November 4, 2022

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

Filed electronically via the Federal eRulemaking Portal at **www.regulations.gov**

Re: Response to Notice 2022-50

Dear Sir or Madam:

The Energy Infrastructure Council (the "**EIC**") is pleased to submit this response to the request for comments in Notice 2022-50 regarding the elective payment provisions under section 6417 and the elective credit transfer provisions under section 6418 of the Internal Revenue Code ("**IRC**"), as amended by the Inflation Reduction Act (the "**IRA**").

The EIC is a non-profit trade association dedicated to advancing the interests of companies that develop and operate energy infrastructure in the United States. As such, the EIC addresses core public policy issues critical to investment in U.S. energy infrastructure. Our members are both public and private traditional and renewable energy infrastructure companies that ensure that energy from a wide variety of sources is delivered efficiently and safely from production facilities and fields to American homes, businesses, and communities.

The focus of this response is on the application of IRC sections 6417 and 6418 to the credit for carbon capture and sequestration in IRC section 45Q (the "**45Q credit**"). In addition, because the substantial progress that has been made on carbon capture projects since the promulgation of the final regulations under IRC section 45Q has identified further areas for which clarification would be helpful, this response includes a few requested clarifications regarding the existing guidance under IRC section 45Q.

We appreciate the request for comments made by the Internal Revenue Service (the "**IRS**") and U.S. Treasury Department (the "**Treasury**") in Notice 2022-50, and we welcome the clarifications that will be provided in forthcoming guidance.

1. SUMMARY OF RECOMMENDATIONS

The EIC requests clarifications on or consideration of the following:

(I) the application of IRC section 45Q(f)(3)(B) to:

(A) IRC section 6417 and clarification of which entities may elect to be treated as applicable entities for purposes of that section; and

(B) IRC section 6418 and clarification on the definition of eligible taxpayers for purposes of that section;

(II) whether a transferee of 45Q credits under IRC section 6418 may elect to be treated as an applicable entity under IRC section 6417(d)(1)(C);

(III) the implementation of a quarterly claim and credit process under IRC section 6417;

(IV) the application of IRC sections 6417 and 6418 to partnerships whose partners are in different postures with respect to qualification under those provisions—specifically:

(A) a partnership's ability to receive direct payments under IRC section 6417 if one or more of its partners are applicable entities and one or more of its partners are not; and

(B) a partnership's ability to transfer credits under IRC section 6418 if one or more of its partners are eligible taxpayers and one or more of its partners are not; and

(V) whether a special allocation under IRC section 704 of eligible 45Q credits (and other eligible credits) and tax-exempt income from the sale of eligible 45Q credits (and other eligible credits) pursuant to IRC section 6418 in any manner agreed to by partners in the partnership will be respected.

2. DISCUSSION

In Section 3 of Notice 2022-50, the Treasury and the IRS specifically request comments on questions arising from IRC sections 6417 and 6418, as added by the IRA, that should be addressed in guidance. In response to such request, the EIC presents the following:

I. Application of IRC Section 45Q(f)(3)(B)

A. To IRC Section 6417

In Section 3.01(5)(a), Notice 2022-50 asks what, if any, guidance is needed to clarify which taxpayers may elect to be treated as applicable entities under IRC section 6417(d)(1)(C) for purposes of IRC section 6417.

IRC section 6417 provides that taxpayers have the option – commonly referred to as "**direct pay**" – to elect to have their 45Q credits treated as overpayments of tax for up to five tax years, subject to certain significant restrictions. Taxpayers which are "applicable entities" may elect for direct pay

for the full 45Q credit period. IRC section 45Q(f)(3)(B) provides that the taxpayer to which the 45Q credit is originally attributable may elect to allow the taxpayer that disposes of the qualified carbon oxide, utilizes the qualified carbon oxide, or injects the qualified carbon oxide as a tertiary injectant to instead claim the 45Q credit. It has not been addressed whether the recipient of 45Q credits pursuant to the election in IRC section 45Q(f)(3)(B) would be eligible to elect direct pay under IRC section 6417.

