed regulations would not, limit the number of transfer elections or number of transferee taxpayers for which an eligible taxpayer can make a transfer election, unless the transfer of a specified credit portion would exceed the available eligible credit to be transferred.

Proposed §1.6418-2(a)(3) would address when eligible taxpayers are permitted to make a transfer election in certain ownership situations. The situations addressed are based on requests from stakeholders for clarification. Rules are proposed for disregarded entities, undivided ownership interests, members of a consolidated group, and partnerships and S corporations. For a disregarded entity wholly owned (directly or indirectly) by an eligible taxpayer, the eligible taxpayer makes a transfer election. For undivided ownership interests, if eligible credit property is directly owned through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code, each co-owner's or member's undivided ownership share of the eligible credit property will be treated for purposes of section 6418 as a separate eligible credit property owned by such co-owner or member, and each makes a separate transfer election. For

members of a consolidated group, a member is required to make a transfer election. Finally, for a partnership or S corporation, with respect to any eligible credit property held directly by such partnership or S corporation, the partnership or S corporation makes a transfer election, not the partners or shareholders.

Proposed §1.6418-2(a)(4) would describe three circumstances where no transfer election can be made.

First, consistent with section 6418(g)(4), the proposed regulations preclude any election with respect to any amount of an eligible credit determined based on progress expenditures that is allowed pursuant to rules similar to the rules of section 46(c)(4) and (d) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990).

Second, the proposed rules would preclude a transfer election when an eligible taxpayer receives any amount not paid in cash (as defined in §1.6418-1(f)) as consideration in connection with the transfer of a specified credit portion. Section 6418(b)(1) requires that "any" consideration paid in connection with a transfer be paid in cash. Thus, if any consideration is other than cash, the transfer election is disallowed.

Third, no election is allowed when eligible credits are not determined with respect to an eligible taxpayer. As further explained later in this preamble, an eligible credit is determined with respect to an eligible taxpayer in cases where the eligible taxpayer owns the underlying eligible credit property or, if ownership is not required, otherwise conducts the activities giving rise to the underlying eligible credit. As examples, the proposed regulations describe two situations where a credit is allowable to an eligible taxpayer, but the eligible taxpayer is not permitted to transfer the credit under section 6418. First, the proposed regulations provide that a section 45Q credit allowable to a person that disposes of qualified carbon oxide, utilizes qualified carbon oxide, or uses qualified carbon oxide as a tertiary injectant due to an election made under section 45Q(f)(3)(B) is not transferable under section 6418. Second, the proposed regulations provide that a section 48 credit allowable to a lessee of property under section 50(d)(5) and an election under

§1.48-4 is not transferable under section 6418. In both cases, the taxpayer is only allowed to claim the credit as a result of an election by another taxpayer, and does not own the eligible credit property to which the credit was determined. These situations can be contrasted with a sale-leaseback transaction under section 50(d)(4) where a purchaser/lessor of investment credit property owns the underlying property to which an eligible credit is determined. In that case, provided all of the rules are met, because the eligible credit is determined with respect to eligible credit property owned and treated as originally placed in service by the purchaser/lessor, the purchaser/lessor can elect to transfer eligible credits determined with respect to the property under section 6418.

B. Manner and due date of making a transfer election

Section 6418(a) allows an eligible taxpayer to transfer an eligible credit (or portion thereof) determined with respect to such taxpayer to a transferee taxpayer. Generally, section 6418 does not expressly provide for the relevant unit of measurement for an election to transfer eligible credits. Proposed §1.6418-2(b) would provide generally that an eligible taxpayer is required to make a transfer election to transfer a specified credit portion on the basis of a single eligible credit property. For example, an eligible taxpayer that determines eligible credits with respect to two eligible credit properties would need to make a separate transfer election with respect to any specified credit portion determined with respect to each eligible credit property. This approach would provide eligible taxpayers with flexibility in determining the credit to transfer and aligns with how an excessive credit transfer is defined in section 6418(g)(2)(C).

In requiring the election to be made on the basis of a single eligible credit property, the Treasury Department and the IRS request comments on two issues. First, whether more specific guidance with respect to any eligible credit property is needed to allow eligible taxpayers to make the election as required. If such guidance is needed, suggestions for further defining the relevant eligible credit property are requested. Second, whether

to adopt a grouping rule that allows taxpayers to make an election with respect to certain groups of eligible credit properties. If such a rule is recommended, discussion of the eligible credits that a rule should apply to, the appropriate circumstances for grouping, as well as specific rules for determining a group with respect to an eligible credit is requested.

Consistent with section 6418(f)(1)(B)(i), proposed §1.6418-2(b)(2) would provide specific rules in the case of any section 45 credit, section 45Q credit, section 45V credit, or section 45Y credit that is an eligible credit. The proposed rules would provide that a transfer election is made with respect to each eligible credit property for which an eligible credit is determined. Consistent with section 6418(f)(1)(B)(ii), the proposed rules also would provide that a transfer election would be required to be made for each taxable year an eligible taxpayer elects to transfer a specified credit portion with respect to such eligible credit property during the 10-year period beginning on the date such eligible credit property was originally placed in service (or, in the case of a section 45Q credit, for each taxable year during the 12-year period beginning on the date the eligible credit property was originally placed in service).

Proposed §1.6418-2(b)(3) would provide the manner of making a valid transfer election. Stakeholders asked for clarity regarding the manner of making a valid election and provided suggestions for how an election should be effectuated and potential information to be included. Proposed §1.6418-2(b)(3) outlines the requirements for making a transfer election for eligible taxpayers other than partnerships or S corporations (those rules are in proposed §1.6418-3(d)). While described in more detail in the proposed regulations, to make a valid transfer election, 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 (short year return)), generally would be required to include the following—(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 Form 3800 (or its successor) showing the amount of eligible credit transferred for each eligible credit property; (D) a transfer election statement as described later in this preamble; and (E) any other information related to the election specified in guidance (as defined in proposed §1.6418-1(e)).

A transfer election statement is described in proposed §1.6418-2(b)(5) and would be generally defined as a written document that describes the transfer of a specified credit portion between an eligible taxpayer and transferee taxpayer. Election statements are used in similar situations to a transfer election under section 6418 (for example, an election under section 50(d)(5) and §1.48-4, section 45G, or section 45J all require a written document between the parties). A transfer election statement that is completed by both the eligible taxpayer and the transferee taxpayer would be necessary to allow the transferee taxpayer the opportunity to file a return without needing to wait for the eligible taxpayer to file. A transfer election statement, which is described in more detail in the proposed regulations, would be required to generally include (1) information related to the transferee taxpayer and the eligible taxpayer; (2) a statement that provides the necessary information and amounts to allow the transferee taxpayer to take into account the specified credit portion with respect to the eligible credit property; (3) a statement that the parties are not related (within the meaning of section 267(b) or 707(b)(1)); (4) a representation from the eligible taxpayer that it has complied with all relevant requirements to make a transfer election; (5) a statement from the eligible taxpayer and the transferee taxpayer acknowledging the notification of recapture requirements under section 6418(g)(3) and the section 6418 regulations (if applicable); and (6) a statement or representation from the eligible taxpayer that the eligible taxpayer has provided the required minimum documentation to the transferee taxpayer. Required minimum documentation is specified in proposed §1.6418-2(b)(3)(iv). Required minimum documentation would be the minimum documentation that the eligible taxpayer is required to provide to a transferee taxpayer, and is more fully described

in the proposed regulations, but is generally documentation to validate the existence of the eligible credit property, any bonus credits amounts, and the evidence of credit qualification. This requirement is consistent with a stakeholder suggestion that such information should be required to be provided by the eligible taxpayer. Proposed §1.6418-2(b)(5)(v) would specify that a transferee taxpayer, consistent with §1.6001-1(e), would be required to retain the requirement minimum documentation provided by the eligible taxpayer so long as the contents thereof may become material in the administration of any internal revenue law.

Proposed §1.6418-2(b)(5)(iii) would provide a rule on the timing of the transfer election statement. The proposed rule generally allows a transfer election statement to be completed any time after the eligible taxpayer and transferee taxpayer have sufficient information to prepare a transfer election statement. However, a transfer election statement cannot be completed for any taxable year after the earlier of (A) the filing of the eligible taxpayer's return for the taxable year for which the specified credit portion is determined with respect to the eligible taxpayer, or (B) the filing of the return of the transferee taxpayer for the year in which the specified credit portion is taken into account. This proposed rule is intended to provide flexibility but places an outer limit on the timing of the transfer election statement because both the eligible taxpayer and the transferee taxpayer would be required to include a transfer election statement as part of filing a return, and therefore, the transfer election statement would need to be completed before a return is filed by either party.

Consistent with section 6418(e)(1), proposed §1.6418-2(b)(4) would provide that an election to transfer any specified credit portion would need to be made not later than the due date (including extensions) for the tax return for the taxable year for which the eligible credit is determined. The proposed regulations would also clarify that an election would need to be filed on an original return and may not be made or revised on an amended return or by filing a request for an administrative adjustment under section 6227 of the Code. An original return includes

a superseding return filed on or before the due date (including extensions). The proposed regulations would also provide that there is no relief available under §§ 301.9100-1 through 301.9100-3 for a late transfer election.

C. Limitations on the election

Proposed §1.6418-2(c) would include rules that describe certain limitations with respect to making an election under section 6418. First, consistent with section 6418(e)(1), the proposed regulations would provide that once made, an election to transfer an eligible credit is irrevocable. Second, consistent with section 6418(e)(2), the proposed regulations would prohibit a transferee taxpayer of any specified credit portion from making a second transfer under section 6418 with respect to any amount of such transferred credit.

Stakeholders asked whether a passthrough transferee taxpayer that allocates purchased eligible credits to its direct or indirect owners violates the no second transfer rule in section 6418(e)(2). An allocation of a transferred specified credit portion to a direct or indirect owner of a passthrough entity would not be considered a transfer under section 6418. As a result, an allocation of a transferred specified credit portion to a direct or indirect owner of a passthrough transferee taxpayer does not violate the no second transfer rule in section 6418(e)(2). However, certain rules would apply to allocations of a transferred specified credit portion from passthrough entities as further described in proposed §1.6418-3.

Stakeholders also inquired whether eligible credits can be transferred through dealer arrangements. Any arrangement where the Federal income tax ownership of a specified credit portion transfers first, from an eligible taxpayer to a dealer or intermediary and then, ultimately, to a transferee taxpayer is in violation of the no second transfer rule in section 6418(e)(2). In contrast, an arrangement using a broker to match eligible taxpayers and transferee taxpayers should not violate the no second transfer rule, assuming the arrangement at no point transfers the Federal income tax ownership of a specified credit portion to the broker or any taxpayer other than the transferee taxpayer.

D. Determining the eligible credit

Proposed §1.6418-2(d) would provide rules to clarify how to determine the amount of an eligible credit that is transferable. Any rules that relate to the determination of an eligible credit, such as rules in sections 49 and 50(b), would apply to the eligible taxpayer and therefore can limit the amount of transferable eligible credits determined with respect to a single eligible credit property owned by the eligible taxpayer. Section 6418(a) states that an eligible taxpayer can elect to transfer all (or any portion specified in the election) of an eligible credit determined with respect to such eligible taxpayer. The inclusion of the word “determined” is instructive, and the proposed regulations would draw a distinction between rules that impact the amount of credit determined or the credit base (and thus, the amount of eligible credit that can be transferred) versus rules that impact a taxpayer’s ability to claim a particular eligible credit against its tax liability. Rules that impact the ability of a taxpayer to claim a particular eligible credit against its tax liability do not limit the amount of an eligible credit that an eligible taxpayer can transfer. Providing a limitation based on an eligible taxpayer’s ability to claim an eligible credit would undercut one of the purposes of section 6418, which is to provide an alternative monetization mechanism to eligible taxpayers that would be unable to utilize credits in the current taxable year.

As previously stated, section 49 generally impacts the amount of a credit determined with respect to an investment credit property that an eligible taxpayer can transfer. The proposed regulations would provide rules for the application of section 49 to a partnership or S corporation that is an eligible taxpayer and elects under section 6418 to transfer an eligible credit (a transferor partnership or transferor S corporation). The proposed regulations would provide that any amount of eligible credit determined with respect to investment credit property held directly by a transferor partnership or transferor S corporation (or held directly by an entity disregarded as separate from such transferor partnership or transferor S corporation) is determined by the transferor

partnership or transferor S corporation by taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the investment credit property is placed in service. Thus, if the credit base of the investment credit property is limited to a partner or shareholder by section 49, then the amount of the eligible credit determined by the transferor partnership or transferor S corporation is also limited. The proposed regulations would provide that a transferor partnership or transferor S corporation that transfers any specified credit portion with respect to an investment credit property must request from each of its partners or shareholders, respectively, that is subject to section 49, the amount of such partner’s or shareholder’s nonqualified nonrecourse financing with respect to the investment credit property as of the close of the taxable year in which the property is placed in service. Additionally, the transferor partnership or transferor S corporation would attach to its tax return for the taxable year in which the property is placed in service, the amount of each partner’s or shareholder’s section 49 limitation with respect to any specified credit portion transferred with respect to the investment credit property. The Treasury Department and the IRS request comments as to whether (1) any information or reporting requirements are needed for transferor partnerships or transferor S corporations to apply these rules when determining the amount of an eligible credit that can be transferred or (2) any additional clarifications are needed regarding how the at-risk rules apply to the determination of an eligible credit by an eligible taxpayer.

E. Treatment of payments made in connection with transfer

Proposed §1.6418-2(e) would include rules to clarify the treatment of payments made by a transferee taxpayer to an eligible taxpayer in connection with the transfer of an eligible credit. The proposed regulations relate to the rules provided in section 6418(b)(1) through (3) and include a rule clarifying when a payment is considered to be made in connection with a transfer election.

Proposed §1.6418-2(e)(1) would provide that an amount paid by a transferee taxpayer to an eligible taxpayer is consideration for a transfer of a specified credit portion only if it is paid in cash (as defined in §1.6418-1(f)), directly relates to the specified credit portion, and is not described in §1.6418-5(a)(3) (describing payments related to an excessive credit transfer). These proposed rules would provide objective criteria for eligible taxpayers and transferee taxpayers that seek certainty as to the timing of payments and acceptable forms of payment. General tax rules apply to any payments made or received outside of the requirements described in proposed §1.6418-2(e)(1). Additionally, the requirements of proposed §1.6418-2(e)(1) would not be satisfied where a specified credit portion is not ultimately transferred to a transferee taxpayer.

Pursuant to section 6418(b), the proposed regulations also include rules that would clarify that amounts paid in connection with a transfer election by a transferee taxpayer are not includible in the gross income of an eligible taxpayer and are not deductible by the transferee taxpayer.

In addition to these rules, the proposed regulations would include an anti-abuse provision. The intent of the anti-abuse provision is to disallow the election and transfer of an eligible credit under section 6418, or otherwise recharacterize a transaction's income tax consequences, in circumstances where the parties to the transaction have engaged in the transaction or a series of transactions with the principal purpose of avoiding tax liability beyond the intent of section 6418. This could include transactions that are intended to decrease the eligible taxpayer's gross income or increase a transferee taxpayer's deductions. For example, a transaction where an eligible taxpayer undercharges or overcharges for services to a customer who is also purchasing credits from the eligible taxpayer as a transferee taxpayer may violate the anti-abuse rule. The proposed regulations include two examples to illustrate application of the anti-abuse rule.

The proposed regulations do not address (1) the Federal income tax treatment of transaction costs, either for the eligible taxpayer or the transferee taxpayer, and (2) whether a transferee taxpayer is

permitted to deduct a loss if the amount paid to an eligible taxpayer exceeds the amount of the eligible credit that the transferee taxpayer can ultimately claim. The Treasury Department and the IRS are currently developing rules on these general issues and seek comments as part of that process. Any comments should also consider the specific matters described in the following paragraphs.

Generally, gain or loss is recognized on the sale or other disposition of property. See section 1001 of the Code. If a seller incurs costs to facilitate the sale of property, such costs are generally required to be capitalized and reduce the amount realized from the sale. See §1.263(a)-1(e). If a buyer incurs costs to facilitate the acquisition of property (for example, legal fees to draft the purchase agreement), such costs are generally required to be capitalized and included in the basis of property acquired. See, for example, §§1.263(a)-2(f)(1) and 1.263(a)-4(b)(1)(v).

It is a longstanding principle that courts should construe Federal tax laws in harmony with the legislative intent and seek to carry out the legislative purpose. *Foster v. U.S.*, 303 U.S. 118 (1938). Furthermore, it is a well-established principle of statutory interpretation that a tax law should not be interpreted to allow the practical equivalent of a double benefit absent a clear declaration of intent by Congress (no double benefit principle). See generally *U.S. v. Skelly Oil Co.* 394 U.S. 678, 684 (1969); cf. *Hillsboro Nat. Bank v. Commissioner*, 460 U.S. 370 (1983). A double tax benefit could arise in situations of a double deduction, a deduction and a credit, a credit or a deduction from amounts that are excluded from gross income, or credits from expenditures made to generate other credits. Cf. *Hintz v. Commissioner*, 712 F.2d 281 (7th Cir. 1983); section 265, Expenses and Interest Relating to Tax-Exempt Income; *S/V Drilling Partners v. Commissioner*—

Section 6418 provides specific rules that explicitly or implicitly supersede certain general Federal income tax rules in whole or in part. Accordingly, the Treasury Department and the IRS must consider not only the application of specific provisions of section 6418 but also other applicable provisions of the Code when developing rules on the general issues described previously.

With respect to an eligible taxpayer, section 6418(b)(2) provides that any consideration received from a transferee taxpayer for the transfer of an eligible credit (or portion thereof) is not includible in gross income of the eligible taxpayer. Section 6418(c)(1)(A) 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, any amount received as consideration for the transfer of such credit is treated as tax exempt income for purposes of sections 705 and 1366. In developing the rules applicable to transaction costs of an eligible taxpayer, it will be necessary to determine, among other things, whether (1) the no double benefit principle applies and, if so, how it should apply, and (2) the capitalization rules of section 263 and the regulations thereunder apply and, if so, how they interact with the rules under section 6418(b)(2) and (c)(1)(A).

With respect to a transferee taxpayer, as described herein, the proposed regulations would provide that there is no gross income to a transferee taxpayer when claiming an eligible credit if the amount paid for the eligible credit is less than the amount of the eligible credit transferred and claimed (transferee gross income exclusion rule). Similar to the development of rules for transaction costs of an eligible taxpayer, in developing the rules applicable to transaction costs of a transferee taxpayer, it will be necessary to determine, among other things, whether (1) the no double benefit principle applies and, if so, how it should apply, and (2) the capitalization rules of section 263 and the regulations thereunder apply and, if so, how they interact with the transferee gross income exclusion rule in the proposed regulations.

Also, with respect to a transferee taxpayer, section 6418(b)(3) provides that any consideration paid to the eligible taxpayer for an eligible credit is not deductible under any provision of the Code. However, it is not clear whether the “not deductible” language in section 6418(b)(3) should be read to preclude capitalization of the consideration paid to the eligible taxpayer (for example, under section 263). Therefore, it will be necessary for the Treasury Department and the IRS to determine whether the capitalization rules

of section 263 and the regulations thereunder apply to a transferee taxpayer and, if so, how they should apply. It will also be necessary to interpret the scope of section 6418(b)(3) and resolve whether it precludes a deduction for any amount of consideration paid that is otherwise deductible as a loss under section 165 (for example, where the amount of consideration paid exceeds the amount of the credit the transferee taxpayer can ultimately claim).

F. Transferee taxpayer's treatment of an eligible credit

Proposed §1.6418-2(f) would provide rules describing the transferee taxpayer's treatment of a transferred specified credit portion. Stakeholders sought clarification of whether a transferee taxpayer has a choice of which year to take an eligible credit into account. Section 6418(d) provides that in the case of any eligible credit transferred to a transferee taxpayer pursuant to a transfer election, the eligible credit is taken into account in the first taxable year of the transferee taxpayer ending with, or after, the taxable year of the eligible taxpayer with respect to which the credit was determined. This language prescribes the specific year the transferee taxpayer takes the transferred eligible credit into account. Therefore, no clarification is needed. To the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on the same date, the transferee taxpayer will take the specified credit portion into account in that taxable year. To the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on different dates, the transferee taxpayer will take the specified credit portion into account in the transferee taxpayer's first taxable year that ends after the taxable year of the eligible taxpayer. Consistent with this rule, the transferee taxpayer may claim a specified credit portion on an amended return or, if applicable, a request for administrative adjustment. A transferee taxpayer may also take into account a specified credit portion that it has purchased, or intends to purchase, when calculating its estimated tax payments, though the transferee taxpayer remains liable for any additions to tax in accordance with sections 6654 and 6655 to the extent the transferee taxpayer has an underpayment of estimated tax.

Stakeholders also asked whether there are any income tax consequences to a transferee taxpayer if the amount paid for an eligible credit is less than the amount of the eligible credit transferred and claimed. As described earlier, the proposed regulations would clarify this issue by providing that there is no gross income to a transferee taxpayer when claiming an eligible credit if the amount paid for the eligible credit is less than the amount of the eligible credit transferred and claimed. Under section 6418(a), a transferee taxpayer is treated as the eligible taxpayer for other purposes of the Code with respect to a transferred eligible credit. An eligible taxpayer would not have gross income as a result of claiming an eligible credit. As such, a transferee taxpayer also should not have gross income as a result of claiming a transferred eligible credit.

The proposed regulations would also describe the effect of the language in section 6418(a), which provides that the transferee taxpayer specified in an election (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to such credit (or such portion thereof). Consistent with an eligible credit being determined based on ownership of the underlying eligible credit property by an eligible taxpayer, or, if ownership is not required, based on conducting the activities giving rise to the eligible credit, the proposed regulations would provide that a transferee taxpayer does not also apply rules that relate to the determination of an eligible credit, such as rules in section 49 or 50(b) as described in proposed §1.6418-2(d)(1). However, a transferee taxpayer would apply rules that relate to the amount of a transferred eligible credit that is allowed to be claimed in the taxable year based on a transferee's particular circumstances, such as the rules in section 38 or 469.

Consistent with applying credit utilization rules to transferee taxpayers, the proposed regulations would provide a rule that a transferred specified credit portion is treated as earned in connection with the conduct of a trade or business, and, if applicable, such transferred specified credit portion is subject to the passive activity limitation rules in section 469. However, a transferee taxpayer (or a direct or indirect owner of a transferee taxpayer that claims

a transferred specified credit portion) that is subject to section 469 is not, as a result of a transfer election, considered to have owned an interest in the eligible taxpayer's business at the time the work was done (as required for material participation in §1.469-5(f)(1)) and cannot change the characterization of the transferee taxpayer's participation with respect to generation of the transferred specified credit portion by using any of the grouping rules in §1.469-4(c). This proposed rule would be consistent with the result that the transferee taxpayer does not apply rules that relate to the determination of an eligible credit because the transferee does not own the underlying eligible credit property to which the credit is determined or conduct the activity directly. Further, allowing a transferee taxpayer to try to change the characterization of an eligible credit based on grouping with its own activities under §1.469-4(c) would conflict with the conclusion that the eligible credit has already been determined. In contrast, an eligible credit generated through the conduct of a trade or business does not lose such attribute through a transfer under section 6418 for purposes of determining whether a transferee taxpayer is allowed the credit. Likewise, a section 38 business credit does not become an individual (non-business) credit if transferred to an individual. If such attributes did not transfer under section 6418, eligible credits earned and used by eligible taxpayers would be subject to different limitations than transferred eligible credits used by transferee taxpayers. The impact of this rule for a transferee taxpayer that is subject to section 469 is that such transferee taxpayer will be considered to earn eligible credits through the conduct of a trade or business related to the eligible credit but will not materially participate in such business for purposes of section 469. Thus, a transferee taxpayer subject to section 469 would be required to treat the credits making up the specified credit portion as passive activity credits (as defined in section 469(d)(2)) to the extent the specified credit portion exceeds passive tax liability. The Treasury Department and the IRS request comments on whether there are circumstances in which it would be appropriate to not apply the passive activity rules under section 469 to a transferee taxpayer or to

attribute the participation of an eligible taxpayer to a transferee taxpayer.

Lastly, proposed §1.6418-2(f)(4) would provide rules for how a transferee taxpayer can take into account a transferred specified credit portion. Section 6418(d) provides the taxable year that a transferee taxpayer takes a transferred eligible credit into account but does not provide further procedures applicable to a transferee taxpayer. In determining the proposed procedures, consideration was given to the requirements for any taxpayer when taking into account a general business credit, with additional information required that is necessary for tracking the transfer of specified credit portions. The proposed rules would provide that in order for a transferee taxpayer to take into account a specified credit portion, the transferee taxpayer would be required to include certain information as part of filing a return (or short year return). The proposed regulations would require (A) a properly completed Form 3800, *General Business Credit* (or its successor), taking into account a transferred eligible credit as a current general business credit, including all registration number(s) related to the transferred eligible credit; (B) the transfer election statement described earlier in this preamble attached to the return; and (C) any other information related to the transfer election specified in guidance.

