Joint Comments of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) on Section 6418 Transfer of Certain Credits

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The International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART) and the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) submit these comments in response to the NPRM, *Section 6418 Transfer of Certain Credits*, which enables the monetization of the credits by transferring them to an entity with greater tax liability.[1]

SMART represents highly skilled members in diverse occupations. As it pertains to clean energy,[2] our members receive broad-based training and attain journeyperson status in the construction, alteration, and repair of HVAC systems for heating and cooling of energy-efficient residential and commercial buildings and building envelopes. SMACNA is a national employer association representing 3,500 contributing unionized sheet metal contractors with expertise in HVAC systems.

INTRODUCTION

In these comments, SMART and SMACNA address transferability from two perspectives: first, as supporters of compliance with prevailing wage requirements for the protection of workers and to protect signatory contractors who comply with labor standards from underbidding by violators of these prevailing wage standards; and second, as supporters of small businesses who will benefit from tax credits and create "good"[3] union jobs in communities. The greatest

[1] *Section 6418 Transfer of Certain Credits*, 88 Fed.Reg. 40496 (June 21, 2023).

[2] Of the 11 tax credits provisions in the IRA, SMART members and signatory contractors will be most affected by section 48C, Qualifying Advanced Energy Project Credit, and section 48, Investment Tax Credit (ITC). 48C tax credits cover "thermal energy storage property," which means property comprising a system that: 1) is directly connected to a heating, ventilation, or air conditioning ("HVAC" system; 2) removes heat from, or adds heat to, a storage medium for subsequent use: and 3) provides energy for heating or cooling of the interior of a residential or commercial building.

[3] *See* the U.S. DOL's *The Good Jobs Initiative*: https://www.dol.gov/general/good-jobs

percentage of bonus credits eligible for transfer – domestic content (10%), low-income communities (10%),[4] and labor standards (30%) – pertain to compliance with the prevailing wage and apprenticeship requirements. In the case of the low-income community bonus, for example, there is no question as to the legitimacy of the transferor's claim because taxpayers must apply and be awarded a tax credit allocation. By contrast, determination of eligibility for a bonus based on compliance with labor standards is not pre-determined by a federal agency prior to the transfer of tax credits. There is, therefore, a strong potential for both unknowing and intentional transfer of such credits in circumstances in which the transferor is not entitled to them.

In the context of transferability, Treasury and the IRS have recognized the need for pre-registration to prevent fraud, improper payments, and excessive payments.[5] Pre-registration does not, however, require disclosure of substantiation of compliance with labor standards or investigative efforts undertaken to verify compliance before the transfer of these tax credits. SMART and SMACNA encourage Treasury and the IRS to adopt robust documentation requirements in this rulemaking, including specific disclosure requirements in "transfer election statements" and "minimum documentation" that a transferor must provide to a transferee concerning substantiation of compliance with labor standards and affirmation that best efforts have been undertaken to establish compliance. Improved documentation will encourage appropriate oversight by taxpayers of compliance with labor standards by employers of laborers and mechanics on covered projects; deter violations of labor standards; and prevent fraudulent transfers of

[4] Before claiming either the Low-Income Communities Bonus Credit under section 48(e) or the Qualifying Advanced Energy Project Credit under section 48C(e), taxpayers must apply and be awarded a tax credit allocation.

[5] 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. In response to Notice 2022-50, *Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits,* 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. 88 Fed.Reg. at 40507.

excessive tax credits when taxpayers (as well as contractors and subcontractors) claim to have complied with labor standards but have deprived workers of the wages and benefits to which they are entitled. Without stringent oversight and enforcement of labor standards, transferors may transfer tax credits, unknowingly or intentionally, to which they are not entitled. Excessive tax credits may not be discovered until after they are transferred and/or after the transferor or transferee has filed a tax return for the applicable taxable year. [6] Depending upon the documentation, enforcement, and disclosure mechanisms adopted by Treasury and the IRS, noncompliance may fly below their radar screen permanently.

