SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, INC.

August 14, 2023

VIA ELECTRONIC SUBMISSION

Douglas W. O'Donnell
Deputy Commissioner for Services and Enforcement
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

**RE: Public Comments on IRS and Treasury Proposed Rules "*Section 6418 Transfer of Certain Credits*," 88 Fed. Reg. 40496 (June 21, 2023) and "*Section 6417 Elective Payment of Applicable Credits*," 88 Fed. Reg. 40528 (June 21, 2023)
REG–101610–23**

Dear Mr. O'Donnell:

The Sheet Metal and Air Conditioning Contractors' National Association (SMACNA) is supported by more than 3,500 construction firms engaged in industrial, commercial, residential, architectural and specialty sheet metal and air conditioning construction throughout the United States and North America. SMACNA members and allied quality-driven contractors understand that any major investment in public infrastructure need to recognize the extreme value of historic incentives and long overdue energy upgrades including energy decarbonization break throughs in untapped markets. Based on decades of experience, SMACNA member firms understand that these important tax changes and incentives will help jump start projects that would lag or be hindered by the lack of upfront financing or investment.

SMACNA provides these comments in support of the Internal Revenue Service's ("IRS") and the U.S. Treasury Department's ("Treasury") Proposed Rules, "*Section 6418 Transfer of Certain Credits*," 88 Fed. Reg. 40496 (June 21, 2023) (hereafter "Transferability Proposed Rule") and "*Section 6417 Elective Payment of Applicable Credits*," 88 Fed. Reg. 40528 (June 21, 2023) (hereafter "Direct Pay Proposed Rule"). Sections 6418 and 6417 were added to the Internal Revenue Code ("IRC") on August 16, 2022, by sections 13801(a) and 13801(b) of the Inflation Reduction Act of 2022 ("IRA"), Pub. L. No. 117–169.

As outlined in detail below, SMACNA fully supports the IRA, including but not limited to the Direct Pay (Section 6417) and Transferability (Section 6418) provisions. Before these amendments, it was not possible to monetize federal tax credits generated by renewable energy projects outside of tax equity financing structures. The Direct Pay and Transferability Provisions

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allow new investors to enter the market, creating a broader and more diverse market to finance projects more quickly and affordably.

I. THE IRA'S TAX INCENTIVES ARE LONG OVERDUE AND CRITICAL TO DRIVING CLEAN-ENERGY INNOVATION AND MODERNIZING OUR INFRASTRUCTURE.

SMACNA and its members are leading the way in the new economy, including the automotive/EV industry and the CHIPS and Science projects. For decades, SMACNA has advocated for tax incentives similar to those adopted in the IRA because they drive private-sector investments in infrastructure, including the construction of new manufacturing facilities. These projects require capital and the IRA incentivizes private capital to fund the critical infrastructure projects of the future, especially at a time when interest rates are high.

The IRA's tax incentives have been quickly and successfully utilized, where regulatory guidance exists, with immediate market results following only months of availability. They are increasing private investment, creating jobs and economic growth at the state, city and even neighborhood levels, often in neglected areas outside urban centers. Some estimates range as high as $500 billion to as much as $1 trillion dollars in additional private – public investment with leveraged public building work is already under negotiation or with signed agreements. Once the IRA's efficiency rebates are available the rate of IRA efficiency adoption in the residential sector will grow exponentially.

The quickly responding business community and related manufacturers, real estate developers, construction, engineering, energy efficiency and construction industries and their trade associations have already taken quick action by:

- Boosting manufacturing capacity and production of high efficiency equipment to cut corporate waste.
- Expanding construction and related workforces to meet the new project opportunities.
- Investing in a record number of marketing, media, training and building owner retrofit programs.
- Expanding registered apprenticeship programs creating career opportunities for non-college bound.
- Hiring and/or offering new employment opportunities based upon tax code incentive-inspired projects.

The IRA also reverses longstanding funding deficiencies in state and local efforts reforming outdated building codes and construction standards.

The IRA wisely increases the incentives to boost badly needed applicants for registered apprenticeship and prevailing wage payment enforcement standards. This emphasis on registered apprenticeship and prevailing wages in the construction sector, directly addresses the nation's skilled labor crisis. This long advocated and common-sense registered apprenticeship initiative is already beginning to expand apprenticeship programs and in time, if supported with resources, will reverse the national skilled labor shortage. This new statute enhancing preferences for registered apprenticeship is even more essential now following decades of insufficient apprenticeship investment by most construction and related firms. The current skilled labor crisis is the direct result of contractor as well as public and private entities neglecting their responsibility to invest in skilled apprenticeship training. The IRA wage and apprenticeship preferences has quickly begun to address that crisis.

II. THE PROPOSED RULE'S DEFINITION OF "APPLICABLE ENTITY" SHOULD BE AS EXPANSIVE AS POSSIBLE.

Prior to the IRA, there were limited opportunities for tax-exempt and governmental organizations to take advantage of the tax incentives available to developers of and investors in clean energy projects (e.g., depreciation deductions and tax credits). The IRA, through the transferability provisions under Section 6418 and, in particular, the elective direct pay provisions of Section 6417, has provided new opportunities for tax-exempt and governmental organizations to engage in these important clean energy initiatives. The IRA creates historic incentives for long overdue renovations and energy decarbonization breakthroughs in markets untapped generally to date.

