

BCSE Comments on Proposed Regulations Related to Elective Payment of Applicable Tax Credits under the Inflation Reduction Act

August 14, 2023

Thank you for the opportunity for the Business Council for Sustainable Energy (BCSE) to provide its views in response to REG-101607-23, Request for Comments on the proposed regulations related to Section 6417, Elective Payment of Applicable Credits.

The Council appreciates the work of the staff at the Department of the Treasury (Treasury) and Internal Revenue Service (IRS) to issue the proposed regulations and prioritize guidance that will maximize public benefit via the use of both the elective payment regime and the transferability regime to propel investment in clean energy projects as provided in the Inflation Reduction Act of 2022 (IRA).¹

The BCSE advocates for energy and environmental policies that promote markets for clean, efficient, and sustainable energy products and services. Since its founding in 1992, BCSE has been focused on policy adoption that will increase the deployment of energy efficiency, natural gas, renewable energy, as well as energy storage, sustainable transportation, and emerging decarbonization technologies. As a diverse coalition, not all BCSE members take a position or endorse the issues discussed in this submission.

BCSE would like to acknowledge the submissions made in response to this request provided by the Large Public Power Council, Metrus Energy and the National Hydropower Association. BCSE encourages the thoughtful consideration of the issues and recommendations included in these submissions.

Release Domestic Content Guidance for Elective Pay for Public Comment and Finalize Rules

Under the IRA, a domestic content bonus is available for certain applicable Production Credits for renewable electricity (§§ 45, 45Y) and Investment Credits for renewable energy (§§ 48, 48E).

It applies to facilities or projects built using the required amounts of domestically produced steel or iron, and manufactured products. When the domestic content requirements are met, Production Tax Credit facilities receive a 10 percent bonus, and Investment Tax Credit projects receive up to a 10-percentage point bonus.

Importantly, starting in 2024, for an applicable entity using elective pay, the domestic content requirement can also result in a reduction of the applicable credit amount (for sections 45, 45Y, 48, and 48E) if it is not met.²

¹ Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (August 16, 2022) (codified as amended in scattered sections across multiple U.S.C. titles).

² Please see: <https://www.irs.gov/pub/irs-drop/n-23-38.pdf>



BCSE supports the intent of the IRA law regarding improving domestic manufacturing and enhancing the security of critical supply chains. BCSE members seek clear guidance in a timely manner that will allow for efficient implementation.

The Treasury Department and IRS released [IRS Notice 2023-38](#) (Notice) on May 12, 2023, providing interim guidance on domestic content requirements under IRA. Understanding that Treasury and the IRS did not establish a public comment period for the Notice, BCSE has submitted a letter sharing feedback on the interim guidance for consideration. Please see the [link to the letter here](#). Further, the Notice did not specifically address whether this guidance would apply to entities seeking to utilize elective pay.

This lack of clarity and specific guidance is creating confusion and may jeopardize important investments. Several areas of clarification are needed, including the specific timelines and procedures for the pre-registration and approval processes and requesting waivers, among others.

BCSE urges Treasury and the IRS to release guidance for comment on domestic content as it relates to elective pay and transferability as soon as possible. This is especially urgent as the rules on domestic guidance will impact applicable entities utilizing direct pay as of January 1, 2024.

Reasonable Timeframes are Needed for Applicable Entities to Make Elective Payment Elections

With the enactment of IRA, applicable entities are currently and will continue to invest in a variety of clean energy technologies and facilities over the next decade. As such, applicable entities will need to have confidence in how to make an elective payment election as well as certainty on the amount of the elective payment. BCSE recommends that the Treasury Department provide transparent and reasonable timeframes for when an applicable entity will receive its pre-filing registration number(s) for its inclusion in its Annual Tax Return and to specify timeframes in which an applicable entity will receive its elective payment. Uncertainty in these key milestones may significantly delay or even cancel investments in clean energy technologies and facilities.

Domestic Content Requirements May Limit Use of Elective Pay

As noted above, the proposed regulation places a separate hurdle for tax exempt entities that should be reconsidered. Elective pay in the IRA allows tax exempt entities to benefit from the incentives in the IRA, under certain conditions. For these entities, compliance with domestic content rules is not an elective exercise performed for the purposes of obtaining a bonus credit, but rather a requirement for the purposes of elective pay.

Failure to demonstrate compliance with domestic content rules will result in these entities losing a portion of their incentives until January 1, 2026, when such a failure would result in losing 100% of the amount.



This requirement and schedule of implementation may create administrative burdens on these entities and would inhibit their ability to access the credit.

Clarify Elective Pay and Transferability for Non-Project Owners in Limited Circumstances

Under IRA, Congress provided that under both the elective pay and transferability regimes, the tax credit must be “determined with respect to” the eligible entity (i.e., the entity owning or doing the renewable energy activity).

However, in contrast, the proposed regulations include the requirement that the entity claiming direct pay “own[] the underlying eligible credit property or ... otherwise conduct[] the activities giving rise to the underlying eligible credit.”

BCSE recommends that the final regulations maintain the requirements in the statute and, in certain circumstances, allow entities that are conducting the activity to be able to claim elective pay.

To ensure that the benefits of elective pay are directed at the applicable entity, BCSE recommends the final regulations be interpreted to allow an applicable entity to transfer elective credits to other entities for them to chain an election or make an elective payment. Chaining should be permissible when the applicable entity is undertaking behind the meter projects (e.g., a solar project for a college or hospital), where the projects are located on the premise of the applicable entity and that are designed for use by that entity.

BCSE appreciates the opportunity to share its views in response to the request for comments on the proposed regulations related to the utilization of elective pay for applicable tax credits.

Please do not hesitate to contact BCSE President, [Lisa Jacobson](#) with any questions. Thank you for your consideration.