CARBON UTILIZATION RESEARCH COUNCIL

ADVANCING FOSSIL ENERGY SOLUTIONS

November 4, 2022

Office of the Associate Chief Counsel (Passthroughs and Special Industries)
U.S. Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-50)
Room 5203, P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

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

Re: Comments of the Carbon Utilization Research Council on Elective Payment of Applicable Credits and Transfer of Certain Credits (Notice 2022-50)

Dear Sir/Madam:

This letter is submitted on behalf of the Carbon Utilization Research Council (CURC) in response to the request in IRS Notice 2022-50 for comments on the implementation of issues identified in the Notice. CURC is an industry coalition focused on technology solutions for the responsible use of our fossil energy resources in a balanced, low carbon generation portfolio. CURC's members include electric utilities and power generators that rely upon diverse sources for their electricity production, equipment manufacturers and technology innovators, national associations that represent the power generating industry, labor unions, fossil energy producers, and state, university and technology research organizations (see www.curc.net for list of CURC members). Members of CURC believe that American fossil fuels and ingenuity in technology innovation will satisfy our world's growing appetite for affordable energy, improve our energy security, increase U.S. exports, create high paying jobs, and improve environmental quality.

CURC members believe it is very important the IRS and Treasury issue regulations providing technical guidance on the requirements and operation of the modifications to the section 45Q tax credit program in a way that will create the investment certainty needed for robust utilization of the new tax credits. In addition, guidance is necessary to accomplish the key policy objectives of Congress in enacting the elective payment and transferability provisions that will help project developers monetize the tax credits.

The Carbon Utilization Research Council respectfully submits the following comments in response to specific questions in Notice 2022-50 – Elective Payment of Applicable Credits and Transfer of Certain Credits.

.01 Elective Payment of Applicable Credits (§ 6417).

> *(4) With respect to an election under § 6417(a) made by a partnership or S corporation pursuant to §6417(c)(1) for any applicable credit determined with respect to any facility or property held directly by a partnership or S corporation:*

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6417(a) and what, if any, guidance is needed with respect to such issues?

A partnership or S corporation may include partners/shareholders that are applicable entities under §6417(d)(1)(a) and those that are not applicable entities. The statutory language in §6417(a) makes it clear that an applicable entity can make an election for the amount of the applicable credit that is determined with respect to that taxpayer. The guidance should make it clear that the partnership or S corporation is making the §6417 election on behalf of the partners/shareholders for the amount of applicable credits that are determined with respect to the partners/shareholders that are applicable entities. This treatment would allow applicable entities to receive the benefits of the applicable credits through a partnership or S corporation in the same manner they would have received those credits if they owned the investment directly. In addition, this should not prevent the partnership from making the §6418 election on behalf of its partners/shareholders that are eligible taxpayers under that section.

(5) With respect to the definition of the term "applicable entity" in § 6417(d)(1):

(a) What, if any, guidance is needed to clarify which entities are applicable entities for purposes of §6417(d)(1)(A), and which taxpayers may elect to be treated as applicable entities under §6417(d)(1)(B), (C), or (D) for purposes of § 6417?

Section 6417(d)(1)(A) as added by the Inflation Reduction Act defines the term "applicable entity" to include any organization exempt from the tax imposed by subtitle A, any State or political subdivision thereof, the Tennessee Valley Authority, an Indian tribal government (as defined in section 30D(g)(9)), any Alaska Native Corporation (as defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m)), or any corporation operating on a cooperative basis which is engaged in furnishing electric energy to persons in rural areas. We believe these terms should be interpreted very broadly to provide for any business owned or controlled by one of the entities listed in 6417 (d)(1)(A) to be treated as an applicable entity eligible to make the §6417 election.

(6) With respect to the elections under § 6417(d)(1)(B), (C), or (D):

(a) What, if any, issues could arise when an entity makes an election under § 6417(d)(1)(B), (C), or (D) and what, if any, guidance is needed with respect to such issues?

The elective payment provisions under §6417 appear to require an applicable entity to either not make the election and use the tax credits to reduce its tax liability or to make the election for the entire amount of an applicable credit. In order to avoid penalties for underpayment of estimated taxes, a taxable entity making the election under § 6417(d)(1)(B), (C), or (D), would be forced to make estimated tax payments even if amount of the elective payment would more than offset the entity's tax liability. If the taxpayer was allowed to make an election for only a portion of the applicable credits, the credits not treated as an elective payment could eliminate the need for the taxpayer to make estimated payments without any penalties. If the Secretary of the Treasury doesn't have the authority to allow partial elections under §6417, the §6417 guidance should allow the value of the elective payment to reduce the amount of any underpayment of estimate taxes for purposes of computing the underpayment penalties.

(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?

