



SUBMITTED VIA REGULATIONS.GOV

February 9, 2024

Internal Revenue Service  
CC:PA:01:PR  
REG-107423-23  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, DC 20044

RE: **Section 45X NPRM**  
Comments and Request to Testify  
REG-107423-23

To Whom It May Concern:

The American Chemistry Council (ACC) represents the leading companies engaged in the multibillion-dollar business of chemistry. ACC members apply the science of chemistry to make innovative products, technologies and services that make people's lives better, healthier and safer. ACC is committed to improved environmental, health, safety and security performance through Responsible Care; common sense advocacy addressing major public policy issues; and health and environmental research and product testing.

ACC members welcomed the enactment of the Advanced Manufacturing Production Tax Credit under Section 45X - the credit was viewed as transformative in the onshoring of manufacturing and was the topic of discussions at many companies as decisions were being made on the location of future investments in manufacturing. The credit's value and the ability to monetize such value tilt the scales in such discussions to investment in the United States, even with strong countercurrents that would favor other countries. Given the credit's 2023 effective date, we are aware of some companies who made investment decisions on the promise of Section 45X.

ACC and its members are surprised and disappointed in the Section 45X notice of proposed rulemaking (NPRM) insofar as it announced a significant curtailment in the value of the Section 45X tax credit for those taxpayers producing electrode active materials (EAMs) and critical minerals. The statute states that the value of such credit shall be "10 percent of the costs incurred by the taxpayer with respect to production." It was unexpected that the NPRM would exclude from the calculation direct and indirect material costs and any costs related to the extraction, production, or acquisition of raw materials. The feedback ACC has received is that by excluding what is often

the number one or two driver in terms of cost to produce EAMs or critical minerals, the NPRM has rendered the credit valuable only on the margins and no longer a driver in decisions on whether to onshore or invest in manufacturing in the United States, directly defeating the provision's intended purpose.

For example, a significant portion of the cost to produce lithium carbonate or lithium hydroxide from brine using direct lithium extraction, a more sustainable process than current methods, would be excluded under the NPRM. Such costs would include pumping the brine from deep subsurface reservoirs and above-ground processes of filtering the lithium from the brine, then crystalizing it into lithium carbonate or lithium hydroxide. The elements currently included under the NPRM (i.e., operations, power and workforce, etc.) range from approximately 30-40% of the total production cost depending on the project and cost basis involved, leaving approximately 60-70% of costs related to the extraction of brine from deep subsurface reservoirs and direct and indirect material costs associated with the production of lithium carbonate or lithium hydroxide via direct lithium extraction excluded. Similarly, hard rock and clay lithium production processes requires the expenditure of significant costs for extraction and conversion of the raw materials. These foundational costs should not be excluded and will not lead to the creation of sufficient production capacity to support the pace of the U.S. energy transition that is envisioned by the legislation.

From a legal perspective we question the authority to so limit Section 45X. Ten percent of the costs incurred by the taxpayer with respect to production of such eligible components as included in the law is unambiguous and has a commonsense meaning. The interpretation is contrary to the statute and its plain language. In addition, there is no legislative history indicating the cost of production should not include certain costs related to the production and, as stated above, such limitation is contrary to the policy of Section 45X and the Inflation Reduction Act (IRA) generally.

The definition of production costs is well settled under the Internal Revenue Code. Taxpayers have long been required to track inventories under Section 471, General Rule for Inventories, and the cost of production of such inventories under Section 263A, Capitalization and Inclusion in Inventory Costs of Certain Expenses. Regulations under Section 263A specifically require the capitalization of certain direct materials and indirect material costs. Notwithstanding this long standing precedent requiring taxpayers to track such cost for purposes to pay the correct tax, the Section 45X NPRM picks and excludes certain costs under Section 263A to calculate a tax benefit. Similarly, Section 199, Income Attributable To Domestic Production Activities, provided a deduction for "qualified production activities." To calculate this deduction taxpayers had to account for "cost of goods sold" properly allocable to qualified production activities income. Under guidance Treasury and the IRS made clear that costs of goods sold included Section 263A costs.

We understand the concern expressed that being over-inclusive in the definition of production cost could cause a theoretical double-counting, with for example a direct material cost getting included in the production of two distinct eligible components generating a tax credit. We suggest that had Congress been so concerned, statutory language would have been provided such as it did in Section 45X as it relates to Section 48C and as included in the IRA tax credits when there was such concern, e.g., the restriction found in the Credit for the Production of Clean Hydrogen under Section 45V prohibits inclusion of a facility for which a Section 45Q credit was claimed.

Unfortunately, the NPRM has already caused some companies to change course and pause their investment activities. It is likely that this “pause” will transition to a termination of investments if materials costs (including raw materials) remain excluded from the calculation of the credit. Therefore, not only do we urge a reconsideration and reversal of the exclusion, but we urge you to announce and finalize the Section 45X regulations quickly. Thank you in advance for your consideration; I welcome the opportunity to attend the hearing scheduled for February 22nd.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert B. Flagg", is centered below the text. The signature is fluid and cursive, with a prominent initial "R" and a long, sweeping tail.

Robert B. Flagg  
Senior Director, Federal Affairs  
American Chemistry Council