

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 1**

[REG–120653–22]

RIN 1545–BQ54

**Advanced Manufacturing Investment Credit****AGENCY:** Internal Revenue Service (IRS), Treasury.**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations to implement the advanced manufacturing investment credit established by the CHIPS Act of 2022 to incentivize the manufacture of semiconductors and semiconductor manufacturing equipment within the United States. The regulations address the credit's eligibility requirements, an election that eligible taxpayers may make to be treated as making a payment of tax (including an overpayment of tax), or for an eligible partnership or S corporation to receive an elective payment, instead of claiming a credit, and a special 10-year credit recapture rule that applies if there is a significant transaction involving the material expansion of semiconductor manufacturing capacity in a foreign country of concern. This document also requests comments on the proposed regulations, including the definition of the term "semiconductor." These proposed regulations affect taxpayers that claim the advanced manufacturing investment credit or instead make an elective payment election.

**DATES:** Written or electronic comments and requests for a public hearing must be received by May 22, 2023. Requests for a public hearing must be submitted as prescribed in the "Comments and Requests for a Public Hearing" section.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (indicate IRS and REG–120653–22) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comments submitted electronically and comments submitted on paper to its public docket. Send hard copy submissions to: CC:PA:LPD:PR (REG–120653–22), Room 5203, Internal Revenue Service, P.O.

Box 7604, Ben Franklin Station, Washington, DC 20044.

**FOR FURTHER INFORMATION CONTACT:**

Concerning the proposed regulations, Jason P. Deirmenjian of the Office of Associate Chief Counsel (Passthroughs and Special Industries), (202) 317–4137 (not a toll-free number); concerning submissions of comments and requests for a public hearing, call Vivian Hayes (202–317–5306) (not a toll-free number) or by email to [publichearings@irs.gov](mailto:publichearings@irs.gov) (preferred).

**SUPPLEMENTARY INFORMATION:****Background**

This document contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 48D of the Internal Revenue Code (Code).

Section 107(a) of the CHIPS Act of 2022 (CHIPS Act), enacted as Division A of Public Law 117–167, 136 Stat. 1366, 1393 (August 9, 2022), added section 48D to the Code to establish the advanced manufacturing investment credit (section 48D credit) as an investment credit for purposes of section 46 of the Code, which is a current year general business credit under section 38 of the Code.

The amount of the section 48D credit allowable to a taxpayer for any taxable year is generally an amount equal to 25 percent of the basis of any qualified property that is part of an eligible taxpayer's advanced manufacturing facility if the qualified property is placed in service during such taxable year and after December 31, 2022. See section 48D(a), and (b)(1) of the Code and section 107(f)(1) of the CHIPS Act. However, section 48D(e) provides that the section 48D credit does not apply to property the construction of which begins after December 31, 2026. In addition, in the case of any qualified property placed in service after December 31, 2022, but the construction of which began prior to January 1, 2023, the section 48D credit is available only to the extent of the basis of qualified property attributable to the construction, reconstruction, or erection after August 9, 2022 (the date of enactment of the CHIPS Act). See section 107(f)(1) of the CHIPS Act. In addition, the portion of the basis of any such property that is attributable to qualified rehabilitation expenditures (as defined in section 47(c)(2) of the Code) in determining the rehabilitation credit under section 47 is excluded from a taxpayer's qualified investment with respect to any advanced manufacturing facility for any taxable year.

For purposes of the section 48D credit, an "eligible taxpayer" is any taxpayer that (1) is not a foreign entity of concern (as defined in section 9901(6) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, as amended by section 103 of the CHIPS Act), and (2) has not made an applicable transaction (as defined in section 50(a) of the Code) during the taxable year. See section 48D(c).

Section 48D(b)(1) provides that the "qualified investment" with respect to any advanced manufacturing facility for any taxable year is the basis of any qualified property placed in service by the taxpayer during such taxable year which is part of an advanced manufacturing facility. Section 48D(b)(2) provides that for purposes of section 48D(b), the term "qualified property" means tangible property with respect to which depreciation (or amortization in lieu of depreciation) is allowable that is integral to the operation of the advanced manufacturing facility if (I) constructed, reconstructed, or erected by the taxpayer, or (II) acquired by the taxpayer, if the original use of such property commences with the taxpayer. Qualified property includes any building or its structural components satisfying such requirements unless the building or portion of the building is used for offices, administrative services, or other functions unrelated to manufacturing. Section 48D(b)(3) provides that the term "advanced manufacturing facility" means a facility for which the primary purpose is the manufacturing of semiconductors or semiconductor manufacturing equipment.

Section 48D(d)(1) allows a taxpayer to elect to treat the section 48D credit determined for the taxpayer for a taxable year as a payment against the tax imposed by subtitle A of the Code (that is, treated as a payment of Federal income tax) equal to the amount of the credit rather than a credit against the taxpayer's Federal income tax liability for that taxable year (elective payment election). Section 48D(d)(2) provides special rules relating to an elective payment election made for (A) property held directly by a partnership (within the meaning of section 761(a) of the Code) or an S corporation (as defined in section 1361(a)(1) of the Code) in which the partnership or S corporation actually receives a payment rather than a credit, (B) the period during which an elective payment election can be made, (C) the timing of the elective payment, (D) appropriations for making elective payments to partnerships and S

corporations, (E) authority of the Secretary of the Treasury or her delegate (Secretary) to require additional information or registration of taxpayers, and (F) repayment of an excessive elective payment, plus a penalty of an amount equal to 20 percent of such excessive payment. Section 48D(d)(3) provides that the section 48D credit is zero for a taxpayer making an elective payment election.

Section 48D(d)(4) provides that the elective payment election will not be treated as part of the income tax laws of any U.S. territory with a mirror code tax system (as defined in section 24(k) of the Code) unless the U.S. territory elects to have the elective payment election apply under its income tax laws. Under section 48D(d)(5), basis reduction and recapture rules similar to the rules of section 50(a) and (c) of the Code apply with respect to amounts treated as paid or actually received by a taxpayer under an elective payment election. Finally, section 48D(d)(6) authorizes the Secretary to issue regulations or other guidance determined to be necessary or appropriate to carry out the elective payment election provisions of section 48D(d), including (A) regulations or other guidance providing rules for determining a partner's distributive share of deemed tax-exempt income, and (B) guidance to ensure that the amount treated as a payment made or the payment received by a taxpayer is commensurate with the amount of the section 48D credit that generally would be otherwise allowable (determined without regard to section 38(c)).

Pursuant to section 107(c) of the CHIPS Act, payments made to a partnership or S corporation pursuant to the elective payment election, as well as amounts treated as payments against tax by taxpayers making an elective payment election, are exempt from reduction under any sequestration order issued under the Balanced Budget and Emergency Deficit Control Act of 1985 (2 U.S.C. 900 *et seq.*) on or after December 31, 2022.

Section 107(b) of the CHIPS Act added new sections 50(a)(3) and (6)(D) and (E) to the Code to provide special recapture rules for certain expansions in connection with advanced manufacturing facilities. Under section 50(a)(3)(A), if there is an applicable transaction by an applicable taxpayer before the close of the 10-year period beginning on the date such taxpayer placed in service property that is eligible for the section 48D credit, then the taxpayer's Federal income tax liability under chapter 1 of the Code (chapter 1) for the taxable year in which such transaction occurs must be

increased by 100 percent of the aggregate decrease in the credits allowed under section 38 for all prior taxable years which would have resulted solely from reducing to zero any investment credit determined under section 46 that is attributable to the section 48D credit with respect to such property (applicable transaction recapture rule). Section 50(a)(3)(B) provides an exception to the applicable transaction recapture rule for an applicable taxpayer that demonstrates to the satisfaction of the Secretary that the applicable transaction has been ceased or abandoned within 45 days of a determination and notice by the Secretary. Section 50(a)(3)(C) authorizes the Secretary to issue such regulations or other guidance as the Secretary determines necessary or appropriate to carry out the purposes of the applicable transaction recapture rule, including regulations or other guidance providing for recordkeeping requirements or information reporting for purposes of administering the requirements of section 50(a)(3).

As added to the Code by section 107(b)(2) of the CHIPS Act, section 50(a)(6)(D) provides that for purposes of section 50(a), the term "applicable transaction" means, with respect to any applicable taxpayer, any significant transaction (as determined by the Secretary, in coordination with the Secretary of Commerce and the Secretary of Defense) involving the material expansion of semiconductor manufacturing capacity of such applicable taxpayer in a foreign country of concern (as defined in section 9901(7) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, as amended by section 103 of the CHIPS Act) other than certain transactions that primarily involve the expansion of manufacturing capacity for legacy semiconductors (as defined in section 9902(a)(6) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, as amended by section 103 of the CHIPS Act). As discussed in the Explanation of Provisions section of this preamble, the proposed regulations primarily apply long-established credit mechanics and procedures common to all investment tax credits (including the section 48D credit) previously set forth in regulations and subregulatory guidance and, consistent with statute, incorporate definitional concepts as determined by the Secretary of Commerce, which are provided in proposed 15 CFR part 231, as contained in the proposed rule, *Preventing the Improper Use of CHIPS Act Funding*, issued by the CHIPS

Program Office, National Institute of Standards and Technology, Department of Commerce (Commerce Proposed Rule). The Commerce Proposed Rule provides guardrails to prevent the improper use of CHIPS Act funding overseen by the Department of Commerce.

Section 50(a)(6)(E) defines an "applicable taxpayer" for purposes of section 50(a) as any taxpayer who has been allowed a section 48D credit for any prior taxable year.

## Explanation of Provisions

### I. Advanced Manufacturing Investment Credit Determined

The proposed regulations provide rules for calculating the amount of a taxpayer's qualified investment pursuant to section 48D(b)(1), generally, and in the context of certain passthrough entities. Section 48D(b)(1) specifies that qualified investment "is the basis of any qualified property placed in service by the taxpayer during such taxable year which is part of an advanced manufacturing facility." The statute is silent as to manner in which a taxpayer's basis in qualified property is allocated in the context of passthrough entities. The proposed regulations clarify that a partner's share of basis in the qualified property of a partnership is determined under the rules in § 1.46–3(f). Section 1.46–3(f) contains rules for determining a partner's share of the qualified basis of a partnership under the former investment tax credit provisions (former sections 46(a) (amount of investment credit) and (c) (qualified basis)). Under those regulations and consistent with section 48D(b)(1), a partner is treated as the taxpayer with respect to its share of the basis of the partnership's qualified property for calculating its qualified investment. A partner's share of the partnership's basis generally is determined in accordance with the ratio in which the partners divide the general profits of the partnership (that is, taxable income of the partnership as described in section 702(a)(8)).