III. Partnerships and S corporations

A. Overview

The proposed regulations would provide general rules related to transfers of eligible credits by transferor partnerships and transferor S corporations and purchases of eligible credits by transferee partnerships and transferee S corporations. As a preliminary matter, the proposed regulations would clarify that a partnership or an S corporation may qualify as an eligible taxpayer or a transferee taxpayer, assuming all other relevant requirements in section 6418 are met. The proposed regulations would also clarify that the language in section 6418(c) requiring an eligible credit property to be “held directly” by a transferor partnership or transferor S corporation allows for such eligible credit property to be owned by an

entity disregarded as separate from the transferor partnership or transferor S corporation for Federal income tax purposes.

In addition, the proposed regulations would clarify that any tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership or transferor S corporation is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As a result, such tax exempt income is not treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B). Because a transfer of a specified credit portion does not involve the transfer of any assets used in a trade or business, it is more appropriate to treat any tax exempt income resulting from the transfer as arising from an investment activity.

B. Special recapture rules for transferor partnerships and S corporations

Stakeholders requested clarification on whether indirect disposition events result in recapture of transferred investment tax credits to a transferee taxpayer under section 6418(g)(3)(B). Section 1.47-4(a)(2) provides that if an S corporation shareholder’s interest in an S corporation is reduced as a result of certain events during the recapture period by a certain percentage of the shareholder’s interest for the taxable year of the S corporation in which the investment credit property is placed in service, recapture can occur to such S corporation shareholder. Likewise, §1.47-6(a)(2) provides that if a partner’s interest in the general profits of a partnership is reduced as a result of certain events during the recapture period by a certain percentage of the partner’s interest in general profits for the taxable year of the partnership in which the investment credit property is placed in service, recapture can occur to such partner. As explained later in part V of this Explanation of Provisions, the proposed regulations would provide generally that if an applicable investment credit property is disposed of, or otherwise ceases to be investment credit property *with respect to the eligible taxpayer*, a transferee taxpayer bears the recapture tax

associated with any transferred eligible investment tax credit transferred to such transferee taxpayer.

The recapture events described in §§1.47-4(a)(2) and 1.47-6(a)(2) are applicable with respect to the specific shareholder or partner to which the recapture event occurs and not with respect to the transferor S corporation or transferor partnership. As a result, such recapture events should not result in recapture of a transferred eligible investment tax credit to a transferee taxpayer under section 6418(g)(3)(B). Instead, the recapture tax liability resulting from the reduction of an S corporation shareholder’s interest or a partner’s interest in general profits should continue to result in recapture to the applicable disposing shareholder or partner. The proposed regulations would clarify that “indirect” dispositions under §§1.47-4(a)(2) and 1.47-6(a)(2) do not result in recapture tax liability to a transferee taxpayer under section 6418. Instead, these rules continue to apply to a disposing partner or shareholder in a transferor partnership or transferor S corporation, respectively. Any recapture to a disposing partner is calculated based on the partner’s share of the basis (or cost) of the section 38 property to which the eligible credits were determined in accordance with §1.46-3(f). Any recapture to a disposing shareholder is calculated based on the shareholder’s pro rata share of the basis (or cost) of the section 38 property to which the eligible credits were determined in accordance with §1.48-5.

The Treasury Department and the IRS request comments on whether additional rules or clarifications are needed with respect to how the indirect disposition recapture rules under §§1.47-6(a)(2) and 1.47-4(a)(2) apply to partners or shareholders in transferor partnerships or transferor S corporations, respectively.

As previously stated, the proposed regulations would provide that any amount of eligible credit determined with respect to investment credit property held directly by a partnership or S corporation would be required to be determined by the partnership or S corporation taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the investment credit property is placed in service. The

proposed regulations also would provide that any net increase in the amount of nonqualified nonrecourse financing during the recapture period for a partner or shareholder in a transferor partnership or transferor S corporation with respect to such partner's or shareholder's credit base for a transferred eligible investment tax credit does not result in recapture to a transferee taxpayer under section 6418(g)(3). Similar to the indirect disposition recapture rules described above, the recapture rules under section 49(b) for partners or shareholders in a transferor partnership or transferor S corporation apply with respect to a disposition or change in financing at the partner or shareholder level and not at the eligible taxpayer (i.e., the partnership or S corporation) level. As such, these rules would continue to apply to partners or shareholders in transferor partnerships or transferor S corporations that increase their nonqualified nonrecourse financing amount during the recapture period. Any recapture to a disposing partner is calculated based on the partner's share of the basis (or cost) of the section 38 property to which the eligible credits were determined in accordance with §1.46-3(f). Any recapture to a disposing shareholder is calculated based on the shareholder's pro rata share of the basis (or cost) of the section 38 property to which the eligible credits were determined in accordance with §1.48-5.

The Treasury Department and the IRS request comments on whether additional rules or clarifications are needed with respect to how the recapture rules under section 49(b) apply to partners or shareholders in transferor partnerships or transferor S corporations. As a clarification, recapture under section 49(b) applicable directly to an eligible taxpayer (for example, to an eligible taxpayer that is an individual) results in recapture to a transferee taxpayer under section 6418(g)(3).

The proposed regulations would also provide that any net decrease in the amount of nonqualified nonrecourse financing during the recapture period with respect to a partner's or shareholder's credit base for a transferred specified credit portion determined with respect to investment credit property does not result in additional eligible credit that can be transferred by the applicable partner,

shareholder or transferor partnership or transferor S corporation. Instead, any net decrease in the amount of nonqualified nonrecourse financing and resulting increase in the credit base to a partner or shareholder results in additional investment tax credit that can be used by the applicable partner or shareholder. The Treasury Department and the IRS request comments on whether additional rules or clarifications are needed with respect to how decreases in nonqualified nonrecourse amounts under section 49(a)(2) that increase the credit base for which eligible credits have previously been transferred apply to partners or shareholders in a transferor partnership or transferor S corporation, respectively.

C. Rules solely applicable to transferor and transferee partnerships

The proposed regulations include special rules applicable to transferor and transferee partnerships and their direct and indirect partners. Section 6418(c)(1)(A) provides that any amount received as consideration for a transfer of eligible credits by a transferor partnership is treated as tax exempt income for purposes of section 705. Section 6418(c)(1)(B) provides that a partner's distributive share of such tax exempt income is based on such partner's distributive share of the otherwise eligible credit for each taxable year. Stakeholders asked for clarity as to how this determination should be made.

The proposed regulations would provide generally that a partner's distributive share of tax exempt income resulting from the receipt of cash by a transferor partnership for a transferred specified credit portion is based on the partner's proportionate distributive share of the otherwise eligible credit as determined under §§1.46-3(f) and 1.704-1(b)(4)(ii). The proposed regulations further clarify that any tax exempt income resulting from the receipt of cash by a transferor partnership for a transferred specified credit portion is treated as received or accrued, including for purposes of section 705, as of the date the specified credit portion is determined with respect to the transferor partnership. In effect, this means that tax exempt income resulting from the receipt of cash by a transferor partnership in exchange

for a transferred specified credit portion should be allocated to the same partners and in the same proportionate amount, as the specified credit portion would have been allocated if not transferred.

The proposed regulations would provide a special rule for allocations of tax exempt income resulting from a transfer of a specified credit portion of less than all eligible credit(s) determined with respect to an eligible credit property held by a transferor partnership. This special rule permits tax exempt income resulting from the receipt of cash for a transfer of one or more specified credit portion(s) of less than all eligible credits from an eligible credit property to, generally, be allocated to those partners that desired to transfer their distributive share of the underlying credits. To take advantage of this special rule, a transferor partnership would first determine each partner's distributive share of the otherwise eligible credits determined with respect to such eligible credit property in accordance with §§1.46-3(f) and 1.704-1(b)(4)(ii). This amount is referred to as a "partner's eligible credit amount." Thereafter, the transferor partnership may determine, either in a manner described in the partnership agreement or as the partners may agree, the portion of each partner's eligible credit amount to be transferred and the portion of each partner's eligible credit amount to be retained and allocated to such partner. Following the transfer of the specified credit portion(s), the transferor partnership may allocate to each partner its agreed upon share of eligible credits, tax exempt income resulting from the receipt of consideration for the transferred specified credit portion(s), or both, as the case may be; provided that, the amount of eligible credits allocated to each partner may not exceed such partner's eligible credit amount and the amount of tax exempt income allocated to each partner would equal such partner's proportionate share of tax exempt income resulting from the transfer(s). Each partner's proportionate share of tax exempt income resulting from the transfer(s) is equal to the total tax exempt income resulting from the transfer(s) of the specified credit portion(s) multiplied by a fraction, (i) the numerator of which is a partner's total eligible credit amount minus the amount of eligible credits actually allocated to the partner with respect to

the eligible credit property for the taxable year, and (ii) the denominator of which is the total amount of the specified credit portion(s) transferred by the partnership with respect to the eligible credit property for the taxable year. The proposed regulations provide examples of this rule.

The Treasury Department and the IRS request comments on whether additional rules or clarifications are needed with respect to when allocations of tax exempt income and eligible credits under section 6418 will be respected under section 704(b).

The proposed regulations would clarify that a partnership that is an indirect or direct partner of a transferor partnership (an upper-tier partnership) is not an eligible taxpayer with respect to an eligible credit allocated by a transferor partnership. The proposed regulations also would clarify that for any tax exempt income allocated to an upper-tier partnership as a result of the receipt of consideration for a transfer of a specified credit portion by a transferor partnership, the upper-tier partnership would determine its partners' distributive shares of the tax exempt income in proportion to the partners' distributive shares of the otherwise eligible credit. In effect, this means that the upper-tier partnership would allocate any tax exempt income resulting from a transfer of a specified credit portion by a lower-tier partnership among its partners as of the same time, and in the same proportionate amount, as the eligible credit would have been allocated if not transferred by the transferor partnership.

Stakeholders asked for confirmation that cash payments received by a transferor partnership as consideration for a transfer of eligible credits can be distributed in a manner different from the partners' distributive shares of the tax exempt income resulting from the receipt of the cash payment. A transferor partnership that receives a cash payment from a transfer of a specified credit portion is under no restriction on how it can use such cash payment (including on how it makes distributions to its partners). Such cash payment is treated in the same manner as the transferor partnership's other cash flows.

The proposed regulations would provide rules for transferee partnerships and

clarify that allocations of a transferred specified credit portion by a transferee partnership are not a violation of the no additional transfer rule in §1.6418-2(c)(2). The proposed regulations also would provide that cash payments by a transferee partnership for a transferred specified credit portion are treated as a section 705(a)(2)(B) expenditure. Each partner's distributive share of any transferred specified credit portion is based on such partner's distributive share of the section 705(a)(2)(B) expenditures used to fund the purchase of such transferred specified credit portion. Each partner's distributive share of the section 705(a)(2)(B) expenditures used to fund the purchase of any transferred specified credit portion is determined by the partnership agreement. Or, if the partnership agreement does not provide for the allocation of such nondeductible expenditures, then each partner's distributive share is based on the transferee partnership's general allocation of nondeductible expenditures.

To prevent avoidance of the no additional transfer rule in proposed §1.6418-2(c)(2) through transfers of interests in transferee partnerships, the proposed regulations in proposed §1.6418-3(b)(4)(iv) would provide that a transferred specified credit portion purchased by a transferee partnership is treated as an extraordinary item under §1.706-4(e) (including also a proposed addition to §1.706-4(e) confirming a transferred specified portion is an extraordinary item). The proposed regulations further provide that if the transferee partnership and eligible taxpayer have the same taxable years, such extraordinary item is deemed to occur on the date the transferee partnership first makes a cash payment to an eligible taxpayer for any transferred specified credit portion. If the transferee partnership and eligible taxpayer have different taxable years, the extraordinary item is deemed to occur on the later of the first date the transferee partnership takes the transferred specified credit portion into account under section 6418(d), or the first date that the transferee partnership made a cash payment to the eligible taxpayer for the transferred specified credit portion. For example, if an eligible taxpayer is a calendar year taxpayer and a transferee partnership is a fiscal year taxpayer

with its tax year beginning on June 1st, and the transferee partnership makes its first cash payment before June 1st for a transferred specified credit portion determined with respect to the eligible taxpayer during year 1, then the transferred specified credit portion is deemed to occur to the transferee partnership on June 1st. However, if the transferee partnership makes its first cash payment at any point from June 1st to December 31st, the transferred specified credit portion is deemed to occur on the cash payment date. The Treasury Department and the IRS continue to study whether additional rules are required under section 6418 to prevent avoidance of the no additional transfer rule through transfers of interests in transferee partnerships.

Finally, for transferee partnerships, the proposed regulations would clarify that an upper-tier partnership that is a direct or indirect partner in a transferee partnership and that is allocated a transferred specified credit portion is not an eligible taxpayer with respect to such transferred specified credit portion. The upper-tier partnership would determine each partner's distributive share of the transferred specified credit portion in accordance with the same rules the transferee partnership determines its partners' distributive shares of the transferred specified credit portion.

The Treasury Department and the IRS request comments on whether additional rules or clarifications are needed with respect to when allocations of a transferred specified credit portion will be respected under section 704(b). The Treasury Department and the IRS also request comments on whether additional rules or clarifications are needed with respect to transfers of partnership interests that are made after the transferring partner has contributed capital to a transferee partnership for the purpose of purchasing eligible credits, but before the transferee partnership has made any cash payments to an eligible taxpayer.

D. Rules solely applicable to transferor and transferee S corporations

The proposed regulations would include special rules applicable to transferor and transferee S corporations and their shareholders. Section 6418(c)(1)

(A) provides that any amount received as consideration for a transfer of eligible credits by a transferor S corporation is treated as tax exempt income for purposes of section 1366. The proposed regulations would provide that each shareholder would take into account each shareholder's pro rata share (as determined under section 1377(a) of the Code) of any tax exempt income resulting from the receipt of cash for the transfer of a specified credit portion by a transferor S corporation. The proposed regulations would further clarify that any tax exempt income resulting from the receipt of cash for the transfer of a specified credit portion by a transferor S corporation is treated as received or accrued, including for purposes of section 1366, as of the date the transferred specified credit portion is determined with respect to the transferor S corporation. In effect, this means that any tax exempt income resulting from the receipt of cash by a transferor S corporation for a transferred specified credit portion should be allocated to the same shareholders and in the same proportionate amount as the specified credit portion would have been allocated if not transferred.

The proposed regulations would also provide rules for transferee S corporations and indicate that allocations of a transferred specified credit portion by a transferee S corporation are not a violation of the no additional transfer rule in §1.6418-2(d)(2).

The proposed regulations would clarify that cash payments by a transferee S corporation for a transferred specified credit portion are treated as an expenditure under section 1367(a)(2)(D) of the Code since such payments are nondeductible. The proposed regulations would also provide rules for how shareholders of a transferee S corporation account for a transferred specified credit portion. Each shareholder of a transferee S corporation would take into account its pro rata share (as determined under section 1377(a)) of any transferred specified credit portion. If the transferee S corporation and eligible taxpayer have the same taxable years, the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's permitted year (as defined

under sections 444 and 1378(b)) that the transferee S corporation first makes a cash payment as consideration to an eligible taxpayer for the transferred specified credit portion. If the transferee S corporation and eligible taxpayer have different taxable years, then the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's first permitted year (as defined under sections 444 and 1378(b)) ending with, or after, the taxable year of the eligible taxpayer to which the transferred specified credit portion was determined.

E. Elections for transferor partnerships and transferor S corporations

Finally, the proposed regulations would provide specific rules relating to elections for transferor partnerships or transferor S corporations. Consistent with the rules for other eligible taxpayers, partnerships and S corporations would generally make a transfer election for a specified credit portion in the manner provided in proposed §1.6418-2(b)(1) through (3) described earlier in this preamble. The proposed regulations would also clarify that all documents required in §1.6418-2(b)(1) through (3) would need to be attached to the partnership or S corporation return for the taxable year during which the transferred specific credit portion was determined. For the transfer election to be valid, the return would need to be filed not later than the time prescribed by §§1.6031(a)-1(e) and 1.6037-1(b) (including extensions of time) for filing the return for such taxable year.

IV. Registration under section 6418(g)(1)

Section 6418(g)(1) provides that as a condition of, and prior to, any transfer of any portion of an eligible credit under section 6418, the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section.

In general, consistent with section 6417, stakeholders requested additional

information about this provision and requested that the regulations balance the need to prevent fraud and abuse with the burden on taxpayers. Stakeholders recommended a registration system that assigns a transfer number to an eligible taxpayer that can be used by transferee taxpayers to claim transferred credits and allows the IRS to track transfers of eligible credits. Stakeholders also recommended that information or registration requirements should be as consistent as possible across sections 48D(d)(1), 6417(d)(5), and 6418(g)(1). In order to meet the purpose of section 6418(g)(1), the Treasury Department and the IRS believe that it is necessary to establish a mandatory registration process that is in place before the end of the 2023 calendar year, which is the first full taxable year during which a transfer election under section 6418 is available.

Proposed §1.6418-4 generally provides rules requiring that eligible taxpayers register before filing the return on which a transfer election is made and provide information related to each eligible credit property for which the eligible taxpayer intends to transfer a specified credit portion. Proposed §1.6418-4(a), consistent with section 6418(g)(1), requires that, as a condition of, and prior to, making an election to transfer a specified credit portion, an eligible taxpayer satisfy the pre-filing registration requirements in proposed §1.6418-4(b). After the required pre-filing registration process is successfully completed, an eligible taxpayer will receive a unique registration number from the IRS for each registered eligible credit property for which the eligible taxpayer intends to transfer a specified credit portion. The Treasury Department and the IRS intend for this pre-filing registration process to occur through an IRS electronic portal (unless otherwise allowed in guidance). An eligible taxpayer that does not obtain a registration number and report the registration number on its return with respect to an eligible credit property is ineligible to make a transfer election. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the eligible taxpayer is eligible to transfer any specified credit portion determined with respect to the eligible credit property. The

registration number also must be reported on the eligible taxpayer's return.

Proposed §1.6418-4(b) provides the following pre-filing registration requirements.

First, an eligible taxpayer must complete the pre-filing registration process electronically through an IRS electronic portal in accordance with the instructions provided therein, unless otherwise provided in guidance. If the election is by a member of a consolidated group, the member must complete the pre-filing registration process as a condition of, and prior to, making an elective payment election. See §1.1502-77 (providing rules regarding the status of the common parent as agent for its members).

Second, an eligible taxpayer must satisfy the registration requirements and receive a registration number prior to making a transfer election for a specified credit portion on the eligible taxpayer's return for the taxable year at issue.

Third, an eligible taxpayer is required to obtain a registration number for each eligible credit property with respect to which a transfer election of a specified credit portion is made.

Finally, an eligible taxpayer must provide the specific information required to be provided as part of the pre-filing registration process. The provision of such information, which includes information about the taxpayer, about the eligible credits, and about the eligible credit property, will allow the IRS to prevent duplication, fraud, improper payments, or excessive transfers under section 6418. For example, 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.

Proposed §1.6418-4(c) provides rules related to the registration number that is obtained after the IRS has reviewed and approved the taxpayer's submitted information. First, these rules provide that a registration number is valid for an eligible

taxpayer only for the taxable year for which it is obtained, and for a transferee taxpayer's taxable year in which the specified credit portion is taken into account. Second, proposed §1.6418-4(c) provides rules for the renewal of a registration number that has been previously obtained. The eligible taxpayer is required to renew the registration with respect to an eligible credit property each year in accordance with guidance, including attesting that all the facts are still correct or updating any facts. Third, the proposed regulations provide that, if facts change with respect to an eligible credit property for which a registration number has been previously obtained, an eligible taxpayer is required to amend the registration to reflect these new facts. Lastly, the proposed regulations provide that an eligible taxpayer is required to include the registration number of the eligible credit property on the eligible taxpayer's return for the taxable year, as provided in proposed §1.6418-2(b), for an election to be effective with respect to any eligible credit determined with respect to any eligible credit property. The IRS will treat a transfer election as ineffective with respect to an eligible credit determined with respect to an eligible credit property for which the eligible taxpayer does not include a valid registration number on its return.

A transferee taxpayer is also required to report the registration number received from an eligible taxpayer on its return for the taxable year that the transferee taxpayer takes the transferred eligible credit into account.

V. Special rules

The proposed regulations would provide special rules relating to the determination of an excessive credit transfer, reasonable cause for a transferee taxpayer, the difference between an excessive credit transfer and recapture under section 50(a) or 45Q(f)(4), the mechanics for basis reduction and recapture notification, and rules for ineffective elections. The proposed regulations also would provide special rules relating to the carryback and carryforward of transferred eligible credits.

The proposed regulations describe the rules related to an excessive credit transfer

consistent with section 6418(g)(2)(A). Section 6418(g)(2)(A) provides in the case of any specified credit portion that is transferred to a transferee taxpayer pursuant to section 6418(a) that the Secretary determines constitutes an excessive credit transfer, the tax imposed on the transferee taxpayer by chapter 1, regardless of whether such entity would otherwise be subject to chapter 1 tax, for the taxable year in which such determination is made will be increased by an amount equal to the sum of (i) the amount of such excessive credit transfer, plus (ii) an amount equal to 20 percent of such excessive credit transfer.

Consistent with section 6418(g)(2)(B), 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. Under the proposed regulations, reasonable cause would be generally determined based on the relevant facts and circumstances of a transaction. The proposed regulations would 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 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 has not been transferred to any other taxpayer. Further, based on a review of suggestions by stakeholders, the proposed regulations would provide a list of factors that a transferee taxpayer could show to demonstrate reasonable cause. The list of factors is not exhaustive and is also not intended as a list of required actions in all transfers. Instead, the list of factors, which 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), would be intended to provide more clarity with respect to reasonable cause in these circumstances for eligible taxpayers, transferee taxpayers and the IRS in administration of the provision.

The proposed regulations also would define the term “excessive credit transfer” consistent with section 6418(g)(2)(C) to mean, with respect to an eligible credit property for which an election is made under proposed §1.6418-2 or §1.6418-3 for any taxable year, an amount equal to the excess of—(i) the amount of the specified credit portion claimed by the transferee taxpayer with respect to such eligible credit property for such taxable year; over (ii) the amount of the eligible credit that, without the application of section 6418, would be otherwise allowable under the Code with respect to such eligible credit property for such taxable year. In the second part of the definition of the term, the Treasury Department and the IRS are interpreting the phrase “amount of such credit... which would be otherwise allowable” with respect to such eligible credit property for the taxable year to have the same meaning as the amount of the eligible credit properly determined with respect to such eligible credit property for such taxable year in the hands of the eligible taxpayer. See Joint Committee on Taxation, *Description Of Energy Tax Changes Made By Public Law 117-169*, JCX-5-23, 98 (April 17, 2023).

The proposed regulations would also provide a rule for determining an excessive credit transfer when there are multiple transferees. The proposed regulations would provide that all transferee taxpayers are considered one transferee for calculating whether there was an excessive credit transfer and the amount of the excessive credit transfer. If there was an excessive credit transfer, then the amount of excessive credit transferred to a specific transferee taxpayer is equal to the total excessive credit transferred multiplied by the transferee’s portion of the total credit transferred to all transferees. This rule is applied on an eligible credit property basis.

Finally, with respect to excessive credit transfers, the proposed regulations provide three examples to illustrate when there is no excessive credit transfer, when there is an excessive credit transfer, and when there is an excessive credit transfer as to multiple transferees.

Stakeholders asked whether a recapture event under section 50(a) would be treated

as an excessive credit transfer under section 6418(g)(2). The excessive credit transfer rules operate separately from the recapture rules. The excessive credit transfer rules apply where the credit amount reported on the original credit source form by the eligible taxpayer and transferred to a transferee taxpayer was excessive. Recapture of a tax credit occurs when the original tax credit reported would have been correct without the occurrence of a subsequent recapture event. The proposed regulations therefore would provide a rule that recapture events under section 45Q(f)(4) or 50(a) do not result in an excessive credit transfer.

Stakeholders asked for clarification whether the recapture tax under section 50(a) is imposed on the eligible taxpayer or the transferee taxpayer. Section 6418(g)(3)(B) provides that if, during any taxable year, the applicable investment credit property (as defined in section 50(a)(5)) is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period (as described in section 50(a)(1))—(i) such eligible taxpayer must provide notice of such occurrence to the transferee taxpayer (in such form and manner as the Secretary prescribes), and (ii) the transferee taxpayer must provide notice of the recapture amount (as defined in section 50(c)(2)), if any, to the eligible taxpayer (in such form and manner as the Secretary prescribes). The proposed regulations include a rule that the recapture amount is calculated and taken into account by the transferee taxpayer. This interpretation is consistent with the statutory framework for recapture tax under section 50, which generally imposes recapture tax on the taxpayer who claimed the credit, regardless of whether such taxpayer owns the underlying property to which the credit is determined. This interpretation is also consistent with section 6418(a), which treats the transferee taxpayer (and not the eligible taxpayer) as the taxpayer for purposes of the Code with respect to a specified credit portion, and with section 6418(g)(3)(B)(ii), which requires the transferee taxpayer to provide notice of the recapture amount, if any, to the eligible taxpayer.

Consistent with recapture tax liability being imposed on the transferee taxpayer,

as a requested clarification, there is no prohibition under section 6418 for an eligible taxpayer and a transferee taxpayer to contract between themselves for indemnification of the transferee taxpayer in the event of a recapture event.

