April 6, 2026

ELECTRONIC SUBMISSION

Attn: IRS REG-121244-23

Jennifer Golden and Danielle Mayfield
Office of Associate Chief Counsel
Energy, Credits, and Excise Tax
Internal Revenue Service
Washington, D.C. 20044

Re: Section 45Z Clean Fuel Production Credit

Dear Ms. Golden and Ms. Mayfield,

On February 4th, 2026, the Internal Revenue Service (IRS) published the notice of proposed rulemaking and public hearing, "Section 45Z Clean Fuel Production Credit."[1] This rulemaking is necessitated by the creation of the Section 45Z clean fuel production tax credit in the Inflation Reduction Act (IRA),[2] as amended by the One Big Beautiful Bill Act (OBBBA).[3] This will be an expensive subsidy, with the extension alone projected to cost the U.S. taxpayer $25.5 billion from now until the end of 2030.[4] To the extent that the U.S. Department of the Treasury and the IRS are implementing the Section 45Z as Congress instructed, they are fulfilling their Constitutional duties and acting as responsible stewards of the public fisc.

However, both in carrying out Congress's intent and in safeguarding taxpayer dollars, it is critical that the IRS ensure that this favorable tax treatment extend only to the industries and business activities authorized in the Internal Revenue Code, namely to U.S. producers of clean transportation fuel used for aviation and vehicular transportation, and their energy suppliers. Unfortunately, the proposed rule as written leaves the 45Z tax credit program vulnerable to regulatory arbitrage and manipulation by financiers and consultants, to enable companies to benefit from tax preferences without necessarily conducting the economic activity that Congress actually intended this program to fund.

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[1] Internal Revenue Service, "Section 45Z Clean Fuel Production Credit," *Federal Register*, Vol. 91, No. 23 (February 4, 2026), p. 5,160.
[2] Sec. 13704 of Pub. L. 117-169, 136 Stat. 1818, 1887 (August 16, 2022).
[3] Sec. 70521 of Pub. L. 119-21, 139 Stat. 72, 276 (July 4, 2025).
[4] Staff of J. Comm. on Tax'n, Estimated Revenue Effects Relative to the Present Law Baseline of the Tax Provisions in "Title VII – Finance" of the Substitute Legislation as Passed by the Senate to Provide for Reconciliation of the Fiscal Year 2025 Budget, 119th Cong., JCX-35-25 (2025).

With appreciation to the IRS for the opportunity to comment, the IRS should enact rules stricter than those proposed, in order to ensure that the tax benefits accrue to companies that actually conduct the economic activities that Congress intended to incentivize, rather than to well-connected, well-funded companies that treat the program as an arbitrage opportunity at taxpayer expense.

Discussion

1) The IRS is Correct to Define "Fuel" so as to Exclude Electricity.

To begin on a supportive note, the IRS is correct to define "fuel" so as to exclude electricity. The IRS has ably explained, from both the language of the underlying statute and the legislative history, that Congress clearly did not intend for electricity to be included within the definition of "transportation fuel" that qualifies for the section 45Z credit.[5] In particular, electricity is already covered by the section 45Y clean energy production credit.[6] That alone would indicate that it would be improperly redundant to use 45Z credits to fund electricity production, given that Congress treated electricity production separately. This is true even without considering the anti-stacking rules that Congress wrote into Section 45Z, which excludes certain other fuel sources, which are covered by other provisions of the Internal Revenue Code.[7]

The exclusions in the anti-stacking rules specifically apply to fuels covered by Sections 45Q,[8] 45V,[9] and 46[10] of the Internal Revenue Code, but do not actually mention the clean electricity covered in Section 45Y. Yet this is explained quite simply, by looking to the scientific and technical definitions of the fuel be covered. In particular, the carbon oxide covered in 45Q, and the clean hydrogen covered in 45V, constitute fuel. Specifically, and in simple terms, fuel is any material substance that can be consumed (typically burned) to generate heat or power.[11] Electricity is not the source that is consumed to create power; rather, electricity is created by these power sources. Electricity acts similarly to fuel, in that electricity acts as a carrier that stores and transports energy, but as a scientific matter, electricity is distinct, in that electricity is not actually consumed to create the power that results.