We believe that the recipient of 45Q credits under an IRC section 45Q(f)(3)(B) election should be treated as the original taxpayer of the 45Q credits and thus should have the ability to elect direct pay under IRC section 6417 (subject to any time based or other restrictions set forth in IRC section 6417). The IRC section 45Q(f)(3)(B) election is meant to provide flexibility and maximize transactional efficiency. IRC section 45Q(f)(3)(B) also makes clear that the taxpayer which is transferred the credit is the original credit claimant (*i.e.*, the electing taxpayer no longer has any claim to such credits). Prohibiting a credit claimant which receives credits under an IRC section 45Q(f)(3)(B) election from electing direct pay would undermine the purpose of the IRC section 45Q(f)(3)(B) election and the underlying policy reasons for allowing a direct pay election for 45Q credits.

B. To IRC Section 6418

In Section 3.02(1), Notice 2022-50 asks what, if any, guidance is needed to clarify the meaning of certain terms, such as "eligible taxpayer," in IRC section 6418.

IRC section 6418 provides that eligible taxpayers have the option to transfer their 45Q credits to unrelated taxpayers. IRC section 45Q(f)(3)(B) provides that the taxpayer to which the 45Q credit is originally attributable may elect to allow the taxpayer that disposes of the qualified carbon oxide, utilizes the qualified carbon oxide, or injects the qualified carbon oxide as a tertiary injectant to instead claim the 45Q credit. It has not be addressed whether the recipient of 45Q credits pursuant to the election in IRC section 45Q(f)(3)(B) would be eligible to transfer such 45Q credits under IRC section 6418.

For the same reasons as outlined in Section I.A above, we believe that the recipient of 45Q credits under an IRC section 45Q(f)(3)(B) election should be entitled to transfer such 45Q credits under IRC section 6418 (subject to the restrictions set forth in IRC section 6418).

II. Transferee's Ability to Elect Direct Pay

In Section 3.01(5)(a), Notice 2022-50 asks what, if any, guidance is needed to clarify which taxpayers may elect to be treated as applicable entities under IRC section 6417(d)(1)(C) for purposes of IRC section 6417.

IRC section 6417 provides that applicable entities have the option to elect direct pay (subject to the restrictions described therein), and IRC section 6418 provides that certain taxpayers have the option to transfer tax credits that they are otherwise entitled to.

The IRA included no restrictions on the ability of transferee taxpayers which received credits under IRC section 6418 to elect for direct pay if they are otherwise applicable entities and would be

entitled to do so. Moreover, IRC section 6418 provides that a transferee taxpayer should be treated as "the taxpayer" with respect to such credits for all purposes.

As such, we believe that the transferee of 45Q credits pursuant to an IRC section 6418 transfer should be entitled to elect direct pay under IRC section 6417 if they would otherwise be entitled to elect direct pay under IRC section 6417 (subject to any time based or other restrictions set forth in IRC section 6417). Said another way, applicable entities should be entitled to utilize the monetization strategy granted to such entities under IRC section 6417 without additional limitations or restrictions not explicitly laid out therein.

III. Direct Pay Timing Alternatives

In Section 3.01(6)(a), Notice 2022-50 asks what, if any, issues could arise when an entity makes an election under IRC section 6417(d)(1)(C) and what, if any, guidance is needed with respect to such issues.

Direct pay under IRC section 6417 provides applicable entities a new means to monetize 45Q credits, subject to certain significant restrictions. While the ability to monetize 100% of the 45Q credits in this manner is a game-changer for applicable entities and has the potential to allow such entities to participate in clean and renewable transactions and projects in a meaningful way, there are concerns regarding the timing of payments by the Treasury of the deemed tax overpayments created with a direct pay election. Specifically, we are concerned that a refund relating to a direct pay election could be significantly delayed beyond the time in which the relevant facility is originally placed in service and/or credits are generated (e.g., 45Q credits for qualified carbon oxide sequestered which are generated beginning in January 2024 would be claimed on the 2024 tax return which is likely filed in the fall of 2025 and direct payment on those 45Q credits could potentially not be received until sometime in 2026).