COMMENTS

I. Treasury and the IRS Should Require Disclosure of Information in the "Transfer Election Statement" and "Minimum Documentation" that Demonstrates Best Efforts by the Transferor to Investigate that Tax Credits Based on Labor Standards are Not Transferred in Error

As proposed, the rules on transfer election statements and minimum documentation are insufficient to ensure that the transferor has undertaken an adequate investigation to ensure that bonus tax credits based on labor standards are valid. This deficiency increases the likelihood of the sale and purchase of excessive tax credits. SMART and SMACNA recommend, therefore, that Treasury and the IRS require that the transfer election statement and minimum documentation require disclosure of the specific efforts undertaken by the transferor to ascertain that these tax

[6] Prior to making a Section 6418 election, the transferor and transferee must together complete a transfer-election statement that includes certain specified information and attestations. The statement must be completed after the transferor and transferee have sufficient information to include the required items, but may not be completed after either the transferor or transferee has filed a tax return for the applicable taxable year. A purchase and sale agreement can serve as a transfer election statement if it includes the required information and is signed under penalties of perjury by the transferor.

credits are not transferred in error and affirmation that it has undertaken best efforts to obtain substantiation.

As proposed, the transfer election statement must include "the necessary information and amount to allow a transferee taxpayer to take into account the specified credit portion," including a "description of the eligible credit." It must also include a statement that the seller has provided the "minimum required documentation" to the buyer. The required minimum documentation, which is specified in proposed § 1.6418–2(b)(3)(iv), is the minimum documentation that the eligible taxpayer is required to provide to a transferee and is designed to validate the existence of the eligible credit property, any bonus credits amounts, and the evidence of credit qualification. Regarding the eligible property credit, the proposed rule points to "evidence" prepared by a third party, such a county board or other governmental entity, a utility, or an insurance provider. By contrast, regarding bonus credits, the proposed rule is vague and provides no direction as to the information that must be disclosed to a transferee concerning substantiation of compliance with labor standards. The proposed rule states that "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." The proposed rule imposes no obligation on transferor to disclose investigative efforts undertaken to substantiate its entitlement to bonus credits based on compliance with labor standards or to disclose the scope of ongoing oversight of employer records on jobsites. Furthermore, it places no burden on any taxpayer – the transferor or transferee – to undertake appropriate investigation to ensure compliance with labor standards.

II. The "Reasonable Cause" Standard Does Not Address Investigation of Excessive Tax Credits Caused by Noncompliance with the Payment of Prevailing Wages and Apprenticeship Utilization Standards

Treasury and the IRS should further clarify the "reasonable cause" provision, as it relates to: 1) the transferor's transfer of excessive tax credits involving the intentional failure to disclose non-payment of prevailing wages to laborers and mechanics employed on a project; and 2) the transferor's unintentional transfer of excessive tax credits on a project where employers (taxpayers, contractors, and/or subcontractors) failed to adhere to labor standards. The reasonable cause standard, as it relates to compliance with labor standards, should promote compliance and encourage private indemnification agreements so that the burden shifts to the party with the contractual authority to oversee compliance.

Proposed § 1.6418–5(a)(4) states 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." The NPRM further states that reasonable cause would be generally determined based on the relevant facts and circumstances of a transaction, with the "most important factor" placing an investigative burden on the transferee. In the context of compliance with labor standards, it is unclear how the transferee would have the ability to ascertain whether other taxpayers, contractors, and subcontractors paid prevailing wages (or engaged in the "correction and penalty" provision) and complied with the apprenticeship utilization requirements. In the proposed rule, the IRS lists the factors, such as "reasonable reliance on the transferor's representations" and "review of the eligible taxpayer's records (including documentation evidencing eligibility for bonus credit amounts)," that a transferee could demonstrate to show reasonable cause but does not provide any guidance concerning investigation of compliance with labor standards. Furthermore, since there is no specific requirement in the

"transfer election statement" or "minimum documentation" concerning substantiation of compliance with labor standards, it appears that the transferor's representation regarding such compliance would be insufficient. Furthermore, a review of an eligible transferor taxpayer's records would be unlikely to reveal compliance with prevailing wage or apprenticeship utilization requirements.

