



441 G St. N.W.
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B-336118

March 26, 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 Advanced Manufacturing Investment Credit*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the U.S. Department of the Treasury, Internal Revenue Service (IRS) titled “Elective Payment of Advanced Manufacturing Investment Credit” (RIN: 1545-BQ75). 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. 17596. The stated effective date is May 10, 2024.

According to IRS, this final rule contains final regulations concerning the elective payment election of the advanced manufacturing investment credit under the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act of 2022. *See generally* CHIPS Act of 2022, Pub. L. No. 117-167, 136 Stat. 1366 (Aug. 9, 2022). IRS stated that the regulations in the final rule describe rules for the elective payment election, including special rules applicable to partnerships and S corporations, repayment of excessive payments, basis reduction and recapture, and the IRS pre-filing registration process that taxpayers wanting to make the elective payment election are required to follow. IRS also stated that the final rule affects taxpayers eligible to make the elective payment election of the advanced manufacturing investment tax credit in a taxable year. IRS stated further that the final rule also removes temporary regulations published on June 21, 2023, in the *Federal Register*. *See generally* 88 Fed. Reg. 40123.

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). This final rule was published in the *Federal Register* on March 11, 2024. 89 Fed. Reg. 17596. IRS provided documentation showing both the House and Senate received the rule on March 12, 2024. Email from Publications &

Regulations Specialist, IRS, to Senior Staff Attorney, GAO, Subject: *RE: [EXT] RE: CRA Submission: TD 9989 (GAO) (Mar. 13, 2024)*. The rule has a stated effective date of May 10, 2024. Therefore, based on the date of receipt of the rule by the House and Senate, 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
TITLED
“ELECTIVE PAYMENT OF ADVANCED MANUFACTURING INVESTMENT CREDIT”
(RIN: 1545-BQ75)

(i) Cost-benefit analysis

The U.S. Department of the Treasury (Treasury), Internal Revenue Service (IRS) addressed the burden associated with this rule. According to IRS, the economic impact associated with this final rule includes administrative costs related to reading and understanding the rule and reporting and recordkeeping requirements. IRS stated that the costs related to reading and understanding the rule are not quantifiable. IRS also stated that the cost is not likely to be significant because projects seeking to qualify for the advanced manufacturing investment credit (section 48D credit) will involve complex legal and commercial transactions, and the cost of understanding these final rules would be implicit in such transactions. IRS stated further that the reporting and recordkeeping requirements associated with the elective payment election are not likely to be significant because they are consistent with the existing framework for claiming business tax credits absent of an election. Additionally, IRS notes that the reporting requirements and recordkeeping requirements associated with the pre-filing registration process are not likely to be significant because the information requested at pre-filing registration is that which a taxpayer claiming a section 48D credit should have available, and taxpayers claiming a section 48D credit are likely to have the resources available given the complexity of their projects.

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

Treasury and IRS certify that the final regulations will not have a significant economic impact on a substantial number of small entities.

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

IRS stated 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 in 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 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 Act in the rule or in its initial submission to us, but in a subsequent email, IRS stated that the Act is not applicable to this final rule. Email from Publications & Regulations Specialist, IRS, to Senior Staff Attorney, GAO, Subject: *RE: [EXT] RE: CRA Submission: TD 9989 (GAO)* (Mar. 14, 2024).

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

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

On March 23, 2023, IRS published in the *Federal Register* a notice of proposed rulemaking. 88 Fed. Reg. 17451 (March 2023 Proposal). IRS stated that it received over 40 comments in response to the March 2023 Proposal. IRS stated further that it held a public hearing on the March 2023 Proposal on July 26, 2023. On June 21, 2023, IRS published another proposed rule to revise certain provisions of the March 2023 Proposal. 88 Fed. Reg. 40123 (June 2023 Proposal). Also on June 21, 2023, IRS published temporary regulations in the *Federal Register*. 88 Fed. Reg. 40086. IRS stated that 12 commenters provided comments in response to the June 2023 Proposal, and a public hearing was held on August 24, 2023. IRS summarized and addressed comments in the preamble of the final rule.

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

IRS stated that the collections of information in this final rule contain reporting and recordkeeping requirements. IRS also stated that the recordkeeping requirements mentioned within the final rule are considered general tax records. IRS stated further that the collections of information under the final rule are already approved by OMB under OMB Control Numbers 1545-0074, 1545-0123, and 1545-2310.

Statutory authorization for the rule

IRS promulgated this final rule pursuant to sections 48D and 7805 of title 26, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

According to IRS, the tax regulatory actions it issues are not subject to the requirements of the Order. Therefore, IRS stated, a regulatory impact assessment is not required.

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.