The proposed regulations specify that an S corporation must apportion the basis of qualified property pro rata among its shareholders. A shareholder is treated as the taxpayer with respect to the shareholder's share of basis in the qualified property of the S corporation. The proposed regulations further specify that an estate or trust must apportion the basis of the estate or trust's qualified property among the estate or trust and its beneficiaries on the basis of the income of the estate or trust allocable to each for that taxable

year. A beneficiary to which the basis of qualified property is apportioned is, for purposes of the section 48D credit, treated as the taxpayer with respect to the property. The proposed regulations are consistent with the rules for allocating basis with respect to an electing small business corporation and estates and trusts under § 1.48–5 and § 1.48–6, respectively, which contain rules for allocating basis for purposes of former sections 48(e) and (f), respectively. Comments are requested as to whether it would be helpful for the final regulations or other guidance to further address the manner in which a taxpayer's basis in qualified property is allocated in the context of passthrough entities.

Under section 48D(b)(5), “rules similar to the rules of subsections (c)(4) and (d) of section 46 (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990) shall apply for purposes of section 48D(a).” The proposed regulations address a taxpayer's ability to make a qualified progress expenditure election, as provided in § 1.46–5, to increase its qualified investment by any qualified progress expenditures, made after December 31, 2022. Comments are requested as to whether it would be helpful for the final regulations or other guidance to expand or clarify a taxpayer's ability to claim a section 48D credit for qualified progress expenditures.

Section 48D(b)(4) excludes from qualified investment “that portion of the basis of any property which is attributable to qualified rehabilitation expenditures (as defined in section 47(c)(2)).” The proposed regulations clarify that a taxpayer's qualified investment does not include the amount of any capital expenditures that meet the definition of a qualified rehabilitation expenditure.

## II. Qualified Property

Section 48D(b)(2)(B)(ii) excepts from the definition of qualified property “a building, or a portion of a building, used for offices, administrative services, or other functions unrelated to manufacturing.” The proposed regulations clarify that human resources or personnel services, payroll services, legal and accounting services, and procurement services; sales and distribution functions; and security services (not including cybersecurity operations) are among functions unrelated to manufacturing semiconductor or semiconductor manufacturing equipment.

Under section 48D(b)(2)(A)(iii)(II), the term “qualified property” means

property acquired by the taxpayer if the original use of such property commences with the taxpayer. The proposed regulations define the term “original use” generally as the first use to which the property is put by any taxpayer in connection with a trade or business or for the production of income. In addition, the proposed regulations add rules related to the definition of “original use” for inventory.

Under section 48D(b)(2)(A)(iv) property must be “integral to the operation of the advanced manufacturing facility” to meet the definition of qualified property. The proposed regulations specify that property is integral to the manufacturing of semiconductors or semiconductor manufacturing equipment if it is used directly in the manufacturing operation and is essential to the completeness of the manufacturing operation. The proposed regulations further specify that property, including a building and its structural components, that constitutes a research or storage facility may qualify as integral to the operation of an advanced manufacturing facility if the property is used in connection with the manufacturing of semiconductors or semiconductor manufacturing equipment. Conversely, a research facility that does not manufacture any type of semiconductors or semiconductor manufacturing equipment does not qualify.

## III. Advanced Manufacturing Facility

Section 48D(b)(3) provides that an advanced manufacturing facility must be a “facility for which the primary purpose is the manufacturing of semiconductors or semiconductor manufacturing equipment.” The proposed regulations explain that the determination of whether the primary purpose of a facility is manufacturing finished semiconductors or manufacturing finished semiconductor manufacturing equipment will be made based on all the facts and circumstances and list certain facts and circumstances relevant to this test. The proposed regulations make clear that a facility that manufactures, produces, grows, or extracts materials or chemicals that are supplied to an advanced manufacturing facility that manufactures semiconductors, or semiconductor manufacturing equipment, does not meet the primary purpose requirement.

The proposed regulations also define the terms “semiconductor manufacturing” or “manufacturing of semiconductors” and “manufacturing of semiconductor manufacturing equipment” for purposes of section 48D.

The Treasury Department and the IRS specifically request comments on the scope of the definition in proposed § 1.48–2(k) of the term “semiconductor.” Specifically, comments are requested as to whether this term, for purposes of the section 48D credit, should include semiconductive substances—materials with electronic properties controllable by the addition of, typically small, quantities of specific elements or dopants—on which an electronic device or system is manufactured, such as, but not limited to polysilicon and compound semiconductor wafers. If so, commenters are requested to explain in detail what principle, standard, or parameters could be incorporated in a definition of the term “semiconductor” so as to prevent extending the definition of that term to also include other materials and supplies used in the manufacture of finished semiconductors.

## IV. Beginning of Construction

The proposed regulations provide guidance regarding the beginning of construction requirement for purposes of the effective date provision in section 107(f)(1) of the CHIPS Act, and the credit termination rule in section 48D(e). The proposed regulations specify that a taxpayer can establish that construction of a property has begun by meeting the Physical Work Test or the Five Percent Safe Harbor, as that test and safe harbor are described in the proposed regulation. The proposed regulations define what is considered the unit of property for purposes of determining the beginning of construction under section 48D(e). Solely for purposes of determining whether construction of a property has begun for purposes of section 48D and the section 48D regulations, multiple items of qualified property or advanced manufacturing facilities that are operated as part of a single advanced manufacturing facility project are treated as a single item of property. Whether multiple qualified properties or advanced manufacturing facilities are operated as part of a single advanced manufacturing facility project will depend on all the relevant facts and circumstances. Thus, whether the beginning of construction requirement is satisfied with respect to any item of property generally is determined based on the date construction of the item of property began, or the date construction of the single advanced manufacturing facility project that the item is part of began.

In addition, the proposed regulations further explain that under either the

Physical Work Test or the Five Percent Safe Harbor, a taxpayer must meet the Continuity Requirement, as described in the proposed regulation, to establish the beginning of construction. For this requirement, a taxpayer must demonstrate that either continuous construction or continuous efforts have occurred. Whether a taxpayer meets the Continuity Requirement under either test is determined by all the relevant facts and circumstances. The IRS will closely scrutinize a unit of property and may determine that the beginning of construction is not satisfied with respect to property if a taxpayer does not meet the Continuity Requirement.

Finally, section 1 of Executive Order 14080 of August 25, 2022 (E.O. 14080), *Implementation of the CHIPS Act of 2022* (87 FR 52847), states that the policy underlying the CHIPS Act (which established the section 48D credit) is, in part, to “make transformative investments to restore and advance our Nation’s leadership in the research, development, and manufacturing of semiconductors” and to “bolster United States technology leadership; and reduce our dependence on critical technologies from China and other vulnerable or overly concentrated foreign supply chains.” In this regard, section 2 of E.O. 14080 directs, in part, that in implementing the CHIPS Act, as appropriate, and to the extent consistent with the law, the Treasury Department and the IRS prioritize, economic, sustainability, and national security needs, by building domestic manufacturing capacity that reduces reliance on vulnerable or overly concentrated foreign production for both leading-edge and mature microelectronics, and ensuring long-term United States leadership in the microelectronics sector. Given the critical national security and foreign policies of the United States that the section 48D credit, as part of the CHIPS Act, is intended to achieve, the Department of the Treasury and the IRS have determined that it is appropriate for the proposed regulations to provide an extended safe harbor for satisfying the Continuity Requirement in this unique case. Under the safe harbor provided in proposed § 1.48D–5(e)(6), a taxpayer is deemed to satisfy the Continuity Requirement provided the property is placed in service no more than 10 calendar years after the date that the Physical Work Test or the Five Percent Safe Harbor is first satisfied with respect to that item of property or the single advanced manufacturing facility project that the item of property is part of.

## V. Elective Payment Election

Section 48D(d)(2)(A)(i) provides that, in the case of a partnership or an S corporation that makes an election under section 48D(d)(1) (in such manner as the Secretary may provide) with respect to the section 48D credit, “the Secretary shall make a payment to such partnership or S corporation equal to the amount of such credit.” Comments are requested on any guidance needed to determine the extent to which, if any, other Code provisions that limit the amount of a credit to a taxpayer, such as section 469 (passive activity credits), section 49 (at-risk credit rules), and section 50, may be applied to limit the amount of the Secretary’s payment to the partnership or S corporation pursuant to section 48D(d)(2)(A)(i)(I). Comments are also generally requested on the treatment of the Secretary’s payment to the partnership or S corporation under the provisions of subchapters K and S of chapter 1, respectively.

Section 48D(d)(2)(E) provides that “as a condition of, and prior to, any amount being treated as a payment which is made by the taxpayer under [section 48D(d)(1)] or any payment being made pursuant to [section 48D(d)(2)(A)(i)(I)], the Secretary may require such information or registration as the Secretary deems necessary or appropriate for purposes of preventing duplication, fraud, improper payments or excessive payments under [section 48D].” The IRS intends to provide, through forms and instructions, the procedures for registration of properties for which an election under section 48D(d) will be made. Comments are requested on the registration requirements and other procedures for purposes of section 48D(d)(2)(E).

Section 48D(d)(2)(F)(i) provides that in the case of an elective payment election, that the Secretary determines constitutes an excessive payment, the tax imposed on such taxpayer by chapter 1 for the taxable year in which such determination is made will be increased by an amount equal to the sum of (I) the amount of such excessive payment, plus (II) an amount equal to 20 percent of such excessive payment. Section 48D(d)(2)(F)(iii) defines an excessive payment as “an amount equal to the excess of—(I) the amount treated as a payment under [section 48D(d)(1)], or the amount of the payment made pursuant to [section 48D(d)(2)(A)], . . . over (II) the amount of the credit which, without application of this subsection, would be otherwise allowable (determined without regard to section 38(c)) under [section 48D(a)] with

respect to such property for such taxable year.” Comments are requested on any guidance needed with respect to the amount that “would be otherwise allowable” for purposes of section 48D(d)(2)(F)(iii)(II).

Section 48D(d)(5) provides that “rules similar to the rules of [sections 50(a) and (c)] shall apply with respect to—(A) any amount treated as a payment which is made by the taxpayer under [section 48D(d)(1)], and (B) any payment made pursuant to [section 48D(d)(2)(A)].” Comments are requested on the guidance necessary to clarify the rules that are similar to the rules of sections 50(a) (investment credit recapture in the case of dispositions, etc.) and (c) (basis adjustment to investment credit property) for purposes of section 48D(d)(5).

## VI. Recapture in the Case of Certain Expansions

The statutory applicable transaction recapture rule in section 50(a)(3) is intended to dissuade an “applicable taxpayer” from engaging in an “applicable transaction” after property qualifying for a section 48D credit is placed in service.

