SEMICONDUCTOR INDUSTRY ASSOCIATION

Comments of the
Semiconductor Industry Association (SIA)
To the
Internal Revenue Service
On the
Elective Payment of Advanced Manufacturing Investment Credit, Notice of Proposed Rulemaking
REG-105595-23
88 Fed. Reg. 40123 (June 21, 2023)

August 14, 2023

The Semiconductor Industry Association (SIA)[1] appreciates the opportunity to provide comments on the Internal Revenue Service (IRS) and Department of Treasury (Treasury) notice of proposed rulemaking[2] ("Proposed Regulations") on the elective payment of the Advanced Manufacturing Investment Credit enacted in the CHIPS and Science Act of 2022 ("CHIPS Act" or "the Act")[3] and set forth in section 48D of the Internal Revenue Code.[4] SIA provides the following comments on the proposed rules and, as necessary, recommends clarifications to provide taxpayers with certainty and flexibility.

I. Elective Payment Election. (§ 1.48D-6)

A. "Each qualified investment in an advanced manufacturing facility must have its own registration number" (§ 1.48D-6(b)(5))

The Proposed Regulations require eligible taxpayers to pre-register each qualified investment of an advanced manufacturing facility prior to making the payment election. While we recognize Treasury seeks to ensure an accurate payment amount, due consideration should be given to the compliance burden taxpayers would bear. If the rule is finalized as proposed, the associated recordkeeping and reporting requirements would require taxpayers to obtain and maintain as many as several thousand registration numbers for a single project.

SIA respectfully requests that Treasury streamline the reporting and recordkeeping requirements for registering qualified investments so as not to impose an overly burdensome compliance regime on the taxpayer making the elective payment election. For example, Treasury should require taxpayers to obtain a registration number for each qualified advanced manufacturing project instead of each qualified investment. The pre-registration filing could

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[1] The Semiconductor Industry Association (SIA) is the voice of the semiconductor industry, one of America's top export industries and a key driver of America's economic strength, national security, and global competitiveness. SIA represents 99% of the U.S. semiconductor industry by revenue and nearly two-thirds of non-U.S. chip firms. Through this coalition, SIA seeks to strengthen leadership of semiconductor manufacturing, design, and research by working with Congress, the Administration, and key industry stakeholders around the world to encourage policies that fuel innovation, propel business, and drive international competition. Learn more at www.semiconductors.org.

[2] Elective Payment of Advanced Manufacturing Investment Credit, Internal Revenue Service, Treasury, 88 Fed. Reg. 40123 (proposed June 21, 2023) (to be codified at 26 CFR 1).

[3] Pub. L. No.117-167 (2022).

[4] All "section" or "§" references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.

include an enumerated list of each of the qualified investments forming the basis of the taxpayer's section 48D credit claim.

Furthermore, the pre-registration filing requirement in the Proposed Regulations does not explicitly cover qualified progress expenditures. SIA respectfully requests that Treasury include in its final regulations the treatment of progress expenditures in the elective payment context and apply the same pre-registration and registration filing rules to all qualified expenses.

B. "Time and manner of election" (§ 1.48D-6(c))

The Proposed Regulations provide a method for annually making the election under section 48D. We request Treasury align the rules to allow for quarterly elections and quarterly returns. This method could mimic the rules under sections 6426 and 6427 providing for quarterly payment of certain fuel excise taxes. Additionally, we ask that such rules apply to partnerships. Providing taxpayers, including those in joint ventures, with an option of quarterly payments under the elective payment regime will provide taxpayers with more certainty and flexibility in making further investments in semiconductor manufacturing and semiconductor manufacturing equipment.

We further ask that Treasury provide a reasonable timeframe as to when taxpayers should expect the IRS to issue refunds via the elective payment election.

