



August 14, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Daniel Werfel
Commissioner
Internal Revenue Service
1111 Constitution Ave. NW
Washington, DC 20224

**Re: Elective Payment of Advanced Manufacturing Investment Credit (REG-105595-23;
88 Fed. Reg. 40,123)**

Dear Commissioner Werfel:

On June 21, 2023, the Internal Revenue Service (IRS) published a proposed rule titled “Elective Payment of Advanced Manufacturing Investment Credit.”¹ The advanced manufacturing investment credit was added to the Internal Revenue Code (Code)² pursuant to the Creating Helpful Incentives to Produce Semiconductors (CHIPS) Act of 2022³ to incentivize semiconductor and semiconductor equipment manufacturing in the United States. This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule.

As written, IRS’s certification that the rule will not have a significant economic impact on a substantial number of small entities lacks a factual basis and is therefore invalid. Advocacy recommends that the agency publish for public comment either a supplemental Regulatory Flexibility Act (RFA)⁴ assessment with an adequate factual basis for certification or an Initial Regulatory Flexibility Analysis (IRFA).

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA). As such, the views expressed by Advocacy do

¹ Elective Payment of Advanced Manufacturing Investment Credit, 88 Fed. Reg. 40,123 (June 21, 2023).

² Internal Revenue Code (I.R.C.), Title 26 U.S.C., as amended.

³ CHIPS Act of 2022, Pub. L. 117-167, Div. A, 136 Stat. 1366, 1372-1399 (Aug. 9, 2022).

⁴ 5 U.S.C. § 601 et seq.

not necessarily reflect the views of SBA or the Administration. The RFA,⁵ as amended by the Small Business Regulatory Enforcement Fairness Act,⁶ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁷ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, unless the agency certifies that the public interest is not served by doing so.⁸

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."⁹

B. The Proposed Rule

On August 9, 2022, section 48D was added to the Code pursuant to section 107(a) of the CHIPS Act of 2022.¹⁰ Section 48D established the advanced manufacturing investment credit, a tax credit generally equal to 25% of an eligible taxpayer's qualified investment in an "advanced manufacturing facility."¹¹ An advanced manufacturing facility is one where the primary purpose is manufacturing semiconductors or semiconductor manufacturing equipment.¹² Section 48D(d)(1) of the Code allows taxpayers to elect to receive the credit as a payment of federal income tax equal to the amount of the credit.¹³

On June 21, 2023, IRS published a notice of proposed rulemaking (NPRM) in the *Federal Register* that provides guidance on the elective payment provisions of the advanced manufacturing investment credit.¹⁴ The proposed rule describes how an entity can choose to make an elective payment.¹⁵ The proposal includes special rules applicable to partnerships and S corporations, repayment of excessive payments, and basis reduction and recapture.¹⁶ The proposal also details rules related to a required IRS pre-filing registration process.¹⁷ The NPRM includes a certification that the proposed rule will not have a significant economic impact on a substantial number of small entities.¹⁸

⁵ *Id.*

⁶ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

⁷ Small Business Jobs Act of 2010, Pub. L. 111-240, §1601.

⁸ *Id.*

⁹ *Id.*

¹⁰ CHIPS Act of 2022, Pub. L. 117-167, Div. A, 136 Stat. 1366, 1393.

¹¹ I.R.C. § 48D(a).

¹² *Id.* § 48D(b)(3).

¹³ *Id.* § 48D(d)(1).

¹⁴ Elective Payment of Advanced Manufacturing Investment Credit, 88 Fed. Reg. 40,123 (June 21, 2023).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 40,128.

II. IRS’s RFA Certification Lacks an Adequate Factual Basis

Pursuant to Section 605 of the RFA, IRS certified that the proposed rule will not have a significant economic impact on a substantial number of small entities.¹⁹ Under section 605, an agency may avoid the requirements of an initial and final regulatory flexibility analysis, including a discussion of regulatory alternatives, if the agency can certify that a rule will not have a significant economic impact on a substantial number of small entities.²⁰

Any such certification must be accompanied by a statement of the factual basis for the certification.²¹ At a minimum, a statement of factual basis should include a description of the affected entities and an estimate of the cost of the impacts that clearly justifies the “no impact” certification.²² Advocacy asserts that IRS’s statement of factual basis fails to provide necessary information and is therefore invalid.

