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February 15, 2024

Via Electronic Submission and Mail

CC:PA:LPD:PR (REG-117631-23)
Room 5203, Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

ATTN: William M. Paul
Principal Deputy Chief Counsel
Deputy Chief Counsel (Technical)

Dear Mr. Paul:

It takes a village to interpret the Internal Revenue Code of 1986, as amended (the "Code"). As a fellow villager, I humbly offer these comments to the proposed regulations issued pursuant to Section 45V.[1]

I stand united with your great zeal to promulgate timely and administrable guidance regarding a critically important Code section and greatly respect and commend what must have been hundreds or thousands of hours of work to publish the December 22, 2023 proposed rules. That being said, the proposed rules require substantial re-visitation.

Let us begin with the statute's legislative history, which few of the comments did.

On August 7, 2022, Congress passed H.R. 5376 (A bill to provide for reconciliation pursuant to title II of S. Con. Res. 14.), commonly referred to as the Inflation Reduction Act of 2022, or simply, the "IRA". As you know, the House passed the predecessor to Section 45V (then called Section 45X) on November 18, 2021 in the first session of the 117th Congress as Section 136204 of H.R. 5376 (A bill to provide for reconciliation pursuant to title II of S. Con. Res. 14.).

What has escaped so many commentators is that the House Budget Committee originally introduced that bill on September 27, 2021 and, in the provision here relevant, the bill read, in the predecessor to Code Section 45V(f):

> Not later than 1 year after the date of enactment of this section, the Secretary, **after consultation with the Secretary of Energy and the Administrator of the Environmental Protection Agency**, shall issue regulations or other guidance to carry out the purposes of this section, including regulations or other guidance . . .
>
> H.R. 5376 Sec. 136204(a) at Sec. 45X(f) (emphasis added).[2]

The highlighted language instructing Treasury to issue guidance "after consultation with" the Secretary of Energy and/or the Administrator of the Environmental Protection Agency ("EPA") appear in the initial bill sixteen times.[3] A little over a month later, the House passes the engrossed bill, and **all sixteen of these consultation with Energy/EPA references were gone**.[4]

What happened?

Democratic leaders of House and Senate committees, the Speaker of the House, Senate Majority Leader, and Senators Krysten Sinema (AZ) and Joe Manchin (WV) were engaging in intra-party, inter-chamber negotiations, which ultimately concluded on October 28, 2021 in an agreed framework for the Build Back Better agenda,[5] with accompanying legislative text.

Applauding the intra-party work that had been done to reach the framework (hereinafter, the "October Compromise"), Speaker Pelosi, in her weekly briefing, made clear Senate rules necessitated the changes.

> We won't have anything, regardless of whatever input we have in the bill, unless it is agreed to by the Senate, and of course we had to have it comply with the Senate's 51-vote rule of the Byrd Rule -- there are two things, the Byrd Rule and the privilege scrub. Is that more on the subject that you ever wanted to know?
>
> - Speaker Pelosi[6]

Within an hour and a half, the House Committee on Rules met to discuss the new legislative text of the October Compromise, with each of the House Budget and Ways and Means Chairmen testifying to the Senate rule influence.

> What basically you have before you -- with a few exceptions -- but what you have before you is a subtraction of many of the provisions and a reduction -- for instance, duration and service -- that was dictated by our responses to the Senate demands.
>
> - House Budget Committee Chair Yarmouth[7]

> We have to deal with the United States Senate, and in this instance here, pretty obvious publically, we had to mollify two members of our own party over in the U.S. Senate. We're trying to shape legislation, on a daily basis, with the other chamber, so we made some adjustments -- hardly radical. I think it's safe to say 90% of what we did was vetted fully in public.
>
> - House Ways and Means Char Neal[8]

Further negotiations with Senate Democrats ensued, resulting in another revised draft of the bill getting debated by the House Committee on Rules the following week.[9]

Ultimately, Congresses passes the IRA, which the Senate approves 50/50 plus a tie-breaking Vice Presidential vote.[10] The language suggesting that Treasury consult with the Secretary of Energy and/or the Administrator of the EPA in Code Section 45V never returns.

