

Part III – Administrative, Procedural, and Miscellaneous

Statutory Exceptions to Phaseout Reducing Elective Payment Amounts for Applicable Entities if Domestic Content Requirements are Not Satisfied

Notice 2024-9

SECTION 1. PURPOSE

The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to propose regulations (forthcoming proposed regulations) addressing the process by which the Secretary of the Treasury or her delegate (Secretary) will implement the statutorily-required exceptions to the phaseouts under §§ 45(b)(10), 45Y(g)(12), 48(a)(13), and 48E(d)(5) of the Internal Revenue Code (Code).¹ Such phaseouts apply to credits determined under § 45, 45Y, 48, or 48E with respect to property placed in service by an applicable entity, as defined in § 6417(d)(1)(A) (Applicable Entity), making an elective payment election under § 6417 with respect to such credits if the property does not satisfy the domestic content requirements under those provisions of the Code (Statutory Elective Payment Phaseouts). If the Statutory Elective Payment Phaseouts apply, the amount of an elective payment received by an Applicable Entity making an election under § 6417 with

¹ Unless otherwise specified, all “section” or “§” references are to sections of the Code.

respect to such property is reduced.

This notice provides transitional procedures for taxpayers to claim the statutory exceptions to the application of the Statutory Elective Payment Phaseouts for Applicable Entities making an election under § 6417 with respect to Applicable Credit Property (that is, qualified facilities under §§ 45 and 45Y, energy projects under § 48, or qualified investments in qualified facilities or energy storage technologies under § 48E), but only if the construction of the Applicable Credit Property begins before January 1, 2025. The Treasury Department and the IRS will treat an attestation, described in section 5.02, provided by an Applicable Entity, as establishing that one or both statutory exceptions to the application of the Statutory Elective Payment Phaseouts are met with respect to Applicable Credit Property the construction of which begins before January 1, 2025. This notice also requests comments to inform the development of the forthcoming proposed regulations regarding the process by which the statutorily-required exceptions will be provided to the Statutory Elective Payment Phaseouts for Applicable Entities making an election under § 6417 with respect to Applicable Credit Property the construction of which begins on or after January 1, 2025.

SECTION 2. BACKGROUND

.01 Domestic Content Bonus Credit Amounts and Steel, Iron, or Manufactured Products. Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA), amends §§ 45 and 48, in part, to provide rules that taxpayers must satisfy to receive bonus credit amounts for satisfying domestic content requirements with respect to steel, iron, and manufactured products with respect to qualified facilities and energy projects placed in service after December 31,

2022. The IRA also adds new § 45Y and new § 48E, which provide similar rules for domestic content bonus credit amounts with respect to qualified facilities, and qualified investments in qualified facilities or energy storage technologies, placed in service after December 31, 2024. On May 12, 2023, the Treasury Department and the IRS released Notice 2023-38, 2023-22 I.R.B. 872, which states that the Treasury Department and the IRS intend to propose regulations to address the application of the rules that taxpayers must satisfy to qualify for the domestic content bonus credit amounts under §§ 45, 45Y, 48, and 48E. Taxpayers may rely on Notice 2023-38 for the domestic content bonus credit requirements for any qualified facility, energy project, or qualified investment with respect to a qualified facility or energy storage technology the construction of which begins before the date that is 90 days after the date of publication of the forthcoming proposed regulations on the domestic content bonus credit requirements in the *Federal Register*.

.02 Statutory Elective Payment Phaseouts and Exceptions. Section 45(b)(10), as amended by the IRA, provides the Statutory Elective Payment Phaseouts with respect to the credit determined under § 45 (§ 45 credit). Section 45(b)(10)(A) provides that in the case of a taxpayer making an election under § 6417 with respect to a § 45 credit, the amount of such credit will be replaced with the value of such credit (determined without regard to § 45(b)(10)), multiplied by the applicable percentage. Section 45(b)(10)(B) provides that in the case of any qualified facility (1) that satisfies the requirements under § 45(b)(9)(B) (that is, the domestic content bonus credit requirements as set forth in Notice 2023-38 or other forthcoming guidance), or (2) with a maximum net output of less than 1 megawatt (as measured in alternating current), the

applicable percentage is 100 percent. Section 45(b)(10)(C) states that subject to the exceptions in § 45(b)(10)(D), for any qualified facility that is not described in § 45(b)(10)(B), the applicable percentage is (1) 100 percent if construction of such facility begins before January 1, 2024, and (2) 90 percent if construction of such facility begins in calendar year 2024.