Section 50(a)(6)(D) defines an applicable transaction to mean, with respect to any applicable taxpayer, any significant transaction (as determined by the Secretary, in coordination with the Secretary of Commerce and the Secretary of Defense) involving the material expansion of semiconductor manufacturing capacity of such applicable taxpayer in a foreign country of concern. The term “foreign country of concern” is defined in section 9901(a)(7) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, as amended by section 103 of the CHIPS Act, to mean a country that is a covered nation (as defined in section 4872(d) of title 10) and any country that the Secretary of Commerce, in consultation with the Secretary of Defense, the Secretary of State, and the Director of National Intelligence, determines to be engaged in conduct that is detrimental to the national security or foreign policy of the United States. The proposed regulations define a foreign country of concern consistent with the statute. Additionally, in coordination with the Secretary of Commerce and the Secretary of Defense and pursuant to the Secretary’s authority under section 50(a)(6)(D)(i) to determine whether transactions are significant transactions, the proposed regulations define the term “significant transaction” to align and harmonize the scope of applicable transactions under section 50(a)(3) with

the scope of prohibited expansion transactions within the meaning of proposed § 231.202 (relating to the Prohibition on Certain Expansion Transactions) as contained in the Commerce Proposed Rule. Accordingly, proposed § 1.50–2(b)(10) defines the term “significant transaction” consistent with proposed § 231.202 as contained in the Commerce Proposed Rule to include certain transactions engaged in by an applicable taxpayer or an applicable taxpayer’s affiliates (within the meaning of proposed § 231.101 as contained in the Commerce Proposed Rule).

Section 50(a)(6)(E) defines an applicable taxpayer to mean “any taxpayer who has been allowed a credit under section 48D(a) for any prior taxable year.” The proposed regulations provide that an applicable taxpayer also includes (i) any member of an affiliated group under section 1504(a) of the Code, determined without regard to section 1504(b)(3) of the Code, that includes a taxpayer who has been allowed a credit under section 48D(a) for any prior taxable year, (ii) any taxpayer who has made an election under section 48D(d)(1), (iii) any partnership or S corporation that has made an election under section 48D(d)(2), and (iv) any partner in a partnership (directly or indirectly through one or more tiered partnerships) or shareholder in an S corporation for which the entity has made an election under section 48D(d)(2) with respect to a credit determined under section 48D(a)(1) for any taxable year prior to the taxable year in which such entity entered into an applicable transaction.

If an applicable taxpayer engages in an applicable transaction before the close of the 10-year period beginning on the date such taxpayer placed in service any property eligible for the section 48D credit, then the applicable taxpayer is subject to an increase in tax under chapter 1 for the taxable year in which the applicable transaction occurs, as provided in section 50(a)(3). The proposed regulations generally address the amount of recapture required pursuant to section 50(a)(3). For example, if a taxpayer claims a section 48D credit on property it owns directly and also claims a section 48D credit on property placed in service by a partnership in which it is a partner, and that taxpayer subsequently enters into an applicable transaction within 10 years of claiming those section 48D credits, then the proposed regulations require that the taxpayer recapture all the credits claimed (that is, credits for property owned directly and through its investment in the partnership). The proposed regulations provide for the

same result if, instead of the taxpayer entering into the applicable transaction, the partnership enters into the applicable transaction. Comments are requested on the appropriate amount of recapture required in the context of partnerships and S corporations, including the appropriateness of the recapture results in the above examples.

As noted in the Background section of this preamble, section 50(a)(3)(C) authorizes the Secretary to issue such regulations or other guidance as the Secretary determines necessary or appropriate to carry out the purposes of the applicable transaction recapture rule, including regulations or other guidance providing for recordkeeping requirements or information reporting for purposes of administering the requirements of section 50(a)(3). The Treasury Department and the IRS are considering proposing record retention and information reporting requirements for applicable taxpayers in addition to those required under current law such that the IRS would have sufficient knowledge regarding proposed applicable transactions and applicable transactions the taxpayer has engaged in. For example, record retention or information reporting requirements may require an applicable taxpayer to maintain records or file information with the IRS related to any proposed or planned significant transaction for a period not ending earlier than the applicable period of limitations under section 6501 of the Code on assessment and collection of tax under chapter 1 with respect to the applicable taxpayer’s return filed for the taxable year that includes the close of the 10-year period beginning on the date such taxpayer placed in service investment credit property that is eligible for the section 48D credit.

Additionally, the Treasury Department and the IRS are considering information reporting requirements that would require notifying the IRS regarding any planned significant transactions of the applicable taxpayer involving the material expansion of semiconductor manufacturing capacity in a foreign country of concern, including any transaction the applicable taxpayer considers to be eligible for an exception under section 50(a)(3) or proposed § 1.50–2. For example, such requirements may require the applicable taxpayer to report accurate and complete information relating to the applicable transaction, including: (i) the name, employer identification number, and other identifying information regarding the applicable taxpayer that is proposing or engaging in a planned applicable transaction, and all other

parties to the applicable transaction; (ii) the name and location of any business in a foreign country of concern where semiconductor manufacturing capacity may be materially expanded by the applicable transaction; (iii) a brief description of the planned applicable transaction, including the specific semiconductor products currently manufactured, the current production technology node and semiconductor manufacturing capacity, as well as the specific semiconductor products proposed for manufacture, the proposed production technology node, and proposed semiconductor manufacturing capacity; (iv) if the planned applicable transaction involves the material expansion of semiconductor manufacturing capacity that produces legacy semiconductors for which the products will predominately serve the market of a foreign country of concern, documentation as to where the final products incorporating the legacy semiconductors are to be used or consumed including the percentage of semiconductor manufacturing capacity or percentage of sales revenue that will be accounted for by use or consumption of the final goods in the foreign country of concern, and (v) if applicable, a statement explaining how the planned significant transaction meets the requirements of an exception to the applicable transaction recapture rule that involve the material expansion of semiconductor manufacturing capacity in proposed § 1.50–2. The Treasury Department and the IRS request comments on the ability of applicable taxpayers to comply with such requirements and what specific procedures should be considered to ensure that the IRS has sufficient information to determine whether an applicable taxpayer engages in an applicable transaction within the meaning of section 50(a)(3) and proposed § 1.50–2.

#### IV. Applicability Date

These regulations (§§ 1.48D–1 through 1.48D–6, and § 1.50–2) are proposed to apply to taxable years ending on or after the date the Treasury decision adopting these regulations as final regulations are published in the **Federal Register**. Taxpayers may rely on these proposed regulations for property placed in service after December 31, 2022, in taxable years ending before the date the Treasury decision adopting these regulations as final regulations is published in the **Federal Register**, provided the taxpayers follow proposed §§ 1.48D–1 through 1.48D–6, and § 1.50–2 in their entirety and in a consistent manner.

## Special Analyses

### I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520) (PRA) generally requires that a Federal agency obtain the approval of the Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.

For purposes of the PRA, the reporting burden associated with the collection of information in proposed § 1.48D–6(a)(1) and (2) will be reflected in the Paperwork Reduction Act Submissions associated with Form 3468 (OMB control number 1545–0155). The reporting burden associated with the collection of information in proposed § 1.48D–6(c) will be reflected in the Paperwork Reduction Act Submissions associated with Form 15396 (OMB control number pending). The reporting burden associated with the collection of information proposed in § 1.50–2(a) will be reflected in the Paperwork Reduction Act Submissions associated with Form 4255 (OMB control number 1545–0166). The IRS anticipates providing an opportunity to comment on any revisions to the forms through subsequent notice in the **Federal Register** and on [www.irs.gov/draftforms](http://www.irs.gov/draftforms).

### II. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that these proposed regulations will not have a significant economic impact on a substantial number of small entities. Although the rules may affect small entities, data are not readily available about the number of taxpayers affected. The economic impact of these regulations is not likely to be significant, because these proposed regulations substantially incorporate statutory changes by the CHIPS Act in establishing section 48D and amending section 50(a) and assist taxpayers in understanding section 48D and the changes to section 50(a). The proposed regulations will also make it easier for taxpayers to comply with section 48D and the changes to section 50(a). Notwithstanding this certification, the Treasury Department and the IRS welcome comments on the impact of these regulations on small entities.

### III. Section 7805(f)

Pursuant to section 7805(f), this notice of proposed rulemaking has been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

### IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). This proposed rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

### IV. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

### V. Regulatory Planning and Review

The Administrator of the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, has determined that this proposed rule is not a significant regulatory action, as that term is defined in section 3(f) of Executive Order 12866. Therefore, OIRA has not reviewed this proposed rule pursuant to section 6(a)(3)(A) of Executive Order 12866 and the April 11, 2018, Memorandum of Agreement between the Treasury Department and the Office of Management and Budget (OMB).

#### *Comments and Requests for a Public Hearing*

Before the proposed regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the **ADDRESSES** section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations. Any comments submitted will be made available at [www.regulations.gov](http://www.regulations.gov) or upon request. A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are encouraged to be made

electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020–4, 2020–17 IRB 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people requesting a reasonable accommodation.

#### *Statement of Availability of IRS Documents*

Guidance cited in this preamble is published in the Internal Revenue Bulletin and is available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at <https://www.irs.gov>.

#### *Drafting Information*

The principal author of these proposed regulations is Jason P. Deirmenjian Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. However, other personnel from the Treasury Department and the IRS participated in their development.

### List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

### Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 1 as follows:

#### **PART 1—INCOME TAXES**

■ **Paragraph 1.** The authority citation for part 1 is amended by adding sectional authorities for §§ 1.48D–6 and 1.50–2 to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*  
Section 1.48D–6 also issued under 26 U.S.C. 48D(d)(6).  
Section 1.50–2 also issued under 26 U.S.C. 50(a)(3)(C).

\* \* \* \* \*

■ **Par. 2.** Sections 1.48D–0 through 1.48D–6 are added to read as follows:

Sec.	
* * * * *	
1.48D–0.	Table of contents.
1.48D–1	Advanced manufacturing investment credit determined.
1.48D–2	Definitions.
1.48D–3	Qualified property.
1.48D–4	Advanced manufacturing facility of an eligible taxpayer.
1.48D–5	Beginning of construction.
1.48D–6	Elective payment election.
* * * * *	

**§ 1.48D-0. Table of contents.**

This section lists the table of contents for §§ 1.48D-1 through 1.48D-6.

**§ 1.48D-1 Advanced manufacturing investment credit determined**

- (a) Overview.
- (b) Determination of credit.
- (c) Coordination with section 47.
  - (1) In general.
  - (2) Example.
  - (d) Applicability date.