To address these concerns, maximize financing options, and prevent perverse incentives (e.g., artificially delaying the date on which a facility is placed in service), we would like to request the implementation of a quarterly direct pay claim and payment process. Such a system could borrow from the Tentative Refund claim process under IRS Form 1139, which was adopted with the same goal of expediting overpayments to taxpayers. Under that process, the tradeoff for taxpayers' more timely receipt of payments could be the IRS's ability to recover those amounts as computational errors in the event it is determined that the amounts were excessive. Further, we would like to request this process be elective so that any taxpayers who would prefer certainty over expediency would have that option.

IV. Treatment of Partnerships with Applicable Entity Partners

A. Under IRC Section 6417

In Section 3.01(4)(a), Notice 2022-50 asks what, if any, issues could arise when a partnership or S corporation makes an election under IRC section 6417(a) and what, if any, guidance is needed with respect to such issues.

IRC section 6417 provides that applicable entities have the option to elect direct pay. An applicable entity is generally defined as a tax-exempt entity, State or local government; the Tennessee Valley Authority; and Indian Tribal Government; or Alaska Native Corporation.

The definition of applicable entities under IRC section 6417, however, does not address the treatment of a partnership that is not itself an applicable entity, but which has partners that are applicable entities. Clarity around the treatment of these partnerships is of particular importance as many applicable entities chose to partner with non-applicable entities in investment and development of credit generating projects. As a general matter, applicable entities may not have the expertise or resources to own such projects outright, and the ability to partner is key to their meaningful participation in the energy transition.

We believe that such partnerships (and their applicable entity partners) should not be unduly disadvantaged merely because the partnership itself it not an applicable entity or is not 100% owned by applicable entities. Guidance is needed in this area in order to provide such partnerships, and their partners, the certainty required to move forward with development and investment in the manner intended by the IRA.

To that end, we believe that there are at least three approaches Treasury should consider: (i) partnerships which are majority owned or controlled (as might be defined by IRC section 707(b)) by applicable entities should be treated as an applicable entity itself under IRC section 6417 (*i.e.*, such partnership would be entitled to elect for direct pay with respect to 100% of the credit it is entitled to), (ii) partnerships with applicable entity partners may be treated as applicable entities in proportion to its applicable entity ownership for the taxable year in which the credit is generated (e.g., for production based credits such as 45Q credits) or when the underlying facility is placed in service (e.g., for investment based credits), or (iii) alternatively, partnerships that are not owned 100% by applicable entities may be ineligible to make an election under IRC section 6417 but should have the full credit available to transfer under IRC section 6418. Given the clear intent of the IRA to provide preferential treatment to applicable entities in IRC section 6417 and to provide a pathway for their investment in, and development of, clean and renewable projects, it is our opinion that the first and second options are most consistent with Congressional intent (but we offer the third for completeness as a way to, at minimum, provide certainty for transactions to move forward).

B. Under IRC Section 6418

In Section 3.02(2)(a), Notice 2022-50 asks what, if any, issues could arise when a partnership or S corporation makes an election under IRC section 6418(a) and what, if any, guidance is needed with respect to such issues.

IRC section 6418 provides that eligible taxpayers have the option to transfer all (or a portion of) eligible 45Q credits to an unrelated taxpayer. Eligible taxpayers are defined as taxpayers which are not applicable entities under IRC section 6417.

However, it has not been addressed whether partnerships with both partners that constitute eligible taxpayers for purposes of IRC section 6418(a) and partners that do not constitute eligible taxpayers for purposes of IRC section 6418(a) have the ability to transfer credits under IRC section 6418. We believe that such partnerships (and their eligible taxpayer partners) should not be unduly disadvantaged merely because the partnership itself is not an eligible taxpayer or is not 100% owned

by eligible taxpayers. In other words, ownership by an applicable entity should not prevent a partnership from being entitled to transfer a credit under IRC section 6418.

