The Real Estate Roundtable

July 28, 2023

The Honorable Lily Batchelder
Assistant Secretary of Tax Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

William M. Paul
Principal Deputy Chief Counsel
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: **Notices of Proposed Rulemaking Regarding Sections 6417 and 6418; Temporary Regulations Related to Pre-Filing Requirements for Certain Tax Credits**

Dear Assistant Secretary Batchelder and Deputy Chief Counsel Paul:

The Real Estate Roundtable (www.rer.org) ("The Roundtable") appreciates the opportunity to comment on proposed regulations concerning the transferability (section 6418) and elective payment (section 6417) of certain energy-related credits, as well as temporary regulations that establish pre-filing registration requirements for credit elections under these provisions.

The Roundtable brings together the leaders of the nation's top publicly held and privately owned real estate ownership, development, lending, and management firms, together with the leaders of major real estate trade associations, to jointly address national policy issues relating to real estate and the overall economy. A significant share of the potential energy savings and reduced greenhouse gas emissions that could result from the expanded energy credits relates to investments in upgrading and modernizing U.S. real estate.

We agree with Secretary Yellen that under the new guidance, "[m]ore clean energy projects will be built quickly and affordably, and more communities will benefit from the growth of the clean energy economy." We also concur that the guidance provides much-needed clarity on which entities are eligible for each credit monetization mechanism and lays out a rational process and timeline to claim and receive an elective payment or to transfer a credit. Our comments below highlight key issues and considerations in the proposed and temporary rules, including certain areas where the Treasury Department and the IRS could further strengthen and improve the regulatory regime to ensure the new tax incentives reach the full range of legal entities and business structures that are prepared to invest in clean and renewable energy.

Transferring credits to multiple transferees. As requested, the proposed rules provide welcome clarity that an eligible taxpayer may divide its qualifying energy credit and sell portions of the credit to multiple, separate transferees (as long as the same credit portion is not transferred twice). While this ability does not allow transferors to separate the base credit portion from the bonus credit portion, it should facilitate clean energy investments by allowing for greater customization of credit transfers, supporting smaller transactions, and expanding the pool of potential buyers.

Reasonable cause exception to excessive credit transfer penalty. In addition, consistent with the Roundtable's comments, the proposed rules provide much-needed guidance on the factors used to determine whether a credit transferee qualifies for the reasonable cause exception to the excessive credit transfer penalty. The proposed rules confirm that transferees can reasonably rely on the transferor's documentation, records, and representations, as well as third party expert reports and certain audited financial statements. Consistent and transparent application of these standards will help reduce transaction risk and increase market confidence in a way that supports the underlying objective of promoting greater clean energy investment.

Advanced payments; credit intermediaries. By confirming that advanced purchases of credits is permitted, the proposed rules will expand property owners' access to capital during critical project development periods. Moreover, by confirming that intermediaries can facilitate credit transactions without violating rules against second transfers, the proposed rules should increase credit liquidity and support the development of third party platforms that further deepen credit markets.

Mixed partnerships. Unfortunately, the proposed rules will create significant challenges for "mixed" partnerships that include a combination of taxable and tax-exempt partners. Tax-exempt investors in mixed real estate partnerships include pension funds, educational endowments, private foundations, and public charities. Today, these tax-exempt entities have invested over $900 billion in commercial real estate, and they represent a large and growing percentage of commercial real estate owners. They typically invest through a partnership structure alongside fully taxable real estate developers, entrepreneurs, and owners. When tax-exempt partners invest in ITC property through a mixed partnership, the partnership generally will not receive the full amount of the ITC credit, but instead the credit will be reduced proportionately based upon the ownership percentages of the tax-exempt partners under the "tax-exempt use property" rules. The proposed rules do not allow a mixed partnership to qualify for direct pay on behalf of its tax-exempt partners for the ITC and PTC.

The interaction of the proposed rules with the "tax-exempt use property" rules creates a perverse outcome in which tax-exempt investors (who clearly were envisioned as potential beneficiaries through the direct pay provisions) will not only be unable to benefit from direct pay, but their presence in the partnership will reduce the amount of the ITC available for the partnership. The result is that mixed partnerships' economic incentive to invest in clean energy is greatly reduced, undermining the objectives of the legislation.