**§ 1.48D-2 Definitions**

- (a) In general.
- (b) Applicable transaction.
- (c) Basis.
- (d) Beginning of construction.
- (e) Eligible taxpayer.
- (f) Foreign entities.
  - (1) Foreign entity.
  - (2) Foreign entity of concern.
  - (3) Owned by, controlled by, or subject to the jurisdiction or direction of.
    - (g) Placed in service.
    - (h) Qualified investment.
      - (1) In general.
      - (2) Special rules for certain passthrough entities.
        - (i) Partnerships.
        - (ii) S corporations.
        - (iii) Estate or trust.
        - (3) Qualified progress expenditures election.
          - (4) Examples.
            - (i) Example 1.
            - (ii) Example 2.
            - (i) Section 48D credit.
            - (j) Section 48D regulations.
            - (k) Semiconductor.
              - (l) Semiconductor manufacturing.
                - (1) In general.
                - (2) Semiconductor manufacturing processes.
                  - (i) Packaging.
                  - (ii) Advanced Packaging.
                  - (m) Semiconductor manufacturing equipment.
                    - (n) Manufacturing semiconductor manufacturing equipment.
                      - (o) Applicability date.

**§ 1.48D-3 Qualified property**

- (a) In general.
- (b) Qualified property.
- (c) Tangible depreciable property.
  - (1) In general.
  - (2) Exception.
  - (d) Constructed, reconstructed, or erected by the taxpayer.
    - (e) Original use.
      - (1) In general.
      - (2) Treatment of inventory.
      - (f) Integral to the operation of an advanced manufacturing facility.
        - (1) In general.
        - (2) Research or storage facilities.
        - (g) Applicability date.

**§ 1.48D-4 Advanced manufacturing facility of an eligible taxpayer**

- (a) In general.
- (b) Advanced manufacturing facility.
- (c) Primary purpose.
  - (1) In general.
  - (2) No primary purpose.
  - (3) Examples.
    - (i) Example (i).

- (ii) Example (ii).
- (d) Applicability date.

**§ 1.48D-5 Beginning of construction**

- (a) Termination of credit.
  - (1) In general.
  - (2) Property.
  - (3) Single advanced manufacturing facility project.
    - (i) Factors used for single advanced manufacturing facility project determination.
    - (ii) Example.
    - (iii) Timing of single advanced manufacturing facility project determination.
    - (iv) Disaggregation.
    - (v) Example.
      - (b) Beginning of construction.
        - (1) In general.
        - (2) Continuity requirement.
        - (c) Physical work test.
          - (1) In general.
          - (2) Physical work of significant nature.
            - (i) In general.
            - (ii) Exceptions.
              - (d) Five percent safe harbor.
                - (1) In general.
                - (2) Costs.
                  - (3) Cost overruns.
                    - (i) Single advanced manufacturing facility project.
                      - (ii) Example.
                      - (iii) Single property.
                        - (A) Example.
                        - (B) [Reserved].
                        - (e) Continuity requirement.
                          - (1) In general.
                          - (2) Continuous construction.
                          - (3) Continuous efforts.
                            - (4) Excusable disruptions to continuous construction and continuous efforts tests.
                              - (i) In general.
                              - (ii) Effect of excusable disruptions on continuity safe harbor.
                                - (iii) Non-exclusive list of construction disruptions.
                                  - (5) Timing of excusable disruption determination.
                                    - (6) Continuity safe harbor.
                                      - (i) In general.
                                      - (ii) Example.
  - (f) Applicability date.

**§ 1.48D-6 Elective payment election**

- (a) Elective payment election.
  - (1) In general.
  - (2) Timing of election.
  - (3) Irrevocable.
  - (4) Denial of double benefit.
  - (5) Treatment of payment.
    - (b) Special rules for partnerships and S corporations.
      - (1) In general.
      - (2) [Reserved].
      - (c) Registration requirement.
        - (1) In general.
        - (2) [Reserved].
        - (d) Excessive payment.
          - (1) In general.
          - (2) Reasonable cause.
          - (3) Excessive payment defined.
          - (4) [Reserved].
          - (e) Basis reduction and recapture.
            - (1) In general.
            - (2) [Reserved].
            - (f) Mirror code territories.
              - (g) Applicability date.

**§ 1.48D-1 Advanced manufacturing investment credit determined.**

(a) *Overview.* For purposes of section 46 of the Internal Revenue Code (Code), the amount of the advanced manufacturing investment credit under section 48D of the Code determined for any taxable year is the amount determined under section 48D and the section 48D regulations (subject to any applicable provisions of the Code that may limit the amount determined under section 48D), for such taxable year with respect to any advanced manufacturing facility of an eligible taxpayer. Paragraph (b) of this section provides the general rules for determining the amount of a taxpayer's section 48D credit for a taxable year. Paragraph (c) of this section provides rules coordinating the section 48D credit with the rules of section 47 (relating to the rehabilitation credit). Section 1.48D-2 provides definitions that apply for purposes of section 48D and the section 48D regulations. Section 1.48D-3 provides rules relating to the definition of qualified property for purposes of the section 48D credit. Section 1.48D-4 provides rules relating to the definition of an advanced manufacturing facility of an eligible taxpayer for purposes of the section 48D credit. Section 1.48D-5 provides rules regarding the beginning of construction of property for purposes of the section 48D credit. Section 1.48D-6 provides rules relating to the elective payment election available to a taxpayer under section 48D(d) to be treated as making a payment of tax, or for a partnership or S corporation to receive an actual payment, in lieu of claiming a section 48D credit. See § 1.50-2 for additional rules under section 50(a)(3) and (6) of the Code relating to applicable transactions that result in the recapture of section 48D credits.

(b) *Determination of credit.* Subject to any applicable sections of the Code that may limit the credit determined under section 48D, the section 48D credit for any taxable year of an eligible taxpayer with respect to any advanced manufacturing facility is an amount equal to 25 percent of the taxpayer's qualified investment for the taxable year with respect to that advanced manufacturing facility. A section 48D credit is available only with respect to qualified property that a taxpayer places in service after December 31, 2022, and, for any qualified property the construction of which began prior to January 1, 2023, but only to the extent of the basis of that property attributable to the construction, reconstruction, or erection of that property occurring after August 9, 2022. Under section 48D(e),



no section 48D credit is allowed to a taxpayer for placing qualified property in service in any taxable year if the beginning of construction of that qualified property as determined under § 1.48D-5 begins after December 31, 2026 (the date specified in section 48D(e)).

(c) *Coordination with section 47*—(1) *In general.* The qualified investment with respect to any advanced manufacturing facility of an eligible taxpayer for any taxable year does not include that portion of the basis of any property that is attributable to qualified rehabilitation expenditures, as defined in section 47(c)(2) and § 1.48-12(c), with respect to a qualified rehabilitated building, as defined in section 47(c)(1) and § 1.48-12(b).

(2) *Example: Coordination with section 47.* X Corp, a calendar-year C corporation, owns Building A, a certified historic structure. X Corp's adjusted basis in Building A is \$100,000. Between August 1, 2024, and October 31, 2024, X Corp incurs \$1 million to reconstruct, within the meaning of section 48D(b)(2)(A)(iii)(I) and § 1.48-12(b)(2)(iv), Building A. X Corp places the reconstructed Building A, a qualified rehabilitated building, in service on November 15, 2024. Of the \$1 million of capitalized expenditures incurred to reconstruct Building A (all of which would meet the definition of qualified investment), \$250,000 also meets the definition of qualified rehabilitation expenditures. As such, X's qualified investment in Building A is \$750,000 (\$1 million - \$250,000).

(d) *Applicability date.* This section applies to property that is placed in service after December 31, 2022, and during a taxable year ending on or after [DATE OF PUBLICATION OF FINAL RULE].

#### § 1.48D-2 Definitions.

(a) *In general.* The definitions in paragraphs (b) through (n) of this section apply for purposes of sections 48D and 50 of the Internal Revenue Code (Code) and the section 48D regulations.

(b) *Applicable transaction.* The term *applicable transaction* has the meaning provided in section 50(a)(6) of the Code and § 1.50-2.

(c) *Basis.* With respect to any qualified property, the term *basis* means the the basis of the qualified property determined immediately before the qualified property is placed in service by the taxpayer and in accordance with the general rules of subtitle A of the Code (subtitle A) for determining the basis of property (see subtitle A, subchapter O, part II). Thus, the basis of

qualified property would generally be its cost (see section 1012) unreduced by any adjustments to basis and would include all items properly included by the taxpayer in the depreciable basis of the property.

(d) *Beginning of construction.* The term *beginning of construction* has the meaning provided in § 1.48D-4.

(e) *Eligible taxpayer.* The term *eligible taxpayer* means any taxpayer that—

(1) Is not a foreign entity of concern; and

(2) Has not made an applicable transaction during the taxable year.

(f) *Foreign entities*—(1) *Foreign entity.* The term *foreign entity* has the same meaning as provided in 15 CFR 231.105.

(2) *Foreign entity of concern.* The term *foreign entity of concern* has the same meaning as provided in 15 CFR 231.106.

(3) *Owned by, controlled by, or subject to the jurisdiction or direction of.* The term *owned by, controlled by, or subject to the jurisdiction or direction of* has the same meaning as provided in 15 CFR 231.112 for purposes of determining whether an entity is a foreign entity under paragraph (f)(1) of this section or a foreign entity of concern under paragraph (f)(2) of this section.

(g) *Placed in service.* The term *placed in service* has the same meaning as provided in § 1.46-3(d).

(h) *Qualified Investment*—(1) *In general.* Except as provided in paragraphs (h)(2) and (3) of this section, the term *qualified investment* with respect to an advanced manufacturing facility means, for any taxable year, the basis of any qualified property that is part of an advanced manufacturing facility and placed in service by the taxpayer during the taxable year.

(2) *Special rules for certain passthrough entities.* In the case of any qualified property that is part of an advanced manufacturing facility of an eligible taxpayer and placed in service by an entity described in paragraphs (h)(2)(i) through (iii) of this section during a taxable year, the rules of this paragraph (h)(2) apply to determine the qualified investment for the taxable year with respect to the advanced manufacturing facility.

(i) *Partnership.* In the case of a partnership that places in service qualified property that is part of an advanced manufacturing facility of an eligible taxpayer, each partner in the partnership must take into account separately the partner's share of the basis of the qualified property placed in service by the partnership during the taxable year as provided in § 1.46-3(f).

(ii) *S corporation.* The basis of qualified property that is part of an

advanced manufacturing facility of an eligible taxpayer and placed in service during the taxable year by an S corporation (as defined in section 1361(a) of the Code) must be apportioned pro rata among the S corporation's shareholders on the last day of the S corporation's taxable year as provided in section 1366.

