

Comments on domestic content rulemaking as relating to elective pay

The Center for Public Enterprise (CPE) submits the following comments on domestic content rules as they relate to the elective pay provisions under § 6417 of the Inflation Reduction Act (IRA).

Explicit and easily accessible safe harbor provisions. The IRA specifies two safe harbor provisions for applicable entities claiming elective pay but who are not able to meet the domestic content requirements based on existing “Buy America” provisions. The first of these safe harbors is if the overall costs of construction of qualified facilities increase by more than 25 percent in the course of meeting domestic content requirements.¹ The second is if certain materials are unavailable in sufficient and reasonable quantities or of satisfactory quality.² The IRS provides a list of potential materials eligible for safe harbor.³ CPE echoes concerns that the list is not specific enough, could be expanded to cover additional applicable project components and applicable project types,⁴ and does not provide insight into the assessment metrics the IRS will utilize to determine if the safe harbor provisions apply to an applicable entity’s project. The IRS should make explicit that this list is neither exhaustive nor final and that the IRS will consider other unlisted materials and provide an expeditious path for applicable entities to indicate that their projects or applicable project components are affected and then request safe harbor. In particular, the IRS should prevent undue burdens or difficulty for entities filing for safe harbor either on the basis of insufficient or unreasonably available qualities or unsatisfactory quality or both. Furthermore, the process for claiming safe harbors should be uniform, transparent, and simple, particularly for applicable entities claiming elective pay on multiple projects in one year.

Clean energy in the United States is undergoing rapid development, with more promising to follow due to the impacts of the IRA and its tax credits. This is the kind of environment where materials may not be available in sufficient quantities or qualities—particularly as suppliers in the United States themselves adjust to the new realities of doing business. Providing generous safe harbors in this circumstance would not contravene the purpose of the domestic content requirements (particularly as an entity receiving safe harbor would not receive the bonus). Rather, it ensures entities can continue with their investment plans using elective pay—thereby preserving and expanding a potential market for domestic suppliers of steel, iron, or manufactured products, as well as the incentives to lower costs.

¹ 1) 49 CFR § 661.7; 2) Cornell Legal Information Institute. *26 U.S. Code § 45 - Electricity produced from certain renewable resources, etc.* Available at: [\[LINK\]](#)

² Ibid.

³ IRS. 2023. *Notice 23-38*. Available at: [\[LINK\]](#). p. 14-15.

⁴ The list currently covers utility-scale photovoltaic systems, land-based wind facilities, offshore wind facilities, and battery energy storage technologies. Source: IRS. 2023. *Notice 23-38*. Available at: [\[LINK\]](#). p. 14-15.



Not only would a robust safe harbor regime provide space to cultivate expanded domestic supplies of crucial inputs, it would mitigate the utilization and abuse of the safe harbor provisions in future years.

Clarification on whether the domestic content bonus can still be claimed by applicable entities monetizing tax credits via elective pay. The IRS notes that failure to meet domestic content can result in a reduction of the applicable credit amount (for § 45, 45Y, 48, and 48E) if it is not met. The IRS should reiterate that meeting domestic content rules satisfies the requirement to claim the full credit amount under elective pay AND that it also entitles the applicable entity to a 10 percentage point bonus on the Investment Tax Credit and a 10 percent bonus on the Production Tax Credit.⁵ Furthermore, the IRS should clarify that projects that fall under identified safe harbors would not see a penalty on their base credit eligibility. CPE conducts frequent conversations with applicable entities and potential users of elective pay: nonprofits, public power entities, rural electric cooperatives, and state and local instrumentalities. The pairing of the requirement and bonus is not common knowledge among these entities.

Establish a formal review process for exceptions to domestic pay requirements. Section 45 (b)(10)(D) provides the secretary with the authority to waive domestic content phaseouts for elective pay if necessary materials are either unavailable or raise project costs by 25%.⁶ CPE requests that the IRS clarify the procedure for determining such exemptions. CPE recommends that guidance be issued on public participation that can inform the Secretary's deliberations on relevant steel, iron, or manufactured products that are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

⁵ IRS. 2023. *Elective Pay and Transferability Frequently Asked Questions: Elective Pay*. Available at: [\[LINK\]](#)

⁶ Cornell Legal Information Institute. *26 U.S. Code § 45 - Electricity produced from certain renewable resources, etc.* Available at: [\[LINK\]](#)