A. IRS Failed to Identify, Describe, or Analyze the Regulated Small Entities

As noted in Advocacy’s RFA guide, an adequate certification statement requires an agency to perform a threshold analysis.²³ The threshold analysis should include a description of the small entities affected by the regulation. That description should be a brief economic and technical statement on the regulated community.²⁴ IRS does not attempt to identify or estimate the number of small entities affected by the proposed rule. Instead, the agency states that “[a]lthough these temporary regulations may affect small entities, data are not readily available about the number of small entities affected.”²⁵ A lack of data is not a sufficient basis for certification.

Although Advocacy recognizes that tax regulations are generally applicable across industries, the CHIPS Act of 2022 was enacted to incentivize semiconductor manufacturing in the United States.²⁶ Therefore, industries associated with semiconductor manufacture are likely to be impacted by the proposed rule. As part of the factual basis for certification, IRS should include the North American Industry Classification System (NAICS) code for any impacted industries with affected small entities and the number of potentially affected small entities. Advocacy believes that the certification statement should include an analysis of NAICS 334413 (Semiconductor and Related Device Manufacturing) and NAICS 333242 (Semiconductor Machinery Manufacturing).

¹⁹ *Id.*

²⁰ 5 U.S.C. § 605(b).

²¹ *Id.*

²² See U.S. Small Bus. Admin., Off. of Advocacy, *The RFA in a Nutshell: A Condensed Guide to the Regulatory Flexibility Act*, 7 (June 2013), <https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/rfa-in-a-nutshell-a-condensed-guide-to-the-regulatory-flexibility-act/>.

²³ See U.S. Small Bus. Admin., Off. of Advocacy, *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, 12 (Aug. 2017), <https://advocacy.sba.gov/resources/the-regulatory-flexibility-act/a-guide-for-government-agencies-how-to-comply-with-the-regulatory-flexibility-act/>.

²⁴ *Id.*

²⁵ 88 Fed. Reg. at 40,128.

²⁶ CHIPS Act of 2022, Pub. L. 117-167, Div. A.

B. IRS Failed to Analyze the Economic Impact of the Rulemaking on Small Entities

Advocacy is also concerned that IRS did not provide any information about the potential economic impact of this rulemaking on small entities. The agency states that “[t]he economic impact of these proposed regulations is not likely to be significant” but provides no supporting analysis.²⁷ To support a factual basis for certification, IRS should provide estimates of all costs to small entities, including the costs of reading and understanding the rule and any reporting and recordkeeping requirements. IRS should also analyze the relative impact of any costs to small entities based on firm size (e.g., by revenue or number of employees). Analysis of impacts by firm size will allow the agency to assess whether small firms can meet the requirements as proposed with the resources they have or through flexibilities where appropriate.

C. Advocacy’s Recommendations

Based on input from semiconductor industry representatives, Advocacy believes that it is possible for IRS to properly certify the proposed rule. Companies capable of making qualified investments in advanced semiconductor and semiconductor equipment manufacturing facilities are unlikely to be small entities, due to the large capital requirements of those activities. Nevertheless, IRS has not provided the information necessary for a valid certification under the RFA.

Advocacy recommends that IRS conduct a threshold economic analysis to determine whether the proposed rule will have a significant economic impact on a substantial number of small entities. IRS should then publish for public comment either of the following before proceeding with the rulemaking:

1. A supplemental RFA assessment with a valid factual basis in support of a certification.
2. An IRFA, including a discussion of specific regulatory alternatives that would minimize the significant economic impact of the proposal on small entities.

III. Conclusion

IRS’s certification that the proposed rule will not have a significant economic impact on a substantial number of small entities lacks a factual basis and is therefore invalid. Advocacy recommends that IRS perform a threshold analysis to determine whether the proposal will have a significant economic impact on a substantial number of small entities. Depending on the outcome of that analysis, IRS should publish for public comment either a supplemental RFA assessment supporting a valid factual basis for certification or an IRFA.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Meagan Singer at (202) 921-4843 or by email at meagan.singer@sba.gov.

²⁷ 88 Fed. Reg. at 40,128.

Sincerely,

/s/

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Deputy Chief Counsel
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/s/

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U.S. Small Business Administration

Copy to: The Honorable Richard L. Revesz, Administrator
Office of Information and Regulatory Affairs
Office of Management and Budget