Thus, definitionally, there can be no question of electricity production being included within the Section 45Z tax credit scheme. As such, there is not the need to include electricity in

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[5] 91 Fed. Reg. at 5,168.
[6] 26 U.S.C. 45Y (Clean Electricity Production Credit).
[7] 26 U.S.C. 45Z(d)(4)(B).
[8] 26 U.S.C. 45Q (Credit for Carbon Oxide Sequestration).
[9] 26 U.S.C. 45V (Credit for Production of Clean Hydrogen).
[10] 26 U.S.C. 46 (computing credit amounts).
[11] EIA. "Fuel." Glossary. U.S. Energy Information Administration. https://www.eia.gov/tools/glossary/index.php?id=Fuel (accessed March 31, 2026).

the anti-stacking exclusions in which hydrogen and carbon oxide are included. Yet even without this explicit exclusion, Congress made clear that electricity is not meant to be covered by the Section 45Z tax credit, both by being explicit that 45Z is only meant to cover fuel production, and secondly by including a separate statutory scheme, immediately preceding in the tax code, for clean electricity production. For these reasons, the IRS is correct to define "transportation fuels" under Section 45Z in such a way that excludes electricity.

2) The Proposed Rule Leaves the Treasury Department Overly Exposed to Arbitrage.

To achieve the underlying policy goals of promoting the production and use of clean fuel in air and highway transportation, and to safeguard the interests of the U.S. taxpayer, it is critical that the IRS administer the 45Z program with sufficient guardrails to prevent waste, fraud, and abuse. Without sufficient guardrails, it will be possible for companies legally to benefit from the 45Z program, without even changing their behavior in the way that Congress intended. Already, the Big Four accounting firms each have tax practices designed to assist stakeholders in maximizing their 45Z tax credits.[12]

The existence of these practices is a legitimate outgrowth of the complexity of the tax code, but it reinforces the importance for the IRS in staying ahead of the game, and to promulgate regulations that ensure that stakeholders in fact deliver the benefits that Congress intended these tax credits to incentivize. Unfortunately, the regulations as proposed fall well short of that standard, and leave the 45Z program open to regulatory arbitrage, which would allow energy producers to obtain the financial benefits of the 45Z program, even without changing their behaviors in the way that Congress intended.

a. *It is Arbitrary and Capricious for the IRS to Apply the Rules of Section 45V to its Administration of 45Z Tax Credits, Without Providing Explanation or any Meaningful Opportunity to Comment*

The proposed regulations state, almost in passing, that the IRS will import a model from a different regulatory section, and that "rules similar to the rules under section 45V would apply unless otherwise specified by the 45ZCF-GREET model with respect to technical modeling issues or other technical differences."[13] The Notice goes on to state, "The proposed regulations

[12] *C.f., e.g.*, KPMG. (2026). *Proposed regulations providing guidance on clean fuel production credit: Overview of section 45Z and key aspects of the proposed regulations.* (Providing an overview of the proposed 45Z regulations, with contacts at the end) https://kpmg.com/kpmg-us/content/dam/kpmg/taxnewsflash/pdf/2026/02/kpmg-report-proposed-regs-45Z.pdf; *see also* EY (2026, February 11). *Comprehensive proposed regulations on IRC Section 45Z clean fuel production credit would clarify requirements for energy producers*. (Providing an overview of the 45Z regulations in an online alert, with points of contact listed at the end.) https://taxnews.ey.com/news/2026-0411-comprehensive-proposed-regulations-on-irc-section-45z-clean-fuel-production-credit-would-clarify-requirements-for-energy-producers.