Section 45(b)(10)(D)(i) directs the Secretary to provide exceptions to the requirements under § 45(b)(10) if: (1) the inclusion of steel, iron, or manufactured products that are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent (Increased Cost Exception), or (2) relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (Non-Availability Exception). Section 45(b)(10)(D)(ii) provides that in any case in which the Secretary provides an exception pursuant to § 45(b)(10)(D)(i), the applicable percentage is 100 percent. The Increased Cost Exception and the Non-Availability Exception are collectively referred to as the Domestic Content Exceptions in this notice.

Section 48(a)(13), as amended by the IRA, and §§ 45Y(g)(12) and 48E(d)(5), as added by the IRA, provide the Statutory Elective Payment Phaseout rules and Domestic Content Exceptions for credits determined under those Code sections, which are similar to the rules and exceptions provided under § 45(b)(10).²

SECTION 3. REQUEST FOR COMMENTS

On October 5, 2022, the Treasury Department and the IRS released Notice

² For purposes of §§ 45Y(g)(12) and 48E(d)(5), the applicable percentages are the same as §§ 45 and 48 for qualified facilities or qualified investments with respect to a qualified facility or energy storage technology that begin construction in 2024 or earlier, but the applicable percentage decreases to 85 percent for construction beginning in 2025, and to 0 percent for construction beginning after 2025.

2022-51, 2022-43 I.R.B. 331, requesting comments on aspects of the increased credit amount provisions enacted by the IRA, including comments regarding the Statutory Elective Payment Phaseouts under §§ 45, 45Y, 48, and 48E. The Treasury Department and the IRS now request additional comments to inform the development of the forthcoming proposed regulations. In addition to general comments, the Treasury Department and the IRS request comments that address the following specific questions:

(1) For purposes of the Increased Cost Exception, what factors should be considered in defining the term “overall costs of construction”? For purposes of the Non-Availability Exception, what factors should be considered in defining the terms “sufficient and reasonably available quantities” or “satisfactory quality”?

(a) Are there existing factors or procedures under other federal programs with different statutory requirements, such as under the Federal Transit Administration’s Buy America requirements or the Build America Buy America Act, that Treasury and the IRS should consider in providing guidance on the Increased Cost Exception and the Non-Availability Exception?

(b) Are there factors or procedures under other federal programs that should *not apply* for the purpose of the Increased Cost Exception and the Non-Availability Exception, including for reasons related to different statutory requirements and administrative feasibility?

(c) Are there alternative approaches that could be adopted by the Secretary to allow domestic manufacturers to identify the availability of domestic steel, iron, or manufactured products that may be relevant to the Domestic Content Exceptions?

(2) What documentation or other substantiation should be required of Applicable Entities to qualify for the Increased Cost Exception?

(3) What documentation or other substantiation should be required of Applicable Entities to establish that relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality to qualify for the Non-Availability Exception?

(4) For purposes of the Non-Availability Exception, what factors should be considered “relevant” in defining the term “relevant steel, iron, or manufactured products”?

(5) How, if at all, should both the Increased Cost Exception and Non-Availability Exception take into account that not all manufactured products must be mined, produced, or manufactured in the United States in order to meet the domestic content bonus credit requirements?

(6) What steps should be taken, if any, in implementing the Domestic Content Exceptions to reduce the burden on Applicable Entities? For example, how can the Secretary identify certain steel, iron, or manufactured products that are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality and what process and criteria could be used?

(7) How many Applicable Credit Properties are expected to be affected by the phaseout of elective payments each year but for the exceptions process, and what are relevant characteristics of such facilities, projects, or technologies (for example, size or other factors) to consider in developing an exceptions process?