House leadership (and the White House) had to acquiesce to the October Compromise due to the Senate's reconciliation process (with the Byrd Rule and privilege scrub).[11] A helpful Congressional Research Service report on point demonstrates meeting these requirements is no mere procedural detail.[12]

Senator Robert C. Byrd, frustrated by the inclusion of too many non-budgetary issues in the Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985, proposed a rule, now known as the "Byrd Rule", to exclude "extraneous matters" from the budget reconciliation process.[13]

The inclusion of extraneous matters in a budget resolution has two problems. First, if a Senator can suggest the inclusion of an extraneous topic, no matter how controversial (*e.g.*, gun control), that proposal can act as a poison pill derailing the budget process. Second, and to quote Senator Byrd, "**more importantly, if we are going to preserve the deliberative process in this U.S. Senate -- which is the outstanding, unique element with respect to the U.S. Senate, action must be taken now to stop this abuse of the budget process**."[14]

The Byrd Rule passes by a vote of 96-0 and is later codified into the Congressional Budget Act of 1974 as permanent law in 1990.[15]

The Byrd Rule is not without controversy and has resulted in numerous changes to House bills, even for good policies with respect to which substantive agreement might have been achieved. As former House Ways and Means Committee Chairman Rostenkowski once noted, "Over 80 pages of statutory language were stripped out of the Medicare title [due to the Byrd Rule]. Staff wasted countless hours, scrutinizing every line to ensure that there is nothing that would upset our friends at the other end of the Capitol."[16]

Alas, bi-cameral consensus is hard -- especially while limiting Senate debate, and it takes 60 votes to override a Byrd Rule violation by waiver.[17]

Thus, for decades, the default Senate rule has been where an issue is "extraneous" to a budget resolution, thou shalt not limit Senate debate.

Matters considered extraneous include those "outside of the jurisdiction of the committee that submitted the title or provision for inclusion in the reconciliation measure."[18]

Code Section 45V, and all of the aforementioned Department of Energy and EPA consultation provisions, were considered by the Senate Finance Committee and included as part of Title I of the IRA.

Regulation of incremental power production, which is extraneous to the budget process and Senate Finance Committee's mandate, lies squarely in the purview of the Senate Committee on Energy and Natural Resources, then chaired by none other than Joe Manchin. Such committee submitted Title V of the IRA, which included appropriations for the Department of Energy.

Looking at the IRA through the lens of the Byrd Rule, you can bifurcate the IRA into a reconciliation package that includes (i) an appropriations (spending) bill and (ii) a revenue raising (tax or tax expenditure) bill, where Section 45V resides. Excluding the appropriations provisions, I found the IRA only amended Code sections that deferred to the Department of Energy or its Secretary twice, and in each case, such deference pre-dated the IRA pursuant to legislation passed outside of the reconciliation process.[19]

Contrast the foregoing procedural history with that of the bipartisan infrastructure law known as the INVEST in America Act that Senate passed in August of 2021 under regular order with 69 votes.[20] House

leadership notably deferred voting on that bi-partisan bill pending the negotiations that resulted in the October Compromise. Substantive energy and environmental policies (like growing incremental power load from renewable resources) could have been part of that bill had Congress chosen to debate those issues and concluded to enact them.

While I applaud the federal government's inter-agency cooperation generally, it is unwelcome in this case given the IRA's October Compromise and reconciliation process background. Even an executive order by the White House suggesting there be cooperation in furtherance of energy or environmental policy goals would have the non-persuasive weight of a presidential signing statement given the rich legislative history of the IRA on this matter.

Considering such history makes Joe Manchin's negative press release regarding the proposed regulations unsurprising.[21]

Treasury cannot defer to Department of Energy policy goals, however noble, because Congress chose not to in the October Compromise (and thereby allowed the IRA to survive the reconciliation process and pass on a 51/50 vote).

While IRS's Notice 2022-58 sought public comment on very legitimate questions such as (i) how to verify the delivery of energy inputs to determine well-to-gate greenhouse gas emissions and (ii) the appropriate granularity of time matching, the IRS was unfortunately met with numerous comments attempting to impose policies rightly the purview of the Department of Energy or EPA into the Section 45V regulations. Some such proposals are sophisticated and the result of years of debate arriving at consensus in other jurisdictions such as the European Union, **but no such debate or consensus occurred in the U.S. Senate**.

While the Administrative Procedure Act demands Treasury to consider these proposals and the thousands of similar comments that have populated the *regulations.gov* portal regarding these proposed regulations, until such time as Section 45V is amended outside of the reconciliation process consistently with these proposals, Treasury should reject them as outside the scope of Section 45V.

Of course, IRS should provide guidance regarding GREET model inputs and assumptions, whether that is the "most recent" or a "successor model" the Treasury determines.[22] While Congress is silent on how to apply a particular project's facts into the GREET spreadsheet, given the October Compromise, and the limitations of the Byrd Rule, Congress could not have intended GREET inputs or spreadsheet tweaks to result in extraneous policy decisions.