[13] 91 Fed Reg. at 5,172 and 5,197.

would also clarify the similar rule for incrementality with respect to the use of energy attribute certificates in the 45ZCF-GREET model," and incorporates § 1.45V-4(d) by reference.[14]

As a preliminary matter, it is surprising that the IRS would incorporate the rules in § 1.45V-4(d) by reference here, without describing those rules in any detail. Given that the Administrative Procedure Act (APA) requires that agencies provide notice and give the public an opportunity to comment on proposed regulations,[15] using such a cross-reference to apply another regulation's rules, "unless otherwise specified," seems to effectively circumvent the comment-and-notice provisions of the APA. At a minimum, the IRS would need to explain why modeling inputs for a regulatory program related to clean hydrogen would be appropriate for a separate program, covering a broader set of fuels. Anything less than a full explanation of why the same model and rules should apply would be necessary to ensure that the rules as applied to the 45Z program are not "arbitrary and capricious" within the meaning of the APA. In this context, it is surprising that the IRS would merely state that the same rules will apply, without providing even a token explanation to justify the application of these rules to a different regulatory context, particularly given how inapt those rules are here, for the reasons discussed below.

b. *Energy Markets, Especially for Renewable Energy, are Susceptible to Regulatory Arbitrage, so Firm Guardrails are Needed to Protect the Taxpayer and Effectuate Congressional Intent*

Energy markets, unlike cash and the financial markets that Treasury often regulates, are not fungible. At a very simple level, this is why, for example, Brent Crude is priced differently from West Texas Intermediate. Even though both are relatively light and sweet oil types, there are differences in their chemical characteristics, and perhaps more important in terms of price, they are extracted from very different parts of the world, and thus exposed to different risk profiles and connected to different markets.[16] As a matter of both logistics and price, Brent Crude is emphatically not interchangeable with West Texas Intermediate oil, in the way for example that cash would be. This also explains, for example, why natural gas prices are consistently, significantly higher in Europe than in the United States.

This lack of interchangeability between the same resource in different markets makes energy markets less efficient. Given that arbitragers by definition profit from these market inefficiencies, this creates a significant opportunity to exploit price differentials, which regulators should bear in mind, particularly when creating new markets for energy tax credits.

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[14] *Id.*
[15] 5 U.S.C. 551 *et seq.*
[16] *E.g.*, Charles Schwab. (2025, August 19). *Energy Investing Basics: WTI vs. Brent Crude Oil*. Charles Schwab. https://www.schwab.com/learn/story/energy-investing-basics-wti-vs-brent-crude-oil

Moreover, this lack of fungibility and interchangeability is even more present in the context of clean, renewable energy markets than in petroleum markets. Many of these renewable energy commodities face challenges to fungibility across time, which we can refer to as intermittency, and also across geographic locations. Solar power, for example, has different availability between and day and night, and across locations, such as cloudy and sunny areas, without infrastructure such as grids that transport the power between different areas, and batteries that store the energy during times of surplus. The same is true for wind power, which poses similar challenges to fungibility across time, as wind patterns fluctuate throughout the day, and across geography, as wind blows differently in different areas, even at the same time.

The challenge here is that the Energy Attribute Certificates (EACs) that the IRS proposes as the 45Z program's enforcement mechanism are readily fungible, in a way that the underlying energy itself is not. In the statute, Congress did not create a certification program, or even mention EACs. This does not necessarily preclude the IRS from using certificates as the mechanism through which to administer the 45Z tax credit program. However, the use of such fungible certificates to represent a less fungible asset creates significant arbitrage opportunities, which the IRS needs to guard against, particularly related to intermittency and geography.

Indeed, Researchers have already raised concerns that renewable energy certificates, such as the EACs proposed by the IRS, undermine the integrity of targets such as those created in the 45Z program.[17] In order to safeguard taxpayer dollars and effect Congressional intent, the IRS will need to be strategic about how to implement an EAC program, particularly if they want to do so cost-effectively. The regulations currently proposed do not create such guardrails, and would need to be reinforced to ensure that the Section 45Z program in fact promotes the use of clean energy in fuel production as envisioned by the statute, rather than financial engineering through the trade of paper (or digital) certificates.

