# The Inflation Reduction Act: Transferability of Investment Tax Credits (ITCs)
# Timeline and key considerations for REITs

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## Tax credit transfers timeline

### 1 Property development

- Construction/development of qualifying energy property (for example, solar panels)
- Is your project small enough (less than 1 MW capacity) or do you need to meet prevailing wage and apprenticeship requirements to claim the full tax incentive?

### 2 Placed in service

- Energy property is ready and available for intended use (all licenses and permits obtained, completion of critical tests, commencement of operations, etc.)

### 3 Registration of credits

- Registration process on IRS portal to get unique registration number for each "energy property"
- May take several months
- IRS may request additional info

### 4 Purchase and sale agreement

- Find tax credit buyer (brokers, online marketplaces, etc.)
- Negotiate PSA with credit buyer
- Buyer due diligence
- Tax insurance (case by case)

### 5 Buyer pays purchase price

- Must be cash purchase price
- Seller can accept cash during period beginning on Jan. 1 of year the energy property is placed in service until due date (including extensions) for tax return for that year

### 6 Transfer election

- Credit is transferred to buyer when seller files its tax return for the year the property is placed in service
- Both buyer and seller include a "transfer election statement" with their tax returns (with unique registration number from IRS portal)
- Transfer election must be made on seller's original and timely filed tax return for that year (extensions okay but not permissible on amended return)

## Transferability – Quick highlights

**Multiple buyers are okay**

A tax credit seller can sell portions of an ITC to separate buyers, so long as the transfers do not exceed the total amount of the ITC.

**Vertical slices only**

If an ITC includes "bonus" credits (energy community, domestic content, etc.), you cannot separately sell the bonus or base credits. For example, assume a 30% ITC plus a 10% energy community bonus. A buyer of the credit must buy all, or a "vertical slice," of the 40% credit amount.

**No tax on receipt of cash consideration**

The cash consideration to a tax credit seller is not taxable income. Also, no deduction for buyer.

**Expect indemnities and/or insurance**

ITC buyers are on the hook for: credit recapture risk, any adjustment of an ITC amount resulting from an IRS audit, and any "excessive credit penalties" if an ITC transfer exceeds the allowable ITC amount (penalty is 20% of excess).

## REIT considerations

**Asset test**

ITCs generated by a REIT that have not yet been transferred are disregarded in both the numerator and denominator for purposes of the REIT 75% asset test.

**Income tests**

Amounts received by a REIT as consideration for the transfer of an ITC do not result in gross income, so are ignored for purposes of the REIT income tests.

**Prohibited transactions**

Because an ITC sale does not result in net income, the transfer by a REIT of an ITC does not give rise to a prohibited transaction tax. Also, the transfer of all or a portion of an ITC does not constitute a sale for purposes of the "seven sales" prong of the prohibited transactions safe harbor.

**Reach out to your Hogan Lovells contacts to discuss further details on ITC transferability and the impact on your business.**