Manhattan Institute

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Section 45Y Clean Electricity Production Credit and Section 48E Clean Electricity Investment Credit

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Thank you for the opportunity to comment on the proposed rules implementing Section 45Y (Clean Electricity Production Credit) and Section 48E (Clean Electricity Investment Credit) of the Internal Revenue Code (IRC). I am a senior fellow with the Manhattan Institute for Policy Research, a non-profit, non-partisan think tank that develops and disseminates ideas that foster economic choice and individual responsibility. Since 2003, I have served as the Institute's director of legal policy. I am writing to express my concern that the rules as proposed lack a clear statutory basis and threaten to expand energy subsidies well beyond the 10-year scope enumerated by the Inflation Reduction Act (IRA).

I. The 80/20 Rule, as applied to the Section 45Y tax credit, skirts statutory limits and may allow eligible operators to claim the Production Tax Credit indefinitely.

IRC Section 45Y creates a tax credit available for the production of energy with zero or negative emissions (Production Tax Credit or PTC). The statutory language of the IRA limits these credits to *new* facilities for *ten-year periods*. In IRA § 13701(b)(1)(A), the statute clearly limits PTCs to facilities "placed in service after December 31, 2024." And the statute further provides that operators are only eligible for this credit for the first ten years of service: "For

purposes of this section, a facility shall only be treated as a qualified facility during the 10-year period beginning on the date the facility was originally placed in service." IRA § 13701(b)(1)(B).

The Proposed Rule, however, creates an exception to these clear statutory commands—the "80/20 rule"—which would allow "green" facilities that existed prior to December 2024 to qualify for tax credits; and also, using ordinary depreciation schedules, to roll over their PTCs indefinitely:

> For purposes of section 45Y(b)(1)(B), a facility may qualify as originally placed in service even if it contains some used components of property within the unit of qualified facility, provided the fair market value of the used components of the unit of qualified facility is not more than 20 percent of the total value of the unit of qualified facility (that is, the cost of the new components of property plus the fair market value of the used components of property within the unit of qualified facility) (80/20 Rule).

89 Fed. Reg. 47,830.

The proposed regulations include several examples that illustrate how the 80/20 Rule may operate. For instance:

> Example 1. Retrofitted facility that that meets the 80/20 Rule. A owns an existing wind facility. On February 1, 2026, A replaces used components of the wind facility with new components at a cost of $2 million. The fair market value of the remaining original components of the wind facility is $400,000, which is not more than 20 percent of the retrofitted wind facility's total fair market value of $2.4 million (the cost of the new components ($2 million) + the fair market value of the remaining original components ($400,000)). Thus, the retrofitted wind facility will be considered newly placed in service for purposes of section 45Y, and the section 45Y credit is allowable for electricity produced by A at the wind qualified facility and sold, consumed, or stored, during the 10-year period beginning on February 1, 2026, assuming all the other requirements of section 45Y are met.

89 Fed. Reg. 47,830 (to be codified at 26 C.F.R. § 1.45Y–4(d)(3)(i)).

In other contexts, the 80/20 Rule dates to 2016; the renewable energy industry petitioned the IRS make clear that the 80/20 Rule applies to the Section 45Y tax credit. But if the industry

wished to avail itself of this Rule it should have petitioned *Congress*, which made no 80/20 exception in its clear statutory language.

In sum: despite the language of the statute clearly limiting the Section 45Y tax credit to *new* energy generation facilities, the 80/20 Rule as applied to IRC Section 45Y would allow *existing* energy generation facilities to claim the credit as long as they retrofit their facilities with new components. If the fair market value of the original components makes up less than 20 percent of the total fair market value of the upgraded facility, that energy generator will be able to claim the PTC for the full 10-year period. If that energy generator continues to invest in its facilities, it could conceivably claim the tax credit for multiple successive 10-year periods by using the 80/20 Rule. By allowing energy generators to effectively claim the PTC in perpetuity, the overall cost to the taxpayer of the PTC would dramatically increase.

Because the Proposed Rule effectively eliminates clear statutory limits on what facilities can receive PTCs, it is obviously unlawful. This is not even a case of statutory ambiguity, *cf. Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024). Nor even of Congress hiding "elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). Rather, the Promulgated Rule skirts a statutory command without any authorization.

II. The 45Y and 48E tax credits may exist for decades, not just the next 10 years.

It is also worth noting that the expiration of the Section 45Y and 48E tax credits is linked not to a date certain, but rather the later of 2032 or "the calendar year in which the Secretary [of Energy] determines that the annual greenhouse gas emissions from the production of electricity in the United States are equal to or less than 25 percent of the annual greenhouse gas emissions from the production of electricity in the United States for calendar year 2022." IRC § 45Y(d)(3).

This statutory language is problematic because in effect it requires greenhouse gasses from electricity producers to be cut by 75% before the tax credits expire. A study conducted by Wood Mackenzie argues:

> Based on the language in the IRA, our view is that these tax credits will be extended for substantially longer than 2032 – perhaps even 30–40 years. Absent IRA repeal, this means that instead of several hundred billion dollars in tax credits for new renewables and storage through 2032, the real money on the table is on the order of trillions of dollars over multiple decades.

Testifying before the House Subcommittee on Economic Growth, Energy Policy, and Regulatory Affairs, Travis Fisher of the Cato Institute described the 25% target as "impossible to meet." He cited a U.S. Energy Information Administration study which found that reaching that target would be unattainable even by the year 2050. The result is that the tax credits which are commonly thought of as having a 10-year lifespan will actually last for decades, costing taxpayers billions more than was promised.

Such timing particularly matters because the IRA was enacted by one vote in the Senate, through the budget reconciliation process, predicated on a ten-year cost estimate. Although the timing issue here is more one of statutory rather than regulatory failing, the essentially limitless length of time for the statute to operate will doubtless come into play in legal challenges.