i. Section 45V's Annual Lifecycle Matching is Inappropriate for the 45Z Program

One of the guardrails from Section 1.45V-4(d), which is entirely inadequate for the Section 45Z program, is the usage of annual as opposed to hourly matching, up until December 31st, 2029. At first appearance, Section 1.45V-4(d) establishes a reasonable temporal matching requirement, that "the electricity represented by the EAC is generated in the same hour that the taxpayer's hydrogen production facility uses electricity to produce hydrogen."[18] Yet in the paragraph immediately following, in what is headlined as a "Transition Rule," Section 1.45V-4(d) establishes that this hourly matching requirement will be satisfied by matching certificates

[17] *E.g.*, Bjørn, Anders & Lloyd, Shannon & Brander, Matthew & Matthews, H.. (2022). Renewable energy certificates threaten the integrity of corporate science-based targets. Nature Climate Change. 12. 539-546. 10.1038/s41558-022-01379-5.
[18] 26 CFR 1.45V-4(d)(3)(ii)(A).

to usage over the course of the entire calendar year, for all EACs representing electricity generated before January 1st, 2030.[19] Only at that date will hourly matching take effect.

This is a major problem in the context of Section 45Z, because the statutory timeframe for the Section 45Z tax credit expires on December 31st, 2029.[20] Thus, adopting the Section 1.45V-4(d) timeframe effectively ensures that the more accurate, hourly matching will never apply to the Section 45Z tax credits. This would turn that so-called "transitional rule" into a permanent one, in the context of Section 45Z. In essence, this provision, as incorporated, constitutes both an acknowledgement by the IRS that hourly matching is the appropriate goal, and simultaneously an assurance that this more accurate goal will never be applied to the Section 45Z program.

This would be deeply problematic in the context of a clean fuel production program that extends beyond the clean hydrogen governed by Section 1.45V-4(d), in a way that would open the program to abuse. In the context of renewable fuel, there are major differences in spot prices, even across the same day. Wind prices, in particular, are known to be highly volatile, with large spikes during times of low winds and high demand, and deep declines, sometimes even into negative territory, in times of high wind and low demand (such as 4am on a Tuesday).[21] This problem also occurs with solar power, given that sun exposure, and therefore solar energy generation, fluctuates throughout the day, irrespective of any matching demand.

The opportunities for regulatory arbitrage here are clear. A qualifying facility would be able to purchase certificates for wind electricity, or any renewable energy source, during a period of low demand, possibly when the spot price is negative, yet run the facility on fossil fuels during the different operating hours. Stretched out across the year, this would allow the facility to purchase cheap (or even negatively priced) certificates to offset their fossil fuel usage on paper, even while continuing to run their operations with no modification to their actual fossil fuel use. Thus, a facility would be able to benefit from reliable, base generation from fossil fuels for their operations, and still benefit from the tax credit for certificates purchased strategically during off hours, regardless of whether the clean energy purchased is actually replacing the usage of fossil fuels as Congress intended.

This is a far greater concern for wind than for the hydrogen energy regulated in Section 45V. For hydrogen energy, technicians use heat, chemical reactions, or electric currents to split

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[19] 26 CFR 1.45V-4(d)(3)(ii)(B).
[20] 26 U.S.C. 45Z(g).
[21] *See* C.K. Woo, I. Horowitz, J. Moore, A. Pacheco, *The impact of wind generation on the electricity spot-market price level and variance: The Texas experience*, Energy Policy, Volume 39, Issue 7, 2011, Pages 3939-3944, ISSN 0301-4215. https://doi.org/10.1016/j.enpol.2011.03.084.

water into hydrogen and oxygen.[22] As such, the process generally remains under human control, unlike with wind or solar energy, which is generated by natural forces beyond human control. Thus, applying the Section 45V rules for temporal matching to 45Z, particularly in the context of wind or solar power, creates far greater opportunities for regulatory arbitrage, in a way that would not have been applicable at the time that commenters responded to the Section 45V rules.