III. SMART and SMACNA Encourage Treasury and the IRS to Clarify the Interaction between the 20% Penalty Provision for an Excessive Tax Credit and the Correction and Penalty Mechanisms in the IRA Concerning Non-Payment of Prevailing Wages

SMART and SMACNA request that Treasury and the IRS provide clarification in the Final Rule between the interaction of the 20% penalty provision for the transfer of excessive credits and the correction and penalty mechanisms in § 45(b)(7)(B), which state that the taxpayer "shall be deemed to have satisfied" the prevailing wage requirements if it pays the penalties provided therein. Initial guidance[7] issued by Treasury and the IRS in November 2022 states, without elaboration, that § 45(b)(7)(B) provides correction and penalty mechanisms for a taxpayer's failure to satisfy the requirements under § 45(b)(7)(A). Under the penalty provision in the proposed rule, absent "reasonable cause," the transferee is subject to tax and penalty in aggregate equal to 120% of the amount of the excessive credit. Since the failure to pay prevailing rates or comply with apprenticeship utilization requirements renders the "taxpayer" ineligible for "bonus credits" based on labor standards, it is important to address which taxpayer bears the obligation to undertake the correction and penalty mechanisms in § 45(b)(7)(B) in the context of transferability when violations are detected post-transfer. Since the bonus credit amounts transferred by the transferor

[7] Prevailing Wage and Apprenticeship Initial Guidance Under Section 45(b)(6)(B)(ii) and Other Substantially Similar Provisions, 87 Fed. Reg. 73580 (Nov. 30, 2022).

are available only if employers (taxpayers, contractors, and/or subcontractors) on the project complied with labor standards, the transferor would have transferred credits to which it was not entitled.

IV. SMART and SMACNA Encourage Treasury and the IRS to Require "Robust" Documentation of Compliance with Labor Standards to Prevent in its Separate Rulemaking on Prevailing Wage and Apprenticeship Utilization to Decrease the Likelihood of the Transfer of Excessive Tax Credits

SMART and SMACNA encourage Treasury and the IRS to require robust documentation of compliance with labor standards to ensure that taxpayers who claim the maximum tax credits allowable comply with the prevailing wage and apprenticeship utilization requirements in the IRA, when issuing proposed and final rules that will supplement the guidance issued on November 22, 2022. [8] Without stringent reporting requirements imposed on employers (taxpayers, contractors, and subcontractors), excessive tax credits will be transferred. SMART and SMACNA endorse the joint recommendations of a dozen Attorneys General office (and other interested parties) concerning the need for "robust" documentation to avoid fraud and to facilitate compliance and enforcement of prevailing wage and apprenticeship utilization.[9] We encourage the Treasury Department and IRS to implement the joint recommendations of a dozen Attorneys General office (and other interested parties) concerning compliance and enforcement of prevailing wage and

[8] *See* Notice 2022-51, *Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022,* and Prevailing Wage and Apprenticeship Initial Guidance Under Section 45(b)(6)(B)(ii) and Other Substantially Similar Provisions, 87 Fed.Reg. 73580 (Nov. 30, 2022).

[9] Comments of the Attorneys General of Massachusetts, Colorado, Delaware, Illinois, Maine, Maryland, Michigan, New Jersey, New York, Oregon, Rhode Island, and the District of Columbia; the California Air Resources Board; and the Ramsey County, Minnesota, Attorney, December 1, 2022

apprenticeship utilization requirements.[10] The documentation recommended by the Attorneys General includes:

- **Notice of Intention to Claim Benefits**: Treasury and the IRS should require all contractors and taxpayers intending to seek prevailing wage and apprenticeship enhancements to file with DOL a notice of intention to seek a tax credit prior to commencing work.

- **Submission of Certified Payroll Records**: Treasury and the IRS should require submission certified payroll records covering each week of the period for which they intend to claim enhanced benefits, and a signed statement certifying under the penalty of perjury that the information contained within the certified payroll records is accurate.[11]

- **Document Apprentice Identification Cards on Certified Payrolls:** Treasury and the IRS should require contractors to include apprentice identification cards from a registered apprentice program alongside certified payroll records to deter contractors from claiming new or inexperienced workers as qualified apprentices.