We respectfully recommend that the final rules allow a partnership to make a direct payment election under section 6417 with respect to qualifying partners. However, if the final rules reach the same conclusion as the proposed regulations, we urge the Administration to propose legislative changes to sections 6417 and 6418 that would allow mixed partnerships to participate fully in the energy credit incentives.

Real Estate Investment Trust ("REIT") considerations. In the preamble to the proposed regulations, the Treasury Department and the IRS did not provide clarification that the eligible credits that have not yet been transferred are real estate assets, cash, or cash items for purposes of the 75% REIT Asset Test. Instead, the Treasury Department and the IRS directed taxpayers to the guidance in the Proposed Regulations with respect to the paid in cash and timing of sale requirements. We thank the Treasury Department and the IRS for the helpful guidance under the paid in cash and timing of sale requirements. However, we believe that further clarification from the Treasury Department and the IRS on this specific issue will be very helpful to REIT taxpayers.

While the paid in cash and timing of sale requirements guidance is helpful, we believe that there remains a potential for an unintended technical failure of the 75% REIT Asset Test. Under the 75% REIT Asset Test, at the end of each calendar quarter, a REIT must have at least 75% of the value of its total assets consist of real estate assets, cash, or cash items. Notwithstanding the paid in cash and timing of sale requirements, a REIT could still be caught in a situation where on the relevant testing date, it owns the eligible credit and it is unable (for whatever reason) to transfer the credit for cash. Especially for a smaller REIT, if the eligible credits are not qualifying assets, it is possible that such credits could cause a REIT to fail the 75% REIT Asset Test. We believe that Congress clearly meant for these credits to benefit REITs and did not intend for these credits to be non-qualifying REIT assets that could cause a REIT to fail the 75% REIT Asset Test. Accordingly, we recommend that the Treasury Department and the IRS provide clarification that the eligible credits are real estate asset, cash, or cash items for purposes of the 75% REIT Asset Test.

In addition, we commend the Treasury Department and the IRS for the helpful guidance in the preamble to the proposed regulations providing that (a) a prohibited transaction tax does not arise from the transfer of the credits and (b) a REIT is not treated as having gross income by becoming entitled to the credit. It would be even more beneficial if the final regulations could indicate that a transfer of the credits is not a sale of property under the seven sales tests of sections 857(b)(6)(C)(iii)(I) or 857(b)(D)(iv)(I). We recommend that the Treasury Department and the IRS adopt such guidance in the form of final regulations.

Pre-registration and timing issues. Credit transfers authorized under section 6418 are already occurring in the marketplace even though there is no process yet in place for eligible taxpayers to obtain pre-filing registration numbers. The agencies should clarify that for taxpayers who have already completed transfer transactions, they can obtain registration numbers once the IRS's electronic system is up and running – and then provide those numbers to their transferees so all parties may include that information when they ultimately file their respective returns. Furthermore, circumstances may arise where transferred credits are claimed during different tax years. For example, a taxpayer may transfer a "base credit" for a section 48 solar project in year 1, but might only be awarded a low-income communities "bonus credit" in year 2 following a competitive application or lottery process.[1] In these situations, the agencies should clarify whether different – or the same – pre-registration numbers are needed for the "base credit" and the "bonus credit," covering the same facility, but each claimed and transferred in different tax years.

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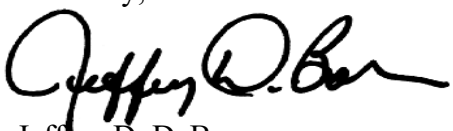
Thank you for the opportunity to submit comments. For more information, please contact: Ryan P. McCormick, Senior Vice President and Counsel (tax) rmccormick@rer.org) and Duane J. Desiderio, Senior Vice President and Counsel (energy) (ddesiderio@rer.org).

Sincerely,



Jeffrey D. DeBoer
President and Chief Executive Officer

[1] The agencies proposed a competitive application and lottery process in their *Additional Guidance on Low-Income Communities Bonus Credit Program*, 88 Fed. Reg. 35, 791 (June 1, 2023).