Thus, the most prudent approach would be to apply no more stringent requirements than standard industry practice with the prevailing GREET model at the time of the IRA. For example, one commentator noted that the GREET model used the North American Electric Reliability Corporation (NERC) regions as the relevant geographic input and properly suggested that the deliverability requirements, if any, should be no narrower than NERC's.[23] For the same reason, annual time matching should be the default rule, not just initially but for the life of Section 45V.[24]

Contemporaneous assumptions like these (and not those proposed by commentators seeking to make qualification for the hydrogen credit more difficult than initially intended) are also consistent with the Joint Committee on Taxation's estimates for the fiscal impact of the hydrogen production credit, which begin at $59MM in 2023 *and increase* every year to $1.41B in 2031.[25]

Successor models should be limited to (i) when that GREET model becomes obsoleted or (b) is updated in ways that improve ease of use to taxpayers, but in no event should the determination of lifecycle greenhouse gas emissions be more stringent than had a taxpayer used the GREET model and prevailing assumptions for a project as of the date of the IRA. One solution could be to include in the final regulations a safe harbor providing that the use of IRA date GREET assumptions always works

Courts would likely invalidate the proposed regulations if finalized in their current form -- and probably after a costly and aggravated litigation fight with *amici* briefs filed from all directions similar to the numerous *regulations.gov* portal comments. Even under the government's position with respect to existing *Chevron* deference, such final regulations should not survive scrutiny.

> [W]hen a reviewing court sustains an agency's interpretation of an ambiguous statute as reasonable under *Chevron*, the court is exercising the judicial power to interpret the law as having conferred authority on the agency to resolve the matter within reasonable bounds. In deciding legal questions, a court must take account of that statutory foundation.

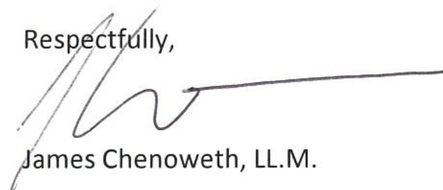
Government's Brief in Opposition, *Loper Bright Enterprises v. Raimondo*[26]

In this case, where Congress had eliminated extraneous energy and environmental policy considerations from Code Section 45V(f), it would be outside reasonable bounds for the administrative agency to reinsert them. The legislative history and statute are clear that the IRA is a budget law. Regulations issued that make the IRA something else not only can be, but should be, invalidated by courts.

As for guidance from the Department of Energy or EPA since the date of the IRA, Treasury should just ignore them, and as one commentator noted in respect of the clean hydrogen production standard, "The DOE should follow the lead of the IRS."[27]

Make final 1.45V a *Treasury* regulation and one that is consistent with, as of the date of the IRA, what the U.S. Senate (including its Parliamentarian policing the Byrd Rule) would have concurred.

Respectfully,



James Chenoweth, LL.M.

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[1] Unless otherwise indicated, all section references are to the Code.

[2] The initial H.R. 5376 (Sep. 27, 2021), in relevant part, is available at https://www.congress.gov/congressional-report/117th-congress/house-report/130/3.

[3] H.R. 5376 (Sep. 27, 2021) at 136204(a) (Section 45X(f)) (predecessor to Code Section 45V(f)); *Id.* at Sections 136102(d)(4) (Section 48(c)(6)), 136103(a) (Section 48(e)(1)); 136106(a) (Section 48E(e)(1), (e)(4)) (twice), 136108(a)(3) (Section 7704(d)(1)(E)), 136203(a) (Section 40B(e)(3)), 136301(f), (g) (Section 25C(e)(2), (h)(3)(B)) (twice), 136303(b) (Section 179D(i)(8)(A), (G)) (twice), 136501(a) (Section 48C(e)(1), (e)(2)(B)(ii)(II), (e)(4), (e)(4)(A)(i)) (four times); 136601 (Section 36F(e)(1)(B)).

[4] House Rules Committee Report 117-17 (117th Cong., 1st Sess.) (Oct. 28, 2021), available at https://www.congress.gov/committee-print/117th-congress/house-committee-print/46233. With amendments not here relevant, the House further amends the bill in early November. See House Rules Committee Print 117-18 (117th Cong. 1st Sess.) (Nov. 3, 2021), available at https://www.congress.gov/committee-print/117th-congress/house-committee-print/46234

[5] Sinema, Krysten, Statement on Budget Reconciliation Proposal Framework (Oct. 28, 2021) ("After months of productive, good-faith negotiations with President Biden and the White House, we have made significant progress on the proposed budget reconciliation package. I look forward to getting this done, expanding economic opportunities and helping everyday families get ahead."), available at https://www.sinema.senate.gov/sinema-statement-budget-reconciliation-proposal-framework/.