This application of the 45V rules to the 45Z credit undermines Congressional intent, is expensive for the taxpayer, and places businesses that act as Congress intended at a disadvantage. Fuel producers who actually use renewable energy sources, and buy the certificates, to run their facilities, will be treated the same as fuel producers who purchase the certificates but continue to rely on fossil fuels to power their operations. The IRS can mitigate this harm by requiring hourly matching of certificate purchases to the operations in which the power is used, rather than annual matching that simply allows the fuel producer to match the related amount at the end of the year. To incorporate by reference a different regulation that applies exactly this solution, on the first day after the statutory authorization for the 45Z program expires, seems in this context to be extraordinarily dismissive of Congress, the taxpayer, and the fuel producers who actually try to use the 45Z program in the way that Congress intended.

The IRS can and should eliminate this opportunity for abuse, by specifying that the temporal matching required for the Section 45Z program will be hourly from the beginning, rather than from the day after the statutory authorization for the program expires.

ii. Section 45Z Should Require a Direct Geographic Nexus Between the Fuel Producer and Supplier of Clean Energy

Similarly, energy markets are fungible across disparate locations, only to the extent that the energy is in fact deliverable across those regions. As with the intermittency issue above, the Notice contained no discussion by the IRS as to any deliverability requirements that the IRS will implement to ensure such a connection underlying the EAC transaction, except for the incorporation of the standards in Section 1.45V-4(d). In that section, the IRS established principles of "deliverability," to ensure that the buyer and seller of the EAC in question were at least "in the same region."[23] That regulation further defines "region" as "a Region that corresponds to a Balancing Authority,"[24] which maintains the load-resource balance throughout a given geographic region.[25]

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[22] U.S. Department of Energy. *Hydrogen Production Processes*. https://www.energy.gov/cmei/fuels/hydrogen-production-processes

[23] 26 CFR 1.45V-4(d)(3)(iii).

[24] 26 CFR 1.45V-4(d)(2)(ix).

[25] *See, e.g.*, NERC (North American Electric Reliability Corporation). "Glossary of Terms Used in NERC Reliability Standards." Updated April 1, 2026. https://www.nerc.com/globalassets/standards/reliability-standards/glossary_of_terms.pdf

Yet these regions can be geographically vast, and this definition makes it fully possible possible that the clean power generator in question may be a long distance, even hundreds of miles, away from the fuel producer, on a different grid node, and with no physical delivery path between the two facilities in question. In other words, simply requiring that the clean energy generator and producer are in the same geographic region does not guarantee that the energy represented by the EAC will actually be transported to the fuel producer in question; in fact, the energy transfer signified by the certificate purchase might not even be physically possible.

Without requiring some identified, physical delivery path between the energy generator and clean fuel producer, rather than mere geographic proximity (which, in the context of a Balancing Area, could still be hundreds of miles apart), this liberal deliverability requirement, developed in the context of clean hydrogen under Section 45V, opens the door to significant regulatory arbitrage in the case of clean fuels under Section 45Z.

It may be helpful to the IRS to note that there exist regulatory models for a tighter standard here. In particular, California requires that the renewable generator: (1) have a first point of interconnection with a California balancing authority, have a first point of interconnection with distribution facilities used to serve end users within a California balancing authority area, or be scheduled into the eligible renewable energy resource into a California balancing authority without substituting electricity from another source; or otherwise (2) have an agreement to dynamically transfer electricity to a California balancing authority.[26] This is a significantly tighter standard, which at least ensures that there is an actual, deliverable pathway between the renewable power generator and the energy purchaser.

3) <u>The IRS Proposal Inflates the Cost of the Section 45Z Program by Applying the Credit to Activities Not Covered by the Authorizing Statute</u>

a. The Statutory Language Restricts the Section 45Z Clean Production Fuel Credit to Fuel Used for Aviation and Land Transportation

The language of section 45Z applies the clean fuel production credit only to transportation fuel.[27] Moreover, the statute limits its definition of transportation fuel to fuel that "is suitable for use as a fuel in a highway vehicle or aircraft."[28] Thus, by its very definition, the section 45Z tax credit is meant to apply to fuel for highway vehicles and aviation. It is therefore

[26] Cal. Pub. Utilities Code § 399.16(b)(1).
[27] 26 U.S.C. 45Z(a)(1)(A).
[28] 26 U.S.C. 45Z(d)(5)(A)(i).