To maximize the benefits of the IRA credits, SMACNA supports an expansive definition of "applicable entity." The list should include both private non-profit entities and public entities: school districts, public utility districts, and special purpose entities established by governments (such as joint action agencies, economic development corporations, and joint powers authorities).

Section § 1.6417–1(c) of the Direct Pay Proposed Rule provides the following definition of "applicable entity":

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

(i) By reason of section 501(a) of the Code; or
(ii) Because it is the government of any U.S. territory or a political subdivision thereof;

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

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

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

(5) The Tennessee Valley Authority;

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

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

26 C.F.R. § 1.6417–1(c); see also 26 U.S.C. § 6417(d).

To remove any doubt as to the availability of direct payments for clean energy tax credits, SMACNA supports that the IRS and Treasury include a non-exhaustive list of example entities to ensure that there is certainty that covered entities are eligible. Examples should include, at a minimum: school districts, public utility districts, and special purpose entities established by governments (such as joint action agencies, economic development corporations, and joint powers authorities).

III. THE PROPOSED RULE SHOULD REQUIRE "ROBUST" DOCUMENTATION SUBSTANTIATING COMPLIANCE WITH PREVAILING WAGE AND APPRENTICESHIP.

To ensure that workers receive the benefit of prevailing wages and apprenticeships promised by the IRA, the IRS and Treasury should adopt rules requiring robust documentation from taxpayers claiming benefits and bolster accountability and enforcement.

In their joint comments,[1] SMACNA and its labor partner, the International Association of Sheet Metal, Air, Rail and Transportation Workers ("SMART"), made clear that they endorse the joint recommendations of a dozen Attorneys General (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.[2]

Specifically, SMACNA and SMART encourage the IRS and Treasury to not just require contractors to ***maintain*** records documenting compliance – instead, the IRS and Treasury should

[1] *See* 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.

[2] *See* 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 (Dec. 1, 2022) (available at: https://stateimpactcenter.org/files/AGActions_22_12.1_IRA-IRS-State-and-Local-Govts-Comment_FINAL.pdf).

require contractors and taxpayers intending to seek the tax credit enhancements to affirmatively ***file*** the following documentation with the Department of Labor ("DOL"):

- **Notice of Intention to Claim Benefits** – All contractors and taxpayers intending to seek prevailing wage and apprenticeship enhancements should be required to ***file*** a notice of intention to seek a tax credit prior to commencing work.

- **Weekly Certified Payroll Records** – All contractors and taxpayers intending to seek prevailing wage and apprenticeship enhancements should be required to file certified payroll records covering each week of the time period for which they intend to claim enhanced benefits. The certified payroll records should include a signed statement certifying under the penalty of perjury that the information contained within the certified payroll records is accurate.

- **Apprentice Identification Cards** – All contractors and taxpayers intending to seek prevailing wage and apprenticeship enhancements should also be required to file apprentice identification cards from a registered apprentice program alongside certified payroll records.

- **Documentation Showing Attempts to Secure Apprentices Should Be Submitted Before a Project Commences** – Before a project commences, any contractor or taxpayer claiming the "good faith effort" exception for apprenticeship enhancements should be required to file with the DOL all records establishing that they requested qualified apprentices from a registered apprenticeship program and were denied or did not receive a timely response.

- **Prevailing Wage Notice** – All contractors and taxpayers intending to seek prevailing wage and apprenticeship enhancements should be required to notify 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.

These documentation and DOL-filing requirements are essential to prevent unscrupulous contractors and taxpayers from taking advantage of the prevailing wage and apprenticeship enhancements without providing the family-sustaining jobs that are provided by SMACNA's members. Indeed, these requirements are similar to the requirements that federal contractors comply with under the Davis-Bacon Act.

These robust documentation requirements have the added benefit of providing certainty as to the availability of the prevailing wage and apprenticeship enhancements. Clarity as to the documentation and filing requirements ensures that honest contractors, workers, taxpayers, government programs, and enforcement officials will benefit from the IRA's clean energy tax credits as they were intended.

IV. THE PROPOSED RULE'S AUTHORIZATION OF "BROKER ARRANGEMENTS" WILL EXPAND THE MARKET FOR CLEAN ENERGY TAX CREDITS.

While the Transferability Proposed Rule provides that "dealer arrangements" are prohibited by the "no second transfer rule in section 6418(e)(2)," the Proposed Rule makes clear that "broker arrangements" are permitted:

> [A]n 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.

Id. at 40501.

By confirming that intermediaries can facilitate credit transactions without violating rules against second transfers, the Proposed Rule increases credit liquidity and supports the development of third-party platforms that further deepen credit markets.