(iii) *Estate or trust.* The basis of qualified property that is part of an advanced manufacturing facility of an eligible taxpayer and placed in service during the taxable year by an estate or trust must be apportioned among the estate or trust and its beneficiaries on the basis of the income of the estate or trust allocable to each for that taxable year.

(3) *Qualified progress expenditures election.* A taxpayer may elect, as provided in § 1.46-5, to increase the qualified investment with respect to any advanced manufacturing facility of an eligible taxpayer for the taxable year, by any qualified progress expenditures made after August 9, 2022.

(4) *Examples.* The provisions of this paragraph (h) are illustrated by the following examples.

(i) *Example 1: Advanced manufacturing investment credit—qualified investment in general.* On November 1, 2023, X, a calendar-year C corporation, places in service qualified property with a basis of \$200,000, and on December 1, 2023, X places in service qualified property with a basis of \$300,000. X's qualified investment for the taxable year is \$500,000 (\$200,000 + \$300,000).

(ii) *Example 2: Advanced manufacturing investment credit, qualified investment for partnerships.* A, B, C, and D, all calendar-year C corporations, are partners in the ABCD partnership. Partners A, B, C, and D share partnership profits equally. On November 1, 2023, the ABCD partnership placed in service qualified property with a basis of \$1 million. Each partner's share of the basis of the qualified property, as determined in § 1.46-3(f)(2), is \$250,000 (\$1m × 0.25) and each partner's qualified investment is \$250,000.

(i) *Section 48D credit.* The term *section 48D credit* means the advanced manufacturing investment credit determined under section 48D and the section 48D regulations.

(j) *Section 48D regulations.* The term *section 48D regulations* means this section and §§ 1.48D-2 through 1.48D-6 and 1.50-2.

(k) *Semiconductor* means, consistent with 15 CFR 231.117, an integrated electronic device or system most commonly manufactured using



materials such as, but not limited to, silicon, silicon carbide, or III-V compounds, and processes such as, but not limited to, lithography, deposition, and etching. Such devices and systems include, but are not limited to, analog and digital electronics, power electronics, and photonics, for memory, processing, sensing, actuation, and communications applications.

(1) *Semiconductor manufacturing*—(1) *In general.* The term *semiconductor manufacturing* and the term *manufacturing of semiconductors* are synonymous and mean, consistent with 15 CFR 231.118, semiconductor fabrication or semiconductor packaging. Semiconductor fabrication includes the process of forming devices like transistors, poly capacitors, non-metal resistors, and diodes, as well as interconnects between such devices, on a wafer of semiconductor material. Semiconductor packaging means the process of enclosing a semiconductor in a protective container (package) and providing external power and signal connectivity for the assembled integrated circuit.

(2) *Semiconductor manufacturing processes.* The following definitions apply for purposes of section 48D and the section 48D regulations:

(i) *Packaging* means the process of enclosing a semiconductor in a protective container (package) and providing external power and signal connectivity for the assembled integrated circuit.

(ii) *Advanced packaging* means a subset of packaging technologies that uses novel techniques and materials to increase the performance, power, modularity, and/or durability of an integrated circuit. Advanced packaging technologies include flip-chip, 2D, 2.5D, and 3D stacking, fan-out and fan-in, and embedded die/system-in-package (SiP).

(m) *Semiconductor manufacturing equipment.* The term *semiconductor manufacturing equipment* means the specialized equipment integral to the manufacturing of semiconductors and subsystems that enable or are incorporated into the manufacturing equipment. Specific examples of semiconductor manufacturing equipment and subsystems that enable semiconductor manufacturing equipment include:

(1) Deposition equipment, including, Chemical Vapor Deposition (CVD), Physical Vapor Deposition (PVD), and Atomic Layer Deposition (ALD);

(2) Etching equipment (wet etch, dry etch);

(3) Lithography equipment (steppers, scanners, extreme ultraviolet (EUV));

(4) Wafer slicing equipment, wafer dicing equipment, and wire bonders;

(5) Inspection and measuring equipment, including scanning electron microscopes, atomic force microscopes, optical inspection systems, and wafer probes;

(6) Certain metrology and inspection systems; and

(7) Ion implantation and diffusion/oxidation furnaces.

(n) *Manufacturing semiconductor manufacturing equipment.* The term *manufacturing semiconductor manufacturing equipment* means the physical production of semiconductor manufacturing equipment in a manufacturing facility.

(o) *Applicability date.* This section applies to property that is placed in service after December 31, 2022, and during a taxable year ending on or after [DATE OF PUBLICATION OF FINAL RULE].

#### § 1.48D-3 Qualified property.

(a) *In general.* This section provides definitions and rules relating to qualified property for purposes of section 48D of the Internal Revenue Code and the section 48D regulations.

(b) *Qualified property.* The term *qualified property* means tangible depreciable property that is integral to the operation of an advanced manufacturing facility and that is either—

(1) Constructed, reconstructed, or erected by the taxpayer; or

(2) Acquired by the taxpayer if the original use of such property commences with the taxpayer.

(c) *Tangible depreciable property*—(1) *In general.* The term *tangible depreciable property* means tangible personal property (as defined in § 1.48-1(c)), other tangible property (as defined in § 1.48-1(d)), and building and structural components (as defined in § 1.48-1(e), except as provided in paragraph (c)(2) of this section) with respect to which depreciation (or amortization in lieu of depreciation) is allowable. The law of a State or local jurisdiction is not controlling for purposes of determining whether property is tangible property for purposes of section 48D or the section 48D regulations.

(2) *Exception.* Pursuant to section 48D(b)(2)(B)(ii), the term *tangible depreciable property* does not include a building and its structural components, or a portion thereof, used for:

(i) Offices;

(ii) Administrative services such as human resources or personnel services, payroll services, legal and accounting services, and procurement services;

(iii) Sales or distribution functions;

(iv) Security services (not including cybersecurity operations); or

(v) Any other functions unrelated to manufacturing of semiconductors or semiconductor manufacturing equipment.

(d) *Constructed, reconstructed, or erected by the taxpayer.* Property is considered constructed, reconstructed, or erected by the taxpayer if the work is done for the benefit of the taxpayer in accordance with the taxpayer's specifications.

(e) *Original use*—(1) *In general.* Except as provided in paragraph (e)(2) of this section, the term *original use* means with respect to any property the first use to which the property is put by any taxpayer in connection with a trade or business or for the production of income. Additional capital expenditures paid or incurred by a taxpayer to recondition or rebuild property acquired or owned by the taxpayer satisfy the original use requirement to the extent of the amount of the expenditures paid or incurred by a taxpayer. However, a taxpayer's cost to acquire property reconditioned or rebuilt by another taxpayer does not satisfy the original use requirement. Whether property is reconditioned or rebuilt property will be determined based on the facts and circumstances.

(2) *Treatment of inventory.* For purposes of paragraph (e)(1) of this section, if a taxpayer initially acquires new property and holds the property primarily for sale to customers in the ordinary course of the taxpayer's trade or business and subsequently withdraws the property from inventory and uses the property primarily in the taxpayer's trade or business or primarily for the taxpayer's production of income, the taxpayer is considered the original user of the property. If a person initially acquires new property and holds the property primarily for sale to customers in the ordinary course of the person's business and a taxpayer subsequently acquires the property from the person for use primarily in the taxpayer's trade or business or primarily for the taxpayer's production of income, the taxpayer is considered the original user of the property. For purposes of this paragraph (e), the original use of the property by the taxpayer commences on the date on which the taxpayer first uses the property primarily in the taxpayer's trade or business or primarily for the taxpayer's production of income.

(f) *Integral to the operation of an advanced manufacturing facility*—(1) *In general.* To qualify for the section 48D credit, property must be integral to the operation of manufacturing

semiconductors or manufacturing semiconductor manufacturing equipment, both as provided in § 1.48D-2. Property is integral to the operation of manufacturing semiconductors or semiconductor manufacturing equipment if such property is used directly in the manufacturing operation, is essential to the completeness of the manufacturing operation, and is not transformed in any material way as a result of the manufacturing operation. Materials, supplies, and other inventoriable items of property that are transformed into a finished semiconductor or into a finished unit of semiconductor manufacturing equipment are not considered property integral to the operation of manufacturing semiconductors or semiconductor manufacturing equipment. In addition, property such as pavements, parking areas, inherently permanent advertising displays, or inherently permanent outdoor lighting facilities, although used in the operation of a business, ordinarily are not integral to the operation of manufacturing semiconductors or semiconductor manufacturing equipment. Thus, for example, all property used by the taxpayer to acquire or transport materials or supplies to the point where the actual manufacturing activity commences (such as docks, railroad tracks, and bridges), or all property (other than materials or supplies) used by the taxpayer to manufacture semiconductors or to manufacture semiconductor manufacturing equipment within the meaning of § 1.48D-2, would be considered property integral to the operation of an advanced manufacturing facility of an eligible taxpayer. Property is considered integral to the operation of an advanced manufacturing facility of an eligible taxpayer if so used either by the owner of the property or by the lessee of the property. Specific examples of property which normally would be integral to the operation of the advanced manufacturing facility of an eligible taxpayer are:

- (i) Deposition equipment used in the processes of Chemical Vapor Deposition (CVD), and Physical Vapor Deposition (PVD), Etching Equipment, lithography equipment, including Extreme Ultraviolet Lithography (EUV);
- (ii) Wet process tools, analytical tools, E-Beam operation tools, mask manufacturing equipment, chemical mechanical polishing equipment, reticle handlers, and stockers;
- (iii) Inspection and metrology equipment;
- (iv) Clean room facilities, including specialized lighting systems, automated

material systems for wafer handling, locker and growing rooms, specialized recirculating air handlers, to maintain the cleanroom free from particles, control temperature and humidity levels, and specialized ceilings comprised of HEPA filters;

(v) Electrical power facilities, cooling facilities, chemical supply systems, and wastewater systems;

(vi) Sub-fab levels containing pumps, transformers, abatement systems, ultrapure water systems, uninterruptible power supply, and boilers, pipes, storage systems, wafer routing systems and databases, backup systems, quality assurance equipment, and computer data centers; and

(vii) Utility level equipment including chillers, systems to handle nitrogen, argon, and other gases, compressor systems, and pipes.

(2) *Research or storage facilities.* If property, including a building and its structural components, constitutes a research or storage facility and is used in connection with the manufacturing of semiconductors or semiconductor manufacturing equipment, the property may qualify as integral to the operation of the advanced manufacturing facility under section 48D(b)(2)(A)(iv). Specific examples of research facilities include research facilities that manufacture semiconductors in connection with research, such as pre-pilot production lines and prototypes, including semiconductor packaging. Specific examples of storage facilities are mineral, chemical, and gas storage tanks, including high pressure cylinders or specially designed tanks and drums. A research facility that does not manufacture any type of semiconductors, as provided in § 1.48D-2(k), or semiconductor manufacturing equipment, as provided in § 1.48D-2(m), does not qualify.