[6] CSPAN, House Speaker Weekly Briefing (Oct. 28, 2021) at 9 min, available at https://www.c-span.org/video/?515671-1/house-speaker-weekly-briefing.

[7] Testimony of John Yarmouth to House Committee on Rules (Oct. 28, 2021), available at https://rules.house.gov/video/rules-committee-meeting-hr-5376-meeting-i-part-i, at 1 hr 14 min.

[8] Testimony of Richard Neal to House Committee on Rules (Oct. 28, 2021), available at https://rules.house.gov/video/rules-committee-meeting-hr-5376-meeting-i-part-i, at 1 hr 27 min.

[9] Testimony of then Budget Chairman Yarmuth to the House Committee on Rules (Nov. 3, 2021) (at 1 hr, 8 mins) ("At one point we were trying to make sure that we could pass a bill that the Senate would pass exactly as we passed it. I think we've come to the conclusion that's impossible.").

[10] See Clerk of the United States House of Representatives, (i) Roll Call 385 (Nov. 19th, 2021) (11th Cong. 1st Sess.), Bill Number H.R. 5376, available at https://clerk.house.gov/Votes/2021385 and (ii) Roll Call 420 (Aug. 12, 2022) (117th Cong., 2nd Sess.), available at https://clerk.house.gov/Votes/2022420.

[11] The so-called "privilege scrub" is simply a procedural step to confirm, after all of the Byrd Rule motions have cleansed the bill at issue, that the House bill keeps its privileged reconciliation status in the Senate (thus, avoiding debate). Hagen, Lisa, *House Democrats Pass Biden's $1.75 Trillion Social Spending Plan After Delays,* US News (Nov. 19, 2021), available at https://www.usnews.com/news/politics/articles/2021-11-19/house-democrats-pass-bidens-1-75-trillion-social-spending-plan-after-delays.

[12] Heniff and Keith, *The Budget Reconciliation Process: The Senate's 'Byrd Rule'*, CRS Report No.30862 (updated September 29, 2022 to include considerations of the IRA), available at https://crsreports.congress.gov/product/pdf/rl/rl30862 ("CRS Report").

[13] CRS Report at 2.

[14] *Id.* at 2, *quoting* Senator Byrd in the Congressional Record, daily edition (Oct. 24, 1985), p. S14032.

[15] *Id.* at 2-3.

[16] *Id.* at 14, *quoting* Representative Rostenkowski, *Congressional Record,* daily edition (Aug. 5, 1993), p. H6126.

[17] *Id.* at 4.

[18] *Id.* at 5.

[19] Section 13303 of the IRA amends Code Section 179D(c)(2)(B), to change from a 2 year standard to a 4 year standard. Code Section 179D(c)(2)(B) had already included language that such standards be confirmed by Treasury after consultation with the Secretary of Energy in language pre-existing the IRA from the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (P.L. 116-260). Section 13304(c) of the IRA amends Section 45L(c)(1)(B), which had previously, since the Energy Tax Incentives Act of 2005 (P.L. 109-58), deferred to certain minimum heating and cooling standards under regulations promulgated by the Secretary of Energy.

[20] Roll Call 314 (Aug. 10, 2021), Bill Number H.R. 3684, as amended, available at https://www.senate.gov/legislative/LIS/roll_call_votes/vote1171/vote_117_1_00314.htm; WV News, Press release

of Sen. Joe Manchin (Aug. 10, 2021) available at https://www.wvnews.com/news/wvnews/manchin-the-senate-is-not-broken/article d0707b76-fa21-11eb-ba6d-1b3c1e2808eb.html.

[21] Manchin, Joe, Administration Kneecapping Hydrogen Projects (Dec. 22, 2023), available at https://www.manchin.senate.gov/newsroom/press releases/manchin administration kneecapping-hydrogen-projects.

[22] Section 45V(c)(1)(B).

[23] Comments to Notice 2022-58 from California Hydrogen Business Counsel (Oct. 13, 2023) at 2.

[24] Comments to Notice 2022-58 from Dow Inc. (Dec. 5, 2022); from Xcel Energy (Aug. 29, 2023) at 4; from Bloom Energy Corp. at 3 (Dec. 5, 2022)

[25] Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 117th Congress, JCS-1-23 (Dec. 2023), Appendix, *Estimated Budget Effects of Tax Legislation Enacted in the 117th Congress* at 11.

[26] Docket No. 22-451, S.Ct. (Feb. 16, 2023) at 28, *citing* Justice Roberts' dissenting opinion in *City of Arlington v. FCC*, 566 U.S. 290 (2023).

[27] Comments to Notice 2022-29 from Shell USA, Inc. at 4 (Dec. 5, 2022).