C. "Denial of double benefit" (§ 1.48D-6(e))

The section 48D credit is intended to operate so that any eligible taxpayer, regardless of tax liability, may benefit. As such, eligible taxpayers may opt for elective payment, a mechanism through which the taxpayer will be treated as having made a "payment against the tax imposed" in the amount of the credit.[5] Thus, if such an election is made, to the extent the section 48D credit amount exceeds the tax liability, the excess is treated as an overpayment of tax and refunded to the taxpayer. In effect, the elective payment option allows the section 48D credit to operate like a refundable credit and provide a cash benefit if the amount of the credit exceeds the tax liability of the taxpayer claiming it.

With respect to taxpayers choosing elective payment, section 48D(d)(3) states that "…[the section 48D] credit is reduced to zero and shall, for any other purposes under this title, be deemed to have been allowed to the taxpayer for such taxable year."[6] The Proposed Regulations reiterate the statutory language and further specify that the *full amount* of the credit is deemed to have been allowed for purposes of the election.[7]

As an initial matter, SIA recommends a narrow interpretation of section 48D(d)(3) such that the "double benefit" Congress sought to prevent was a double benefit as it relates to the advanced manufacturing investment credit itself, rather than as a double benefit extending to other section 38 credits. Specifically, SIA respectfully requests that in the event a taxpayer makes the elective payment election, the full amount of the section 48D credit will be treated as a payment against

[5] §§ 48D(d)(3), 6417.
[6] § 48D(d)(3) *see also* § 6417(e).
[7] § 1.48D-6(e)(1), (3) (emphasis added).

tax – and therefore exempt from the ordering rules under section 38, thereby limiting the impact of section 48D(d)(3) to the taxpayer's ability to claim the full amount of the section 48D credit a second time. Importantly, this result is required by the statutory text mandating that, upon an elective payment election, the "taxpayer is treated as making a payment against the tax imposed…equal to the amount of such credit."[8] To do otherwise would force taxpayers making the elective payment election to limit their ability to claim other general business credits, frustrating the purpose of the elective payment framework.

Moreover, when applied in the context of the Base Erosion and Anti-Abuse Tax (BEAT) under section 59A and the Corporate Alternative Minimum Tax (CAMT) credit limitation under section 53(c), an application of the Proposed Regulation — that is, deeming the full amount of advanced manufacturing investment credit as a credit allowed as opposed to a payment against tax — results in an unintended delay or a complete denial of the benefit of the credit.

Under section 59A, treating the full amount of the section 48D credit as a credit against regular tax could subject the eligible taxpayer to BEAT liability. Under the elective payment rules, the amount of the section 48D credit is determined without regard to the limitations of section 38(c)[9] and is fully refundable to the extent the amount of the credit exceeds tax liability. However, the elective payment provision under the Code makes clear that the taxpayer electing such treatment with respect to any credit be "…treated as making a payment against the tax imposed."[10] We ask that the final regulations treat the section 48D credit as a payment of tax for the purposes of BEAT liability.

In the context of the CAMT, a credit carryforward is allowed for subsequent years in which regular tax liability exceeds CAMT liability. Specifically, the amount of the CAMT credit carryforward is reduced by general business credits, but not by refundable credits under sections 31 through 37. Similar to our request regarding the BEAT determination, SIA asks that the final regulations do not treat the full amount of the section 48D credit as a credit, but instead as a payment of tax for purposes of the CAMT credit limitation. The inclusion of an express provision to treat the 48D credit as a payment of tax for purposes of section 53(c) would ensure taxpayers' ability to claim sufficient CAMT credits to offset their regular tax liability and also maintain the benefit of the advanced manufacturing investment credit.

To summarize, to ensure that eligible taxpayers benefit from the section 48D elective payment incentive, we respectfully recommend that final regulations provide that for purposes of the BEAT and the CAMT credit limitation, the elective payment amount is treated as a payment against tax, and the amount of the section 48D credit for which an elective payment election is made is treated as zero. This treatment would align the treatment of the section 48D elective payment with the treatment of refundable credits in the context of the BEAT and CAMT credit and would thereby ensure that taxpayers benefit as intended from the section 48D credit.