(g) *Applicability date.* This section applies to property that is placed in service after December 31, 2022, and during a taxable year ending on or after [DATE OF PUBLICATION OF FINAL RULE].

**§ 1.48D-4 Advanced manufacturing facility of an eligible taxpayer.**

(a) *In general.* This section provides definitions and rules relating to advanced manufacturing facilities of eligible taxpayers for purposes of section 48D of the Internal Revenue Code and the section 48D regulations.

(b) *Advanced manufacturing facility.* For purposes of section 48D(b)(3) and this section, the term *advanced manufacturing facility* means a facility of an eligible taxpayer for which the primary purpose, as determined under

paragraph (c)(1) of this section, is the manufacturing of finished semiconductors, as defined in § 1.48D-2(l), or the manufacturing of finished semiconductor manufacturing equipment, as defined in § 1.48D-2(n).

(c) *Primary purpose—(1) In general.* The determination of the *primary purpose* of a facility will be made based on all the facts and circumstances surrounding the construction, reconstruction, or erection of the advanced manufacturing facility of an eligible taxpayer. Facts that may indicate a facility has a primary purpose of manufacturing finished semiconductors or manufacturing finished semiconductor manufacturing equipment include designs or other documents for the facility that demonstrate that the facility is designed to make finished semiconductors or finished products consisting of specialized equipment that can only be used for semiconductor manufacturing; the possession of permits or licenses needed to manufacture finished semiconductors or finished semiconductor manufacturing equipment; and executed contracts to supply finished semiconductor manufacturing equipment to a finished semiconductor manufacturer in place either before or within 6 months after the facility is placed in service.

(2) *No primary purpose.* A facility that manufactures, produces, grows, or extracts materials or chemicals that are supplied to an advanced manufacturing facility is not a facility for which the primary purpose is the manufacturing of semiconductors or semiconductor manufacturing equipment. Thus, for example, facilities that grow wafers or produce gases, or that manufacture components or parts, to supply an advanced manufacturing facility that manufactures semiconductors or semiconductor manufacturing equipment are not facilities for which the primary purpose is the manufacturing of semiconductors or the manufacturing of semiconductor manufacturing equipment.

(3) *Examples.* The following examples illustrate the rules of this paragraph (c):

(i) *Example (i)—Primary purpose.* In January 2023, X Corp, a calendar-year C corporation, begins construction of a facility that will manufacture equipment that is integral to the manufacturing operations of a manufacturer of semiconductors. A portion of the equipment, however, could be used for other manufacturing operations. X Corp enters into a contract with Y Corp, which is building a semiconductor manufacturing facility to be placed in service in July 2024, to supply Y Corp

with the equipment it will need for its semiconductor manufacturing operations. Such equipment represents approximately 75 percent of the potential output of X Corp's facility (by cost to produce such equipment) of X Corp's facility for the first year of operations. X Corp will be considered as having a primary purpose of manufacturing semiconductor manufacturing equipment.

(ii) *Example (ii)—Primary purpose.* In January 2023, Y Corp, a C corporation, with a calendar-year taxable year, begins construction of a facility that will manufacture scanning electron microscopes. Y Corp enters into a contract with Z Corp, which is building a semiconductor manufacturing facility to be placed in service in July 2024, to supply Z Corp with equipment it will use as an integral part of its semiconductor manufacturing operations. Such equipment represents approximately 75 percent of the potential output (by cost) of Y Corp's facility for the first year of operations. Y Corp will be considered as having a primary purpose of manufacturing semiconductor manufacturing equipment because scanning electron microscopes are specialized equipment integral to the manufacturing of semiconductors.

(d) *Applicability date.* This section applies to property that is placed in service after December 31, 2022, and during a taxable year ending on or after [DATE OF PUBLICATION OF FINAL RULE].

#### **§ 1.48D-5 Beginning of construction.**

(a) *Termination of credit—(1) In general.* The credit allowed under section 48D of the Internal Revenue Code (Code) and the section 48D regulations does not apply to property that is part of an advanced manufacturing facility of an eligible taxpayer if the beginning of construction of the property, as defined in paragraph (a)(2) of this section, begins after December 31, 2026 (the date specified in section 48D(e)).

(2) *Property.* For purposes of determining beginning of construction of property under this section, the unit of property is—

(i) A single advanced manufacturing facility project as described in paragraph (a)(3) of this section; or

(ii) An item of qualified property (as defined in § 1.48D-3(b)).

(3) *Single advanced manufacturing facility project.* Solely for purposes of determining whether construction of a qualified property has begun for purposes of section 48D and the section 48D regulations, multiple items of

qualified property or advanced manufacturing facilities that are operated as part of a single advanced manufacturing facility project (along with any items of property, such as clean rooms, chemical delivery systems, chemical storage facilities, temperature control systems, and robotic handling systems that are integral to the operation of the single advanced manufacturing facility project) will be treated as a single item of qualified property. Whether multiple qualified properties or advanced manufacturing facilities are operated as part of a single advanced manufacturing facility project will depend on all the relevant facts and circumstances.

(i) *Factors used for single advanced manufacturing facility project determination.* Factors indicating that multiple qualified properties or advanced manufacturing facilities are operated as part of a single advanced manufacturing facility project may include:

(A) The properties or facilities are owned by a single legal entity;

(B) The properties or facilities are constructed on contiguous pieces of land;

(C) The properties or facilities are described in a common supply contract or other type of relevant contract;

(D) The properties or facilities share a common electricity and/or water supply;

(E) The properties or facilities are described in one or more common environmental or other regulatory permits;

(F) The properties or facilities were constructed pursuant to a single master construction contract; or

(G) The construction of the properties or facilities was financed pursuant to the same loan agreement or other financing arrangement.

(ii) *Example.* A taxpayer is developing Project C, a project that will consist of 3 advanced manufacturing facilities constructed on the same campus. Project C will share a common electricity supply, and semiconductors manufactured by Project C will be sold to Buyer through a single supply contract. In 2023, for 1 of the 3 advanced manufacturing facilities, the taxpayer installs deposition equipment. Thereafter, the taxpayer completes the construction of all 3 advanced manufacturing facilities pursuant to a continuous program of construction. For purposes of the section 48D credit, Project C is a single project that will be treated as a single property, and the taxpayer performed physical work of a significant nature that constitutes the

beginning of construction of Project C in 2023.

(iii) *Timing of single advanced manufacturing facility project determination.* Whether multiple properties or advanced manufacturing facilities are operated as part of a single advanced manufacturing facility project and are treated as a single item of property for purposes of the beginning of construction requirement of section 48D and the section 48D regulations is determined in the taxable year during which the last of the multiple properties or facilities is placed in service.

(iv) *Disaggregation.* Multiple properties or advanced manufacturing facilities that are operated as part of a single advanced manufacturing facility project and treated as a single item of qualified property under paragraph (a)(3) of this section for purposes of determining whether construction of a qualified property or advanced manufacturing facility has begun may be disaggregated and treated as separate items of qualified property for purposes of determining whether a separate advanced manufacturing facility or item of qualified property satisfies the continuity safe harbor (as defined in paragraph (e) of this section). Those disaggregated separate advanced manufacturing facilities or items of qualified property that are placed in service prior to the continuity safe harbor deadline will be eligible for the continuity safe harbor. The remaining disaggregated separate items of property or facilities may satisfy the continuity requirement under a facts and circumstances determination.

(v) *Example.* A taxpayer is developing Project D, a project that will consist of 4 separate properties. Project D will use the same water supply and each property within Project D will be constructed pursuant to a single master construction contract. Under the single project rule provided in paragraph (a)(3) of this section, Project D is a single project that will be treated as a single property. In 2024, for 3 of the 4 separate properties, the taxpayer installs property integral to the operation of the advanced manufacturing facility. Accordingly, the taxpayer has performed physical work of a significant nature that constitutes the beginning of construction of Project D for purposes of section 48D(e). Thereafter, on the last day of the 10-year continuity safe harbor period, the taxpayer places in service only 3 of the 4 separate properties within Project D. The taxpayer disaggregates Project D under paragraph (a)(3)(iv) of this section and accordingly, only 3 of the 4 separate properties satisfy the Continuity Safe Harbor. For

the remaining 1 separate property, the taxpayer may demonstrate that it satisfies the continuity requirement provided in paragraph (e) of this section based on the facts and circumstances, to enable the taxpayer to claim the section 48D credit.

(b) *Beginning of construction*—(1) *In general.* For purposes of section 48D, the section 48D regulations, and section 107(f)(1) of the CHIPS Act of 2022, Public Law 117–167, div. A, 136 Stat. 1366, 1399 (August 9, 2022), a taxpayer may establish that construction of an item of property (as defined in paragraph (a)(2) of this section) of the taxpayer begins under either:

(i) The physical work test of paragraph (c) of this section; or

(ii) The five percent safe harbor of paragraph (d) of this section.

(2) *Continuity requirement.* See paragraph (e) of this section for the continuity requirement applicable for purposes of the physical work test and the five percent safe harbor, which must be demonstrated either by maintaining continuous construction (as defined in paragraph (e)(2) of this section) or continuous efforts (as defined in paragraph (e)(3) of this section).

(c) *Physical work test*—(1) *In general.* Under the physical work test, construction of an item of property begins when physical work of a significant nature begins, provided that the taxpayer maintains continuous construction or continuous efforts. This test focuses on nature of the work performed, not the amount of the costs. Assuming the work performed is of a significant nature, there is no fixed minimum amount of work, monetary or percentage threshold required to satisfy the physical work test.

(2) *Physical work of significant nature*—(i) *In general.* Work performed by the taxpayer and work performed for the taxpayer by other persons under a binding written contract that is entered into prior to the manufacture, construction, or production of the property for use by the taxpayer in the taxpayer's trade or business of manufacturing semiconductors or semiconductor manufacturing equipment is taken into account in determining whether physical work of a significant nature has begun. Both on-site and off-site work (performed either by the taxpayer or by another person under a binding written contract) may be taken into account for purposes of demonstrating that physical work of a significant nature has begun. A written contract is binding only if it is enforceable under local law against the taxpayer or a predecessor and does not limit damages to a specified amount (for

example, by use of a liquidated damages provision). For this purpose, a contractual provision that limits damages to an amount equal to at least five percent of the total contract price will not be treated as limiting damages to a specified amount. For additional guidance regarding the definition of a binding written contract, see § 1.168(k)–1(b)(4)(ii)(A) through (D).