The proposed regulations would also provide guidance on the notifications that are required by the eligible taxpayer and the transferee taxpayer after a recapture event, as described in section 6418(g)(3)(B)(i) and (ii). The proposed regulations would provide that an eligible taxpayer would be required to provide notification of a recapture event to a transferee taxpayer, with such notification including all of the information necessary for the transferee taxpayer to calculate the recapture amount (as defined under section 50(c)(2)). This notification would need to be provided in a timely manner so that a transferee taxpayer can calculate the recapture amount by the due date of the transferee taxpayer’s return (without extensions). Beyond these requirements, the parties can contract as to the form the notice must take and to any additional time periods for providing the notice, provided the terms of the contract do not otherwise conflict with the terms of the proposed regulations. The IRS would also be permitted to provide further information requirements or more specific time periods if required through instructions to forms or further guidance. The proposed regulations contain similar requirements as to the notification required by the transferee taxpayer of the recapture amount, with the difference being the type of information that is provided. Together, these notification rules seek to inform parties of the minimum information required in a notice and the outer limits on time periods, but still allow for parties to agree to other terms as needed.

Section 6418(g)(3) does not specifically address recapture under section 45Q(f)(4). Instead, section 6418(g)(3) only addresses recapture under section 50(a), which occurs when an investment credit property for which an eligible credit was determined is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer before the end of the recapture period. However, applying rules consistent with section 6418(g)(3) to eligible section 45Q credits is appropriate. Section 45Q

has similar requirements in that carbon oxide that has been sequestered, utilized, or used and to which a section 45Q credit has been determined is generally intended to remain sequestered, utilized or used for the entire recapture period. Addressing this issue is also consistent with the authority granted in section 6418(h) to issue regulations necessary to carry out the purposes of section 6418. As such, the proposed regulations would clarify that the rules under proposed §§1.6418-5(d) and 1.45Q-5 apply to a transferee taxpayer to the extent any eligible section 45Q is transferred under section 6418. The proposed regulations would also clarify that an eligible taxpayer would be required to provide notice to a transferee taxpayer of a recapture event, the amount of leaked qualified carbon oxide, the amount of qualified carbon oxide subject to recapture and the recapture amount in accordance with §1.45Q-5(c) through (e). Such notice would be required to be provided in a timely manner so that a transferee taxpayer can calculate the recapture amount by the due date of the transferee taxpayer's tax return (without extensions).

The proposed regulations would also provide a clarification that an ineffective election is not considered an excessive credit transfer to the transferee taxpayer. An ineffective election to transfer an eligible credit means that no transfer has occurred for purposes of section 6418. This means that section 6418 would not apply to the transaction, and the tax consequences are determined under any other relevant provisions of the Code. For example, an ineffective election results if an eligible taxpayer tries to elect to transfer an eligible credit, but the eligible taxpayer did not complete or receive a registration number with respect to the eligible credit property to which the credit is determined or if an eligible taxpayer attempts to transfer an eligible credit to a related party.

Stakeholders asked whether eligible credits are subject to new section 39(a)(4), regarding additional carryback and carryforward years. The proposed regulations would provide that a transferee taxpayer can use section 39(a)(4) to the extent an eligible credit is also listed in section 6417(b). Section 39(a)(4) generally allows a 3-year carryback period (as opposed to a 1-year) in the case of

any applicable credit (as defined in section 6417(b)). This issue has two parts, the first of which is broader than these proposed regulations. The first issue is whether the reference in section 39(a)(4) to applicable credit is only referring to an applicable credit determined by an applicable entity under section 6417(a), or, if the reference is only referring to the list of credits in section 6417(b). The proposed regulations would provide that the language in section 39(a)(4) is referring to the list of credits in section 6417(b). Regardless of the taxpayer determining the credit, if the credit is listed in section 6417(b), then the credit is an applicable credit. The second issue is whether there is any prohibition against a transferee taxpayer using section 39(a)(4). No statutory language prohibits a transferee taxpayer from using the rule in section 39(a)(4) with respect to an eligible credit. All of the eligible credits would meet the definition in section 6417(b), although there are placed in service dates under section 6417(b)(2), (3), and (5) that may impact application of section 39(a)(4), which must be taken into consideration.

With respect to real estate investment trusts (REITs), stakeholders requested that the proposed regulations clarify that eligible credits that have not yet been transferred are treated as a real estate asset, cash, or cash item and thus, will not potentially cause a REIT to fail the asset test for REITs under section 856(c)(4). The proposed regulations do not directly adopt this comment; however, the Treasury Department and the IRS believe that the proposed regulations, particularly with respect to the paid in cash and timing of sale requirements, will assist REITs in managing issues with the REIT asset test. Further comments are requested with respect to whether the proposed regulations provide sufficient guidance to enable REITs to manage the potential REIT asset test issues.—ection 857(b)(6)—Section 857(b)(6)—

Proposed Applicability Dates

These regulations are proposed to apply to taxable years ending on or after the date the final regulations are published in the *Federal Register*. Taxpayers may rely on these proposed regulations for taxable years beginning after December

31, 2022, and before the date the final regulations are published in the *Federal Register*, provided the taxpayers follow the proposed regulations in their entirety and in a consistent manner.

Special Analyses

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) (“PRA”) generally requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in these proposed regulations contain reporting and recordkeeping requirements. The recordkeeping requirements mentioned within these proposed regulations are considered general tax records under §1.6001-1(e). These records are required for the IRS to validate that transferee taxpayers have met the regulatory requirements and are entitled to the transferred specified credit portions. For PRA purposes, general tax records are already approved by OMB under 1545-0074 for individuals and under 1545-0123 for business entities.

These proposed regulations also mention reporting requirements related to making transfer elections as detailed in proposed §§1.6418-2 and 1.6418-3. These transfer elections will be made by eligible taxpayers as part of filing a return (such as the appropriate Form 1040, Form 1120, Form 1120-S, or Form 1065), including filling out the relevant source credit form and completing the Form 3800. The proposed regulation in proposed §1.6418-2(b)(5) describes third-party disclosures, which require eligible taxpayers and transferee taxpayers to complete transfer election statements and also require eligible taxpayers to provide required minimum documentation to transferee taxpayers as part of making a transfer election. These forms and third-party disclosures are

approved under 1545-0074 for individuals and 1545-0123 for business entities.

These proposed regulations also describe recapture procedures as detailed in proposed §1.6418-5 that are required by section 6418(g)(3). The reporting of a recapture event will still be required to be reported using Form 4255, Recapture of Investment Credit. This form is approved under 1545-0074 for individuals and 1545-0123 for business entities. The proposed regulation is not changing or creating new collection requirements not already approved by OMB.

These proposed regulations mention the reporting requirement to complete pre-filing registration with IRS to be able to transfer eligible credits to a transferee taxpayer as detailed in proposed §1.6418-4. For further information concerning the registration and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the corresponding temporary regulations (T.D. 9975) published in the Rules and Regulations section of this issue of the *Federal Register*. For burden estimates associated with the pre-filing registration requirement as detailed in proposed §1.6418-4, see the preamble to the corresponding temporary regulations. This proposed regulation is not changing or creating new collection requirements beyond the requirements that are being reviewed and approved by OMB under the temporary regulations.

II. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Treasury Department and the IRS have not determined whether the proposed

rule, when finalized, will likely have a significant economic impact on a substantial number of small entities. This determination requires further study. However, because there is a possibility of significant economic impact on a substantial number of small entities, an IRFA is provided in these proposed regulations. The Treasury Department and the IRS invite comments on both the number of entities affected and the economic impact on small entities. Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel of Advocacy of the Small Business Administration for comment on its impact on small business.

1. Need for and Objectives of the Rule

The proposed regulations would provide guidance to taxpayers that intend to make an election under section 6418 to transfer eligible credits. The proposed regulations would also provide guidance to transferee taxpayers as to the treatment of transferred eligible credits under section 6418. The proposed rules would include needed definitions, the time and manner to make a transfer election, and information about the pre-filing registration process, among other items. The Treasury Department and the IRS intend and expect that providing taxpayers guidance that allows them to effectively use section 6418 to transfer eligible credits will beneficially impact various industries, deliver benefits across the economy, and reduce economy wide greenhouse gas emissions.

In particular, section 6418 allows eligible taxpayers to transfer an eligible credit (or portion thereof) to a transferee taxpayer. Allowing eligible taxpayers without sufficient Federal income tax liability to use a business tax credit to instead transfer the tax credit to a taxpayer that has sufficient tax liability to use the credit will increase the incentive for taxpayers to invest in clean energy projects that generate eligible credits. It will also increase the amount of cash available to such taxpayers, thereby reducing the amount of financing needed for clean energy projects.

2. Affected Small Entities

The RFA directs agencies to provide a description of, and where feasible, an

estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The Small Business Administration's Office of Advocacy estimates in its 2023 Frequently Asked Questions that 99.9 percent of American businesses meet its definition of a small business. The applicability of these proposed regulations does not depend on the size of the business, as defined by the Small Business Administration. As described more fully in the preamble to this proposed regulation and in this IRFA, section 6418 and these proposed regulations may affect a variety of different entities across several different industries as there are 11 different eligible credits that may be transferred pursuant to a transfer election. Although there is uncertainty as to the exact number of small businesses within this group, the current estimated number of respondents to these proposed rules is 50,000 taxpayers as described in the Paperwork Reduction Act section of the preamble. The Treasury Department and the IRS expect to receive more information on the impact on small businesses through comments on this proposed rule and again when taxpayers start to make the transfer election using the guidance and procedures provided in these proposed regulations.

3. Impact of the Rules

The proposed regulations provide rules for how taxpayers can take advantage of the section 6418 credit monetization regime. Taxpayers that elect to take advantage of transferability will have administrative costs related to reading and understanding the rules in addition to recordkeeping and reporting requirements because of the pre-filing registration and tax return requirements. The costs will vary across different-sized taxpayers and across the type of project(s) in which such taxpayers are engaged.

The pre-filing registration process requires a taxpayer to register itself as intending to make a transfer election, to list all eligible credits it intends to transfer, and to list each eligible credit property that contributed to the determination of such credits. This process must be completed to receive a registration number for each eligible credit property with respect

to which the eligible taxpayer intends to transfer an eligible credit. On filing the return, to make a valid transfer election, the eligible taxpayer and transferee taxpayer would be required to complete and attach a transfer election statement. The transfer election statement is generally a written document that describes the transfer of a specified credit portion between an eligible taxpayer and transferee taxpayer. Further, the eligible taxpayer is required to provide certain required minimum documentation to the transferee taxpayer, and the transferee taxpayer is required to retain the documentation for as long as it may be relevant. Many of the other requirements, such as completing the relevant source credit form and completing the Form 3800 would be required for any taxpayer that is claiming a general business credit, regardless of whether the taxpayer was transferring the credit under section 6418. Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of the preamble.

4. Alternatives Considered

The Treasury Department and the IRS considered alternatives to the proposed regulations. The proposed regulations requirements of pre-filing registration and the additional requirements to make a valid transfer election were designed to minimize burden while also minimizing the opportunity for duplication, fraud, improper payments, or excessive payments under section 6418. For example, in adopting these requirements, the Treasury Department and the IRS considered whether such information could be obtained strictly at filing of the relevant return. However, the Treasury Department and IRS decided that such an option would increase the opportunity for duplication, fraud, improper payments or excessive payments under section 6418. Section 6418(g)(1) specifically authorizes the IRS to require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments,

or excessive payments under section 6418 as a condition of, and prior to, any transfer of any portion of an eligible credit. As described in the preamble to these proposed regulations, these proposed rules carry out that Congressional intent as pre-filing registration allows for the IRS to verify certain information in a timely manner and then process the annual tax return of the eligible taxpayer and the transferee taxpayer with minimal delays. Having a distinction between eligible taxpayers that are small businesses versus others making a transfer election would create a scenario where a subset of taxpayers seeking to transfer eligible credits would not have been verified or received registration numbers, potentially delaying return processing for both eligible taxpayers and transferee taxpayers.

Another example is the proposed requirement that eligible taxpayers and transferee taxpayers complete a transfer election statement. In determining to adopt this proposal, the Treasury Department and the IRS considered that such a statement would again minimize opportunity for fraud and decrease the chance of duplication but would also benefit a transferee taxpayer by allowing the filing of its return without having to wait for an eligible taxpayer to file in all cases. Further, the contents of the transfer election statement were intended to be available to eligible taxpayers, such that the size of the business should not impact greatly the time needed to prepare such statements. The Treasury Department and the IRS also considered whether any required documentation was needed to be provided by eligible taxpayers to transferee taxpayers, which the transferee taxpayers are then required to keep for so long as the contents thereof may become material in the administration of any internal revenue law. Again, this requirement was considered consistent with the goal of minimizing fraud, as the information is generally documentation to validate the existence of the eligible credit property, any bonus credits amounts, and the evidence of credit qualification. Any size business generating an eligible credit should have access to such information. Further the recordkeeping duration is consistent with general recordkeeping

rules under §1.6001-1(e). This proposed requirement also will benefit small businesses that are transferee taxpayers as it provides a mechanism to receive such information from the eligible taxpayer. Comments are requested on the requirements in the proposed regulations, including specifically, whether there are less burdensome alternatives that do not increase the risk of duplication, fraud, improper payments, or excessive payments under section 6418.

5. Duplicative, Overlapping, or Conflicting Federal Rules

The proposed rule would not duplicate, overlap, or conflict with any relevant Federal rules. As discussed above, the proposed rule would merely provide procedures and definitions to allow taxpayers to take advantage of the ability to transfer eligible credits. The Treasury Department and the IRS invite input from interested members of the public about identifying and avoiding overlapping, duplicative, or conflicting requirements.

IV. *Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandate Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). These proposed regulations do not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

V. *Executive Order 13132: Federalism*

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These proposed regulations do not

have federalism implications and do not impose substantial, direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

VI. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) prohibits an agency from publishing any rule that has tribal implications if the rule either imposes substantial, direct compliance costs on Indian tribal governments, and is not required by statute, or preempts tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive order. This proposed rule does not have substantial direct effects on one or more federally recognized Indian tribes and does not impose substantial direct compliance costs on Indian tribal governments within the meaning of the Executive order.

VII. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any electronic comments submitted, and any paper comments submitted, will be made available at <https://www.regulations.gov> or upon request.

Announcement 2023-16, 2023-20 I.R.B. 854 (May 15, 2023), provides that public hearings will be conducted in person, although the IRS will continue to provide a telephonic option for individuals

who wish to attend or testify at a hearing by telephone. Any telephonic hearing will be made accessible to people with disabilities.

A public hearing has been scheduled for August 23, 2023, beginning at 10:00 a.m. ET, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC, unless no outlines are received by August 14, 2023. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts.

The rules of 26 CFR 601.601(a) (3) apply to the hearing. Persons who wish to comment by telephone at the hearing must submit written or electronic comments and an outline of the topics to be discussed as well as the time to be devoted to each topic by August 14, 2023, as prescribed in the preamble under the **ADDRESSES** section.

A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available at <https://www.regulations.gov>, search IRS and REG-101610-23. Copies of the agenda will also be available by emailing a request to publichearings@irs.gov. Please put “REG-101610-23 Agenda Request” in the subject line of the email.

Individuals who want to testify in person at the public hearing must send an email to publichearings@irs.gov to have your name added to the building access list. The subject line of the email must contain the regulation number REG-101610-23 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG-101610-23.

Individuals who want to testify by telephone at the public hearing must send an email to publichearings@irs.gov to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-101610-23 and the language TESTIFY Telephonically. For

example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG-101610-23.

Individuals who want to attend the public hearing in person without testifying must also send an email to publichearings@irs.gov to have your name added to the building access list. The subject line of the email must contain the regulation number REG-101610-23 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG-101610-23. Requests to attend the public hearing must be received by 5:00 p.m. EST on August 21, 2023. Individuals who want to attend the public hearing by telephone without testifying must also send an email to publichearings@irs.gov to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-101610-23 and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG-101610-23. Requests to attend the public hearing must be received by 5:00 p.m. EST on August 21, 2023.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to publichearings@irs.gov (preferred) or by telephone at (202) 317-6901 (not a toll-free number) at least August 18, 2023.

Statement of Availability of IRS Documents

IRS notices and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

Drafting Information

The principal authors of these proposed regulations are James Holmes and Jeremy Milton, Office of the Associate

Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and record-keeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry in numerical order for §§ 1.6418-0 through 1.6418-5 to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Sections 1.6418-0 through 1.6418-5 also issued under 26 U.S.C. 6418(g)(1) and (h).

* * * * *

Par. 2. Section 1.706-4 is amended as follows:

1. Redesignate paragraphs (e)(2)(ix) through (xi) as paragraphs (e)(2)(x) through (xii).
2. Add new paragraph (e)(2)(ix).
3. Revise the heading of paragraph (g).
4. Redesignate the text of paragraph (g) as paragraph (g)(1).
5. Add paragraph (g)(2).

The addition and revisions read as follows:

§1.706-4 Determination of distributive share when a partner's interest varies.

* * * * *

(e) * * *

(2) * * *

(ix) Any specified credit portion transferred pursuant to section 6418 and §§ 1.6418-1 through 1.6418-5;

* * * * *

(g) *Applicability date.* * * *

(2) Paragraph (e)(2)(ix) of this section applies to taxable years ending on or after date of publication of final rule.

Par. 3. Sections 1.6418-0 through 1.6418-5 are added to read as follows:

Sec.

* * * * *

1.6418-0 Table of contents.

1.6418-1 Transfer of eligible credits.

1.6418-2 Rules for making transfer elections.

1.6418-3 Additional rules for partnerships and S corporations.

1.6418-4 Additional information and registration.

1.6418-5 Special rules.

* * * * *

§1.6418-0 Table of contents.

This section lists the captions contained in §§ 1.6418-1 through 1.6418-5.

§1.6418-1 Transfer of eligible credits.

- (a) Transfer of eligible credits.
- (b) Eligible taxpayer.
- (c) Eligible credit.
- (d) Eligible credit property.
- (e) Guidance.
- (f) Paid in cash.
- (g) Section 6418 regulations.
- (h) Specified credit portion.
- (i) Statutory references.
- (j) Transfer election.
- (k) Transferee partnership.
- (l) Transferee S corporation.
- (m) Transferee taxpayer.
- (n) Transferor partnership.
- (o) Transferor S corporation.
- (p) Transferred specified credit portion.
- (q) U.S. territory.
- (r) Applicability date.

§1.6418-2 Rules for making transfer elections.

- (a) Transfer election.
- (b) Manner and due date of making a transfer election.
- (c) Limitations after a transfer election is made.
- (d) Determining the eligible credit.
- (e) Treatment of payments made in connection with a transfer election.
- (f) Transferee taxpayer's treatment of eligible credit.
- (g) Applicability date.

§1.6418-3 Additional rules for partnerships and S corporations.

- (a) Rules applicable to both partnerships and S corporations.
- (b) Rules applicable to partnerships.
- (c) Rules applicable to S corporations.
- (d) Transfer election by a partnership or S corporation.
- (e) Examples.
- (f) Applicability date.

§1.6418-4 Additional information and registration.

- (a) Pre-filing registration and election.
- (b) Pre-filing registration requirements.
- (c) Registration number.
- (d) Applicability date.

§1.6418-5 Special rules.

- (a) Excessive credit transfer tax imposed.
- (b) Excessive credit transfer defined.
- (c) Basis reduction under section 50(c).
- (d) Notification and impact of recapture under section 50(a) or 49(b).
- (e) Notification and impact of recapture under section 45Q(f)(4).
- (f) Impact of an ineffective transfer election by an eligible taxpayer.
- (g) Carryback and carryforward.
- (h) Applicability date.

§1.6418-1 Transfer of eligible credits.

(a) *Transfer of eligible credits.* An eligible taxpayer may make a transfer election under § 1.6418-2(a) to transfer any specified portion of an eligible credit determined with respect to any eligible credit property of such eligible taxpayer for any taxable year to a transferee taxpayer in accordance with section 6418 of the Code and the section 6418 regulations (defined in paragraph (g) of this section). Paragraphs (b) through (q) of this section provide definitions. See § 1.6418-2 for rules and procedures under which all transfer elections must be made, limitations to making transfer elections, the treatment of payments made in connection with transfer elections, and the treatment of eligible credits transferred to transferee taxpayers.

See §1.6418-3 for special rules pertaining to transfer elections made by partnerships or S corporations. See §1.6418-4 for pre-filing registration requirements and other information required to make any transfer election effective. See §1.6418-5 for special rules related to the imposition of tax on excessive credit transfers, basis reductions, required notifications and impacts of the recapture of transferred credits, and rules regarding carrybacks and carryforwards.

(b) *Eligible taxpayer.* The term *eligible taxpayer* means any taxpayer (as defined in section 7701(a)(14) of the Code), other than one described in section 6417(d)(1)(A) and §1.6417-1(b).

(c) *Eligible credit*—(1) *In general.* The term *eligible credit* is a credit described in paragraph (c)(2) of this section determined for a taxable year with respect to a single eligible credit property of an eligible taxpayer but does not include any business credit carryforward or business credit carryback determined under section 39 of the Code.

(2) *Separately determined credit amounts.* The amount of any credit described in this paragraph (c)(2) is the entire amount of the credit separately determined with respect to each single eligible credit property of the eligible taxpayer and includes any bonus credit amounts described in paragraph (c)(3) of this section determined with respect to that single eligible credit property. The eligible credits described in this paragraph (c)(2) are:

(i) *Alternative fuel vehicle refueling property.* So much of the credit for alternative fuel vehicle refueling property allowed under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit).

(ii) *Renewable electricity production.* The renewable electricity production credit determined under section 45(a) of the Code (section 45 credit).

(iii) *Carbon oxide sequestration.* The credit for carbon oxide sequestration determined under section 45Q(a) of the Code (section 45Q credit).

(iv) *Zero-emission nuclear power production.* The zero-emission nuclear

power production credit determined under section 45U(a) of the Code (section 45U credit).

(v) *Clean hydrogen production.* The clean hydrogen production credit determined under section 45V(a) of the Code (section 45V credit).

(vi) *Advanced manufacturing production.* The advanced manufacturing production credit determined under section 45X(a) of the Code (section 45X credit).

(vii) *Clean electricity production.* The clean electricity production credit determined under section 45Y(a) of the Code (section 45Y credit).

(viii) *Clean fuel production.* The clean fuel production credit determined under section 45Z(a) of the Code (section 45Z credit).

(ix) *Energy.* The energy credit determined under section 48 of the Code (section 48 credit).

(x) *Qualifying advance energy project.* The qualifying advanced energy project credit determined under section 48C of the Code (section 48C credit).

(xi) *Clean electricity.* The clean electricity investment credit determined under section 48E of the Code (section 48E credit).

(3) *Bonus credit amounts.* The bonus credit amounts described in this paragraph (c)(3) are:

(i) In the case of a section 30C credit, the increased credit amounts for which the requirements under section 30C(g)(2)(A) and (3) are satisfied.

(ii) In the case of a section 45 credit, the increased credit amounts for which the requirements under section 45(b)(7)(A) (8), (9), and (11) are satisfied.

(iii) In the case of a section 45Q credit, the increased credit amounts for which the requirements under section 45Q(h)(3) and (4) are satisfied.

(iv) In the case of a section 45U credit, the increased credit amount for which the requirements under section 45U(d)(2) are satisfied.

(v) In the case of a section 45V credit, the increased credit amounts for which the requirements under section 45V(e)(3) and (4) are satisfied.

(vi) In the case of a section 45Y credit, the increased credit amounts for which

the requirements under section 45Y(g)(7), (9), (10), and (11) are satisfied.

(vii) In the case of a section 45Z credit, the increased credit amounts for which the requirements under section 45Z(f)(6) and (7) are satisfied.

(viii) In the case of a section 48 credit, the increased credit amounts for which the requirements under section 48(a)(10), (11), (12), (14), and (e) are satisfied.

(ix) In the case of a section 48C credit, the increased credit amounts for which the requirements under section 48C(e)(5) and (6) are satisfied.

(x) In the case of a section 48E credit, the increased credit amounts for which the requirements under section 48E(a)(3)(A), (B), (d)(3), (d)(4), and (h) are satisfied.

(d) *Eligible credit property.* The term *eligible credit property* means each of the units of property of an eligible taxpayer described in paragraphs (d)(1) through (11) of this section with respect to which the amount of an eligible credit is determined:

(1) In the case of a section 30C credit, a *qualified alternative fuel vehicle refueling property* described in section 30C(c).

(2) In the case of a section 45 credit, a *qualified facility* described in section 45(d).

(3) In the case of a section 45Q credit, a *single process train of carbon capture equipment* described in §1.45Q-2(c)(3).

(4) In the case of a section 45U credit, a *qualified nuclear power facility* described in section 45U(b)(1).

(5) In the case of a section 45V credit, a *qualified clean hydrogen production facility* described in section 45V(c)(3).

(6) In the case of a section 45X credit, a *facility* that produces eligible components, as described in guidance under sections 48C and 45X.

(7) In the case of a section 45Y credit, a *qualified facility* described in section 45Y(b)(1).

(8) In the case of a section 45Z credit, a *qualified facility* described in section 45Z(d)(4).

(9)(i) *In general.* In the case of a section 48 credit and except as provided in paragraph (d)(9)(ii) of this section, an *energy property* described in section 48.

(ii) *Pre-filing registration and elections.* At the option of an eligible taxpayer,

and to the extent consistently applied for purposes of the pre-filing registration requirements of §1.6418-4 and the election requirements of §§1.6418-2 through 1.6418-3, an *energy project* as described in section 48(a)(9)(A)(ii) and defined in guidance.

