



441 G St. N.W.
Washington, DC 20548

B-336120

March 25, 2024

The Honorable Ron Wyden
Chairman
The Honorable Mike Crapo
Ranking Member
Committee on Finance
United States Senate

The Honorable Jason Smith
Chairman
The Honorable Richard Neal
Ranking Member
Committee on Ways and Means
House of Representatives

Subject: *Department of the Treasury, Internal Revenue Service: Elective Payment of Applicable Credits*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of the Treasury, Internal Revenue Service (IRS) entitled “Elective Payment of Applicable Credits” (RIN: 1545-BQ63). We received the rule on March 7, 2024. It was published in the *Federal Register* as final regulations and removal of temporary regulations on March 11, 2024. 89 Fed. Reg. 17546. The effective date is May 10, 2024.

According to IRS, this final rule concerns the election under the Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022), to treat the amount of certain tax credits as a payment of federal income tax. IRS explained that the regulations describe rules for the elective payment of these credit amounts in a taxable year, including definitions and special rules applicable to partnerships and S corporations and regarding repayment of excessive payments. Additionally, IRS stated that the regulations describe rules related to a required IRS pre-filing registration process. IRS noted that these regulations affect tax-exempt organizations, state and local government, Indian tribal governments, Alaska Native Corporations, the Tennessee Valley Authority, rural electric cooperatives, and, in the case of three of these credits, certain taxpayers eligible to elect the elective payment of credit amounts in a taxable year.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The rule was published in the *Federal Register* on March 11, 2024. 89 Fed. Reg. 17546. The rule was received by the House of Representatives on March 15, 2024. 170 Cong. Rec. EC3549 (daily ed. Mar. 22, 2024). The rule was received by the Senate on March 19, 2024. 170 Cong. Rec. EC3799 (daily ed. Mar. 20, 2024). The rule

has a stated effective date of May 10, 2024. Therefore, based on the date of congressional receipt, the final rule does not have the required 60-day delay in its effective date.

Enclosed is our assessment of IRS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Shari Brewster, Assistant General Counsel, at (202) 512-6398.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive, flowing style.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Oluwafunmilayo A. Taylor
Chief, Publications and Regulations
Internal Revenue Service

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
ENTITLED
“ELECTIVE PAYMENT OF APPLICABLE CREDITS”
(RIN: 1545-BQ63)

(i) Cost-benefit analysis

In this final rule, the Department of the Treasury, Internal Revenue Service (IRS) included a statement discussing the impact of the rule. According to IRS, this final rule provides rules for how taxpayers can take advantage of the section 6417¹ credit monetization regime. IRS explained that taxpayers who elect to take advantage of section 6417 will have administrative costs related to reading and understanding the rules as well as recordkeeping and reporting requirements because of the pre-filing registration and tax return requirements. IRS also stated that the costs will vary across different-sized entities and across the type of project(s) in which such entities are engaged.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

IRS prepared a Final Regulatory Flexibility Analysis. The analysis included (1) a statement of the need for and objectives of the rule, (2) a description of significant issues raised by public comments, (3) a description of the small entities subject to the rule, (4) a description of the impact of the rule, (5) a discussion of alternatives considered, and (6) a statement that the rule does not duplicate, overlap, or conflict with any relevant federal rules.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

IRS determined that this final rule does not include any federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of the threshold under the Act.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the

¹ This final rule amends the Income Tax Regulations (26 C.F.R. part 1) and the Procedure and Administration Regulations (26 C.F.R. part 301) to implement the statutory provisions of section 6417 of the Internal Revenue Code (Code), as enacted by section 13801(a) of Public Law 117-169, 136 Stat. 1818, 2003 (Aug. 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA).

Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act's exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act's requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act" in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

IRS did not discuss the Administrative Pay-As-You-Go Act of 2023 in the rule or in its submission to us.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

On June 21, 2023, IRS published a proposed rule. 88 Fed. Reg. 40528. According to IRS, the Treasury Department and IRS received 151 written comments in response to the proposed regulations. IRS noted that the comments are available for public inspection at www.regulations.gov or upon request. Additionally, IRS explained that a hearing was conducted in person and telephonically on August 21, 2023, during which 10 presenters provided comments. IRS responded to comments in this final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

IRS determined that this final rule contains information collection requirements under the Act. According to IRS, the recordkeeping requirements mentioned within the rule are considered general tax records under section 1.6001-1(e) of title 26, *Code of Federal Regulations*. According to IRS, these records are required for IRS to validate that taxpayers have met the regulatory requirements and are entitled to make an elective payment election. For purposes of the Act, IRS stated that general tax records are already approved by OMB under OMB Control Number 1545-0047 for tax-exempt organizations and government entities; OMB Control Number 1545-0074 for individuals; and under OMB Control Number 1545-0123 for business entities.

Additionally, IRS stated that the rule mentions reporting requirements related to making elections as detailed in sections 1.6417-2 and 1.6417-3 of title 26, *Code of Federal Regulations*, and calculating the claim amounts as detailed in sections 1.6417-2 and 1.6417-4, title 26, *Code of Federal Regulations*. IRS noted that that these elections will be made by taxpayers on Forms 990-T, 1040, 1120-S, 1065, and 1120; and credit calculations will be made on Form 3800 and supporting forms. According to IRS, these forms are approved by OMB under OMB Control Number 1545-0047 for tax-exempt organizations and governmental entities; OMB Control Number 1545-0074 for individuals; and OMB Control Number 1545-0123 for business entities.

IRS explained that the rule also mentions recapture procedures as detailed in section 1.6417-6 of title 26, *Code of Federal Regulations*. According to IRS, these recaptures are performed using Form 4255. IRS stated that this form is approved by OMB under OMB Control Number

1545-0047 for tax-exempt organizations and governmental entities; OMB Control Number 1545-0074 for individuals; and OMB Control Number 1545-0123 for business entities. IRS noted that the rule is not changing or creating new collection requirements not already approved by OMB. Additionally, the rule mentions a requirement to register with IRS to be able to elect payments as detailed in section 1.6417-5 of title 26, *Code of Federal Regulations*. IRS stated that the pre-filing registration portal is approved by OMB under OMB Control Number 1545-2310 for all filers.

IRS stated that it solicited feedback on the collection requirements for reporting, recordkeeping, and pre-filing registration. Although no public comments received by IRS were directed specifically at the Act or on the collection requirements, IRS noted that several commenters generally expressed concerns about the burdens associated with the documentation requirements contained in the proposed regulations. In response, IRS stated its belief that the documentation requirements are necessary to administer the elective payment election under section 6417 of title 26, United States Code.

Statutory authorization for the rule

IRS promulgated this final rule pursuant to sections 6417(h) and 7805 of title 26, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

According to IRS, pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by IRS are not subject to the requirements of section 6(b) of the Order. Therefore, IRS determined a regulatory impact assessment is not required for the rule.

Executive Order No. 13132 (Federalism)

IRS determined that this final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Order.