(ii) *Exceptions.* Physical work of significant nature does not include preliminary activities, including but not limited to planning or designing, securing financing, exploring, researching, obtaining permits, licensing, conducting surveys, environmental and engineering studies, or clearing a site, even if the cost of those preliminary activities is properly included in the depreciable basis of the property. Physical work of a significant nature also does not include work (performed either by the taxpayer or by another person under a binding written contract) to produce property that is either in existing inventory or is normally held in inventory by a vendor.

(d) *Five percent safe harbor*—(1) *In general.* Construction of a property will be considered as having begun if:

(i) A taxpayer pays or incurs (within the meaning of § 1.461–1(a)(1) and (2)) five percent or more of the total cost of the property; and

(ii) Thereafter, the taxpayer maintains continuous construction or continuous efforts.

(2) *Costs.* All costs properly included in the basis of the property are taken into account to determine whether the five percent safe harbor has been met. For property that is manufactured, constructed, or produced for the taxpayer by another person under a binding written contract with the taxpayer, costs incurred with respect to the property by the other person before the property is provided to the taxpayer are deemed incurred by the taxpayer when the costs are incurred by the other person under the principles of section 461 of the Code.

(3) *Cost overruns*—(i) *Single advanced manufacturing facility project.* If the total cost of a property that is a single advanced manufacturing facility project comprised of multiple properties (as described in paragraph (a)(3) of this section) exceeds its anticipated total cost such that the amount the taxpayer actually paid or incurred with respect to the single advanced manufacturing facility project to establish the beginning of its construction under paragraph (b)(1)(ii) of this section is less than five percent of the total cost at the time it is placed in service, the five percent safe harbor is not fully satisfied.

However, the five percent safe harbor will be satisfied with respect to some, but not all, of the separate properties or facilities (as described in paragraph (a)(3) of this section) comprising the single advanced manufacturing facility project, as long as the total aggregate cost of those properties is not more than twenty times greater than the amount the taxpayer paid or incurred.

(ii) *Example.* In 2023, taxpayer incurs \$300,000 in costs to construct Project A, comprised of six advanced manufacturing facilities that will be operated as a single project. Taxpayer anticipates that each advanced manufacturing facility will cost \$1,000,000 for a total cost for Project A of \$6,000,000. Thereafter, the taxpayer makes continuous efforts to advance towards completion of Project A. The taxpayer timely places Project A in service in 2025. In 2025, the actual total cost of Project A amounts to \$7,500,000, with each advanced manufacturing facility costing \$1,250,000. Although the taxpayer did not pay or incur five percent of the actual total cost of Project A in 2023, the taxpayer will be treated as satisfying the Five Percent Safe Harbor in 2023 with respect to four of the advanced manufacturing facilities, as their actual total cost of \$5,000,000 is not more than twenty times greater than the \$300,000 in costs incurred by the taxpayer. The taxpayer will not be treated as satisfying the five percent safe harbor in 2023 with respect to two of the properties. Thus, the taxpayer may claim the section 48D credit based on \$5,000,000 the cost of four of the properties.

(iii) *Single property.* If the total cost of a single property, which is not part of a single advanced manufacturing facility project comprised of multiple properties or facilities (as described in paragraph (a)(3) of this section) and cannot be separated into multiple properties or facilities, exceeds its anticipated total cost so that the amount a taxpayer actually paid or incurred with respect to the single property as of an earlier year is less than five percent of the total cost of the single property at the time it is placed in service, then the taxpayer will not satisfy the five percent safe harbor with respect to any portion of the single property in such earlier year.

(A) *Example.* In 2023, a taxpayer incurs \$250,000 in costs to construct Project B, a single property. The taxpayer anticipates that the total cost of Project B will be \$5,000,000. Thereafter, the taxpayer makes continuous efforts to advance towards completion of Project B. The taxpayer places Project B in service in a later year. At that time, its actual total cost amounts to \$6,000,000.

Because Project B is a single property that is not a single project comprised of multiple properties, the taxpayer will not satisfy the five percent safe harbor as of 2023. However, if the construction of Project B satisfies the requirements of the physical work test by also beginning physical work of a significant nature in 2024, the taxpayer may be able to demonstrate that construction began in 2024.

(B) [Reserved]

(e) *Continuity requirement*—(1) *In general.* For purposes of the physical work test and five percent safe harbor, taxpayers must satisfy the *continuity requirement* by demonstrating either continuous construction or continuous efforts regardless of whether the physical work test or the five percent safe harbor was used to establish the beginning of construction. Whether a taxpayer meets the continuity requirement under either test is determined by the relevant facts and circumstances. The Commissioner will closely scrutinize a property and may determine that the beginning of construction is not satisfied with respect to a property if a taxpayer does not meet the continuity requirement.

(2) *Continuous construction.* The term *continuous construction* means a continuous program of construction that involves continuing physical work of a significant nature. Whether a taxpayer maintains a continuous program of construction to satisfy the continuity requirement will be determined based on all the relevant facts and circumstances.

(3) *Continuous efforts.* The term *continuous efforts* means continuous efforts to advance towards completion of a property to satisfy the continuity requirement. Whether a taxpayer makes continuous efforts to advance towards completion of a property will be determined by the relevant facts and circumstances. Facts and circumstances indicating continuous efforts to advance towards completion of a property may include:

- (i) Paying or incurring additional amounts included in the total cost of the property;
- (ii) Entering into binding written contracts for the manufacture, construction, or production of the property or for future work to construct the property;
- (iii) Obtaining necessary permits; and
- (iv) Performing physical work of a significant nature.

(4) *Excusable disruptions to continuous construction and continuous efforts tests*—(i) *In general.* Certain disruptions in a taxpayer's continuous construction or continuous efforts to

advance towards completion of a property that are beyond the taxpayer's control will not be considered as indicating that a taxpayer has failed to satisfy the continuity requirement.

(ii) *Effect of excusable disruptions on continuity safe harbor.* The excusable disruptions provided in this paragraph (e)(4) will not extend the continuity safe harbor deadline that is provided in paragraph (e)(6) of this section.

(iii) *Non-exclusive list of construction disruptions.* The following is a non-exclusive list of construction disruptions that will not be considered as indicating that a taxpayer has failed to satisfy the continuity requirement:

- (A) Delays due to severe weather conditions;
- (B) Delays due to natural disasters;
- (C) Delays in obtaining permits or licenses from Federal, Indian Tribal, State, territorial, or local governments, including—
  - (1) Delays in obtaining air emissions, water discharge, or hazardous waste management permits or chemical handling licenses from the Environmental Protection Agency (EPA) or another environmental protection authority;
- (2) Delays as a result of the review process under State, local, or Federal environmental laws, for example, a review under the National Environmental Policy Act; and
- (3) Delays in obtaining construction permits;
- (D) Delays at the written request of a Federal, State, local, or Indian Tribal government regarding matters of public health, public safety, security, or similar concerns, including hazardous chemical transport;

(E) Delays related to electrical or water supply, such as those relating to the completion of construction on a distribution line or water supply line that may be associated with a project's electrical and water needs, whether constructed by the eligible taxpayer that is the owner of the advanced manufacturing facility, a governmental entity, or another person;

(F) Delays in the manufacture of custom components or equipment;

(G) Delays due to the inability to obtain specialized equipment of limited availability;

(H) Delays due to supply shortages;

(I) Delays due to the presence of endangered species;

(J) Financing delays; and

(K) Delays due to specialized labor shortages or labor stoppages.

(5) *Timing of excusable disruption determination.* In the case of a single advanced manufacturing facility project comprised of a single property, whether

an excusable disruption has occurred for purposes of the beginning of construction requirement of section 48D and the section 48D regulations must be determined in the taxable year during which the property is placed in service. In the case of a single advanced manufacturing facility project comprised of multiple properties or facilities, whether an excusable disruption has occurred for purposes of the beginning of construction requirement of section 48D and the section 48D regulations must be determined in the taxable year during which the last of multiple properties or facilities is placed in service.

(6) *Continuity safe harbor*—(i) *In general.* A taxpayer will be deemed to satisfy the continuity requirement provided the property is placed in service no more than 10 calendar years after the calendar year during which construction of the property began for purposes of section 48D and the section 48D regulations.

(ii) *Example.* If construction begins on a property on January 15, 2023, and the property is placed in service by December 31, 2033, the property will be considered to satisfy the Continuity Safe Harbor. If the property is not placed in service before January 1, 2034, whether the continuity requirement was satisfied will be determined based on all the relevant facts and circumstances.

(f) *Applicability date.* This section applies to property that is placed in service after December 31, 2022, and during a taxable year ending on or after [DATE OF PUBLICATION OF FINAL RULE].

#### § 1.48D–6 Elective payment election.

(a) *Elective payment election*—(1) *In general.* Except as provided in paragraph (b) of this section, a taxpayer may elect under section 48D(d)(1) of the Internal Revenue Code (Code) and this section with respect to the section 48D credit to be treated as making a payment against the tax imposed by subtitle A of the Code (for the taxable year with respect to which such credit was determined) equal to the amount of the credit with respect to any property otherwise allowable to the taxpayer (determined without regard to section 38(c) of the Code).

(2) *Timing of election.* Any election under section 48D(d)(1) and this section must be made not later than the due date (including extensions of time) for the return of tax imposed by subtitle A of the Code for the taxable year for which the election is made, but in no event earlier than May 8, 2023.

(3) *Irrevocable.* Any election under section 48D(d)(1) and this section, once

made, will be irrevocable and, except as otherwise provided, will apply with respect to any amount of section 48D credit for the taxable year for which the election is made.

(4) *Denial of double benefit.* In the case of a taxpayer making an election under section 48D(d) and this section with respect to any section 48D credit determined under section 48D(a) and § 1.48D-1, such credit will be reduced to zero and will, for any other purposes under the Code, be deemed to have been allowed to the taxpayer for such taxable year.

(5) *Treatment of payment.* The payment described in section 48D(d)(1) and paragraph (a)(1) of this section will be treated as made on the later of the due date (determined without regard to extensions) of the return of tax imposed by subtitle A of the Code for the taxable year or the date on which such return is filed.

(b) *Special rules for partnerships and S corporations—(1) In general.* If a partnership or S corporation directly holds any property for which an advanced manufacturing investment credit is determined, any election under paragraph (a) must be made by the partnership or S corporation. No election under 48D(d) and this section by any partner or shareholder is allowed.

(2) [Reserved]

(c) *Registration required—(1) In general.* As a condition of, and prior to, any amount being treated as a payment that is made by the taxpayer under section 48D(d)(1) or any payment made pursuant to section 48D(d)(2)(A)(i)(I), the eligible taxpayer or partnership or S corporation must timely comply with the registration procedures set forth in this paragraph (c).