(10) In the case of a section 48C credit, an *eligible property* described in section 48C(c)(2).

(11) In the case of a section 48E credit, a *qualified facility* as defined in section 48E(b)(3) or, in the case of a section 48E credit relating to a qualified investment with respect to energy storage technology, an *energy storage technology* described in section 48E(c)(2).

(e) *Guidance*. The term *guidance* means guidance published in the *Federal Register* or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the IRS.gov website. See §§601.601 and 601.602 of this chapter.

(f) *Paid in cash*. The term *paid in cash* means a payment in United States dollars that—

(1) Is made by cash, check, cashier's check, money order, wire transfer, automated clearing house (ACH) transfer, or other bank transfer of immediately available funds;

(2) Is made within the period beginning on the first day of the eligible taxpayer's taxable year during which a specified credit portion is determined and ending on the due date for completing a transfer election statement (as provided in §1.6418-2(b)(5)(iii)); and

(3) May include a transferee taxpayer's contractual commitment to purchase eligible credits with United States dollars in advance of the date a specified credit portion is transferred to such transferee taxpayer if all payments of United States dollars are made in a manner described in paragraph (f)(1) of this section during the time period described in paragraph (f)(2) of this section.

(g) *Section 6418 regulations*. The term *section 6418 regulations* means this section and §§1.6418-2 through 1.6418-5.

(h) *Specified credit portion*. The term *specified credit portion* means a proportionate share (including all) of an eligible credit determined with respect to a single eligible credit property of the eligible taxpayer that is specified in a transfer

election. A specified credit portion of an eligible credit must 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.

(i) *Statutory references*—(1) *Chapter 1*. The term *chapter 1* means chapter 1 of the Code.

(2) *Code*. The term *Code* means the Internal Revenue Code.

(3) *Subchapter K*. The term *subchapter K* means subchapter K of chapter 1.

(4) *Subtitle A*. The term *subtitle A* means subtitle A of the Code.

(j) *Transfer election*. The term *transfer election* means an election under section 6418(a) of the Code to transfer to a transferee taxpayer a specified portion of an eligible credit determined with respect to an eligible credit property in accordance with the section 6418 regulations.

(k) *Transferee partnership*. The term *transferee partnership* means a partnership for Federal income tax purposes that is a transferee taxpayer.

(l) *Transferee S corporation*. The term *transferee S corporation* means an S corporation within the meaning of section 1361(a) that is a transferee taxpayer.

(m) *Transferee taxpayer*. The term *transferee taxpayer* means any taxpayer that is not related (within the meaning of section 267(b) or 707(b)(1) of the Code) to the eligible taxpayer making the transfer election to which an eligible taxpayer transfers a specified credit portion of an eligible credit.

(n) *Transferor partnership*. The term *transferor partnership* means a partnership for Federal income tax purposes that is an eligible taxpayer that makes a transfer election.

(o) *Transferor S corporation*. The term *transferor S corporation* means an S corporation within the meaning of section 1361(a) that is an eligible taxpayer that makes a transfer election.

(p) *Transferred specified credit portion*. The term *transferred specified credit portion* means the specified credit portion that is transferred from an eligible taxpayer to a transferee taxpayer pursuant to a transfer election.

(q) *U.S. territory*. The term *U.S. territory* means the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands,

American Samoa, and the Commonwealth of the Northern Mariana Islands.

(r) *Applicability date*. This section applies to taxable years ending on or after date of publication of final rule.

§1.6418-2 Rules for making transfer elections.

(a) *Transfer election*—(1) *In general*. An eligible taxpayer can make a transfer election as provided in this section. If a valid transfer election is made by an eligible taxpayer for any taxable year, the transferee taxpayer specified in such election (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to the specified credit portion. This paragraph (a) provides rules on the number of transfers permitted, rules for determining the eligible taxpayer in certain ownership situations, and rules describing circumstances where no transfer election is allowed. Paragraph (b) of this section provides specific rules regarding the scope, manner, and timing of a transfer election. Paragraph (c) of this section provides rules regarding limitations applicable to transfer elections. Paragraph (d) of this section provides rules regarding an eligible taxpayer's determination of an eligible credit. Paragraph (e) of this section provides the treatment of payments in connection with a transfer election. Paragraph (f) of this section provides rules regarding a transferee taxpayer's treatment of an eligible credit following a transfer.

(2) *Multiple transfer elections permitted*. An eligible taxpayer may make multiple transfer elections to transfer one or more specified credit portion(s) to multiple transferee taxpayers, provided that the aggregate amount of specified credit portions transferred with respect to any single eligible credit property does not exceed the amount of the eligible credit determined with respect to the eligible credit property.

(3) *Transfer election in certain ownership situations*—(i) *Disregarded entities*. If an eligible taxpayer is the sole owner (directly or indirectly) of an entity that is disregarded as separate from such eligible taxpayer for Federal income tax purposes and such entity directly holds an eligible

credit property, the eligible taxpayer may make a transfer election in the manner provided in this section with respect to any eligible credit determined with respect to such eligible credit property.

(ii) *Undivided ownership interests.* If an eligible taxpayer is a co-owner of an eligible credit property through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code, then the eligible taxpayer's undivided ownership share of the eligible credit property will be treated for purposes of section 6418 as a separate eligible credit property owned by such eligible taxpayer, and the eligible taxpayer may make a transfer election in the manner provided in this section for any eligible credit(s) determined with respect to such eligible credit property.

(iii) *Members of a consolidated group.* A member of a consolidated group is required to make a transfer election in the manner provided in this section to transfer any eligible credit determined with respect to the member. —

(iv) *Partnerships and S corporations.* A partnership or S corporation that determines an eligible credit with respect to any eligible credit property held directly by such partnership or S corporation may make a transfer election in the manner provided in §1.6418-3(d) with respect to eligible credits determined with respect to such eligible credit property.

(4) *Circumstances where no transfer election can be made—*(i) *Prohibition on election or transfer with respect to progress expenditures.* No transfer election can be made with respect to any amount of an eligible credit that is allowed for progress expenditures pursuant to rules similar to the rules of section 46(c)(4) and (d) (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990).

(ii) *No election allowed when non-cash consideration.* No transfer election is allowed when an eligible taxpayer receives any consideration other than cash (as defined in §1.6418-1(f)) in connection with the transfer of a specified credit portion.

(iii) *No election allowed when eligible credits not determined with respect to taxpayer.* No transfer election is allowed

for eligible credits that are not determined with respect to an eligible taxpayer as described in paragraph (d) of this section. For example, a section 45Q credit allowable to an eligible taxpayer because of an election made under section 45Q(f)(3) (B), or a section 48 credit allowable to an eligible taxpayer because of an election made under section 50(d)(5) and §1.48-4, although described in §1.6418-1(c)(2), is not an eligible credit that can be transferred by the taxpayer because such credit is not determined with respect to the eligible taxpayer.

(b) *Manner and due date of making a transfer election—*(1) *In general.* An eligible taxpayer must make a transfer election to transfer a specified credit portion of an eligible credit on the basis of a single eligible credit property. For example, an eligible taxpayer that determines eligible credits with respect to two eligible credit properties would need to make a separate transfer election with respect to any specified credit portion of the eligible credit determined with respect to each eligible credit property. Any transfer election must be consistent with the eligible taxpayer's pre-filing registration under §1.6418-4.

(2) *Specific rules for certain eligible credits.* In the case of any section 45 credit, section 45Q credit, section 45V credit, or section 45Y credit that is an eligible credit, the rules in paragraphs (b)(2) (i) and (ii) of this section apply.

(i) *Separate eligible credit property.* A transfer election must be made separately with respect to each eligible credit property described in §1.6418-1(d)(2), (3), (5), and (7), as applicable, for which an eligible credit is determined.

(ii) *Time period.* A transfer election must be made for each taxable year an eligible taxpayer elects to transfer specified credit portions with respect to such an eligible credit property during the 10-year period beginning on the date such eligible credit property was originally placed in service (or, in the case of a section 45Q credit, for each taxable year during the 12-year period beginning on the date the single process train of carbon capture equipment was originally placed in service).

(3) *Manner of making a valid transfer election.* A transfer election is made by

an eligible taxpayer on the basis of each specified credit portion with respect to a single eligible credit property that is transferred to a transferee taxpayer. To make a valid transfer election, 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 (short year return)), must include the following—

(i) A properly completed relevant source credit form for the eligible credit (such as Form 7207, *Advanced Manufacturing Production Credit*, if making a transfer election for a section 45X credit) for the taxable year that the eligible credit was determined;

(ii) A properly completed Form 3800, *General Business Credit* (or its successor), including reductions necessary because of the transferred eligible credit as required by the form and instructions and the registration number received during the required pre-filing registration (as described in §1.6418-4) related to the eligible credit property with respect to which a transferred eligible credit was determined;

(iii) A schedule attached to the Form 3800 (or its successor) showing the amount of eligible credit transferred for each eligible credit property (such as for a section 45X election, the relevant lines that include the eligible credit property reported on Form 7207), except as otherwise provided in guidance;

(iv) A transfer election statement as described in paragraph (b)(5) of this section; and

(v) Any other information related to the election specified in guidance.

(4) *Due date and original return requirement of a transfer election.* A transfer election by an eligible taxpayer with respect to a specified portion of an eligible credit must be made on an original return not later than the due date (including extensions of time) for the original return of the eligible taxpayer for the taxable year for which the eligible credit is determined. No transfer election may be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There is no late-election relief available under §§ 301.9100-1 through 301.9100-3 of this chapter for a transfer election that is not timely filed.

(5) *Transfer election statement*—(i) *In general.* A transfer election statement is a written document that describes the transfer of a specified credit portion between an eligible taxpayer and transferee taxpayer. An eligible taxpayer and transferee taxpayer must each attach a transfer election statement to their respective return as required under paragraphs (b)(3)(iv) and (f)(4)(ii) of this section, unless otherwise provided in guidance. An eligible taxpayer and transferee taxpayer can use any document (such as a purchase and sale agreement) that meets the conditions in paragraph (b)(5)(ii) of this section but must label the document a “Transfer Election Statement” when attaching to a return. The information required in paragraph (b)(5)(ii) of this section does not otherwise limit any other information that the eligible taxpayer and transferee taxpayer may agree to provide in connection with the transfer of any specified credit portion. The statement must be signed under penalties of perjury by an individual with authority to legally bind the eligible taxpayer. The statement must also include the written consent of an individual with authority to legally bind the transferee taxpayer.

(ii) *Information required in transfer election statement.* A transfer election statement must, at a minimum, include each of the following:

(A) Name, address, and taxpayer identification number of the transferee taxpayer and the eligible taxpayer. If the transferee taxpayer or eligible taxpayer is a member of a consolidated group (as defined in §1.1502-1), then only include information for the group member that is the transferee taxpayer or eligible taxpayer (if different from the return filer).

(B) A statement that provides the necessary information and amounts to allow the transferee taxpayer to take into account the specified credit portion with respect to the eligible credit property, including—

(1) A description of the eligible credit (for example, advanced manufacturing production credit for a section 45X transfer election), the total amount of the credit determined with respect to the eligible credit property, and the amount of the specified credit portion;

(2) The taxable year of the eligible taxpayer and the first taxable year in which

the specified credit portion will be taken into account by the transferee taxpayer;

(3) The amount(s) of the cash consideration and date(s) on which paid by the transferee taxpayer; and

(4) The registration number related to the eligible credit property.

(C) Attestation that the eligible taxpayer (or any member of its consolidated group) is not related to the transferee taxpayer (or any member of its consolidated group) within the meaning of section 267(b) or 707(b)(1).

(D) A statement or representation from the eligible taxpayer that it has or will comply with all requirements of section 6418, the section 6418 regulations, and the provisions of the Code applicable to the eligible credit, including, for example, any requirements for bonus credit amounts described in §1.6418-1(c)(3) (if applicable).

(E) A statement or representation from the eligible taxpayer and the transferee taxpayer acknowledging the notification of recapture requirements under section 6418(g)(3) and the section 6418 regulations (if applicable).

(F) A statement or representation from the eligible taxpayer that the eligible taxpayer has provided the required minimum documentation (as described in paragraph (b)(5)(iv) of this section) to the transferee taxpayer.

(iii) *Timing of transfer election statement.* A transfer election statement can be completed at any time after the eligible taxpayer and transferee taxpayer have sufficient information to meet the requirements of paragraph (b)(5)(ii) of this section, but the transfer election statement cannot be completed for any year after the earlier of:

(A) The filing of the eligible taxpayer’s return for the taxable year for which the specified credit portion is determined with respect to the eligible taxpayer; or

(B) The filing of the return of the transferee taxpayer for the year in which the specified credit portion is taken into account.

(iv) *Required minimum documentation.* Required minimum documentation is the minimum documentation that the eligible taxpayer is required to provide to a transferee taxpayer. This documentation consists of—

(A) Information that validates the existence of the eligible credit property,

which could include evidence prepared by a third party (such as a county board or other governmental entity, a utility, or an insurance provider);

(B) If applicable, documentation substantiating that the eligible taxpayer has satisfied the requirements to include any bonus credit amounts (as defined in §1.6418-1(c)(3)) in the eligible credit that was part of the transferred specified credit portion; and

(C) Evidence of the eligible taxpayer’s qualifying costs in the case of a transfer of an eligible credit that is part of the investment credit or the amount of qualifying production activities and sales amounts, as relevant, in the case of a transfer of an eligible credit that is a production credit.

(v) *Transferee recordkeeping requirement.* Consistent with §1.6001-1(e), the transferee taxpayer must retain the required minimum documentation provided by the eligible taxpayer as long as the contents thereof may become material in the administration of any internal revenue law.

(c) *Limitations after a transfer election is made*—(1) *Irrevocable.* A transfer election with respect to a specified credit portion is irrevocable.

(2) *No additional transfers.* A specified credit portion may only be transferred pursuant to a transfer election once. A transferee taxpayer may not make a transfer election of any specified credit portion transferred to the transferee taxpayer.

(d) *Determining the eligible credit*—(1) *In general.* An eligible taxpayer may only transfer eligible credits determined with respect to the eligible taxpayer (paragraph (a)(4) of this section disallows transfer elections in other situations). For an eligible credit to be determined with respect to an eligible taxpayer, the eligible taxpayer must own the underlying eligible credit property or, if ownership is not required, otherwise conduct the activities giving rise to the underlying eligible credit. All rules that relate to the determination of the eligible credit, such as the rules in sections 49 and 50(b) of the Code, apply to the eligible taxpayer and therefore can limit the amount of eligible credit determined with respect to an eligible credit property that can be transferred. Rules relating to the amount of an eligible credit that is allowed

to be claimed by an eligible taxpayer, such as the rules in section 38(c) or 469 of the Code, do not limit the eligible credit determined, but do apply to a transferee taxpayer as described in paragraph (f)(3) of this section.

(2) *Application of section 49 at-risk rules to determination of eligible credits for partnerships and S corporations.* Any amount of eligible credit determined with respect to investment credit property held directly by a transferor partnership or transferor S corporation that is eligible credit property (eligible investment credit property) must be determined by the partnership or S corporation taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the eligible investment credit property is placed in service. Thus, if the credit base of an eligible investment credit property is limited to a partner or S corporation shareholder by section 49, then the amount of the eligible credit determined by the transferor partnership or transferor S corporation is also limited. A transferor partnership or transferor S corporation that transfers any specified credit portion with respect to an eligible investment credit property must request from each of its partners or shareholders, respectively, that is subject to section 49, the amount of such partner's or shareholder's nonqualified nonrecourse financing with respect to the eligible investment credit property as of the close of the taxable year in which the property is placed in service. Additionally, the transferor partnership or transferor S corporation must attach to its tax return for the taxable year in which the eligible investment credit property is placed in service, the amount of each partner's or shareholder's section 49 limitation with respect to any specified credit portion transferred with respect to the eligible investment credit property. Changes to at-risk amounts under section 49 for partners or S corporation shareholders after the close of the taxable year in which the eligible investment credit property is placed in service do not impact the eligible credit determined by the transferor partnership or transferor S corporation, but do impact the partner(s) or S corporation shareholder(s) as described in §1.6418-3(a)(6)(ii).

(e) *Treatment of payments made in connection with a transfer election—(1) In general.* An amount paid by a transferee taxpayer to an eligible taxpayer is in connection with a transfer election with respect to a specified credit portion only if it is paid in cash (as defined in §1.6418-1(f)), directly relates to the specified credit portion, and is not described in §1.6418-5(a)(3) (describing payments related to an excessive credit transfer).

(2) *Not includible in gross income.* Any amount paid to an eligible taxpayer that is described in paragraph (e)(1) of this section is not includible in the gross income of the eligible taxpayer.

(3) *Not deductible.* No deduction is allowed under any provision of the Code with respect to any amount paid by a transferee taxpayer that is described in paragraph (e)(1) of this section.

(4) *Anti-abuse rule—(i) In general.* A transfer election of any specified credit portion, and therefore the transfer of that specified credit portion to a transferee taxpayer, may be disallowed, or the Federal income tax consequences of any transaction(s) effecting such a transfer may be recharacterized, in circumstances where the parties to the transaction have engaged in the transaction or a series of transactions with the principal purpose of avoiding any Federal tax liability beyond the intent of section 6418. An amount of cash paid by a transferee taxpayer will not be considered as paid in connection with the transfer of a specified credit portion under paragraph (e)(1) of this section if a principal purpose of a transaction or series of transactions is to allow an eligible taxpayer to avoid gross income. Conversely, an amount of cash paid by a transferee taxpayer will be considered paid in connection with the transfer of a specified credit portion under paragraph (e)(1) of this section if a principal purpose of a transaction or series of transactions is to increase a Federal income tax deduction of a transferee taxpayer.

(ii) *Example 1.* Taxpayer A, an eligible taxpayer, generates \$100 of an eligible credit with respect to an eligible credit property in the course of its trade or business. Taxpayer A also provides services to customers. Taxpayer A offers Customer B, a transferee taxpayer that cannot deduct the cost of the services, the opportunity to be transferred \$100 of eligible credit for \$100 while receiving Taxpayer A's services for free. Taxpayer A normally charges \$20 for the same services without the purchase of the

eligible credit, and the average transfer price of the eligible credit between unrelated parties is \$80 paid in cash for \$100 of the eligible credit. Taxpayer A is engaged in a transaction where it is undercharging for services to Customer B to avoid recognizing \$20 of gross income. This transaction is subject to recharacterization under the anti-abuse rule in paragraph (e)(4) of this section, and Taxpayer A will be treated as transferring \$100 of the eligible credit for \$80, and have \$20 of gross income from the services provided to Customer B.

(iii) *Example 2.* Taxpayer C, an eligible taxpayer, generates \$100 of an eligible credit with respect to an eligible credit property in the course of its trade or business. Taxpayer C also sells property to customers. Taxpayer C offers Customer D, a transferee taxpayer that can deduct the purchase of property, the opportunity to receive the \$100 of eligible credit for \$20 while purchasing Taxpayer C's property for \$80. Taxpayer C normally charges \$20 for the same property without the transfer of the eligible credit, and the average transfer price of the eligible credit between unrelated parties is \$80 paid in cash for \$100 of the eligible credit. Taxpayer C is willing to accept the higher price for the property because Taxpayer C has a net operating loss carryover to offset any taxable income from the transaction. This transaction is subject to recharacterization under the anti-abuse rule under paragraph (e)(4) of this section, and Taxpayer C will be treated as selling the property for \$20 and transferring \$100 of the eligible credit for \$80, and Customer D will have a \$20 deduction related to the purchase of the property instead of \$80.

(f) *Transferee taxpayer's treatment of eligible credit—(1) Taxable year in which credit taken into account.* In the case of any specified credit portion transferred to a transferee taxpayer pursuant to a transfer election under this section, the transferee taxpayer takes the specified credit portion into account in the transferee taxpayer's first taxable year ending with or ending after the taxable year of the eligible taxpayer with respect to which the eligible credit was determined. Thus, to the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on the same date, the transferee taxpayer will take the specified credit portion into account in that taxable year. To the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on different dates, the transferee taxpayer will take the specified credit portion into account in the transferee taxpayer's first taxable year that ends after the taxable year of the eligible taxpayer.

(2) *No gross income for a transferee taxpayer when claiming a transferred specified credit portion.* A transferee taxpayer does not have gross income when claiming a transferred specified credit

portion even if the amount of cash paid to the eligible taxpayer was less than the amount of the transferred specified credit portion, assuming all other requirements of section 6418 are met. For example, a transferee taxpayer who paid \$9X for \$10X of a specified credit portion that the transferee taxpayer then claims on its return does not result in the \$1X difference being included in the gross income of the transferee taxpayer.

(3) *Transferee treated as the eligible taxpayer*—(i) *In general.* A transferee taxpayer (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to the transferred specified credit portion. An eligible taxpayer must apply the rules necessary to determine the amount of an eligible credit prior to making the transfer election for a specified credit portion, and therefore a transferee taxpayer does not re-apply rules that relate to a determination of an eligible credit, such as the rules in section 49 or 50(b). However, a transferee taxpayer must apply rules that relate to computing the amount of the specified credit portion that is allowed to be claimed in the taxable year by the transferee taxpayer, such as the rules in section 38 or 469, as applicable.

(ii) *Application of section 469.* A specified credit portion transferred to a transferee taxpayer is treated as determined in connection with the conduct of a trade or business and, if applicable, such transferred specified credit portion is subject to the rules in section 469. In applying section 469, a transferee taxpayer is not considered to own an interest in the eligible taxpayer's trade or business at the time the work was done (as required for material participation under §1.469-5(f)(1)) and cannot change the characterization of the transferee taxpayer's participation (or lack thereof) in the eligible taxpayer's trade or business by using any of the grouping rules under §1.469-4(c).

(4) *Transferee taxpayer requirements to take into account a transferred specified credit portion.* In order for a transferee taxpayer to take into account in a taxable year (as described in paragraph (f)(1) of this section) a specified credit portion that was transferred by an eligible taxpayer, as part of filing a return (or short year return), an amended return, or a request for an administrative adjustment under section

6227 of the Code, the transferee taxpayer must include the following—

(i) A properly completed Form 3800, *General Business Credit* (or its successor), to take into account the transferred specified credit portion as a current general business credit, and including all registration number(s) related to the transferred specified credit portion;

(ii) The transfer election statement described in paragraph (b)(5) of this section attached to the return; and

(iii) Any other information related to the transfer election specified in guidance.

(g) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§1.6418-3 Additional rules for partnerships and S corporations.

(a) *Rules applicable to both partnerships and S corporations*—(1) *Partnerships and S corporations as eligible taxpayers and transferee taxpayers.* Under section 6418, a partnership or an S corporation may qualify as a transferor partnership or a transferor S corporation and may elect to make a transfer election to transfer a specified credit portion to a transferee taxpayer. A partnership or S corporation may also qualify as a transferee partnership or a transferee S corporation. This section provides rules applicable to transferor partnerships and transferor S corporations and transferee partnerships and transferee S corporations. Paragraph (b) of this section provides rules applicable solely to partnerships. Paragraph (c) of this section provides rules applicable solely to S corporations. Paragraph (d) of this section provides guidelines for the manner and due date for which a partnership or S corporation makes an election under section 6418(a). Paragraph (e) of this section contains examples illustrating the operation of the provisions of this section. Except as provided in this section, the general rules under section 6418 and the section 6418 regulations apply to partnerships and S corporations.

(2) *Treatment of cash received for a specified credit portion.* In the case of any specified credit portion determined with respect to any eligible credit property held directly by a partnership or S corporation,

if such partnership or S corporation makes a transfer election with respect to such specified credit portion—

(i) Any amount of cash payment received as consideration for the transferred specified credit portion will be treated as tax exempt income for purposes of sections 705 and 1366 of the Code; and

(ii) A partner's distributive share of such tax exempt income will be as described in paragraphs (b)(1) and (2) of this section.

(3) *No partner or shareholder level transfers.* In the case of an eligible credit property held directly by a partnership or S corporation, no transfer election by any partner or S corporation shareholder is allowed under §1.6418-2 or this section with respect to any specified credit portion determined with respect to such eligible credit property.

(4) *Disregarded entity ownership.* In the case of an eligible credit property held directly by an entity disregarded as separate from a partnership or S corporation for Federal income tax purposes, such eligible credit property will be treated as held directly by the partnership or S corporation for purposes of making a transfer election.

(5) *Treatment of tax exempt income.* Tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership or transferor S corporation is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, any tax exempt income is not treated as passive income to any direct or indirect partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

(6) *Certain recapture events not requiring notice*—(i) *Indirect dispositions under section 50*—(A) *Treatment of transferor partnership or transferor S corporation and transferee taxpayer.* For purposes of section 6418(g)(3)(B) only, the disposition of a partner's interest under §1.47-6(a)(2) or an S corporation shareholder's interest under §1.47-4(a)(2) in an eligible taxpayer that is treated as a transferor partnership or transferor S corporation is disregarded. As such, provided the investment credit property that is eligible credit property

owned by the transferor partnership or transferor S corporation is not disposed of, and continues to be investment credit property with respect to such transferor partnership or transferor S corporation, a transferor partnership or transferor S corporation should not provide notice to a transferee taxpayer of an interest disposition by the partner or shareholder because the disposition does not result in recapture under section 6418(g)(3)(B) to which the transferee taxpayer is liable, and thus, the transferee taxpayer does not have to calculate a recapture amount.