disappointing, not to mention profligate to the taxpayer, that the IRS has announced its intention to extend this tax credit to marine transport fuel as well.[29]

The IRS describes this extension of the credit as a "clarification," but in fact this provision adds to the language in such a way that changes the meaning of the underlying statute, and adds cost to the taxpayer beyond what Congress intended. It is true that the Section 45Z credit has replaced various preexisting credits, including, for example the Section 40A credit for biodiesel and renewable diesel used as fuel.[30] However, none of these preexisting tax credits (except the aviation credit)[31] contained provisions limiting their use to any particular mode of transport. Thus, Congress has not merely consolidated these preexisting credits into section 45Z, but has introduced language clarifying that the credit applies to fuel suitable for use in highway vehicles or aircraft. Thus, the IRS's new language and example do not clarify the meaning of the statute at all, but rather counteracts the clarification that Congress incorporated into the statute.

For the benefit of the American taxpayers who ultimately subsidize these tax credits, the IRS should not contradict the statute by applying the section 45Z tax credit to fuels not included in the definition that Congress chose to delineate in the authorizing statute. Ideally, the Final Rule should require that the fuel be used in a highway vehicle or aircraft; at a minimum, the Final Rule should exclude the availability of the tax credit where the fuel is known to be intended for uses other than as "transportation fuel" as defined by the statute, which would exclude marine transport fuel.

b. The Proposed Regulations Undermine the Statutory Limitations by Awarding the 45Z Tax Credit to Clean Energy Producers who sell their Fuel to Intermediate Users

In the statute establishing the clean fuel production credit, Congress limited the tax credit to transportation sold to an unrelated person: (a) for use by such person in the production of a fuel mixture; (b) for use by such person in a trade or business; or (c) who sells such fuel at retail to another person and places such fuel in the fuel tank of such other person.[32] Nowhere does this mention sale to distributors or intermediaries. The IRS recognized this as recently as last year, when it required in Notice 2025-10 that the fuel must actually be "sold for use as a fuel"[33] in order to qualify for the tax credit. This original interpretation makes more sense, given that the intermediaries are not themselves using the fuel in question in their operations.

The first and third statutory categories are straightforwardly for blenders and retail gas stations, respectively. In this context, the second category clearly envisions business consumers

[29] 91 Fed. Reg. at 5,167-68 and 5,194.
[30] 26 U.S.C. 40A.
[31] 26 U.S.C. 40B.
[32] *See* 26 U.S.C. 45Z(a)(4).
[33] I.R.S. Notice 2025-10, 2025-6 I.R.B. 682.

who actually use the fuel in their own operations. To reinterpret the "use" in a trade or business to cover intermediary sales largely eliminates any limiting principle from this statutory provision. The purpose of this credit is to incentivize producers of aviation and vehicular fuel to adopt less carbon-intensive operations. Yet if credit is generated based on fuel sold to a distributor, there is no way to ensure that the fuel will in fact be used for the Congressionally authorized end uses.

As such, the IRS should retain its initial guidance, and require, in line with Congressional language and intent, that the fuel in question must in fact be "sold for use as a fuel" in order to qualify for the Section 45Z tax credit.

4) <u>It is Inappropriate for the IRS to Rely on the Feedstock Carbon Intensity Calculator (FD-CIC) Before Comments Regarding that Model have been Adjudicated, and a Final Rule Published in the Federal Register.</u>

The Internal Revenue Code at Section 45Z(b)(1)(B)(ii) requires the IRS to calculate the lifecycle greenhouse gas emissions of non-aviation fuel by using the most recent determinations under the Greenhouse gases, Regulated Emissions, and Energy use in Transportation model developed by Argonne National Laboratory, or a successor model as determined by the Secretary of the Treasury.[34] In the Notice, the IRS proposes to use not to use determinations from the Argonne model, but rather from the FD-CIC,[35] recently published by the U.S. Department of Agriculture (USDA).[36] As the IRS acknowledges in the Section 45Z Notice,[37] USDA has only published a beta version of the FD-CIC, which has yet to be proven through peer review, public feedback, and beta testing.[38]

As noted above, the APA requires that proposed regulatory changes with legal effect be published in the Federal Register, and subject to notice and comment.[39] For a Federal agency to adopt a pending model, which has not yet been subjected to peer review and to adjudication of public comments, in lieu of another model specifically listed in the authorizing statute, is the definition of "arbitrary and capricious." Peer review needs to be performed, and public comments addressed, before the IRS adopts such a model for the purpose of determining the provision of tax credits.