(8) What solicitation processes are used by Applicable Entities with respect to qualified facilities or energy projects that have a maximum net output of 1 megawatt or greater and how might this affect their ability to source domestic products or determine these products would qualify for the Non-Availability Exception or Increased Cost Exception? Do these solicitation processes provide cost, product origin, and/or product availability information? If Applicable Entities use a request for proposal (RFP) or similar solicitation process with respect to qualified facilities or energy projects that have a maximum net output of 1 megawatt or greater:

(a) Is it common for a respondent's proposal to specify whether the steel, iron, or manufactured products that are applicable project components are produced in the United States?

(b) What is the range of cost information provided in the proposal and is it auditable?

(c) Besides bids that are submitted in response to an RFP, could Applicable Entities provide other documentation or information to demonstrate that the applicable project components are not produced in the United States, or are not produced sufficiently or satisfactorily in the United States, or that including applicable project components produced in the United States increases costs by at least a specified percentage?

(d) Who is involved in the procurement process? Do developers or installers contracted through the RFP handle the procurement process for Applicable Entities?

SECTION 4. SUBMISSION OF COMMENTS

Written comments should be submitted by February 26, 2024. The subject line for

the comments should include a reference to Notice 2024-9. Comments may be submitted electronically via the Federal eRulemaking Portal at <https://www.regulations.gov> (type IRS-2023-0062 in the search field on the regulations.gov homepage to find this notice and submit comments). Alternatively, comments may be submitted by mail to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2024-9), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. All commenters are strongly encouraged to submit comments electronically. The Treasury Department and the IRS will publish for public availability any comment submitted electronically, or on paper, to the IRS's public docket on regulations.gov.

SECTION 5. TRANSITION PROCESS FOR CLAIMING THE STATUTORY EXCEPTION TO THE ELECTIVE PAYMENT PHASEOUTS

.01 Exception for Eligible Construction. If an Applicable Entity provides an attestation described in section 5.02 of this notice with respect to an Applicable Credit Property the construction of which begins before January 1, 2025 (Eligible Construction), the Treasury Department and the IRS will treat the attestation as establishing that a Domestic Content Exception is met with respect to such Applicable Credit Property.

.02 Attestation. An attestation is described in this section 5.02 if an Applicable Entity attests, under penalties of perjury, that it has reviewed the requirements for the Increased Cost Exception and the Non-Availability Exception provided under §§ 45(b)(10)(D), 48(a)(13), 45Y(g)(12)(D), or 48E(d)(5), as applicable, and has made a good faith determination that the qualified facility, energy project, or qualified investment with respect to a qualified facility or energy storage technology, as applicable, qualifies for either the Increased Cost Exception or the Non-Availability Exception, or both. The

attestation described in this section 5.02 must be signed by a person with the legal authority to bind the Applicable Entity in federal tax matters and must be attached to a Form 8835, *Renewable Electricity Product Credit*; Form 3468, *Investment Credit*; or other applicable form required to be filed by the Applicable Entity to make an elective payment election under § 6417.

.03 Recordkeeping. An Applicable Entity providing an attestation described in section 5.02 of this notice must meet the general recordkeeping requirements under § 6001 and the regulations thereunder to substantiate its attestation.

SECTION 6. PAPERWORK REDUCTION ACT

Any collection burden associated with this notice is accounted for in Office of Management and Budget (OMB) control numbers 1545-0123 and 1545-0047. The collection of information (the attestation detailed in section 5 of this notice) is associated with the IRA-related changes to Form 3468 and Form 8835 and is approved, and will continue to be approved, under OMB control numbers 1545-0123 and 1545-0047. The IRS will use this attestation to allow exceptions to the phaseout of elective payments. This notice does not alter any previously approved information collection requirements and does not create new collection requirements not already approved by OMB.

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is the Office of Associate Chief Counsel (Passthroughs & Special Industries). However, other personnel from the Treasury Department and the IRS participated in its development. For further information regarding this notice, call the energy security guidance contact number at (202) 317-5254 (not a toll-free call).