(B) *Treatment of partner or shareholder.* A partner or S corporation shareholder that has disposed of an interest in a transferor partnership or transferor S corporation is subject to the rules relating to such disposition under §1.47-6(a)(2) or §1.47-4(a)(2), respectively. Any recapture to a disposing partner is calculated based on the partner's share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with §1.46-3(f). Any recapture to a disposing shareholder is calculated based on the shareholder's pro rata share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with §1.48-5.

(ii) *Changes in at-risk amounts under section 49—(A) Treatment of transferor partnership or transferor S corporation and transferee taxpayer.* For purposes of section 6418 only, a change in the nonqualified nonrecourse financing (as defined in section 49(a)(1)(D)) amount of any partner or shareholder of a transferor partnership or transferor S corporation, respectively, after the close of the taxable year in which the investment credit property is placed in service and the specified credit portion is determined, is disregarded. A transferor partnership or transferor S corporation should not provide notice to a transferee taxpayer of the change because the change does not cause recapture under section 6418(g)(3)(B) to which the transferee taxpayer is liable, and thus, the transferee taxpayer does not have to calculate a recapture amount.

(B) *Treatment of partner or shareholder.* A partner or shareholder in a transferor partnership or transferor S corporation, respectively, must apply the

rules under section 49 at the partner or shareholder level if there is a change in nonqualified nonrecourse financing with respect to the partner or shareholder after the close of the taxable year in which the investment credit property is placed in service and the specified credit portion is determined. If there is an increase in nonqualified nonrecourse financing to a partner, any adjustment under the rules of section 49(b) is calculated based on the partner's share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with §1.46-3(f). If there is an increase in nonqualified nonrecourse financing to a shareholder, any adjustment under the rules of section 49(b) is calculated based on the shareholder's pro rata share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with §1.48-5. If there is a decrease in nonqualified nonrecourse financing, any increase in the credit base is taken into account by the partner or shareholder as provided under section 49, and any resulting credit is not eligible for transfer under section 6418.

(b) *Rules applicable to partnerships—*

(1) *Allocations of tax exempt income amounts generally.* A transferor partnership must generally determine a partner's distributive share of any tax exempt income resulting from the receipt of consideration for the transfer based on such partner's proportionate distributive share of the eligible credit that would otherwise have been allocated to such partner absent the transfer of the specified credit portion (otherwise eligible credit). A partner's distributive share of an otherwise eligible credit is determined under §§1.46-3(f) and 1.704-1(b)(4)(ii). Tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership is treated as received or accrued, including for purposes of section 705 of the Code, as of the date the specified credit portion is determined with respect to the transferor partnership (such as, for investment credit property, the date the property is placed in service).

(2) *Special rule for allocations of tax exempt income amounts and eligible credits for an election to transfer less than all*

eligible credits determined with respect to an eligible credit property. In the event a transferor partnership elects to transfer one or more specified credit portions of less than all eligible credits determined with respect to an eligible credit property held directly by the partnership, the partnership may allocate any tax exempt income resulting from the receipt of consideration for the specified credit portion(s) in accordance with the rules in this paragraph (b)(2).

(i) First, the partnership must determine each partner's distributive share of the otherwise eligible credits with respect to such eligible credit property in accordance with paragraph (b)(1) of this section (partner's eligible credit amount).

(ii) Thereafter, the transferor partnership may determine, in any manner described in the partnership agreement, or as the partners may agree, the portion of each partner's eligible credit amount to be transferred, and the portion of each partner's eligible credit amount to be retained and allocated to such partner. The partnership may allocate to each partner its agreed upon share of eligible credits, tax exempt income resulting from the receipt of consideration for the specified credit portion(s), or both, as the case may be, provided that—

(A) The amount of eligible credits allocated to each partner may not exceed such partner's eligible credit amount; and

(B) Each partner is allocated its proportionate share of tax exempt income resulting from the transfer(s).

(iii) Each partner's proportionate share of tax exempt income resulting from the transfer(s) is equal to the total amount of tax exempt income resulting from the transfer(s) of the specified credit portion(s) by the partnership multiplied by a fraction—

(A) The numerator of which is such partner's eligible credit amount minus the amount of eligible credits actually allocated to such partner with respect to the eligible credit property for the taxable year; and

(B) The denominator of which is the specified credit portion(s) transferred by the partnership with respect to the eligible credit property for the taxable year.

(3) *Transferor partnerships in tiered structures.* If a partnership (upper-tier

partnership) is a direct or indirect partner of a transferor partnership and directly or indirectly receives—

(i) An allocation of an eligible credit, the upper-tier partnership is not an eligible taxpayer under section 6418 with respect to any eligible credit allocated by a transferor partnership; or

(ii) An allocation of tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership, the upper-tier partnership must determine its partners' distributive shares of such tax exempt income in proportion to the partners' distributive shares of the otherwise eligible credit as provided in paragraph (b)(1) of this section.

(4) *Partnership as a transferee taxpayer*—(i) *Eligibility under section 6418.* A partnership may qualify as a transferee partnership to the extent it is not related (within the meaning of section 267(b) or 707(b)(1)) to an eligible taxpayer. A transferee partnership is subject to the no additional transfer rule in §1.6418-2(c)(2), however, an allocation of a transferred specified credit portion to a direct or indirect partner of a transferee partnership under section 704(b) is not a transfer for purposes of section 6418.

(ii) *Treatment of a cash payment for a transferred specified credit portion.* A cash payment by a transferee partnership as consideration for a transferred specified credit portion is treated as an expenditure described in section 705(a)(2)(B).

(iii) *Allocations of transferred specified credit portions.* A transferee partnership must determine each partner's distributive share of any transferred specified credit portion based on such partner's distributive share of the nondeductible expenses for the taxable year used to fund the purchase of such transferred specified credit portion. Each partner's distributive share of the nondeductible expenses used to fund the purchase of any transferred specified credit portion is determined by the partnership agreement, or, if the partnership agreement does not provide for the allocation of nondeductible expenses paid pursuant to section 6418, then the allocation of the specified credit portion is based on the transferee partnership's general allocation of nondeductible expenses.

(iv) *Transferred specified credit portion treated as an extraordinary item.* A transferred specified credit portion is treated as an extraordinary item and must be allocated among the partners of a transferee partnership as of the time the transfer of the specified credit portion to the transferee partnership is treated as occurring in accordance with this paragraph (b)(4)(iv) and §1.706-4(e)(1) and (e)(2)(ix). If the transferee partnership and eligible taxpayer have the same taxable years, the transfer of a specified credit portion to a transferee partnership is treated as occurring on the first date that the transferee partnership makes a cash payment to the eligible taxpayer as consideration for the specified credit portion. If the transferee partnership and eligible taxpayer have different taxable years, the transfer of a specified credit portion to a transferee partnership is treated as occurring on the later of—

(A) The first date of the taxable year that the transferee partnership takes the specified credit portion into account under section 6418(d); or

(B) The first date that the transferee partnership makes a cash payment to the eligible taxpayer for the specified credit portion.

(v) *Transferee partnerships in tiered structures.* If an upper-tier partnership is a direct or indirect partner of a transferee partnership and directly or indirectly receives an allocation of a transferred specified credit portion, the upper-tier partnership is not an eligible taxpayer under section 6418 with respect to the transferred specified credit portion. The upper-tier partnership must determine each partner's distributive share of the transferred specified credit portion in accordance with paragraphs (b)(4)(iii) and (iv) of this section and must report the credits to its partners in accordance with guidance.

(c) *Rules applicable to S corporations*—(1) *Pro rata shares of tax exempt income amounts.* Each shareholder of a transferor S corporation must take into account such shareholder's pro rata share (as determined under section 1377(a) of the Code) of any tax exempt income resulting from the receipt of consideration for the transfer. Tax exempt income resulting from the receipt of consideration for

the transfer of a specified credit portion by a transferor S corporation is treated as received or accrued, including for purposes of section 1366, as of the date the specified credit portion is determined with respect to the transferor S corporation (such as, for investment credit property, the date the property is placed in service).

(2) *S corporation as a transferee taxpayer*—(i) *Eligibility under section 6418.* An S corporation may qualify as a transferee taxpayer to the extent it is not related (within the meaning of section 267(b) or 707(b)(1)) to an eligible taxpayer (transferee S corporation). A transferee S corporation is subject to the no additional transfer rule in §1.6418-2(c)(2), however, an allocation of a transferred specified credit portion to a direct or indirect shareholder of a transferee S corporation is not a transfer for purposes of section 6418.

(ii) *Treatment of a cash payment for a transferred specified credit portion.* A cash payment by a transferee S corporation as consideration for a transferred specified credit portion is treated as an expenditure described in section 1367(a)(2)(D) of the Code.

(iii) *Pro rata shares of transferred specified credit portions.* Each shareholder of a transferee S corporation must take into account such shareholder's pro rata share (as determined under section 1377(a)) of any transferred specified credit portion. If the transferee S corporation and eligible taxpayer have the same taxable years, the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's permitted year (as defined under sections 444 and 1378(b)) that the transferee S corporation first makes a cash payment as consideration to the eligible taxpayer for the specified credit portion. If the transferee S corporation and eligible taxpayer have different taxable years, then the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's first permitted year (as defined under sections 444 and 1378(b)) ending with or after, the taxable year of the eligible taxpayer to which the transferred specified credit portion was determined.

(d) *Transfer election by a partnership or S corporation*—(1) *In general.* A partnership or S corporation may make

a transfer election to transfer a specified credit portion under section 6418 if it files an election in accordance with the rules set forth in this paragraph (d). A transfer election is made on the basis of an eligible credit property and only applies to the specified credit portion identified in the transfer election by such partnership or S corporation in the taxable year for which the election is made.

(2) *Manner and due date of making a transfer election.* A transfer election for a specified credit portion must be made in the manner provided in §1.6418-2(b)(1) through (3). All documents required in §1.6418-2(b)(1) through (3) must be attached to the partnership or S corporation return for the taxable year during which the transferred specific credit portion was determined. For the transfer election to be valid, the return must be filed not later than the time prescribed by §§1.6031(a)-1(e) and 1.6037-1(b) (including extensions of time) for filing the return for such taxable year. No transfer election may be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There is no late-election relief available under §§ 301.9100-1 through 301.9100-3 of this chapter for a transfer election that is not timely filed.

(3) *Irrevocable election.* A transfer election by a partnership or S corporation is irrevocable.

(e) *Examples.* The examples in this paragraph (e) illustrate the application of paragraphs (a)(6), (b), and (c) of this section.

(1) *Example 1. Transfer of all eligible credits by a transferor partnership—(i) Facts.* A and B each contributed \$150X of cash to AB partnership for the purpose of investing in energy property. The partnership agreement provides that A and B share equally in all items of income, gain, loss, deduction, and credit of AB partnership. AB partnership invests \$300X in an energy property in accordance with section 48 and places the energy property in service on date X in year 1. As of the end of year 1, AB partnership has \$90X of eligible credits under section 48 with respect to the energy property. Before AB partnership files its tax return for year 1, AB partnership transfers the \$90X of eligible credits to an unrelated transferee taxpayer, Transferee Taxpayer X for \$80X and executes a transfer election statement with Transferee Taxpayer X.

(ii) *Analysis.* Under §1.6418-3(b)(1), AB partnership allocates the tax exempt income resulting from the transfer of the specified credit portion proportionately among the partners based on each partner's distributive share of the otherwise eligible

section 48 credit as determined under §§1.46-3(f) and 1.704-1(b)(4)(ii). Under §1.46-3(f)(2), each partner's share of the basis of the energy property is determined in accordance with the ratio in which the partners divide the general profits (or taxable income) of the partnership. Under the AB partnership agreement, A and B share partnership profits equally. Thus, each partner's share of the basis of the energy property under §1.46-3(f) and distributive share of the otherwise eligible credits under §1.704-1(b)(4)(ii) is 50 percent. The transfer made pursuant to section 6418(a) causes AB partnership's eligible credits under section 48 with respect to the energy property to be reduced to zero, and the consideration of \$80X received by AB partnership for the transferred specified credit portion is treated as tax exempt income. Because the tax exempt income is allocated in the same proportion as the otherwise eligible credit would have been allocated, A and B will each be allocated \$40X of tax exempt income. Each of partner A's and partner B's basis in its partnership interest and capital account will be increased by \$40X. Also in year 1, the basis in the energy property held by AB partnership and with respect to which the credit is calculated is reduced under section 50(c)(3) by 50 percent of the amount of the credit so determined, or \$45. A's and B's basis in their partnership interests and capital accounts will be appropriately adjusted to take into account adjustments made to the energy property under section 50(c)(5) and §1.704-1(b)(2)(iv)(j). The tax exempt income received or accrued by AB partnership as a result of the transferred specified credit portion is treated as received or accrued, including for purposes of section 705, as of date X in year 1, which is the date the transferred specified credit portion was determined with respect to AB partnership.

(2) *Example 2. Recapture to a transferor partnership—(i) Facts.* Assume the same facts as in paragraph (e)(1)(i) of this section (*Example 1*), except in year 3, within the recapture period related to the energy property, A reduces its proportionate interest in the general profits of the partnership by 50 percent causing a recapture event to A under §1.47-6(a)(2). The energy property is not disposed of by AB partnership and continues to be energy property with respect to AB partnership.

(ii) *Analysis.* AB partnership should not provide notice of recapture to Transferee Taxpayer X as a result of the recapture event under §1.47-6(a)(2) with respect to A. Transferee Taxpayer X is not liable for any recapture amount. A, however, is subject to recapture as provided in §1.47-6(a)(2) and based on its share of the basis (or cost) of the energy property to which the eligible credits were determined under §1.46-3(f)(2).

(3) *Example 3. Transfer of a portion of eligible credits by a transferor partnership—(i) Facts.* C and D each contributed cash to CD partnership for the purpose of investing in a qualified wind facility. The partnership agreement provides that until a flip point, C is allocated 99 percent of all items of income, gain, loss, deduction and credit of CD partnership and D is allocated the remaining 1 percent of such items. After the flip point, C is allocated 5 percent of all items of income, gain, loss, deduction and credit of CD Partnership and D is allocated 95 percent of such items. CD partnership invests in a qualified wind

facility and places the facility in service in year 1. CD partnership generates \$100X of credit under section 45(a) for year 1. Before the due date for CD partnership's year 1 tax return (with extension), C and D agree that D's share of the eligible credit will be transferred, and C will be allocated its share of eligible credit. CD partnership transfers \$1X of the eligible credit to an unrelated transferee taxpayer for \$1X. The flip point has not been reached by the end of year 1.

(ii) *Analysis.* Under paragraph (b)(2) of this section, CD partnership must first determine each partner's eligible credit amount, which is equal to such partner's distributive share of the otherwise eligible section 45(a) credit as determined under §1.704-1(b)(4)(ii). Under §1.704-1(b)(4)(ii), for an eligible credit that is not an investment tax credit, allocations of credit are deemed to be in accordance with the partner's interest in the partnership if the credit is allocated in the same proportion as the partners' distributive share of the receipts that give rise to the credit. The CD partnership agreement provides that until the flip point, C is allocated 99 percent of all items of income, gain, loss, deduction and credit of CD partnership and D is allocated the remaining 1 percent of such items. Assuming all requirements of the safe harbor provided for in Revenue Procedure 2007-65, 2007-2 CB 967 are met, CD partnership's allocations of the otherwise eligible credits would be respected as in accordance with section 704(b). Thus, partner C's and partner D's distributive share of the otherwise eligible credit is 99 percent and 1 percent, respectively. C and D have agreed to sell D's eligible credit amount of \$1X for full value and to allocate to C its eligible credit amount of \$99X. The transfer made pursuant to section 6418(a) causes CD partnership's eligible credits under section 45(a) with respect to the wind facility to be reduced to \$99X, and the consideration of \$1X received by CD partnership is treated as tax exempt income. D is allocated \$1X of tax exempt income from the transfer of the eligible credits, and C is allocated \$99X of eligible credits under section 45(a) with respect to the wind facility. Neither C nor D is allocated more eligible credits than its eligible credit amount. Additionally, D is allocated an amount of tax exempt income equal to $\$1X \times (1 - 0)/1$ and C is allocated none of the tax exempt income. The allocations of eligible credits and tax exempt income are permissible allocations under paragraph (b)(2) of this section.

(4) *Example 4. Upper-tier partnership of a transferor partnership—(i) Facts.* E, F, and G each contributed \$100X of cash to EFG partnership for the purpose of investing in an energy property. E, F, and G are partnerships for Federal income tax purposes. The partnership agreement provides that E, F and G share equally in all items of income, gain, loss, and deduction of EFG partnership. EFG partnership invests \$300X in an energy property in accordance with section 48 and places the energy property in service in year 1. As of the end of year 1, EFG partnership has \$90X of eligible credits under section 48 with respect to the energy property. Before the due date for EFG partnership's year 1 tax return (with extension), E, F and G agree that E's share of the eligible credits will be transferred, and F and G will each be allocated their shares of eligible credits (or basis). EFG partnership transfers \$30X of the

eligible credits to an unrelated transferee taxpayer for \$25X. Assuming the allocations to E, F and G of the eligible credits and tax exempt income resulting from the receipt of cash for the transferred specified credit portion are permissible allocations under paragraph (b)(2) of this section, E is allocated \$25X of tax exempt income from the transfer of the eligible credits and F and G are each allocated \$30X of basis with respect to the energy property.

(ii) *Analysis.* E must allocate the \$25X of tax exempt income to its partners as if it had retained its share of the eligible credits. Under §1.46-3(f)(2), each partner's share of the basis of the section 48 energy property is determined in accordance with the ratio in which the partners divide the general profits (or taxable income) of the partnership. The E partnership agreement provides for equal allocations of income, gain, deduction, and loss to its partners, and thus, E partnership must allocate the otherwise eligible credits in the same manner. Therefore, E partnership must allocate the \$25X of tax exempt income equally among its partners. In accordance with paragraph (b)(3)(i) of this section, F and G do not qualify as an eligible taxpayer for purposes of section 6418 and thus, are not permitted to make a transfer election for any portion of the \$30X of eligible credit allocated to them by EFG partnership. Under §1.46-3(f)(2), each partner's share of the basis of the section 48 energy property is determined in accordance with the ratio in which the partners divide the general profits (or taxable income) of the partnership. The F and G partnership agreements provide for equal allocations of income, gain, deduction, and loss to its partners, and F and G must allocate the basis from the energy property to their partners in the same manner.

(5) *Example 5. Transferee partnership—(i) Facts.* Y and Z each contributed \$50X of cash to YZ partnership for the purpose of purchasing eligible section 45 credits under section 6418. The partnership agreement provides that all items of income, gain, loss, deduction, and credit are shared equally among Y and Z. The partnership agreement also provides that any nondeductible expenses used to fund the purchase of any transferred specified credit portion will be shared equally among Y and Z. On date X in year 1, YZ partnership qualifies as a transferee taxpayer and makes a cash payment of \$80X to an eligible taxpayer for \$100X of a transferred specified credit portion. The eligible credits will be determined with respect to the eligible taxpayer as of the end of year 1. Both YZ partnership and the eligible taxpayer are calendar year taxpayers.

(ii) *Analysis.* The cash payment of \$80X made by YZ partnership for the transferred specified credit portion is treated as a nondeductible expenditure under section 705(a)(2)(B). Under paragraph (b)(4)(iii) of this section, YZ partnership must determine each partner's distributive share of the transferred specified credit portion based on such partner's distributive share of the nondeductible expenses for the taxable year used to fund the purchase of such transferred specified credit portion. The YZ partnership agreement provides that nondeductible expenses used to fund the purchase of any transferred specified credit portion will be shared equally among Y and Z and thus, the transferred specified credit portion is also shared equally among Y and Z. The transferred

specified credit portion is treated as an extraordinary item under §1.706-4(e)(2)(ix) that is deemed to occur on date X in year 1. As of date X in year 1, each of Y and Z are allocated \$40X of a section 705(a)(2)(B) expenditure with respect to the cash payment for the transferred specified credit portion and \$50X of transferred section 45 credits.

(6) *Example 6. Upper-tier partnership of a transferee partnership—(i) Facts.* Assume the same facts as in paragraph (e)(5)(i) of this section (*Example 5*), except Y is a partnership for Federal tax purposes, and Z is a corporation for Federal tax purposes.

(ii) *Analysis.* In accordance with paragraph (b)(4)(v) of this section, Y does not qualify as an eligible taxpayer for purposes of section 6418 for that portion of the transferred specified credit portion allocated to it by YZ partnership. Under paragraph (b)(4)(iii) of this section, Y must determine each partner's distributive share of the transferred specified credit portion based on such partner's distributive share of the nondeductible expenses for the taxable year used to fund the purchase of such transferred specified credit portion. The Y partnership agreement provides that all items of income, gain, loss, deduction, and credit are shared equally. The partnership agreement also provides that any nondeductible expenses used to fund the purchase of any specified credit portion are shared equally. Thus, the transferred specified credit portion must be shared equally among the partners of Y.

(7) *Example 7. Transferor S corporation—(i) Facts.* V and W each contributed \$150X of cash to an S corporation for the purpose of investing in energy property. The S corporation invests \$300X in an energy property in accordance with section 48 and places the energy property in service on date X in year 1. As of the end of year 1, the S corporation has \$90X of eligible credits under section 48 with respect to the energy property. Before the due date for S corporation's year 1 tax return (with extension), S corporation transfers the \$90X of eligible credits to an unrelated transferee taxpayer for \$80X.

(ii) *Analysis.* The transfer made pursuant to section 6418(a) causes the S corporation's eligible credits under section 48 with respect to the energy property to be reduced to zero, and the consideration of \$80X received by the S corporation for the transferred specified credit portion is treated as tax exempt income. Under paragraph (c)(1) of this section, each of V and W must take into account its pro rata share (as determined under section 1377(a)) of any tax exempt income resulting from the receipt of consideration for the transfer of the eligible credit, or \$40X. Under section 1367(a)(1)(A), each of the shareholder's basis in its stock will be increased by \$40X. Also in year 1, the basis in the energy property with respect to which the credit is calculated is reduced under section 50(c)(3) by 50 percent of the amount of the credit so determined, or \$45. The tax exempt income received or accrued by S corporation as a result of the transfer of the specified credit portion is treated as received or accrued, including for purposes of section 1366, as of date X in year 1, which is the date the transferred specified credit portion was determined with respect to the transferor S corporation.

(8) *Example 8. Transferee S corporation—(i) Facts.* J and K each contributed \$50X of cash to S

corporation for the purpose of purchasing eligible section 48 credits under section 6418. At the beginning of year 2, S corporation qualifies as a transferee taxpayer and makes a cash payment of \$80X to an eligible taxpayer for \$100X of a transferred specified credit portion. The transferred specified credit portion was determined with respect to the eligible taxpayer for energy property placed in service in year 1. Both S corporation and the eligible taxpayer are calendar year taxpayers.

(ii) *Analysis.* The cash payment of \$80X made by the S corporation for the transferred specified credit portion is treated as an expenditure described in section 1367(a)(2)(D). Each of J and K must take into account its pro rata share (as determined under section 1377(a)) of the transferred specified credit portion. The transferred specified credit portion is deemed to arise for purposes of sections 1366 and 1377 during year 2 of the S corporation. For year 2, each of J and K take into account \$40X of a section 1367(a)(2)(D) expenditure with respect to the cash payment for the transferred specified credit portion and \$50X of transferred section 48 credits.

(f) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§1.6418-4 Additional information and registration.

(a) *Pre-filing registration and election.* As a condition of, and prior to, any specified credit portion being transferred by an eligible taxpayer to a transferee taxpayer pursuant to an election under §1.6418-2, or a specified credit portion being transferred by a partnership or S corporation pursuant to §1.6418-3, the eligible taxpayer is required to satisfy the pre-filing registration requirements in paragraph (b) of this section. An eligible taxpayer that does not obtain a registration number under paragraph (c)(1) of this section, and report the registration number on its return pursuant to paragraph (c)(5) of this section, is ineligible to make a transfer election for a specified credit portion under §1.6418-2 or §1.6418-3, with respect to the eligible credit determined with respect to the specific eligible credit property for which the eligible taxpayer has failed to obtain and report a registration number. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the eligible taxpayer is eligible to transfer any specified credit portion determined with respect to the eligible credit property.

(b) *Pre-filing registration requirements—(1) Manner of pre-filing*

registration. Unless otherwise provided in guidance, eligible taxpayers must complete the pre-filing registration process electronically through an IRS electronic portal and in accordance with the instructions provided therein.

(2) *Pre-filing registration and election for members of a consolidated group.* A member of a consolidated group is required to complete pre-filing registration to transfer any eligible credit determined with respect to the member. —

(3) *Timing of pre-filing registration.* An eligible taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (c) of this section prior to making a transfer election under §1.6418-2 or §1.6418-3 for a specified credit portion on the taxpayer's return for the taxable year at issue.

(4) *Each eligible credit property must have its own registration number.* 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.