- **Documentation of Good Faith Efforts**: Before a project commences, taxpayers claiming the good faith effort exception for apprenticeship enhancements should be required to file with DOL all records establishing that they requested qualified apprentices from a registered apprenticeship program and were denied or did not receive a timely response.

- **Written Notice to Workers:** Treasury and the IRS to require contractors to provide notice to workers on a qualifying project of their right to earn prevailing wages and to provide DOL a signed statement certifying under the penalty of perjury that such notice was provided to obtain a tax credit related to that qualifying project.

As stated in the joint comments of the Attorneys General, state and local government have a substantial interest in ensuring that workers' rights are protected and that employers claiming federal benefits operate on a level playing field—interests squarely implicated by the IRA's credit enhancements for compliance with its prevailing wage and apprenticeship provisions. According

[10] *Id*.

[11] See comments of the Attorneys General at 13: "It is all too common for employers and contractors to submit certified payroll records that, on their face, appear to comply with prevailing wage requirements while hiding the fact that workers were paid off the books at non-prevailing rates of pay or were required to return to their employers the difference between their regular wages and the prevailing wage."

to their comments, violations of wage and hour laws continue to "harm our workforces and demand significant enforcement resources." The Massachusetts Attorney General's Office, for example, has received over 800 complaints related to the Commonwealth's Prevailing Wage Laws since 2015. In addition to recommending documentation, the Attorneys General urge Treasury and the IRS to bolster accountability and enforcement with "on-the-ground verification" of compliance. According to the Attorneys General, Treasury and the IRS should pursue not only technological measures to identify prevailing wage and apprenticeship violations, but also on-the-ground verification for many types of violations that cannot be readily identified through file reviews.

V. The Transferability Provisions in Section 6418 Broaden the Potential Pool of Investors and Projects, Including Smaller Projects Undertaken by Small Business

SMACNA members are "small businesses"[12] who are encouraged by the financial opportunities created by the transferability provisions in the IRA to engage in the construction, alteration, and repair of clean energy projects. While the extent to which small businesses will benefit as transferors and transferees has not yet been quantified by Treasury and the IRS, the transferability provisions in the IRA make it far more likely that small businesses will have the financial ability to fund projects.

The transferability feature in the IRA for various green energy tax credits makes it possible for a larger universe of taxpayers to take advantage of the credits, since they will not be reliant on entering into complicated tax equity structures to see a benefit. Although tax equity structures have been a key source of funding for clean energy, the complexity and costs associated with these

[12] *See Frequently Asked Questions About Small Business*, which describes the criteria for small businesses: https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf

structures have limited their appeal and availability for some developers and investors. In response, Congress recognized that more, and more efficient, private financing are needed to incentivize the rapid development of the green economy.[13]

Facilitating transfers of credits to individuals will allow developers of smaller projects that are not large enough to attract large corporate transferees – including smaller energy projects in low-income communities or energy communities - to find willing transferees that are trying to offset smaller absolute tax liabilities. Transferability both broadens the pool of investors and the pool of projects:

- **Pool of potential investors**: Because the transactions will be simpler, the supply of investors interested in financing renewable projects is expected to dramatically increase—particularly the many investors of different sizes who previously would not want to face the learning curve of tax equity financing. Now, they can be brought into the market.[14]
- **Pool of projects**: Transferability may increase access to financing for smaller projects, which have historically been unattractive to large investors who were often unwilling to undertake the arduous work of forming a tax partnership for a small amount of tax credit. Further, smaller developers may not have previously had the relationships or resources to form these partnerships in the first place.[15]

Treasury and the IRS can maximize the benefits to small businesses by prioritizing projects, in the award of competitive tax credits in section 48C,[16] which have received public input and