V. THE PROPOSED RULE SHOULD MAKE CLEAR THAT TAX INSURANCE AND INDEMNITY PROVISIONS ARE NOT INCONSISTENT WITH THE RULE.

The Transferability Proposed Rule provides that "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." *Id.* at 40509. A prudent contractor, however, knows that an indemnity provision is only as protective as the strength of the promisor. Thus, in addition to indemnity provisions, tax insurance can provide effective protection against loss of tax credits as well as penalties and interest levied by taxing authorities. Accordingly, the Proposed Rule should be clarified to ensure that both tax insurance and indemnity provisions are not inconsistent with the Rule.

VI. WITH RESPECT TO LABOR STANDARDS ENHANCEMENTS, THE PROPOSED RULE SHOULD CLARIFY THAT "REASONABLE CAUSE" FOR AVOIDING THE 20% RECAPTURE PENALTY MAY BE SATISFIED IF THE TAXPAYER MAKES A SUBSTANTIAL SHOWING OF DILIGENCE.

As SMACNA and SMART made clear in their joint comments,[3] the IRS and the Treasury should clarify the "reasonable cause" standard with respect 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

[3] *See* 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.

excessive tax credits on a project where employers (taxpayers, contractors, and/or subcontractors) failed to adhere to labor standards.

"Reasonable cause" should be defined in conjunction with the "robust" documentation and DOL-filing requirements outlined above. *See supra* II. Specifically, a taxpayer or contractor could demonstrate "reasonable cause" by reviewing and/or maintaining copies of the transferor's: (1) Notice of Intention to Claim Benefits; (2) Weekly Certified Payroll Records; (3) Apprentice Identification Cards; (4) Documentation Showing Attempts to Secure Apprentices Should Be Submitted Prior to Project Commencement (if any); and (5) Prevailing Wage Notices to Employees. Reviewing and/or maintaining copies of this material is sufficient to demonstrate "reasonable cause" with respect to the labor standards enhancements.

At a minimum, "reasonable cause" should be defined to include the transferee's review of the applicable collective bargaining agreements and the transferee's review of documentation showing that contractors performing the work are signatory to the relevant collective bargaining agreement.

VII. THE PROPOSED RULE SHOULD EXPAND THE MARKET FOR CLEAN ENERGY TAX CREDITS.

As SMACNA and SMART outlined in their joint comments,[4] most of SMACNA's members are "small businesses" and they are encouraged by the financial opportunities created by the transferability provisions in the IRA to engage in construction, alteration, and repair of clean energy 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 structures have limited their appeal and availability for some developers and investors. In response, Congress recognized that more, and more efficient, private financing is needed to incentivize the rapid development of the green economy.

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.

[4] *See* 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.

The Treasury and the IRS can maximize the benefits to small businesses by prioritizing projects, in the award of competitive tax credits in section 48C, which have received public input and community and labor participation in the project creation and application process. Because 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. Community benefits will be optimized when developers: (1) obtain input from community-based organizations on matters related to local hires; (2) utilize 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.

In addition, as proposed, Section 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. SMACNA expects 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.

VIII. THE PROPOSED RULE SHOULD MAKE CLEAR THAT SUBSEQUENT CHANGES IN LAW OR REGULATIONS WILL NOT IMPACT EXISTING TAX CREDITS.

Both the Transferability and the Direct Pay Provisions are intended to facilitate financing renewable energy projects by opening up a market to new types of investors outside of traditional institutional tax-equity players. New participants will not be forthcoming, however, if there is a concern that subsequent administrations may attempt to "roll back" or "invalidate" clean energy tax credits.

As a result, SMACNA supports guidance from the IRS and Treasury stating that subsequent changes in law will not impact tax credits that have already been applied for via the pre-filing registration. If there was any semblance that the credits would be rejected or nullified by a new congress or administration, then the market for them will dry up.

IX. THE PROPOSED RULE SHOULD INCLUDE CLEAR AND TRANSPARENT STANDARDS TO ENSURE A ROBUST MARKET FOR CLEAN ENERGY TAX CREDITS.

The Treasury and IRS should develop clear standards and educational materials to ensure that the public understands the direct-pay and transferability provisions. Entities will not take advantage of these provisions unless they understand the rules and have certainty that they are eligible.

In their joint comments,[5] SMACNA and SMART recognize that the IRS has started the process of educating small businesses on understanding and claiming tax credits and deductions on its website: https://home.treasury.gov/system/files/136/SmallBusinessSOPOnePager.pdf. SMACNA encourages the IRS to continue its efforts to help small businesses understand and claim credits and deductions.

X. Conclusion.

SMACNA appreciates the opportunity to provide this information and the continued engagement of the Administration in ensuring that the IRA's investment in American infrastructure will generate well-paid, family-supporting jobs for American workers.

Given our expertise in the areas of labor standards, we believe that the IRS and Treasury should carefully consider our recommendations to ensure that the intent of the IRA is effectuated.

Thank you for the opportunity to submit comments on this matter.

Sincerely,

Aaron Hilger
Chief Executive Officer

cc: Julie A. Su, Acting Secretary
U.S. Department of Labor

[5] *See* 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.