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[34] 26 U.S.C. 45Z(b)(1)(B)(ii).
[35] 91 *Fed. Reg.* at 5,172.
[36] U.S. Department of Agriculture, "Technical Guidelines for Climate-Smart Agriculture Crops Used as Biofuel Feedstocks," *Federal Register*, Vol. 90, No. 11 (January 17, 2025), p. 5,497.
[37] 91 *Fed. Reg.* at 5,172.
[38] *See* 90 *Fed. Reg.* at 5,499.
[39] *Supra*, n. 15.

In the authorizing statute, Congress required that lifecycle greenhouse gas emissions be calculated according to the "determinations" of the Argonne model or any successor.[40] Yet the results of any successor model would not be final determinations, as required by the statute, but only tentative calculations at best, until the model is subjected to appropriate peer review and the public comments are adjudicated.

This is a meaningful distinction. For the IRS to adopt a tentative model, promulgated by a different agency, before the model's methodology is finalized, places an inappropriate risk on taxpayers. The Section 45Z notice contains no mechanism to retroactively adjust the credits awarded if the beta model needs to be changed. Surprisingly, in the 45Z Notice the IRS does not even appear to contemplate that the beta version of the model could undergo changes that would affect the tax credits due.[41]

Allowing a retroactive adjustment would place a burden on industry, which could potentially be required to pay back some tax credits, based on the finalized model, whenever the final model is published. This would be disruptive for businesses trying to navigate a complex regulatory environment, and introduce unpredictability into their operations. Yet the appropriate regulatory response would be for the IRS to rely on the existing, Congressionally authorized model, and allow potential adjustments only after the FD-CIC is finalized.

Conclusion

In the IRA, as amended by the OBBBA, Congress enacted a tax credit meant to incentivize fuel producers to reduce the carbon intensity of their transportation fuel, by relying on power generated by domestic clean energy providers. Nothing in the authorizing statute requires, or even mentions, a certification process such as the IRS has proposed. Although the IRS has discretion to decide how to implement this program, including through certification, the IRS needs to do so with awareness that the proposed certification scheme exposes the program to regulatory arbitrage, which would allow fuel producers to claim tens of billions of dollars in tax credits, without actually changing their behavior to align with the statutory program. This adds to the cost of an already expensive program, beyond what Congress envisioned, even whilst undermining the purposes of the statute.

This regulatory arbitrage is possible because the certificates created in the IRS proposal are readily fungible, in a way that the underlying energy commodity is not. Part of the problem is that the IRS incorporates a model used to award certificates for a very specific type of low-emission fuel (namely, hydrogen), in the context of power sources that are far less controllable, and therefore far more volatile in terms of pricing. If the IRS insists on relying on this certification scheme to administer the Section 45Z tax credit, then the IRS at a minimum should

[40] *Supra*, n. 34.
[41] *See* 91 *Fed. Reg.* at 5,172.

limit the opportunities for regulatory arbitrage, by requiring a close temporal relationship between when the energy represented by a certificate is generated and used, and also by actually requiring geographic deliverability between the generator and user of the energy represented by the certificate.

In addition, the IRS should lower the costs of the proposed program by aligning the Section 45Z program more closely to what Congress authorized, by prohibiting the use of the credit to subsidize marine fuel, by only authorizing the credit for sale to energy users rather than intermediaries, and by requiring the use of the Argonne model, or at least a finalized model, rather than the tentative FD-CIC.

Thank you for your consideration of these comments.

Respectfully yours,

Trevar D. Kolodny
Visiting Fellow, The Heritage Foundation[42]

[42] These comments are submitted in my individual capacity, and do not necessarily represent the views of The Heritage Foundation.