

**DEPARTMENT OF THE TREASURY**

**Internal Revenue Service**

**26 CFR Part 1**

[REG–101610–23]

RIN 1545–BQ64

**Section 6418 Transfer of Certain Credits**

**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 Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn.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](mailto: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).<sup>1</sup>

(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 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

<sup>1</sup> 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).

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*, 114 T.C. 83 (2000).

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 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 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.

Stakeholders also requested that the proposed regulations clarify that the transfer of an eligible credit pursuant to section 6418 is not considered a dealer sale under the REIT prohibited transactions rules of section 857(b)(6). The proposed regulations do not include a rule addressing this question. The Treasury Department and the IRS do not believe that a prohibited transaction tax issue arises from the transfer of eligible tax credits. Section 6418 provides that the cash amount received as consideration for the transfer of an eligible credit from an eligible taxpayer to a transferee taxpayer is not includible in the eligible taxpayer's gross income. Section 857(b)(6) imposes a tax equal to 100% of the net income derived from a REIT's prohibited transactions. Since cash received by an eligible REIT as consideration for the transfer of an eligible tax credit would not be includible in any calculation of the eligible taxpayer's gross income, the transaction cannot result in any net

income and, consequently, there is no prohibited transaction tax issue regarding the transfer of an eligible credit.

Stakeholders also requested confirmation that receipt of (or the right to receive) an eligible credit does not result in income to an eligible taxpayer that is also a REIT. Generally, Federal income tax rules do not treat as gross income a person's becoming entitled under the Code to a credit against Federal income tax. This general principle equally applies to an eligible taxpayer—including a REIT—becoming entitled to an eligible credit that it may transfer under section 6418. Accordingly, the proposed regulations do not include the requested rule specifically addressing REITs.

Lastly, stakeholders sought confirmation that the sale of energy under sections 45 and 45Y is not a dealer sale under the REIT prohibited transactions rules of section 857(b)(6). The proposed regulations do not address this issue. However, in the preamble to TD 9784 (81 FR 59849, 59856 (August 31, 2016)), the Treasury Department and the IRS noted that until additional guidance is published in the Internal Revenue Bulletin, in any taxable year in which (1) the quantity of excess electricity transferred to the utility company during the taxable year from energy producing distinct assets that serve an inherently permanent structure does not exceed (2) the quantity of electricity purchased from the utility company during the taxable year to serve the inherently permanent structure, the IRS will not treat any net income resulting from the transfer of such excess electricity as constituting net income derived from a prohibited transaction under section 857(b)(6). The Treasury Department and the IRS believe that any sale of electricity that is not within the scope of the statement in the 2016 preamble should be analyzed on a facts and circumstances basis to determine whether the sale is subject to the prohibited transaction rules of section 857(d)(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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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](mailto: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 recordkeeping 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 advance 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. See § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(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 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 of 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. 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)(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.*

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