(5) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, an eligible taxpayer is required to provide the following information to the IRS to complete the pre-filing registration process:

(i) The eligible taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity;

(ii) Any additional information required by the IRS electronic portal, such as information establishing that the entity is an eligible taxpayer;

(iii) The taxpayer's taxable year, as determined under section 441;

(iv) The type of annual tax return(s) normally filed by the eligible taxpayer, or that the eligible taxpayer does not normally file an annual tax return with the IRS;

(v) The type of eligible credit(s) for which the eligible taxpayer intends to make a transfer election;

(vi) Each eligible credit property that the eligible taxpayer intends to use to determine a specified credit portion for which the eligible taxpayer intends to make a transfer election;

(vii) For each eligible credit property listed in paragraph (b)(5)(vi) of this

section, any further information required by the IRS electronic portal, such as—

(A) The type of eligible credit property;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the eligible credit property);

(C) Any supporting documentation relating to the construction or acquisition of the eligible credit property (such as State, Indian Tribal, or local government permits to operate the eligible credit property, certifications, evidence of ownership that ties to a land deed, lease, or other documented right to use and access any land or facility upon which the eligible credit property is constructed or housed, and U.S. Coast Guard registration numbers for offshore wind vessels);

(D) The beginning of construction date, and the placed in service date of the eligible credit property; and

(E) Any other information that the eligible taxpayer believes will help the IRS evaluate the registration request;

(viii) The name of a contact person for the eligible taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either:

(A) Possess legal authority to bind the eligible taxpayer; or

(B) Must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative*;

(ix) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant; and

(x) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(c) *Registration number*—(1) *In general.* The IRS will review the registration information provided and will issue a separate registration number for each eligible credit property for which the eligible taxpayer provided sufficient verifiable information.

(2) *Registration number is only valid for one taxable year.* A registration number is valid to an eligible taxpayer only for the taxable year in which the credit is determined for the eligible credit property

for which the registration is completed, and for a transferee taxpayer's taxable year in which the eligible credit is taken into account under §1.6418-2(f).

(3) *Renewing registration numbers.* If an election to transfer an eligible credit will be made with respect to an eligible credit property for a taxable year after a registration number under this section has been obtained, the eligible taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(4) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained, but not yet used, an eligible taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if the owner of a facility previously registered for a transfer election under §1.6418-2 or §1.6418-3 for eligible credits determined with respect to that facility and the facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the facility must amend the original registration to disassociate its EIN from the eligible credit property and the new owner must submit separately an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered eligible credit property.

(5) *Reporting of registration number by an eligible taxpayer and a transferee taxpayer*—(i) *Eligible taxpayer reporting.* As part of making a valid transfer election under §1.6418-2 or §1.6418-3, an eligible taxpayer must include the registration number of the eligible credit property on the eligible taxpayer's return (as provided in §1.6418-2(b) or §1.6418-3(d)) for the taxable year the specified credit portion

was determined. The IRS will treat an election as ineffective if the eligible taxpayer does not include a valid registration number on the return.

(ii) *Transferee taxpayer reporting.* A transferee taxpayer must report the registration number received (as part of the transfer election statement as described in §1.6418-2(b) or otherwise) from a transferor taxpayer on the Form 3800, *General Business Credit*, as part of the return for the taxable year that the transferee taxpayer takes the transferred specified credit portion into account. The specified credit portion will be disallowed to the transferee taxpayer if the transferee taxpayer does not include the registration number on the return.

(d) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

§1.6418-5 Special rules.

(a) *Excessive credit transfer tax imposed—(1) In general.* If any specified credit portion that is transferred to a transferee taxpayer pursuant to an election in §1.6418-2(a) or §1.6418-3 is determined to be an excessive credit transfer (as defined in paragraph (b) of this section), the tax imposed on the transferee taxpayer by chapter 1 (regardless of whether such entity would otherwise be subject to chapter 1 tax) for the taxable year in which such determination is made will be increased by an amount equal to the sum of—

(i) The amount of such excessive credit transfer; and

(ii) An amount equal to 20 percent of such excessive credit transfer.

(2) *Taxable year of the determination.* The taxable year of the determination for purposes of paragraph (a)(1) of this section is the taxable year that includes the determination and not the taxable year when the eligible credit was originally determined by the eligible taxpayer, unless those are the same taxable years.

(3) *Payments related to excessive credit transfer.* Any payments made by a transferee taxpayer to an eligible taxpayer that directly relate to the excessive credit transfer (as defined in paragraph (b) of this section) are not subject to section 6418(b)(2) or §1.6418-2(e).

(4) *Reasonable cause.* Paragraph (a)(1)(ii) of this section does not apply if the transferee taxpayer demonstrates to the satisfaction of the IRS that the excessive credit transfer resulted from reasonable cause. Determination of reasonable cause will be made based on the relevant facts and circumstances. Generally, the most important factor is the extent of the transferee taxpayer's efforts to determine that the amount of specified credit portion transferred by the eligible taxpayer to the transferee taxpayer is not more than the amount of the eligible credit determined with respect to the eligible credit property for the taxable year in which the eligible credit was determined and has not been transferred to any other taxpayer. Circumstances that may indicate reasonable cause can include, but are not limited to, review of the eligible taxpayer's records with respect to the determination of the eligible credit (including documentation evidencing eligibility for bonus credit amounts), reasonable reliance on third party expert reports, reasonable reliance on representations from the eligible taxpayer that the total specified credit portion transferred (including portions transferred to other transferee taxpayers when an eligible taxpayer makes multiple transfer elections with respect to a single credit property) does not exceed the total eligible credit determined with respect to the eligible credit property for the taxable year, and review of audited financial statements provided to the Securities and Exchange Commission (and underlying information), if applicable.

(5) *Recapture events.* A recapture event under section 45Q(f)(4) or 50(a) is not an excessive credit transfer.

(b) *Excessive credit transfer defined—(1) In general.* The term *excessive credit transfer* means, with respect to an eligible credit property for which a transfer election is made under §1.6418-2 or §1.6418-3 for any taxable year, an amount equal to the excess of—

(i) The amount of the transferred specified credit portion claimed by the transferee taxpayer with respect to such eligible credit property for such taxable year; over

(ii) The amount of the eligible credit that, without the application of section

6418, would be otherwise allowable under the Code with respect to such eligible credit property for such taxable year.

(2) *Multiple transferees treated as one.* All transferee taxpayers are considered as one transferee for calculating whether there was an excessive credit transfer and the amount of the excess credit transfer. If there was an excessive credit transfer, then the amount of excessive credit transferred to a specific transferee taxpayer is equal to the total excessive credit transferred multiplied by the transferee taxpayer's portion of the total specified credit portions transferred to all transferees. The rule in this paragraph (b)(2) is applied on an eligible credit property basis, as applicable.

(3) *Examples.* The following examples illustrate the rules of this paragraph (b):

(i) *Example I – No excessive credit transfer.* Taxpayer A claims \$50 of an eligible credit and transfers \$50 of an eligible credit to Transferee Taxpayer B related to a single facility that was expected to generate \$100 of such eligible credit. In a later year it is determined that the facility only generated \$50 of such eligible credit. There is no excessive credit transfer in this case because the amount of the eligible credit claimed by Transferee Taxpayer B of \$50 is equal to the amount of the credit that would be otherwise allowable with respect to such facility for the taxable year the transfer occurred. Taxpayer A is disallowed the \$50 of the eligible credit claimed.

(ii) *Example II – Excessive credit transfer.* Same facts as in paragraph (b)(3)(i) of this section (*Example I*) except that Taxpayer A transfers \$80 of the \$100 of eligible credit to Transferee Taxpayer B. Taxpayer A claims \$20 of the eligible credit and Transferee Taxpayer B claims \$80 of the eligible credit. In this situation, there is a \$30 excessive credit transfer because the amount of the credit claimed by Transferee Taxpayer B (\$80) exceeds the amount of credit otherwise allowable with respect to the facility (\$50) by \$30. Therefore, Transferee Taxpayer B's tax is increased in the later year by \$36, which is equal to the amount of the excessive credit transfer plus 20 percent of the excessive credit transfer as provided in paragraph (a) of this section and section 6418(g)(2)(A). If Transferee Taxpayer B can show reasonable cause as provided in paragraph (a)(4) of this section and section 6418(g)(2)(B), then Transferee Taxpayer B will only have a tax increase of \$30. Taxpayer A is disallowed the \$20 of the eligible credit claimed, and pursuant to paragraph (a)(3) of this section the payments made to Taxpayer A from Transferee Taxpayer B that directly relate to the excessive credit transfer are not subject to section 6418(b)(2) or §1.6418-2(e).

(iii) *Example III – Excessive credit with multiple transferees.* Same facts as in paragraph (b)(3)(i) of this section (*Example I*) except that Taxpayer A transfers \$45 of the eligible credit to Transferee Taxpayer B and \$35 of the eligible credit to

Transferee Taxpayer C. Taxpayer A claims \$20 of the eligible credit, Transferee Taxpayer B claims \$45 of the eligible credit, and Transferee Taxpayer C claims \$35 of the eligible credit. In this situation, because there are multiple transferees, all transferees are treated as one transferee for determining the excessive credit transfer amount under paragraph (b)(2) of this section. There is a total excessive credit transfer of \$30 because the amount of the credit claimed by the transferees in total (\$80) exceeds the amount of credit otherwise allowable with respect to the facility (\$50) by \$30. The excessive credit transfer to Taxpayer B is equal to $(\$45/\$80 * \$30) = \16.88 , and the excessive credit transfer to Taxpayer C is equal to $(\$35/\$80 * \$30) = \13.12 . Therefore, Transferee Taxpayer B and Transferee Taxpayer C are subject to the provisions in paragraph (a) of this section. Transferee Taxpayer B's and Transferee Taxpayer C's tax is increased in the later year by the respective excessive credit transfer amount and 20 percent of the excessive credit transfer amount (\$20.26 for Transferee Taxpayer B and \$15.74 for Transferee Taxpayer C) as provided in paragraph (a) of this section and section 6418(g)(2)(A). If Transferee Taxpayer B or Transferee Taxpayer C can show reasonable cause as provided in paragraph (a)(4) of this section and section 6418(g)(2)(B), then the tax increase will only be \$16.88 or \$13.12, respectively. Taxpayer A is disallowed the \$20 of eligible credit claimed and pursuant to paragraph (a)(3) of this section the payments made to Taxpayer A that directly relate to the excessive credit transfer are not subject to section 6418(b)(2) or §1.6418-2(e).

(c) *Basis reduction under section 50(c)*. In the case of any transfer election under §1.6418-2 or §1.6418-3 with respect to any specified credit portion described in §1.6418-1(c)(2)(ix) through (xi), section 50(c) will apply to the applicable investment credit property (as defined in section 50(a)(6)(A)) as if such credit was allowed to the eligible taxpayer.

(d) *Notification and impact of recapture under section 50(a) or 49(b)*—(1) *In general*. In the case of any election under §1.6418-2 or §1.6418-3 with respect to any specified credit portion described in §1.6418-1(c)(2)(ix) through (xi), if, during any taxable year, the applicable investment credit property (as defined in section 50(a)(6)(A)) is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period (as described in section 50(a)(1)(A)), other than as described in §1.6418-3(a)(6), or has a reduction in credit base causing recapture under section 49, other than as described in §1.6418-3(a)(6), such eligible taxpayer and the transferee taxpayer must follow the notification process in paragraph (d)(2) of this section, with

recapture impacting the transferee taxpayer and eligible taxpayer as described in paragraph (d)(3) of this section.

(2) *Notification requirements*—(i) *Eligible taxpayer*. The eligible taxpayer must provide notice of the occurrence of recapture to the transferee taxpayer. This notice must provide all information necessary for a transferee taxpayer to correctly compute the recapture amount (as defined under section 50(c)(2)), and the notification must occur in sufficient time to allow the transferee taxpayer to compute the recapture amount by the due date of the transferee taxpayer's return (without extensions) for the taxable year in which the recapture event occurs. The eligible taxpayer and transferee taxpayer can contract with respect to the form of the notice and any specific time periods that must be met, so long as the terms of the contractual arrangement do not conflict with the requirements of this paragraph (d)(2)(i). Any additional information that is required or other specific time periods that must be met may be prescribed by the IRS in guidance issued with respect to this notification requirement.

(ii) *Transferee taxpayer*. The transferee taxpayer must provide notice of the recapture amount (as defined in section 50(c)(2)), if any, to the eligible taxpayer. This must occur in sufficient time to allow the eligible taxpayer to calculate any basis adjustment with respect to the investment credit property by the due date of the eligible taxpayer's return (without extensions) for the taxable year in which the recapture event occurs. The eligible taxpayer and transferee taxpayer can contract with respect to the form of the notice and any specific time periods that must be met, so long as the terms of the contractual arrangement do not conflict with the requirements of this paragraph (d)(2)(ii). Any additional information that is required or other specific time periods that must be met may be provided in guidance prescribed by the IRS issued with respect to this notification requirement.

(3) *Impact of recapture*—(i) *Impact of recapture on transferee*. The transferee taxpayer is responsible for any amount of tax increase under section 50(a) upon the occurrence of a recapture event.

(ii) *Impact on eligible taxpayer*. The eligible taxpayer must increase the basis of the investment credit property (immediately before the event resulting in such recapture) by an amount equal to the recapture amount provided to the eligible taxpayer by the transferee taxpayer under paragraph (d)(2)(ii) of this section and in accordance with section 50.

(e) *Notification and impact of recapture under section 45Q(f)(4)*—(1) *In general*. In the case of any election under §1.6418-2 or §1.6418-3 with respect to any specified credit portion described in §1.6418-1(c)(2)(iii), if, during any taxable year, there is recapture of any section 45Q credit allowable with respect to any qualified carbon oxide that ceases to be captured, disposed of, or used as a tertiary injectant in a manner consistent with section 45Q, before the close of the recapture period (as described in §1.45Q-5(f)), such eligible taxpayer and the transferee taxpayer must follow the notification process in paragraph (e)(2) of this section with recapture impacting the transferee taxpayer as described in paragraph (e)(3) of this section.

(2) *Notification requirements*. The notification requirements for the eligible taxpayer are the same as for an eligible taxpayer that must report a recapture event as described in paragraph (d)(2)(i) of this section, except that the recapture amount that must be computed is defined in §1.45Q-5(e).

(3) *Impact of recapture*. The transferee taxpayer is responsible for any amount of tax increase under section 45Q(f)(4) and §1.45Q-5 upon the occurrence of a recapture event.

(f) *Impact of an ineffective transfer election by an eligible taxpayer*. An ineffective transfer election means that no transfer of an eligible credit has occurred for purposes of section 6418, including section 6418(b). Section 6418 does not apply to the transaction and the tax consequences are determined under any other relevant provisions of the Code. For example, an ineffective election results if an eligible taxpayer tries to elect to transfer a specified credit portion, but the eligible taxpayer did not register and receive a registration number with respect to the eligible credit property

(or otherwise satisfy the requirements for making a transfer election under the section 6418 regulations) with respect to which the specified credit portion was determined.

(g) *Carryback and carryforward.* A transferee taxpayer can apply the rules in section 39(a)(4) (regarding a 3-year carryback period for unused current year business credits) to a specified credit portion to the extent the specified credit portion is described in section 6417(b) (list of applicable credits, taking into account any placed in service requirements in section 6417(b)(2), (3), and (5)).

(h) *Applicability date.* This section applies to taxable years ending on or after date of publication of final rule.

Douglas W. O'Donnell,
*Deputy Commissioner for Services
and Enforcement.*

(Filed by the Office of the Federal Register June 14, 2023, 11:15 a.m., and published in the issue of the Federal Register for June 21, 2023, ** FR *****)

Notice of Proposed Rulemaking

Elective Payment of Advanced Manufacturing Investment Credit

REG-105595-23

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations concerning the elective payment election of the advanced manufacturing investment credit under the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act of 2022. The proposed regulations describe rules for the elective payment election, including special rules applicable to partnerships and S corporations, repayment of excessive payments, and basis

reduction and recapture. In addition, the proposed regulations provide rules related to an IRS pre-filing registration process that taxpayers wanting to make the elective payment election would be required to follow. These proposed regulations affect taxpayers eligible to make the elective payment election of the advanced manufacturing investment tax credit in a taxable year. This document also provides notice of a public hearing on the proposed regulations.

DATES: Written or electronic comments must be received by August 14, 2023. The public hearing on these proposed regulations is scheduled to be held on August 24, 2023, at 10 a.m. ET. Requests to speak and outlines of topics to be discussed at the public hearing must be received by August 14, 2023. If no outlines are received by August 14, 2023, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5 p.m. ET on August 22, 2023. The public hearing will be made accessible to people with disabilities. Requests for special assistance during the hearing must be received by August 21, 2023.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at <https://www.regulations.gov> (indicate IRS and REG-105595-23) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted electronically and comments submitted on paper to its public docket. Send hard copy submissions to: CC:PA:LPD:PR (REG-105595-23), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION

CONTACT: Concerning this proposed regulation, Lani M. Sinfield at (202) 317-5871 (not a toll-free number); concerning submissions of comments and/or the public hearing, Vivian Hayes at (202) 317-6901

(not a toll-free number) or by email to publichearings@irs.gov (preferred).

SUPPLEMENTARY INFORMATION:

Background

Section 48D was added to the Internal Revenue Code (Code) on August 9, 2022, by section 107(a) of the CHIPS Act of 2022 (CHIPS Act), which was enacted as Division A of the CHIPS and Science Act of 2022, Public Law 117-167, 136 Stat. 1366, 1393. Section 48D established the advanced manufacturing investment credit (section 48D credit) and section 48D(d) allows taxpayers (other than partnerships and S corporations) to elect to treat the amount of the section 48D credit determined under section 48D(a) as a payment against their Federal income tax liabilities. Section 48D(d) also provides special rules relating to elective payments to partnerships and S corporations and directs the Secretary of the Treasury or her delegate (Secretary) to provide rules for making elections under section 48D and to require information or registration necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 48D. Section 48D applies to qualified property placed in service after December 31, 2022, and, for any property the construction of which began prior to January 1, 2023, only to the extent of the basis thereof attributable to the construction, reconstruction, or erection of such qualified property after August 9, 2022 (the date of enactment of the CHIPS Act). See section 107(f)(1) of the CHIPS Act.

On March 23, 2023, the Treasury Department and the IRS published in the *Federal Register* (88 FR 17451) a notice of proposed rulemaking (REG-120653-22), which contains proposed regulations to implement the general provisions relating to the section 48D credit (March 2023 proposed regulations). The March 2023 proposed regulations included proposed definitions of various statutory terms, including “eligible taxpayer,” “qualified property,” “advanced manufacturing facility,” and “semiconductor.” The March 2023 proposed regulations also proposed rules under section 48D regarding the

beginning of construction requirement; proposed rules requiring pre-filing registration with the IRS in advance of filing an elective payment election; and proposed rules implementing the “applicable transaction” credit recapture rules under section 50(a)(3) of the Code. In addition, the March 2023 proposed regulations requested comments on potential issues with respect to the elective payment election provisions under section 48D(d) that may require guidance. This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) to implement the statutory provisions of section 48D(d) and revise the rules in proposed § 1.48D-6 of the March 2023 proposed regulations.

In the Rules and Regulations section of this issue of the *Federal Register*, the Treasury Department and the IRS are issuing temporary regulations under § 1.48D-6T that implement the pre-filing registration process described in proposed § 1.48D-6 of the proposed regulations. The temporary regulations require taxpayers that want to elect the elective payment of the section 48D credit to register with the IRS through an IRS electronic portal in advance of the taxpayer filing the return on which the election under section 48D is made.

I. Overview of elective payment election under section 48D

Section 48D(d)(1) allows a taxpayer to elect to treat the section 48D credit determined for the taxpayer for a taxable year as a payment against the tax imposed by subtitle A of the Code (that is, treated as a payment of Federal income tax) equal to the amount of the credit rather than a credit against the taxpayer’s Federal income tax liability for that taxable year (elective payment election).

II. Section 48D rules for partnerships and S corporations

Section 48D(d)(2)(A) provides special rules for partnerships (as defined in section 761(a)) and for S corporations (as defined in section 1361(a)(1) of the Code). Section 48D(d)(2)(A)(i) provides that, in the case of any credit determined with respect to any property held directly

by a partnership or S corporation, any election under section 48D(d)(1) is to be made by such partnership or S corporation and must be made in such manner as the Secretary may provide. If such partnership or S corporation makes an election under section 48D(d)(1), (1) the Secretary will make a payment to such partnership or S corporation equal to the amount of such credit, (2) section 48D(d)(3) is applied with respect to the credit before determining any partner’s distributive share, or S corporation shareholder’s pro rata share, of such credit, (3) any credit amount with respect to which the election in section 48D(d)(1) is made is treated as tax exempt income for purposes of sections 705 and 1366 of the Code, and (4) a partner’s distributive share of such tax exempt income is based on such partner’s distributive share of the otherwise applicable credit for each taxable year.

III. Special rules

Section 48D(d)(2)(B) requires the elective payment election to be made no later than the due date (including extensions of time) of the tax return for the taxable year for which the election is made. The elective payment election is irrevocable once made and applies with respect to any credit for the taxable year for which the election is made.

Section 48D(d)(2)(E) provides that, as a condition of, and prior to, any amount between treated as a payment by or to the taxpayer, the Secretary may require such information or registration as the Secretary deems necessary or appropriate for purposes of preventing duplication, fraud, improper payments, or excessive payments.

Section 48D(d)(2)(F) provides rules relating to excessive payments. In the case of any amount treated as a payment which is made by the taxpayer under section 48D(d)(1), or the amount of the payment made pursuant to section 48D(d)(2)(A), that the Secretary determines constitutes an excessive payment, the tax imposed on such taxpayer by chapter 1 of the Code, for the taxable year in which such determination is made must be increased by an amount equal to the sum of (1) the amount of any payment treated as made by or to

the taxpayer which the Secretary determines constitutes an excessive payment, (2) plus 20 percent of such excessive payment. The increase equal to 20 percent of the excessive payment does not apply if the taxpayer demonstrates to the satisfaction of the Secretary that the excessive payment resulted from reasonable cause.

Section 48D(d)(2)(F)(iii) defines “excessive payment” as, with respect to property for which an elective payment election is made for any taxable year, an amount equal to the excess of (I) the amount treated as a payment made by the taxpayer under section 48D(d)(1) or the amount of the payment made pursuant to section 48D(d)(2)(A)(i) over (II) the amount of the credit which, without application of section 48D(d), would be otherwise allowable under section 48D(a) (determined without regard to section 38(c)) with respect to such property for such taxable year.

Section 48D(d)(3) provides a denial of double benefit rule. It states that, in the case of a taxpayer making an elective payment election with respect to the credit determined under section 48D(a), such credit is reduced to zero and is deemed to have been allowed to the taxpayer for such taxable year for any other purposes under the Code.

Section 48D(d)(5) provides basis reduction and recapture rules. It states that rules similar to the rules of section 50(a) and (c) of the Code apply with respect to amounts treated as a payment made by a taxpayer under section 48D(d)(1) and any payment made pursuant to section 48D(d)(2)(A).

Section 48D(d)(6) authorizes the Secretary to issue regulations or other guidance determined to be necessary or appropriate to carry out the elective payment election provisions of section 48D(d), including (A) regulations or other guidance providing rules for determining a partner’s distributive share of the tax exempt income described in section 48D(d)(2)(A)(i) and (B) guidance to ensure that the amount treated as a payment under section 48D(d)(1) or payment made under section 48D(d)(2)(A)(i) is commensurate with the amount of the section 48D credit that generally would be otherwise allowable (determined without regard to section 38(c) of the Code).

Explanation of Provisions

I. Rules for Making Elective Payment Elections

A. In general

These proposed regulations revise §1.48D-6(a)(1) and (2) of the March 2023 proposed regulations to clarify that an elective payment election may only be made on an original return of tax filed not later than the due date (including extensions of time) for the return for the taxable year for which the section 48D credit is determined and in the manner as provided in guidance, and must include any required completed source credit form(s) with respect to the qualified property, a completed Form 3800, *General Business Credit*, and any additional information, including supporting calculations, required in instructions to the relevant forms. An original return would include a superseding return filed on or before the due date (including extensions). No elective payment election would be permitted to be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code. There also would be no relief available under §§ 301.9100-1 through 301.9100-3 of the Procedure and Administration Regulations (26 CFR part 301) for an elective payment election that is not timely filed.

These proposed regulations would further provide that a taxpayer makes the elective payment election with respect to any section 48D credit determined with respect to such taxpayer in accordance with section 48D(d)(1), and the taxpayer must include a statement with the election attesting under penalties of perjury that the taxpayer claiming to be an eligible taxpayer is not a foreign entity of concern and has not made an applicable transaction during the taxable year that the qualified property is placed in service, and will not claim a double benefit (within the meaning of section 48D(d)(3) and § 1.48-6(d)(2)(ii)(B) and (C) and (e)) with respect to any elective payment election made by the taxpayer.

II. Denial of Double Benefit

These proposed regulations revise §1.48D-6(a)(4) of the March 2023

proposed regulations by explaining the application of the section 48D(d)(3) denial of a double benefit rule and addressing the methodology for determining the amount of an elective payment, reducing the section 48D credit amount to zero, and treating the section 48D credit as a credit allowed for the taxable year for all other purposes of the Code with respect to taxpayers other than partnerships or S corporations. The proposed application of the denial of a double benefit rule is redesignated as proposed §1.48D-6(e). The methodology with respect to a payment made to a partnership or S corporation is provided in proposed §1.48D-6(d)(2)(ii)(B), as described in part III of this Explanation of Provisions.