Making the election for an elective payment should be as simple and as transparent as possible. For taxable entities, the guidance should provide for an election that can be attached to the entity's tax return by the due date, including extensions for filing the tax return. In addition, the guidance should make it clear that the amount of the elective payment must be paid within 90 days of the later of the date the return is filed or the date the tax return was due. For non-taxable applicable entities, the guidance should include a form that can be filed with supporting materials to show the amount of tax credits earned, make it clear the due date by which the form must be filed, and provide for the election to receive the elective payment.

(9) For purposes of preventing duplication, fraud, improper payments, or excessive payments under § 6417, what information, including any documentation created in or out of the ordinary course of business, or registration, should the IRS require as a condition of, and prior to, any amount being treated as a payment made by an applicable entity under § 6417(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required? Should the IRS require the same documentation or registration as a condition of, and prior to, any amount being treated as a payment made by both an applicable entity as well as a taxpayer who is treated as an applicable entity after making an election under § 6417(d)(1)(B), (C), or (D)? Should the IRS require the same documentation or registration for all applicable credits? If not, how should the information or registration differ between applicable credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive payments under § 6417?

The IRS and Treasury have already developed documents for the transfer of the §45Q tax credit: Form 8933 and the model certificates to report all of the information necessary to determine the amount of credits earned by the taxpayer, the amount transferred to a third party, and all information necessary to determine the party that is eligible to reduce its tax liability by the amount of those credits. Similar forms and model certificates should be developed for making the §6417 election to report the applicable credits determined with respect to the entity making the election that will be treated as an estimated tax payment rather than a tax credit on the entity's tax return or credit reporting form for those non-taxable entities.

.02 Transfer of Certain Credits (§ 6418).

(2) Section 6418(c)(1) provides that, in the case of any eligible credit determined with respect to any facility or property held directly by a partnership or S corporation, the Secretary determines the manner in which such partnership or S corporation makes an election under § 6418(a) with respect to such credit.

(a) What, if any, issues could arise when a partnership or S corporation makes an election under § 6418(a) and what, if any, guidance is needed with respect to such issues?

A partnership or S corporation may include partners/shareholders that are eligible taxpayers under §6418(f)(2)(a) and those that are applicable entities under §6417(d)(1)(a). The statutory language in §6418(a) makes it clear that an eligible taxpayer can make an election for the eligible credit that is determined with respect to that taxpayer. The guidance should make it clear that the partnership or S corporation is making a §6418 transfer on behalf of the partners/shareholders for the eligible credits that are determined with respect to the partners/shareholders that are eligible taxpayers. This treatment would allow eligible taxpayers to receive the benefits of the eligible credits through a partnership or S corporation in the same manner they would have received those credits if they owned the investment directly. In addition, this treatment would not prevent the partnership/S corporation from making the 6417 election on behalf of its applicable entity partners/shareholders and the 6418 transfer on behalf of it eligible taxpayer partners/shareholders.

> *(b) What factors should the Treasury Department and the IRS consider in determining the time and manner for making the election?*

Making the election should be as simple and as transparent as possible for eligible taxpayers to make the election and report the eligible credits earned by the taxpayer and transferred to a third party.

> *(8) For purposes of preventing duplication, fraud, improper payments, or excessive credit transfers under § 6418, what information, including any documentation created in or out of the ordinary course of business, or registration, should be required by the IRS as a condition of, prior to, or after any transfer of any portion of an eligible credit pursuant to § 6418(a)? What factors should the Treasury Department and the IRS consider as to when documentation or registration should be required? Should the IRS require the same documentation or registration for all eligible credits? If not, how should the information or registration differ between eligible credits? What other processes could be implemented by the IRS to prevent duplication, fraud, improper payments, or excessive credit transfers under § 6418?*

The IRS and Treasury have already developed documents for the transfer of the §45Q tax credit: Form 8933 and the model certificates to report all of the information necessary to determine the amount of credits earned by the taxpayer, the amount transferred to a third party, and all information necessary to determine the party that is eligible to reduce its tax liability by the amount of those credits. Similar forms and model certificates should be adopted for transferring these credits that would need to be filed by the taxpayer transferring the credits and the third party receiving those credits.

> *(12) Please provide comments on any other topics that may require guidance.*

With respect to the transferability rules under §6418, the guidance on these provisions should make it clear that a taxpayer that makes the §6417 election for the first five years of the §§ 45Q, 45V, or 45X credits would be allowed to make an election to transfer the credits under those sections for each of the remaining years in the credit window for those credits. In addition, if the taxpayer makes the election to terminate the previously made §6417 election, IRS should make it clear that transferability would be available for the year in which the revocation election is made and all subsequent years in the credit window.

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Thank you for the opportunity to provide comments on these important issues.

Sincerely,

Shannon Angielski

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Executive Director
Carbon Utilization Research Council