November 4, 2022

CC:PA:LPD:PR (Notice 2022-50)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Via Federal eRulemaking Portal at: www.regulations.gov (IRS-2022-0050)

Re: API Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits
Notice 2022-50

Dear Sir/Madam:

The American Petroleum Institute ("API") is the national trade association representing America's oil and natural gas industry. Our industry supports more than 11 million U.S. jobs and accounts for approximately 8 percent of U.S. GDP. API's nearly 600 members, from fully integrated oil and natural gas companies to independent companies, comprise all segments of the industry. API's members are producers, refiners, suppliers, retailers, pipeline operators, and marine transporters as well as service and supply companies providing much of our nation's energy. API was formed in 1919 as a standards setting organization and is the global leader convening subject matter experts from across the industry to establish, maintain, and distribute consensus standards for the oil and natural gas industry. API has developed more than 800 standards to enhance operational safety, environmental protection, and sustainability in the industry.

On behalf of our member companies, I write in response to the Notice on Elective Payment of Applicable Credits and Transfer of Certain Credits concerning the elective payment provisions under section 6417 and the elective credit transfer provisions under section 6418 of the Internal Revenue Code. As such, our members wish to ensure that the final rules and relevant guidance accomplish the legislative intent of the statute and provide efficient ways to ensure its goals are achieved. We submit these comments to the Department of the Treasury and Internal Revenue Service ("Treasury and IRS") in an effort to assist in developing those goals.

Section 6417(b)

Section 6417(b) defines the term "applicable credit" to mean, in relevant part, "so much of the credit for carbon oxide sequestration determined under section 45Q(a) as is attributable to carbon capture equipment that is originally placed in service after December 31, 2022."

It would be helpful if Treasury and the IRS would clarify that taxpayers may make an election under section 6417 with respect to all or a portion of the applicable credits generated for a particular tax year. Section 6417(d)(4)(B) provides that, with respect to entities that are not tax exempt, the direct payment of tax provided for under section 6417(a) shall be treated as made on the later of the due date of the tax return for the taxable year or the date on which such return is filed. The clarification should ensure that taxpayers

are allowed to utilize applicable credits to reduce the taxpayer's obligation to make estimated tax payments, and only the remainder of such credits, if any, shall be treated as a direct payment of tax made on the date specified by section 6417(d)(4)(B).

Section 6417(d) and 45Q

A person who uses carbon capture equipment at a qualified facility may make an election under section 45Q(f)(3)(B) to assign relevant section 45Q tax credits to the person that disposes of the qualified CO, utilizes the qualified CO, or uses the qualified CO as a tertiary injectant. However, it is not clear whether a taxpayer that has been validly assigned section 45Q tax credits pursuant to section 45Q(f)(3)(B) is eligible to make an election under section 6417.

Section 6417(d)(1)(C) defines an "applicable entity," in relevant part, as a non-taxable entity that makes an election under section 6417 with respect to any taxable year in which such taxpayer has placed in service carbon capture equipment at a qualified facility.

It would be helpful for Treasury and the IRS to clarify that the person allowed to claim section 45Q tax credits under an election pursuant to section 45Q(f)(3)(B) shall be treated as the owner and as having placed the carbon capture equipment in service for purposes of section 6417.

In addition, Treasury and the IRS should clarify that a taxpayer need not be the current owner of the carbon capture equipment or have placed carbon capture equipment in service during the tax year to make a direct pay election.

Section 6418 and Section 45Q

It is API's and its members' understanding that during a taxable year, taxpayers may generate credits and be the transferee of credits pursuant to section 6418. A taxpayer may make a section 6417 election for generated section 45Q credits and within the same taxable year, such taxpayer may be the transferee of section 45Q credits pursuant to an agreement with an unrelated party under section 6418.

Treasury and the IRS should clarify that taxpayers may utilize credits arising from the same taxable year in any order on its annual tax return and that any valid direct pay election under section 6417 by the taxpayer will apply to generated and transferred credits without distinction. With respect to any taxable year, a taxpayer should be able to utilize section 45Q credits up to the extent it has capacity to do so and make a direct pay election up to the amount of applicable credits under section 6417(a), so long as the taxpayer does not exceed the aggregate amount of section 45Q credits to which it is allowed.

Section 6418 and Section 45Q(f)(3)(B)

Section 6418 provides that "eligible taxpayers" that generate "eligible credits," including tax credits under section 45Q, may elect to transfer all or a portion of those credits pursuant to the rules under section 6418. Eligible taxpayers for this purpose are taxpayers that are not described in section 6417(d)(1)(A). There is uncertainty regarding whether an eligible taxpayer that has been assigned section 45Q tax credits under section 45Q(f)(3)(B) is eligible to make an election under section 6418 with respect to those section 45Q tax credits.

It would be helpful for Treasury and the IRS to clarify that in the event a taxpayer has been validly assigned section 45Q tax credits pursuant to the rules under section 45Q(f)(3)(B), the assignee taxpayer should be permitted to make an election under section 6418 with respect to the section 45Q tax credits that were validly assigned under section 45Q(f)(3)(B).

Section 6418(a) Election for Partnerships or S corporations

API and its member companies recognize that partnerships are characterized by a myriad of complexities in relation to their structures and their respective partners. In considering the complexities relating to the application of section 6418(a), it is important to consider the varying degrees to which partners in joint ventures can utilize "eligible credits" as defined under section 6418(f)(1)(A). We note that there is a need for allocation amongst partners for credits, and funds raised through transfers pursuant to section 6418 in order to provide equity.

It would be helpful for Treasury and the IRS to clarify that, if a partnership validly elects to transfer a portion of its tax credits pursuant to section 6418, the partnership should be able to specially allocate any non-transferred tax credits among the partners who have the capability of utilizing such credits. The partnership would be required to allocate the tax-exempt income from the sale of the tax credits (and distribute the sales proceeds) to the partners that were not allocated tax credits by the partnership.

Section 6418 Transfers and the Book Minimum Tax

We also wish to raise an issue with respect to sections 6417 and 6418 that was not in the Notice. We note that the statute defining applicable financial statement income that is used to define the base for the book minimum tax under section 56A excludes payments received under section 6417 and any deductions from the purchase of credits. Section 56A(c)(9) expressly excludes from AFSI any book income related to payments received pursuant to a "direct pay" election under section 6417. However, there is no specific mention for transfers under section 6418. However, section 56A(c)(5) provides that federal income taxes are disregarded for purposes of calculating AFSI and that the Treasury shall issue regulations to "provide for the proper treatment of current and deferred taxes." Inconsistency in how sections 6417 and 6418 are treated for purposes of calculating AFSI would undermine the intent of Congress behind these provisions and it would be helpful if Treasury and the IRS would, under the authority granted in section 56A(c)(5), exclude from AFSI payments received under a section 6418 election.

We appreciate the opportunity to comment and look forward to continued interaction as this process moves forward. To the extent you have any questions, please do not hesitate to contact me at colgana@api.org or 202-682-8044.

Sincerely,

Aindriu Colgan
Director, Tax and Trade Policy