A taxpayer (other than a partnership or S corporation) making an elective payment election applies section 48D(d)(3) by taking the following steps. First, the taxpayer would compute the amount of the tax liability (if any) for the taxable year, without regard to general business credits (GBCs), that is payable on the due date of the tax return (without regard to extensions), and the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on the amount of tax under section 38 (Step 1). Second, the taxpayer would compute the allowed amount of the GBCs carryforwards carried to the taxable year plus the amount of current year GBCs (including the section 48D credit) allowed for the taxable year under section 38 (that is, in accordance with all the rules in section 38, including the ordering rules provided in section 38(d)). Since the election would be required to be made on an original return filed before the due date (including extensions of time) for the taxable year for which the section 48D credit is determined, any GBC carryback would not be considered when determining the elective payment amount for the taxable year (Step 2). Third, the taxpayer would apply the GBCs allowed for the taxable year as computed in Step 2, including those attributable to the section 48D credit as GBCs, against the tax liability computed in Step 1. Fourth, the taxpayer would identify the amount of any excess or unused current year GBC, as defined under section 39, attributable to current year section 48D credit(s) for which the taxpayer is making

an elective payment election. The amount of such unused section 48D credits would be treated as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credits are determined (rather than having them available for carryback or carryover) (net elective payment amount) (Step 4). Fifth, the taxpayer would reduce the section 48D credit(s) for which an elective payment election is made by the amount (if any) allowed as a general business credit under section 38 for the taxable year, as provided in Step 3, and by the net elective payment amount (if any) that is treated as a payment against tax, as provided in Step 4, which results in the section 48D credit(s) being reduced to zero.

The proposed regulations would provide, consistent with section 48D(d)(3), that the full amount of the section 48D credits for which an elective payment election is made is deemed to have been allowed for all other purposes of the Code, including, but not limited to, the basis reduction and recapture rules imposed by section 50 and the calculation of any underpayment of estimated taxes under sections 6654 and 6655 of the Code.

The Treasury Department and the IRS request comments on whether future guidance should expand or clarify the methodology that a taxpayer follows to compute the amount of its elective payment. Comments are also requested on additional Code sections under which it may be necessary to consider the section 48D credit to have been deemed to have been allowed for the taxable year in which an elective payment election is made.

III. Partnership and S Corporations

A. Overview

Section 48D(d)(2)(A)(i) provides that, in the case of any credit determined with respect to any property held directly by a partnership or S corporation, any election under section 48D(d)(1) is to be made by such partnership or S corporation and must be made in such manner as the Secretary may provide. If such partnership or S corporation makes an election under section 48D(d)(1), the special rules of section 48D(d)(2)(A)(i) (I) through (IV) apply. In that regard,

proposed §1.48D-6(d)(2)(ii) would provide that (1) the IRS will make a payment to such partnership or S corporation equal to the amount of such credit; (2) before determining any partner's distributive share, or shareholder's pro rata share, of such credit, such credit is reduced to zero and is, for any other purposes under the Code, deemed to have been allowed solely to such entity (and not allocated by such entity, or otherwise allowed, to any partner or shareholder) for such taxable year; (3) any amount with respect to which the election under section 48D(d)(1) is made is treated as tax exempt income for purposes of sections 705 and 1366; and (4) a partner's distributive share of such tax exempt income is equal to such partner's distributive share of its otherwise allocable basis in the qualified property as determined under § 1.48D-2(h)(2)(i) for such year. The tax exempt income is taken into account by the partnership or S corporation at the same time as the underlying credit would have been taken into account by the partnership or S corporation absent an elective payment election. Such tax exempt income resulting from such election is treated as received or accrued, including for purposes of sections 705 and 1366 of the Code, as of the date the qualified property is placed in service with respect to the partnership or S corporation. The proposed regulations provide an example illustrating this rule. Because it is the section 48D credits, and not the tax exempt income, that arise from the conduct of the trade or business, the proposed regulations would treat the tax exempt income resulting from an elective payment election by a partnership or an S corporation as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, the tax exempt income would not be treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

In response to stakeholder comments, the Treasury Department and the IRS clarify here that there are no restrictions imposed under section 48D or the section 48D regulations on how a partnership or S corporation that receives a payment

from the IRS pursuant to an elective payment election may use the cash payment in its operations (including when it makes distributions to its distributions to its partners or shareholders).

Section 48D(d)(6)(B) requires that the Secretary issue regulations or other guidance to ensure that the amount of a payment under section 48(D)(2)(A)(i)(I) to a partnership or S corporation is commensurate with the amount of the credit that would otherwise be allowable (without regard to section 38(c)). Therefore, proposed §1.48D-6(d)(6) would provide that, in determining the section 48D credit amount that will result in a payment to a partnership or S corporation, the partnership or S corporation must compute the amount of the section 48D credit allowable (without regard to section 38(c)) as if an elective payment election were not made. Because a partnership or S corporation is not subject to section 469 (that is, section 469 applies at the partner or shareholder level), the amount of the credit determined with respect to any qualified property owned by a partnership or S corporation is not subject to limitation by section 469.

However, section 49 generally impacts the amount of a credit determined with respect to a qualified property. Proposed §1.48D-6(d)(6)(ii) provides rules for the application of section 49 to a partnership or S corporation. The proposed regulations would provide that any amount of section 48D credit determined with respect to the qualified property held directly by a partnership or S corporation must be determined by the partnership or S corporation taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the qualified property is placed in service. Thus, if the credit base of the qualified property is limited to a partner or shareholder by section 49, then the amount of the section 48D credit determined by the partnership or S corporation is also limited. The proposed regulations would provide that a partnership or S corporation that makes an elective payment election must request from each of its partners or shareholders, respectively, that is subject to section 49, the amount of such partner's or shareholder's nonqualified nonrecourse

financing with respect to the qualified property as of the close of the taxable year in which the property is placed in service. Additionally, the partnership or S corporation would attach to its tax return for the taxable year in which the property is placed in service, the amount of each partner's or shareholder's section 49 limitation with respect to the qualified property. The Treasury Department and the IRS request comments as to whether (1) any information or reporting requirements are needed for partnerships and S corporations to apply these rules when determining the amount of the section 48D credit for which an elective payment election can be made by a partnership or S corporation or (2) any additional clarifications are needed regarding how the at-risk rules apply to the determination of the section 48D credit by a taxpayer.

B. BBA Partnership

Many partnerships are subject to the centralized partnership audit regime found in subchapter C of chapter 63 of the Code as amended by the Bipartisan Budget Act of 2015 (BBA).² In connection with the implementation of section 48D, the Treasury Department and the IRS identified several areas of the BBA regulations that require updates to administer section 48D in the case of a partnership subject to the BBA (BBA partnership). Section 6221 of the Code provides that any adjustment to a partnership-related item with respect to a BBA partnership, and any tax attributable thereto, is assessed and collected at the partnership-level except to the extent provided under the BBA. The BBA outlines centralized audit procedures which generally must be followed before the IRS can adjust a partnership-related item (as defined in § 301.6241-1). Accordingly, the notice of proposed rulemaking (REG-101607-23) found in the Proposed Rules of this issue of the *Federal Register*, which primarily relates to proposed rules under section 6417, would add a new paragraph (j) to § 301.6241-7 to provide that an election by a BBA partnership under section 48D(d) can be adjusted outside of the BBA audit rules. Proposed §1.48D-6(d)(7) would cross-reference to proposed § 301.6241-7(j) for rules applicable to payments made to BBA partnerships.

IV. Pre-filing Registration Requirements and Additional Information

Proposed §1.48D-6(b)(1) would provide the mandatory pre-filing registration process that, except as provided in guidance, a taxpayer must complete as a condition of, and prior to, any amount being treated as a payment against the tax imposed under §1.48D-6(a)(1), or an amount paid to a partnership or S corporation pursuant to §1.48D-6(d)(2)(ii) (A). A taxpayer would be required to use the pre-filing registration process to register each qualified investment in an advanced manufacturing facility. A taxpayer that does not obtain a registration number or report the registration number on its annual tax return with respect to an advanced manufacturing facility would be ineligible to receive any elective payment amount with respect to the amount of any section 48D credit determined with respect to that advanced manufacturing facility. However, completion of the pre-filing registration requirements and receipt of a registration number would not, by itself, mean that the taxpayer would be eligible to receive a payment with respect to the section 48D credits determined with respect to the advanced manufacturing facility.

The pre-filing registration requirements are proposed to be that a taxpayer:

(1) must complete the registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein, unless otherwise provided in guidance;

(2) must satisfy the registration requirements and receive a registration number prior to making a section 48D(d)(1) elective payment election on the taxpayer's tax return for the taxable year at issue;

(3) is required to obtain a registration number for each qualified investment in an advanced manufacturing facility with respect to which a section 48D credit will be determined and for which the taxpayer wishes to make a section 48D(d)(1) elective payment election; and

(4) provide the specific information required to be provided as part of the pre-filing registration process. The

provision of such information, which includes information about the taxpayer and about the qualified investment in an advanced manufacturing facility that would allow the IRS to prevent duplication, fraud, improper payments, or excessive payments under section 48D. For example, verifying information about the taxpayer would allow the IRS to mitigate the risk of fraud or improper payments to entities that are not eligible taxpayers. Information about the taxpayer's taxable year would allow the IRS to ensure that an elective payment election is timely made on the entity's annual tax return. Information about the advanced manufacturing facility, including its address and coordinates (longitude and latitude), supporting documentation, beginning of construction date, and placed in service date would allow the IRS to mitigate the risk of duplication, fraud, and improper payments for properties that are not advanced manufacturing facilities.

Proposed §1.48D-6(b)(7)(i) provides that, after a taxpayer completes pre-filing registration with respect to each qualified investment in an advanced manufacturing facility with respect to which the taxpayer intends to elect a section 48D(d) elective payment election for the taxable year, the IRS will review the information provided and will issue a separate registration number for each qualified investment for which the taxpayer provided sufficient verifiable information.

Proposed §1.48D-6(b)(7)(ii) would provide that a registration number is valid only for the taxable year for which it is obtained. Proposed §1.48D-6(c)(7)(iii) would provide that, if an elective payment election will be made with respect to qualified investment in an advanced manufacturing facility for a taxable year for which a registration number under this section has been obtained for a prior taxable year, the taxpayer must renew the registration each subsequent year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts that are relevant in calculating the amount of the section

48D credit. Proposed §1.48D-6(b)(7)(iv) would provide that, if facts change with respect to the qualified investment in an advanced manufacturing facility for which a registration number has been previously obtained, the taxpayer must amend the registration to reflect these new facts. The regulations would provide, for example, that if the facility previously registered for an elective payment election undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner would be required to amend the original registration to disassociate its EIN from the advanced manufacturing facility and the new owner must submit an original registration (or if the new owner previously registered other advanced manufacturing facilities, must amend its original registration) to associate the new owner's EIN with the previously registered advanced manufacturing facility.

Lastly, proposed §1.48D-6(b)(7)(v) would provide that the taxpayer would be required to include the registration number of the advanced manufacturing facility on the taxpayer's annual return for the taxable year for an election under proposed §1.48D-6(a)(1). The IRS will treat an elective payment election as ineffective with respect to any section 48D credit determined with respect to the advanced manufacturing facility for which the taxpayer does not include a valid registration number on the annual tax return.

The corresponding temporary regulations under § 1.48D-6T(b) published in the Rules and Regulations section of this edition of the *Federal Register*, which are identical to those that would apply under proposed § 1.48D-6(b), apply to taxable years ending on or after **June 21, 2023**, and expire on **June 12, 2026**.

V. Special Rules

These proposed regulations amend the proposed rules relating to excessive

¹ See section 1101 of the BBA, Public Law 114-74, 129 Stat. 584, 625-638 (2015), as amended by section 411 of the Protecting Americans from Tax Hikes Act of 2015, Public Law 114-113, 129 Stat. 2242, 3121 (2015), and sections 201 through 207 of the Tax Technical Corrections Act of 2018, Public Law 115-141, 132 Stat. 348, 1171-1183 (2018).

payment and basis reduction and recapture under REG-120653-22 by adding examples of excessive payment, clarifying the basis reduction and recapture notice requirement and renumbering the affected paragraphs as §1.48D-6(f) and (g), respectively.

A. Excessive payment

Proposed §1.48D-6(f)(4) provides an example of excessive payment, including the year in which the tax is imposed and the calculation of the additional 20 percent tax. The Treasury Department and the IRS request comments on whether additional guidance on excessive payments is needed.

B. Basis reduction and recapture

Proposed §1.48D-6(g)(1) would provide that rules similar to the rules of section 50(a) and (c) apply for purposes of section 48D. Proposed §1.48D-6(g)(2)(i) provides that the adjusted basis of property generally must be reduced by the amount of the section 48D credit determined with respect to property for which the taxpayer has made an election under section 48D(d)(1). Proposed §1.48D-6(g)(2)(ii) would provide a similar basis reduction rule for partnerships or S corporations making an election under section 48D(d)(1). Proposed §1.48D-6(g)(2)(iii) would clarify the application of the basis adjustment rule under section 50(c)(5) to take into account adjustments made under proposed §1.48D-6(e)(2)(ii) for partners and S corporation shareholders of such partnerships or S corporations.

Proposed §1.48D-6(g)(3) would clarify that any reporting of recapture is made on the taxpayer's annual return in the manner prescribed by the IRS in any guidance. In addition, the excessive payment rules operate separately from the recapture rules. The excessive payment rules apply where the credit amount reported on the original credit source form by the taxpayer was excessive. Recapture of a tax credit occurs when the original tax credit reported would have been correct without the occurrence of a subsequent recapture event. Thus, recapture events under section 50(a) do not result in an excessive payment.

Proposed Applicability Dates

Proposed §1.48D-6 is proposed to apply to taxable years ending on or after the date the Treasury decision adopting these regulations as final regulations is published in the *Federal Register*. Taxpayers may rely on these proposed regulations for elective payments of section 48D credit amounts after December 31, 2022, in taxable years ending before the date the Treasury decision adopting these regulations as final regulations is published in the *Federal Register*, provided the taxpayers follow the proposed regulations in their entirety and in a consistent manner with respect to all elections made under section 48D(d).

Special Analyses

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520) ("PRA") generally requires that a federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in these proposed regulations contain reporting and recordkeeping requirements. The recordkeeping requirements mentioned within these proposed regulations are considered general tax records under §1.6001-1(e). These records are required for the IRS to validate that taxpayers have met the regulatory requirements and are entitled to make an elective payment election. For PRA purposes, general tax records are already approved by OMB under 1545-0074 for individuals and 1545-0123 for business entities.

These proposed regulations also mention reporting requirements related to making elections as detailed in §1.48D-6. These elections will be made by eligible taxpayers as part of filing a return (such as the appropriate Form 1040, Form 1120, Form 1120-S, or Form 1065), including

filling out the relevant source credit form and completing the Form 3800. These forms are approved under 1545-0074 for individuals and 1545-0123 for business entities.

These proposed regulations also describe recapture procedures as detailed in proposed §1.48D-6 that are required by section 48D(d)(5). The reporting of a recapture event will still be required to be reported using Form 4255, Recapture of Investment Credit. This form is approved under 1545-0074 for individuals and 1545-0123 for business entities. These proposed regulations are not changing or creating new collection requirements for recapture not already approved by OMB.

These proposed regulations mention the reporting requirements to complete pre-filing registration with the IRS to be able to make an elective payment election in proposed §1.48D-6. For further information concerning the registration and where to submit comments on the collection of information and the accuracy of the estimated burden, and suggestions for reducing this burden, please refer to the preamble to the corresponding temporary regulations (T.D. 9975) published in the Rules and Regulations section of this issue of the *Federal Register*. For burden estimates associated with the pre-filing registration requirement as detailed in proposed §1.48D-6, see the preamble to the corresponding temporary regulations. These proposed regulations are not changing or creating new collection requirements beyond the requirements that are being reviewed and approved by OMB under the temporary regulations.

II. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. Although these temporary regulations may affect small entities, data are not readily available about the number of small entities affected. The economic impact of these proposed regulations is not likely to be significant. Section 1.48D-6T(b) implements

the statutory authority granted by section 48D(d)(2)(E) that authorizes the IRS to require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments. These proposed regulations will assist small entities wanting to make the elective payment election under section 48D(d). Notwithstanding this certification, the Treasury Department and the IRS welcome comments on the impact of these temporary regulations on small entities.

III. Section 7805(f)

Pursuant to section 7805(f), these proposed regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandate Reform Act of 1995 requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$100 million in 1995 dollars (updated annually for inflation). These proposed regulations do not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

V. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These proposed regulations do not have federalism implications and do not impose substantial, direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

VII. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

Comments and Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. All comments will be made available at www.regulations.gov or upon request. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.

Announcement 2023-16, 2023-20 I.R.B. 854 (May 15, 2023), provides that public hearings will be conducted in person, although the IRS will continue to provide a telephonic option for individuals who wish to attend or testify at a hearing by telephone. Any telephonic hearing will be made accessible to people with disabilities.

A public hearing has been scheduled for August 24, 2023, beginning at 10 a.m. ET, in the Auditorium at the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC, unless no outlines are received by August 14, 2023. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to comment by telephone at the hearing must submit written or electronic comments and an outline of the topics to be discussed as well as the time

to be devoted to each topic by August 14, 2023, as prescribed in the preamble under the **ADDRESSES** section. If no outline of the topics to be discussed at the hearing is received by August 14, 2023, the public hearing will be cancelled. If the public hearing is cancelled, a notice of cancellation of the public hearing will be published in the **Federal Register**.

A period of ten minutes will be allocated to each person for making comments. After the deadline for receiving outlines has passed, the IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available: (1) at the hearing, (2) at <https://www.regulations.gov>, search IRS and REG-105595-23, or (3) by emailing a request to publichearings@irs.gov. Please put “REG-105595-23 Agenda Request” in the subject line of the email.

Individuals who want to testify in person at the public hearing must send an email to publichearings@irs.gov to have your name added to the building access list. The subject line of the email must contain the regulation number REG-105595-23 and the language TESTIFY In Person. For example, the subject line may say: Request to TESTIFY In Person at Hearing for REG-105595-23.

Individuals who want to testify by telephone at the public hearing must send an email to publichearings@irs.gov to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-105595-23 and the language TESTIFY Telephonically. For example, the subject line may say: Request to TESTIFY Telephonically at Hearing for REG-105595-23.

Individuals who want to attend the public hearing in person without testifying must also send an email to publichearings@irs.gov to have your name added to the building access list. The subject line of the email must contain the regulation number REG-105595-23 and the language ATTEND In Person. For example, the subject line may say: Request to ATTEND Hearing In Person for REG-105595-23. Requests to attend the public hearing must be received by 5 p.m. EST on August 22, 2023.

Individuals who want to attend the public hearing by telephone without testifying must also send an email to publichearings@irs.gov to receive the telephone number and access code for the hearing. The subject line of the email must contain the regulation number REG-105595-23 and the language ATTEND Hearing Telephonically. For example, the subject line may say: Request to ATTEND Hearing Telephonically for REG-105595-23. Requests to attend the public hearing must be received by 5 p.m. EST on August 22, 2023.

Hearings will be made accessible to people with disabilities. To request special assistance during a hearing please contact the Publications and Regulations Branch of the Office of Associate Chief Counsel (Procedure and Administration) by sending an email to publichearings@irs.gov (preferred) or by telephone at (202) 317-6901 (not a toll-free number) at least August 21, 2023.

Statement of Availability of IRS Documents

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

Drafting Information

The principal author of this proposed regulation is Lani M. Sinfield, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and record-keeping requirements.

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

Paragraph. 1. The authority citation for part 1 is amended by adding an entry for §1.48D-6 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.48D-6 also issued under 26 U.S.C. 48D(d)(6).

* * * * *

Par. 2. Section 1.48D-6, as proposed to be added by 88 FR 17451, March 23, 2023, is revised to read as follows:

§1.48D-6 Elective payment election.

(a) *Elective payment election*—(1) *In general.* A taxpayer, after successfully completing the pre-filing registration requirements under paragraph (b) of this section, may make an elective payment election with respect to any section 48D credit determined with respect to such taxpayer in accordance with section 48D(d)(1) of the Internal Revenue Code (Code) and this section. A taxpayer, other than a partnership or S corporation, that makes an elective payment election in the manner provided in paragraph (c) of this section will be treated as making a payment against the Federal income taxes imposed by subtitle A of the Code (subtitle A) for the taxable year with respect to which a section 48D credit is determined equal to the amount of the section 48D credit with respect to any qualified property otherwise allowable to the taxpayer (determined without regard to section 38(c) of the Code). The payment described in section 48D(d)(1) and this paragraph (a)(1) will be treated as made on the later of the due date (determined without regard to extensions) of the return of tax imposed by subtitle A for the taxable year or the date on which such return is filed.

(2) *Partnerships and S corporations.* See paragraph (d) of this section for special rules regarding elective payment elections under section 48D(d) applicable to partnerships and S corporations.

(3) *Irrevocable.* Any election under section 48D(d)(1) and this section, once made, will be irrevocable and, except as otherwise provided, will apply with respect to any amount of section 48D credit for the taxable year for which the election is made.

(b) *Pre-filing registration required*—(1) *In general.* Pre-filing registration by any taxpayer (including a partnership or an S corporation) in accordance with this paragraph (b) is a condition that must be successfully completed prior to making an elective payment election under section 48D(d)(1) and this section with respect to qualified property placed in service by the taxpayer as part of an advanced manufacturing facility of an eligible taxpayer. An elective payment election will not be effective with respect to the section 48D credit determined with respect to any such qualified property placed in service by any taxpayer unless the taxpayer received a valid registration number for the taxpayer's qualified investment in the advanced manufacturing facility of an eligible taxpayer in accordance with this paragraph (b) and provided the registration number for each qualified investment in each advanced manufacturing facility on its Form 3800, *General Business Credit*, attached to the tax return in accordance with guidance. —*guidance*—*Federal Register*— However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the taxpayer is eligible to receive a payment with respect to any section 48D credit determined with respect to the qualified property.

(2) *Manner of registration.* Unless otherwise provided in guidance, a taxpayer must complete the pre-filing registration process electronically through the IRS electronic portal and in accordance with the instructions provided therein.

(3) *Members of a consolidated group*—

(4) *Timing of pre-filing registration.* A taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (b)(6) of this section prior to making any elective payment election under this section on the taxpayer's tax return for the taxable year at issue.

(5) *Each qualified investment in an advanced manufacturing facility must have its own registration number.* A taxpayer must obtain a registration number for each qualified investment in an advanced manufacturing facility of an eligible taxpayer with respect to which an elective payment election is made.

(6) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, a taxpayer must provide the following information to the IRS to complete the pre-filing registration process:

(i) The taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity;

(ii) Any additional information required by the IRS electronic portal;

(iii) The taxpayer's taxable year, as determined under section 441 of the Code;

(iv) The type of annual return(s) normally filed by the taxpayer with the IRS;

(v) A list of each qualified investment in an advanced manufacturing facility that the taxpayer intends to use to determine a section 48D credit for which the taxpayer intends to make an elective payment election;

(vi) For each qualified investment in an advanced manufacturing facility listed in paragraph (b)(6)(v) of this section, any further information required by the IRS electronic portal, such as:

(A) The type of qualified investment in the advanced manufacturing facility;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the advanced manufacturing facility);

(C) Any supporting documentation relating to the construction, reconstruction or acquisition of the advanced manufacturing facility (such as, State and local government permits to operate the advanced manufacturing facility, certifications, and evidence of ownership that ties to the land deed, lease, or other documented right to use and access any land upon which the advanced manufacturing facility is constructed or housed);

(D) The beginning of construction date and the placed in service date of any qualified property that is part of the advanced manufacturing facility;

(E) The source of funds the taxpayer used to acquire the qualified property with respect to which the qualified investment was made; and

(F) Any other information that the taxpayer or entity believes will help the IRS evaluate the registration request;

(vii) The name of a contact person for the taxpayer. The contact person is the person whom the IRS may contact if there

is an issue with the registration. The contact person must either:

(A) Possess legal authority to bind the taxpayer; or

(B) Must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative*;

(viii) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant; and

(ix) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(7) *Registration number*—(i) *In general.* The IRS will review the information provided and will issue a separate registration number for each qualified investment in an advanced manufacturing facility of an eligible taxpayer for which the taxpayer making the registration provided sufficient verifiable information.

(ii) *Registration number is only valid for one year.* A registration number is valid only with respect to the taxpayer that obtained the registration number under this section and only for the taxable year for which it is obtained.

(iii) *Renewing registration numbers.* If an elective payment election will be made with respect to any section 48D credit determined with respect to a qualified investment in an advanced manufacturing facility for a taxable year after a registration number under this section has been obtained, the taxpayer must renew the registration for that subsequent year in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts.

(iv) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to a qualified investment in an advanced manufacturing facility for which a registration number has been previously obtained, a taxpayer must amend the registration (or may need to submit a new registration)

to reflect these new facts. For example, if an eligible taxpayer that is the owner of an advanced manufacturing facility previously registered for an elective payment election for a section 48D credit determined with respect to that advanced manufacturing facility and the advanced manufacturing facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the advanced manufacturing facility must amend the original registration to disassociate its EIN from the advanced manufacturing facility and the new owner must submit separately an original registration (or if the new owner previously registered other qualified investments or advanced manufacturing facilities, must amend its original registration) to associate the new owner's EIN with the previously registered advanced manufacturing facility.