[13] The 48C credit was originally enacted by § 1302(b) of the American Recovery and Reinvestment Act of 2009 (2009 Act), Public Law 111-5, Division B, Title I, Subtitle D, 123 Stat. 115, 345 (February 17, 2009), to provide an allocated credit for qualified investments in qualifying advanced energy projects. https://www.irs.gov/pub/irs-drop/n-23-44.pdf

[14] Center for American Progress, *Understanding Direct Pay and Transferability for Tax Credits in the Inflation Reduction Act*: https://www.americanprogress.org/article/understanding-direct-pay-and-transferability-for-tax-credits-in-the-inflation-reduction-act/

[15] *Id.*

[16] Since 48C is a competitive tax credit program, with an application and certification process, it is important that the DOE and IRS collaborate in prioritizes proposals that effectuate all remedial purposes of section 48C. Applications are ranked based upon the following goals: 1) avoidance or reduction of greenhouse gas emissions; 2) benefit to the community; and 3) strengthening U.S. industrial competitiveness and clean energy supply chains.

community and labor participation in the project creation and application process. Since 48C is a competitive tax credit program, with an application and certification process, it is important that the DOE and IRS collaborate in prioritizing proposals that effectuate all remedial purposes of section 48C. This will help create long-term, permanent jobs that will strengthen and diversify the local economy. A community's benefits will be optimized by when developers: 1) obtain input from community-based organizations on matters related to local hires; 2) use labor unions and joint labor-management committees as the sources of journeypersons and apprentices; and 3) enter into Community Workforce Agreements and Community Benefit Agreements.

VI. SMART and SMACNA Support the Proposed Rule Permitting an Eligible Taxpayer to Make Multiple Elections to Transfer an Eligible Credit to Multiple Transferees

Proposed § 1.6418–2(a)(2) permits an eligible taxpayer to 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. SMART and SMACNA expect that this interpretation of section 6418 will better enable small businesses in the sheet metal industry to benefit from §§ 48 and 48C tax credits; both as transferors and transferees.

VII. SMART and SMACNA Support User-Friendly Guidance from Federal Agencies to Small Businesses to Maximize their Ability to Take Full Advantage of Available Tax Credits

SMART and SMACNA endorse the Air-Conditioning, Heating, and Refrigeration Institute's (AHRI)[17] position that clear guidance, education, and outreach is essential to encourage a broad pool of businesses to benefit from IRA tax credits. With tax policy driving the clean energy transition, it is critical that these incentives are implemented in a clear and consistent manner to provide market participants the confidence they need to spur investments to reduce greenhouse gas emissions. It will not be possible to achieve President Biden's goals of "cutting climate pollution in half by 2030 and reaching net-zero emissions by no later than 2050" without providing clear signals to industry encouraging achievable emissions reduction targets in the near and long-term.

SMART and SMACNA commend the IRS for initiating the process of educating small businesses on understanding and claiming tax credits and deductions. [18] The IRS has committed to helping small businesses in the following ways:

- Help small businesses understand and claim credits and deductions: For the first time, the IRS will help taxpayers claim the credits and deductions for which they are eligible, strengthening the financial security of small businesses.
- The IRS will incorporate a "credits and deductions" search function in online account and improve relevant content on IRS.gov.
- The IRS will make it easier for taxpayers to help themselves and work to reach taxpayers in new ways, including through personalized alerts and with outreach through partnerships with community and nonprofit partners. This will help small business owners learn about credits and deductions for which they are eligible.

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[17] *See* comments of the Air-Conditioning, Heating, and Refrigeration Institute (AHRI) in response to Notice 2022-49. AHRI has 320 member companies that manufacture quality, safe, efficient, and innovative residential, commercial, and industrial air conditioning, space heating, water heating, and commercial refrigeration equipment and components for sale in North America and in export markets around the world.

[18] IRS, *How A Transformed IRS Will Benefit Small Businesses*: https://home.treasury.gov/system/files/136/SmallBusinessSOPOnePager.pdf

CONCLUSION

SMART and SMACNA appreciate the opportunity to comment on the transferability provisions in the IRA. We are available to share our expertise in the areas of labor standards, which is a critical component of the transfer of bonus credits.

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