As such, similar to the options described in Section IV.A, we suggest the following options for consideration: (i) partnerships which are majority owned or controlled (as might be defined by IRC section 707(b)) by eligible taxpayers should be treated as an eligible taxpayer itself under IRC section 6417 (*i.e.*, such partnership would be entitled to elect transfer 100% of the credit it is entitled to) or (ii) partnerships with eligible taxpayer partners may be treated as eligible taxpayers in proportion to its eligible taxpayer ownership for the taxable year in which the credit is generated (e.g., for production based credits such as 45Q credits) or when the underlying facility is placed in service (e.g., for investment based credits). We note that there is no policy reason to prevent a partnership that is not 100% owned by eligible taxpayers to be able to transfer 100% of the credit it is otherwise entitled to (subject to the restrictions therein) – as such, Treasury may consider granting partnerships with less than 100% ownership by applicable entity partners to be entitled to transfer 100% of the credit it is otherwise entitled to.

V. Special Allocations of 45Q Credits

In Section 3.02(2)(a), Notice 2022-50 asks what, if any, issues could arise when a partnership or S corporation makes an election under IRC section 6418(a) and what, if any, guidance is needed with respect to such issues.

IRC section 6418 provides that eligible taxpayers have the option to transfer all (or a portion of) eligible 45Q credits to an unrelated taxpayer. This new monetization strategy is clearly intended to grant taxpayers additional flexibility in the financing and development of investments and projects which generate eligible credits, as defined by IRC section 6418. Given the ability of eligible taxpayers to transfer 100% of eligible 45Q credits to an unrelated taxpayer, there is no reason to impose restrictions on the manner in which such credits (which are not transferred under IRC section 6418) are allocated among a partnership's partners. In other words, if a partnership can freely transfer all (or a portion) of eligible 45Q credits to an unrelated taxpayer, there is no reason such partnership should be limited in its ability to allocate such credits to its partners (whether related or not).

As such, we would suggest Treasury amend Treasury Regulations section 1.704-1(b)(4)(ii) to permit special allocations of (i) eligible 45Q credits (and other eligible credits) and (ii) tax-exempt income from the sale of eligible 45Q credits (and other eligible credits) pursuant to IRC section 6418, in any manner agreed to by the partners in the partnership. This should apply regardless of whether an IRC section 6418 transfer occurs with respect to all or any portion of a partnership's eligible credits (*i.e.*, if no eligible credits are transferred, 100% of such credits could be specially allocated in any manner agreed to by the partners, or, if less than 100% of eligible credits are transferred, the remaining portion of such credits could be specially allocated in any manner agreed to by the partners).

As it is often the case that a partnership may have a partner (or partners) with the tax capacity to utilize 45Q credits and another partner (or partners) without the tax capacity to utilize 45Q credits (or other eligible credits), this would offer partnerships a more efficient way to monetize tax credits. Without this ability, partnerships may be incentivized to transfer the credits generated pursuant to IRC section 6418 at a discount even when a partner in the partnership could utilize such credits if a special allocation was permitted (*i.e.*, an inefficient use of taxpayer dollars may be the most commercially viable option). Moreover, we believe the aforementioned suggested revisions to

Treasury Regulations section 1.704-1(b)(4)(ii) are consistent with the clear Congressional intent to permit flexibility in credit monetization.

Alternatively, we would request that Treasury consider whether a partnership may be deemed to transfer eligible credits on behalf of a partner and that such transfer would be deemed to only impact the eligible credits that would have otherwise been allocated to such partner. For example, in many tax equity partnerships, consistent with IRS safe harbors, the tax equity investor is allocated 99% of eligible credits and the sponsor is allocated 1%. Partnerships should be entitled to elect to transfer the 1% that would have been allocated to sponsor if not transferred, without disturbing the 99% that is allocated to the tax equity investor, and Treasury should clarify that the allocation of 99% of eligible credits to the tax equity investor would be respected under IRC section 704 and would not be in conflict with prior IRS safe harbors, notwithstanding that sponsor's 1% share was transferred by the partnership (instead of allocated to the sponsor).

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We appreciate the opportunity to offer comments in response to Notice 2022-50. If you have questions, please do not hesitate to contact Lori Ziebart at Lori@eic.energy or 202-747-6570.

Sincerely,

Lori E. L. Ziebart
President & CEO
Energy Infrastructure Council