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[8] § 48D(d)(1). Interpreting the full amount of the elective payment election to be outside the ordering rules of section 38(d) is also consistent with the statutory language of the denial of double benefit rule under section 48D(d)(3). Under that subsection, if a taxpayer makes an elective payment election, the amount of the section 48D credit is reduced to zero, because it is treated as a payment against tax. Because the section 48D credit is reduced to zero, it has no impact on the ordering rules under section 38(d) and limitation under section 38(c).

[9] § *See* 48D(d)(6).

[10] § 48D(d)(1).

D. Estimated Tax Calculation

As noted above, the elective payment option allows the section 48D credit to operate like a refundable credit and provide a cash benefit if the amount of the credit exceeds the tax liability of the taxpayer claiming it. Further to the treatment as a refundable credit, the Proposed Regulations provide that the full amount of the credit is taken into account for purposes of calculating any underpayment of taxes under sections 6654 and 6655.[11]

Sections 6654 and 6655 impose an underpayment penalty for failure to pay estimated tax if required installments based on the required annual payment are not made in a timely manner. The term "required annual payment" generally means 100 percent of the "tax shown on the return for the taxable year" for a large corporation.[12] The term "tax" means, in relevant part, the excess of "the tax imposed by section 11," over "the credits against tax provided by part IV of subchapter A of chapter 1 of the Internal Revenue Code."[13]

We respectfully request that Treasury and IRS publish examples showing that the full amount[14] of the section 48D credit reduces "tax" within the meaning of Treasury regulation section 1.6655-1(g).

E. "Excessive payment" (§ 1.48D-6(f))

When there is a determination that a portion of an elective payment amount of a taxpayer constitutes an excessive payment, the taxpayer's tax liability is increased by 20 percent of that excessive payment.[15] There is an exception to this 20 percent addition to tax if the taxpayer demonstrates to the satisfaction of the Secretary that the excessive payment resulted from reasonable cause.[16] Other than reciting the rule abating the penalty if the excessive payment resulted from reasonable cause,[17] neither the Proposed Regulations nor the preamble define the parameters of reasonable cause. In our view, express adoption of a known standard for reasonable cause would promote transparency, fairness, and a consistent administration of the tax law. Specifically, we recommend that the section 48D regulations explicitly adopt the reasonable cause standard under section 6664(c), because the statute and underlying regulations have been extensively interpreted by courts and is familiar to the IRS and taxpayers.

Section 6664(c)(1) provides that an accuracy-related penalty under section 6662 or a fraud penalty under section 6663 does not apply with respect to any portion of an underpayment if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith with respect to such portion. Although the regulations under section 6664 necessarily require fact-based inquiries,[18] they provide important guideposts for the IRS and taxpayers, including guidance on determining whether a taxpayer's reliance on professional advice is

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[11] Prop. Treas. Reg. § 1.48D-6(e)(3).
[12] *See* section 6655(d)(1)(B)(i), (2)(A); Treas. Reg. § 1.6655-1(d)(1)(i).
[13] Treas. Reg. § 1.6655-1(g)(1).
[14] For the avoidance of doubt, if the amount of the credit under section 48D(a) is $100, then the full amount of the credit is $100.
[15] § 48D(d)(2)(F)(i).
[16] § 48D(d)(2)(F)(ii); *see also* Prop. Treas. Reg. § 1.48D-6(f)(2).
[17] Prop. Treas. Reg. §1.48D-6(f)(2).
[18] *See* Treas. Reg. § 1.6664-4(b)(1).

reasonable.[19] As another example, the regulations under section 6664 recognize that "an isolated computational or transcriptional error generally is not inconsistent with reasonable cause and good faith."[20]

In the context of a new tax incentive that is based upon complicated and uncertain legal and factual determinations, the framework of section 6664(c) would provide meaningful guidance to the IRS and taxpayers.

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SIA appreciates the opportunity to comment on this proposal, and we look forward to continuing to work with Treasury in the development and implementation of these rules.

[19] Treas. Reg. §1.6664-4(c)(1).
[20] Treas. Reg. §1.6664-4(b)(1).