(v) *Registration number is required to be reported on the return for the taxable year of the elective payment election.* The taxpayer must include the registration number of the qualified investment in the advanced manufacturing facility on the taxpayer's return as provided in this paragraph (b) for the taxable year. The IRS will treat an elective payment election as ineffective with respect to a section 48D credit determined with respect to a qualified investment in an advanced manufacturing facility for which the taxpayer does not include a valid registration number on the annual return.

(c) *Time and manner of election*—(1) *In general.* Any elective payment election under section 48D(d)(1) and this section with respect to any section 48D credit determined with respect to a taxpayer's qualified investment must—

(i) Be made on the taxpayer's original return of tax (including a superseding return) filed not later than the due date (including extensions of time) for the taxable year for which the section 48D credit is determined and the election is made in the manner prescribed by the IRS in guidance;

(ii) Include any required completed source credit form(s), a completed Form

3800, and any additional information required in instructions, including supporting calculations;

(iii) Provide on the completed Form 3800 a valid registration number for the qualified investment that is placed in service as part of an advanced manufacturing facility of an eligible taxpayer;

(iv) Include a statement attesting under the penalties of perjury that—

(A) The taxpayer claiming to be an eligible taxpayer is not a foreign entity of concern within the meaning of §1.48D-2(f)(2) and has not made an applicable transaction as defined in §1.50-2(b)(3) during the taxable year that the qualified property is placed in service; and

(B) The taxpayer will not claim a double benefit (within the meaning of section 48D(d)(3) and paragraphs (d)(2)(ii)(B) and (C) and (e) of this section) with respect to any elective payment election made by the taxpayer; and

(v) Be made not later than the due date (including extensions of time) for the taxable year for which the election is made, but in no event earlier than May 8, 2023.

—Limitations—

(d) *Special rules for partnerships and S corporations*—(1) *In general*. If a partnership or S corporation directly holds any property for which an advanced manufacturing investment credit is determined, any election under this section must be made by the partnership or S corporation. No election under section 48D(d) and this section by any partner or shareholder is allowed.

(2) *Election*—(i) *Time and manner of election*. An elective payment election by a partnership or S corporation is made at the same time and in the same manner, and subject to the pre-filing registration and other requirements for the election to be effective, as provided in paragraphs (b) and (c) of this section.

(ii) *Effect of election*. If a partnership or S corporation makes an elective payment election with respect to a section 48D credit, the following rules will apply:

(A) The Internal Revenue Service will make a payment to such partnership or S corporation equal to the amount of such credit, determined in accordance with paragraph (d)(6) of this section (unless the partnership or S corporation owes a Federal tax liability, in which case the

payment may be reduced by such tax liability);

(B) Before determining any partner's distributive share, or S corporation shareholder's pro rata share, of such credit, such credit is reduced to zero and is, for any other purposes under the Code, deemed to have been allowed solely to such entity (and not allocated or otherwise allowed to its partners or shareholders) for such taxable year; and

(C) Any partner's or S corporation shareholder's share of any qualified investment in an advanced manufacturing facility for which an elective payment election has been made for the taxable year, is reduced to zero for such taxable year.

(iii) *Coordination with sections 705 and 1366*. Any amount with respect to which the election is made is treated as tax exempt income for purposes of sections 705 and 1366 of the Code.

(iv) *Partner's distributive share*. A partner's distributive share of such tax exempt income is equal to such partner's distributive share of its otherwise allocable basis in qualified property under §1.48D-2(h)(2)(i) for such taxable year.

(v) *S corporation shareholder's pro rata share*. An S corporation shareholder's pro rata share (as determined under section 1377(a) of the Code) of such tax exempt income is taken into account by the S corporation shareholder in the taxable year (as determined under sections 444 and 1378(b) of the Code) in which the section 48D credit is determined and is based on the shareholder's otherwise apportioned basis in qualified property under §1.48D-2(h)(2)(ii) for the taxable year.

(vi) *Timing of tax exempt income*. Such tax exempt income resulting from such election is treated as received or accrued, including for purposes of sections 705 and 1366 of the Code, as of the date the qualified property is placed in service with respect to the partnership or S corporation.

(3) *Disregarded entity ownership*. In the case of a qualified property held directly by an entity disregarded as separate from a partnership or S corporation for Federal income tax purposes, such qualified property will be treated as held directly by the partnership or S corporation for purposes of making an elective payment election.

(4) *Electing partnerships in tiered structures*. If a partnership (upper-tier partnership) is a direct or indirect partner of a partnership that makes an elective payment election and directly or indirectly receives an allocation of tax exempt income resulting from the elective payment election made by the partnership, the upper-tier partnership must determine its partners' distributive shares of such tax exempt income in proportion to each partner's distributive share of its otherwise allocable basis in qualified property under §1.48D-2(h)(2)(i) for such taxable year.

(5) *Character of tax exempt income*. Tax exempt income resulting from an elective payment election by an S corporation or a partnership is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, the tax exempt income is not treated as passive income to any partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

(6) *Determination of amount of the section 48D credit*—(i) *In general*. In determining the amount of the section 48D credit that will result in a payment under paragraph (d)(2)(ii)(A) of this section, the partnership or S corporation must compute the amount of the credit allowable (without regard to section 38(c)) as if an elective payment election were not made. Because a partnership or S corporation is not subject to section 469 (that is, section 469 applies at the partner or shareholder level), the amount of the credit determined by a partnership or S corporation is not subject to limitation by section 469. Because the section 48D credit is an investment credit under section 46, sections 49 and 50 apply to limit the amount of the credit.

(ii) *Application of section 49 at-risk rules to determination of section 48D credit for partnerships and S corporations*. Any amount of section 48D credit determined with respect to qualified property held directly by a partnership or S corporation must be determined by the partnership or S corporation taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the qualified property is placed

in service. Thus, if the credit base of a qualified property is limited to a partner or S corporation shareholder by section 49, then the amount of the section 48D credit determined by the partnership or S corporation is also limited. A partnership or S corporation that directly holds qualified property must request from each of its partners or shareholders, respectively, that is subject to section 49, the amount of such partner's or shareholder's nonqualified nonrecourse financing with respect to the qualified property as of the close of the taxable year in which the property is placed in service. Additionally, the partnership or S corporation must attach to its tax return for the taxable year in which the qualified property is placed in service, the amount of each partner's or shareholder's section 49 limitation with respect to any qualified property. Changes to at-risk amounts under section 49 for partners or S corporation shareholders after the close of the taxable year in which the qualified property is placed in service do not impact the section 48D credit determined by the partnership or S corporation, but do impact the partner(s) or S corporation shareholder(s) as provided in paragraph (d)(6)(iii) of this section.

(iii) *Changes in at-risk amounts under section 49 at partner or shareholder level.* A partner or shareholder in a partnership or S corporation, respectively, must apply the rules under section 49 at the partner or shareholder level if there is a change in nonqualified nonrecourse financing with respect to the partner or shareholder after the close of the taxable year in which the qualified property is placed in service and the section 48D credit is determined. If there is an increase in nonqualified nonrecourse financing to a partner, any adjustment under the rules of section 49(b) is calculated based on the partner's share of the basis (or cost) of the qualified property to which the section 48D credit was determined in accordance with §1.48D-2(h)(2)(i). If there is an increase in nonqualified nonrecourse financing to a shareholder, any adjustment under the rules of section 49(b) is calculated based on the shareholder's pro rata share of the basis (or cost) of the qualified property to which the section 48D was determined in accordance with §1.48D-2(h)(2)(ii). If

there is a decrease in nonqualified nonrecourse financing, any increase in the credit base is taken into account by the partner or shareholder as provided under section 49, and any resulting credit is not eligible for an elective payment election under section 48D(d).

(7) *Partnerships subject to subchapter C of chapter 63 of the Code.* See §301.6241-7(j) of this chapter for rules applicable to payments made to partnerships subject to subchapter C of chapter 63 of the Code for a partnership taxable year.

(8) *Example.* The following example illustrates the rules of this paragraph (d).

(i) *Example.* P is a calendar-year partnership consisting of partners A and B, each 50% owners. P constructs Facility A, an advanced manufacturing facility, at V. P completes the pre-filing registration with respect to Facility A at V for 2024 in accordance with paragraph (b) of this section. In 2024, P places in service qualified property which is part of Facility A at V. P timely files its 2024 Form 1065 and properly makes the elective payment election in accordance with paragraph (c) of this section. On its Form 1065, P properly determines that the amount of section 48D credit with respect to the qualified property placed in service at Facility A for 2024 is \$100,000. The IRS processes P's return and makes a \$100,000 payment to P. Before determining A's and B's distributive shares, P reduces the section 48D credit to zero. However, for other purposes of the Code, the \$100,000 section 48D credit is deemed to have been allowed to P for 2024. The \$100,000 is treated as tax exempt income for purposes of section 705, and A's and B's distributive shares of such tax exempt income is based on each partner's otherwise allocable basis in qualified property under §1.48D-2(h)(2)(i) for the 2024 taxable year (\$50,000 each). A's and B's basis in their partnership interests and capital accounts will be appropriately adjusted to take into account basis adjustments made to the qualified property under section 50(c)(5) and §1.704-1(b)(2)(iv)(f). See paragraph (g)(2) of this section. The tax exempt income received or accrued by P as a result of the elective payment election is treated as received or accrued, including for purposes of section 705, as of date P placed in service the qualified property in 2024.

(ii) [Reserved]

(e) *Denial of double benefit—(1) In general.* In the case of a taxpayer making an election under section 48D(d) and this section with respect to any section 48D credit determined under section 48D(a) and §1.48D-1, such credit is reduced to zero and is, for any other purposes under the Code, deemed to have been allowed to the taxpayer for such taxable year. Paragraphs (e)(2) and (3) of this section explain the application of the section 48D(d)(3) denial of a double benefit rule

to a taxpayer (other than a partnership or S corporation). The application of section 48D(d)(3) to a partnership or S corporation is provided in paragraphs (d)(2)(ii)(B) and (C) of this section.

(2) *Application of the denial of double benefit rule.* A taxpayer (other than a partnership or S corporation) making an elective payment election applies section 48D(d)(3) by taking the following steps:

(i) Compute the amount of the Federal income tax liability (if any) for the taxable year, without regard to the general business credit under section 38 (GBC), that is payable on the due date of the tax return (without regard to extensions), and the amount of the Federal income tax liability that may be offset by GBCs pursuant to the limitation based on the amount of tax under section 38.

(ii) Compute the amount of the GBCs carryforwards carried to the taxable year plus the amount of the current year GBCs (including the current section 48D credit) allowed for the taxable year under section 38. Because the election must be made on an original return of tax for the taxable year for which the section 48D credit is determined, any business credit carrybacks are not considered when determining the elective payment amount for the taxable year.

(iii) Apply the GBCs allowed for the taxable year as computed under paragraph (e)(2)(ii) of this section, including those attributable to the section 48D credit as GBC, against the tax liability computed in paragraph (e)(2)(i) of this section.

(iv) Identify the amount of any excess or unused current year GBC, as defined under section 39, attributable to current year section 48D credit for which the taxpayer is making an elective payment election. Treat the amount of such unused section 48D credit as a payment against the tax imposed by subtitle A for the taxable year with respect to which such credit is determined (rather than having them available for carryback or carryover) (net elective payment amount).

(v) Reduce the section 48D credit for which an elective payment election is made by the amount (if any) allowed as a general business credit under section 38 for the taxable year, as provided in paragraph (e)(2)(iii) of this section, and by the net elective payment amount (if any)

that is treated as a payment against tax, as provided in paragraph (e)(2)(iv) of this section, which results in the section 48D credit being reduced to zero.

(3) *Use of the section 48D credit for other purposes.* The full amount of the section 48D credit for which an elective payment election is made is deemed to have been allowed for all other purposes of the Code, including, but not limited to, the basis reduction and recapture rules imposed by section 50, and the calculation of any underpayment of estimated taxes under sections 6654 and 6655 of the Code.

(4) *Examples.* The following examples illustrate the rules of this paragraph (e).

(i) *Example 1.* Z Corp is a calendar-year C corporation. Z Corp places in service qualified property which is part of an advanced manufacturing facility in June of 2024. Z Corp completes the pre-filing registration in accordance with this section and receives a registration number for the qualified property. Z Corp timely files its 2024 Form 1120 on April 15, 2025, properly making the elective payment election with respect to the section 48D credit in accordance with this section. On its return, Z Corp properly determines that it has \$500,000 of tax imposed by subtitle A of the Code (see paragraph (e)(2)(i) of this section). For simplicity, assume the maximum amount of GBCs that can be claimed for the taxable year is \$375,000. Z Corp properly determines that the amount of the section 48D credit determined with respect to the qualified property (its GBC for the taxable year) is \$100,000 (see paragraph (e)(2)(ii) of this section). Under paragraph (e)(2)(iii) of this section, the section 48D credit reduces Z Corp's tax liability to \$400,000. Z Corp pays its \$400,000 tax liability on April 15, 2025. Because there is no unused section 48D credit, paragraph (e)(2)(iv) of this section does not apply. Under paragraph (e)(2)(v) of this section, the \$100,000 of section 48D credit is reduced by the \$100,000 of section 48D credit claimed as GBCs for the taxable year, which results in the section 48D credit being reduced to zero. However, the \$100,000 of section 48D credit is deemed to have been allowed to Z Corp for 2024 for all other purposes of the Code under paragraph (e) of this section.

(ii) *Example 2.* Assume the same facts as in paragraph (e)(4)(i) of this section (*Example 1*), except that Z Corp has \$80,000 of tax imposed by subtitle A (paragraph (e)(2)(i) of this section). Z Corp's GBC credit is still \$100,000 (paragraph (e)(2)(ii) of this section). For simplicity, assume the maximum amount of GBCs that can be claimed for the taxable year under section 38(c) is \$60,000. Z Corp uses \$60,000 of its section 48D credit against its tax liability under paragraph (e)(2)(iii) of this section. Z Corp's net elective payment amount is \$40,000 determined under paragraph (e)(2)(iv) of this section. Z Corp reduces the elective payment amount by the \$60,000 claimed against tax in paragraph (e)(2)(iii) of this section and by the \$40,000 net elective payment amount determined

in paragraph (e)(2)(iv) of this section, resulting in the applicable credit being reduced to zero (paragraph (e)(2)(v) of this section). When the IRS processes Z Corp's 2024 Form 1120, the net elective payment amount results in a \$40,000 refund to Z Corp. However, for other purposes of the Code, the \$100,000 section 48D credit is deemed to have been allowed to Z Corp for 2024 (paragraph (e) of this section). Even though Z Corp did not owe tax after applying the net elective payment amount against its net tax liability, Z Corp may be subject to the section 6655 penalty for failure to pay estimated income tax. The net elective payment is not an estimated tax installment, rather it is treated as a payment made at the filing of the return.

(f) *Excessive payment—(1) In general.* Except as provided in paragraph (f)(2) of this section, in the case of any amount treated as a payment which is made by the taxpayer under section 48D(d)(1) and paragraph (a) of this section, or any payment made pursuant to section 48D(d)(2)(A)(i)(II) and paragraph (d) of this section, with respect to any property, which amount the Commissioner determines constitutes an excessive payment as defined in paragraph (f)(3) of this section, the tax imposed on such taxpayer by chapter 1 of the Code for the taxable year in which such determination is made is increased by an amount equal to the sum of—

(i) The amount of such excessive payment; plus

(ii) An amount equal to 20 percent of such excessive payment.

(2) *Reasonable cause.* Paragraph (f)(1)(ii) of this section will not apply if the taxpayer demonstrates to the satisfaction of the Commissioner that the excessive payment resulted from reasonable cause.

(3) *Excessive payment defined.* For purposes of section 48D(d) and this paragraph (f), the term *excessive payment* means, with respect to any property for which an election is made under section 48D(d) and this section for any taxable year, an amount equal to the excess of—

(i) The amount treated as a payment which is made by the taxpayer pursuant to section 48D(d)(1) and paragraph (a) of this section, or any payment made by the Commissioner pursuant to section 48D(d)(2)(A)(I)(i) and paragraph (d) of this section, with respect to such property for such taxable year; over

(ii) The amount of the section 48D credit which, without application of section 48D(d) and this section, would be

otherwise allowable (determined without regard to section 38(c)) under section 48D(a) and the section 48D regulations with respect to such property for such taxable year.

(4) *Examples.* The following example illustrates the principles of this paragraph (f).

(i) *Example.* A Corp is a calendar-year C corporation. A Corp places in service qualified property which is part of Facility A, an advanced manufacturing facility in 2023. A Corp properly completes the pre-filing registration in accordance with paragraph (b) of this section and receives a registration number for the advanced manufacturing facility. A Corp timely files its 2023 Form 1120, properly providing the registration number for Facility A and otherwise complying with paragraph (c) of this section. On its return, Corp A calculates that the amount of the section 48D credit with respect to the qualified property is \$100,000 and that the net elective payment amount is \$100,000. Corp A receives a refund in the amount of \$100,000. In 2025, the IRS determines that the amount of the section 48D credit properly allowable to Corp A in 2023 with respect to Facility A (as determined pursuant to §1.48D-1(b) and without regard to the limitation based on tax in section 38(c)) was \$60,000. Corp A is not able to show reasonable cause for the difference. The excessive payment amount is \$40,000 (\$100,000 treated as a payment - \$60,000 allowable amount). In 2025, the tax imposed under chapter 1 on Corp A is increased in the amount of \$48,000 (\$40,000 + (20% * \$40,000 = \$8,000).

(ii) [Reserved]

(g) *Basis reduction and recapture—(1) In general.* The rules in section 50(a) and (c) of the Code apply with respect to elective payments under paragraphs (a) and (d) of this section.

(2) *Basis adjustment—(i) In general.* If a section 48D credit is determined with respect to property for which a taxpayer makes an election under section 48D(d)(1), then the adjusted basis of the property shall be reduced by the amount of the section 48D credit determined for which the taxpayer made an election under section 48D(d)(1).

(ii) *Basis adjustment by partnership or S corporation.* If an advanced manufacturing investment credit is determined with respect to property for which a partnership or S corporation makes an election under section 48D(d)(1), then the adjusted basis of the property shall be reduced by the amount of the advanced manufacturing investment credit determined with respect to the property held by the partnership or S corporation, for which the IRS made a payment to the partnership or

S corporation pursuant to section 48D(d)(2)(A)(i)(I).

(iii) *Basis adjustment of partners and S corporation shareholders.* The adjusted basis of a partner's interest in a partnership, and stock in an S corporation, shall be appropriately adjusted pursuant to section 50(c)(5) to take into account adjustments made under paragraph (g)(2)(ii) of this section in the basis of property held

by the partnership or S corporation, as the case may be.

(3) *Recapture reporting.* Any reporting of recapture is made on the taxpayer's annual return in the manner prescribed by the IRS in any guidance.

(h) *Applicability date.* This section applies to property that is placed in service after December 31, 2022, and during

a taxable year ending on or after date of publication of final rule.

Douglas W. O'Donnell,
*Deputy Commissioner for Services
and Enforcement.*

(Filed by the Office of the Federal Register June 14, 2023, 11:15 a.m., and published in the issue of the Federal Register for June 21, 2023, ** FR *****)

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as “rulings”) that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the

new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the

new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.

ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
FR.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel’s Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.

PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

Numerical Finding List¹

Bulletin 2023–27

Announcements:

2023-2, 2023-2 I.R.B. 344
2023-1, 2023-3 I.R.B. 422
2023-3, 2023-5 I.R.B. 447
2023-4, 2023-7 I.R.B. 470
2023-5, 2023-9 I.R.B. 499
2023-6, 2023-9 I.R.B. 501
2023-8, 2023-14 I.R.B. 632
2023-9, 2023-15 I.R.B. 639
2023-10, 2023-16 I.R.B. 663
2023-7, 2023-17 I.R.B. 797
2023-11, 2023-17 I.R.B. 798
2023-12, 2023-17 I.R.B. 799
2023-13, 2023-18 I.R.B. 833
2023-14, 2023-19 I.R.B. 853
2023-16, 2023-20 I.R.B. 854
2023-15, 2023-21 I.R.B. 856

AOD:

2023-1, 2023-10 I.R.B. 502
2023-2, 2023-11 I.R.B. 529

Notices:

2023-4, 2023-2 I.R.B. 321
2023-5, 2023-2 I.R.B. 324
2023-6, 2023-2 I.R.B. 328
2023-8, 2023-2 I.R.B. 341
2023-1, 2023-3 I.R.B. 373
2023-2, 2023-3 I.R.B. 374
2023-3, 2023-3 I.R.B. 388
2023-7, 2023-3 I.R.B. 390
2023-9, 2023-3 I.R.B. 402
2023-10, 2023-3 I.R.B. 403
2023-11, 2023-3 I.R.B. 404
2023-12, 2023-6 I.R.B. 450
2023-13, 2023-6 I.R.B. 454
2023-16, 2023-8 I.R.B. 479
2023-17, 2023-10 I.R.B. 505
2023-18, 2023-10 I.R.B. 508
2023-20, 2023-10 I.R.B. 523
2023-19, 2023-11 I.R.B. 560
2023-21, 2023-11 I.R.B. 563
2023-22, 2023-12 I.R.B. 569
2023-23, 2023-13 I.R.B. 571
2023-24, 2023-13 I.R.B. 571
2023-26, 2023-13 I.R.B. 577
2023-25, 2023-14 I.R.B. 629
2023-27, 2023-15 I.R.B. 634
2023-28, 2023-15 I.R.B. 635
2023-31, 2023-16 I.R.B. 661
2023-30, 2023-17 I.R.B. 766
2023-33, 2023-18 I.R.B. 803
2023-34, 2023-19 I.R.B. 837

Notices:—Continued

2023-38, 2023-22 I.R.B. 872
2023-39, 2023-22 I.R.B. 877
2023-40, 2023-22 I.R.B. 879
2023-41, 2023-23 I.R.B. 905
2023-43, 2023-24 I.R.B. 919
2023-44, 2023-25 I.R.B. 924
2023-42, 2023-26 I.R.B. 1085
2023-46, 2023-26 I.R.B. 1086
2023-49, 2023-26 I.R.B. 1087
2023-48, 2023-27 I.R.B. 1124

Proposed Regulations:

REG-100442-22, 2023-3 I.R.B. 423
REG-146537-06, 2023-3 I.R.B. 436
REG-114666-22, 2023-4 I.R.B. 437
REG 122286-18, 2023-11 I.R.B. 565
REG-120653-22, 2023-15 I.R.B. 640
REG-105954-22, 2023-16 I.R.B. 713
REG-120080-22, 2023-16 I.R.B. 746
REG 109309-22, 2023-17 I.R.B. 770
REG 121709-19, 2023-17 I.R.B. 789
REG-124064-19, 2023-17 I.R.B. 789
REG-108054-21, 2023-23 I.R.B. 907
REG-106228-22, 2023-26 I.R.B. 1088
REG-110412-23, 2023-26 I.R.B. 1098
REG-101607-23, 2023-27 I.R.B. 1127
REG-101610-23, 2023-27 I.R.B. 1161
REG-105595-23, 2023-27 I.R.B. 1194

Revenue Procedures:

2023-1, 2023-1 I.R.B. 1
2023-2, 2023-1 I.R.B. 120
2023-3, 2023-1 I.R.B. 144
2023-4, 2023-1 I.R.B. 162
2023-5, 2023-1 I.R.B. 265
2023-7, 2023-1 I.R.B. 305
2023-8, 2023-3 I.R.B. 407
2023-10, 2023-3 I.R.B. 411
2023-11, 2023-3 I.R.B. 417
2023-14, 2023-6 I.R.B. 466
2023-9, 2023-7 I.R.B. 471
2023-13, 2023-13 I.R.B. 581
2023-17, 2023-13 I.R.B. 604
2023-18, 2023-13 I.R.B. 605
2023-19, 2023-13 I.R.B. 626
2023-20, 2023-15 I.R.B. 636
2023-12, 2023-17 I.R.B. 768
2023-15, 2023-18 I.R.B. 806
2023-21, 2023-19 I.R.B. 837
2023-22, 2023-19 I.R.B. 838
2023-23, 2023-22 I.R.B. 883

Revenue Rulings:

2023-1, 2023-2 I.R.B. 309
2023-3, 2023-6 I.R.B. 448

Revenue Rulings:—Continued

2023-4, 2023-9 I.R.B. 480
2023-5, 2023-10 I.R.B. 503
2023-6, 2023-14 I.R.B. 627
2023-7, 2023-15 I.R.B. 633
2023-2, 2023-16 I.R.B. 658
2023-8, 2023-18 I.R.B. 801
2023-9, 2023-19 I.R.B. 835
2023-10, 2023-23 I.R.B. 884
2023-11, 2023-23 I.R.B. 886
2023-12, 2023-27 I.R.B. 1111

Treasury Decisions:

9970, 2023-2 I.R.B. 311
9771, 2023-3 I.R.B. 346
9772, 2023-11 I.R.B. 530
9773, 2023-11 I.R.B. 557
9975, 2023-27 I.R.B. 1113

¹ A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2022–27 through 2022–52 is in Internal Revenue Bulletin 2022–52, dated December 27, 2022.

Finding List of Current Actions on Previously Published Items¹

Bulletin 2023–27

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