(2) [Reserved]

(d) *Excessive payment—(1) In general.* Except as provided in paragraph (d)(2) of this section, in the case of any amount treated as a payment which is made by the taxpayer under section 48D(d)(1) and paragraph (a) of this section, or any payment made pursuant to section 48D(d)(2)(A)(i)(II) and paragraph (b) of this section, with respect to any property, which amount the Commissioner determines constitutes an excessive payment as defined in paragraph (d)(3) of this section, the tax imposed on such taxpayer by chapter 1 of the Code for the taxable year in which such determination is made is increased by an amount equal to the sum of—

(i) The amount of such excessive payment; plus

(ii) An amount equal to 20 percent of such excessive payment.

(2) *Reasonable cause.* Paragraph (d)(1) of this section will not apply if the taxpayer demonstrates to the satisfaction of the Commissioner that the excessive payment resulted from reasonable cause.

(3) *Excessive payment defined.* For purposes of section 48D(d) and this paragraph (d), the term *excessive payment* means, with respect to any property for which an election is made under section 48D(d) and this section for any taxable year, an amount equal to the excess of—

(i) The amount treated as a payment which is made by the taxpayer pursuant to section 48D(d)(1) and paragraph (a) of this section, or any payment made by the Commissioner pursuant to section 48D(d)(2)(A)(I)(i) and paragraph (b) of this section, with respect to such property for such taxable year; over

(ii) The amount of the section 48D credit which, without application of section 48D(d) and this section, would be otherwise allowable (determined without regard to section 38(c)) under section 48D(a) and the section 48D regulations with respect to such property for such taxable year.

(4) [Reserved]

(e) *Basis reduction and recapture—(1) In general.* The rules in sections 50(a) and (c) of the Code apply with respect to elective payments under paragraphs (a) and (b) of this section.

(2) [Reserved]

(f) *Mirror code territories.* In the case of any possessions of the United States (U.S. territory) with a mirror code tax system (as defined in section 24(k) of the Code), section 48D(d) and this section are not treated as part of the income tax laws of the United States for purposes of determining the income tax law of such U.S. territory unless such territory elects to have section 48D(d) and this section so treated. Taxpayers must consult the applicable territory tax authority on whether such an election was made for the particular U.S. territory.

(g) *Applicability date.* This section applies to property that is placed in service after December 31, 2022, and during a taxable year ending on or after [DATE OF PUBLICATION OF FINAL RULE].

■ **Par. 3.** Section 1.50-2 is added to read as follows:

**§ 1.50-2 Recapture of the advanced manufacturing investment credit in the case of certain expansions.**

(a) *Recapture in connection with certain expansions—(1) In general.* Except as provided in section 50(a)(3)(B) of the Internal Revenue Code (Code) and paragraph (a)(2) of this section, if an

applicable taxpayer engages in an applicable transaction before the close of the applicable period, then the tax under chapter 1 of the Code for the taxable year in which such transaction occurs is increased by 100 percent of the applicable transaction recapture amount. Any applicable taxpayer that engages in an applicable transaction during a taxable year does not meet the definition of an eligible taxpayer under section 48D(c) and the section 48D regulations and is ineligible for the section 48D credit for that taxable year. See paragraph (b) of this section for definitions of terms used in section 50(a)(3) and this section.

(2) *Exception.* Section 50(a)(3)(A) and paragraph (a)(1) of this section do not apply if the applicable taxpayer demonstrates to the satisfaction of the Commissioner that the applicable transaction has been ceased or abandoned within 45 days of a determination and notice by the Commissioner. A taxpayer that ceases or abandons an applicable transaction for a taxable year may still be treated as engaging in a separate applicable transaction for a taxable year. However, a taxpayer may not circumvent the application of section 50(a)(3) and this section by engaging in a series of applicable transactions, multiple applicable transactions, or other similar arrangements.

(3) *Carrybacks and carryover adjusted.* In the case of any cessation described in section 50(a)(1) or (2), or any applicable transaction to which section 50(a)(3) and paragraph (a)(1) of this section apply, any carryback or carryover under section 39 is appropriately adjusted by reason of such cessation or applicable transaction.

(b) *Definitions.* The following definitions apply for purposes of section 50(a)(3) and this section.

(1) *Applicable period.* The term *applicable period* means the 10-year period beginning on the date that an applicable taxpayer placed in service property that is eligible for the section 48D credit.

(2) *Applicable taxpayer—(i) In general.* The term *applicable taxpayer* means—

(A) Any taxpayer who was allowed a section 48D credit or made an election under section 48D(d)(1) and § 1.48D-6(a) with respect to such credit, for any taxable year prior to the taxable year in which such taxpayer entered into an applicable transaction;

(B) Any partnership or S corporation that made an election under section 48D(d)(2) and § 1.48D-6(b) with respect to a credit determined under section 48D(a)(1) for any taxable year prior to

the taxable year in which such partnership or S corporation entered into an applicable transaction; and

(C) Any partner in a partnership (directly or indirectly through one or more tiered partnerships) or shareholder in an S corporation for which the partnership or S corporation made an election under section 48D(d)(2) and § 1.48D-6(b) with respect to a credit determined under section 48D(a) for any taxable year prior to when such partner or shareholder entered into an applicable transaction.

(ii) *Affiliated groups.* For purposes of this paragraph (b)(2), all members of an affiliated group under section 1504(a) of the Code, determined without regard to section 1504(b)(3) of the Code, are treated as one taxpayer.

(3) *Applicable transaction.* Except as provided in section 50(a)(6)(D)(ii) and paragraph (c)(1) of this section, the term *applicable transaction* means, with respect to any applicable taxpayer, any significant transaction involving the material expansion of semiconductor manufacturing capacity of such applicable taxpayer in any foreign country of concern.

(4) *Applicable transaction recapture amount—(i) In general.* The term *applicable transaction recapture amount* means, with respect to an applicable taxpayer, the aggregate decrease in the credits allowed under section 38 of the Code for all prior taxable years that would have resulted solely from reducing to zero any credit determined under section 46 of the Code that is attributable to the advanced manufacturing investment credit under section 48D(a), with respect to property that has been placed in service during the applicable period.

(ii) *[Reserved]*

(5) *Existing facility.* The term *existing facility*, consistent with 15 CFR 231.103, means any facility built, equipped, and operating at the semiconductor manufacturing capacity level for which it was designed prior to being placed in service by the taxpayer. Existing facilities are defined by their semiconductor manufacturing capacity at the time the qualified property is placed in service; facilities that undergo significant renovations after being placed in service will no longer qualify as existing facilities within the meaning of this paragraph (b)(5).

(6) *Foreign country of concern.* The term *foreign country of concern* has the same meaning as provided in 15 CFR 231.104.

(7) *Material expansion.* The term *material expansion* means, consistent with 15 CFR 231.111, the addition of physical space or equipment that has

the purpose or effect of increasing semiconductor manufacturing capacity of a facility by more than 5 percent; or a series of such expansions which, in the aggregate at any time during the applicable period, increasing the semiconductor manufacturing capacity of a facility by more than 5 percent.

(8) *Semiconductor manufacturing capacity.* The term *semiconductor manufacturing capacity* means, consistent with 15 CFR 231.119, the productive capacity of a semiconductor facility. In the case of a semiconductor fabrication facility, semiconductor manufacturing capacity is measured in wafer starts per month. In the case of a packaging facility, semiconductor manufacturing capacity is measured in packages per month.

(9) *Significant renovations.* The term *significant renovations* means, consistent with 15 CFR 231.122, any set of changes to a facility that, in the aggregate during the applicable period, increase semiconductor manufacturing capacity by adding an additional line, or otherwise increasing semiconductor manufacturing capacity by 10 percent or more.

(10) *Significant transaction.* As determined in coordination with the Secretary of Commerce and the Secretary of Defense, the term *significant transaction* means—

(i) Any investment, whether proposed, pending, or completed, that is valued at \$100,000 or more, including:

(A) A merger, acquisition, or takeover, including:

(1) The acquisition of an ownership interest in an entity;

(2) A consolidation;

(3) The formation of a joint venture; or

(4) A long-term lease or concession arrangement under which a lessee (or equivalent) makes substantially all business decisions concerning the operation of a leased entity (or equivalent), as if it were the owner; or

(B) Any other investment, including any capital expenditures or the formation of a subsidiary;

(ii) A series of transactions described in paragraph (b)(10)(i) of this section, which, in the aggregate at any time during the applicable period, are valued at \$100,000 or more;

(iii) A transaction that involves the expansion of manufacturing capacity for legacy semiconductors (other than with respect to an existing facility or equipment of an applicable taxpayer for manufacturing legacy semiconductors) if less than 85 percent of the output of the semiconductor manufacturing facility (for example, wafers, semiconductor devices, or packages) by

value, is incorporated into final products (that is, not an intermediate product that is used as a factory inputs for producing other goods) that are used or consumed in the market of a foreign country of concern;

(iv) A transaction during the applicable period in which an applicable taxpayer knowingly (within the meaning of 15 CFR 231.109) engages in any joint research, as defined in 15 CFR 231.108, or technology licensing effort with a foreign entity of concern that relates to a technology or product that raises national security concerns; or

(v) Any of the transactions described in paragraphs (b)(10)(i) through (iv) of this section engaged in by any entity described in this paragraph (b)(10)(v) (consistent with the definition of affiliate in 15 CFR 231.101):

(A) Any entity if an applicable taxpayer directly or indirectly owns at least 50 percent of the outstanding voting interests in such entity.

(B) Any entity if such entity directly or indirectly owns at least 50 percent of the outstanding voting interests in an applicable taxpayer.

(C) Any entity if one or more entities described in paragraph (b)(10)(v)(B) of this section directly or indirectly owns at least 50 percent of the outstanding voting interests.

(11) *Technology licensing.* The term *technology licensing* has the same meaning as provided in 15 CFR 231.123.

(12) *Technology or product that raises national security concerns.* The term *technology or product that raises national security concerns* means, consistent with 15 CFR 231.124, any semiconductors critical to national security, as defined in 15 CFR 231.120, or any technology or product listed in Category 3 of the Commerce Control List (supplement No. 1 to part 774 of the Export Administration Regulations, 15 CFR part 774) that is controlled for National Security (“NS”) reasons, as described in 15 CFR 742.4, or Regional Stability (“RS”) reasons, as described in 15 CFR 742.6.

(c) *Exception from the definition of applicable transaction for the manufacturing of legacy semiconductors—(1) In general.* The term *applicable transaction*, as defined in section 50(a)(6)(D) and paragraph (b)(3) of this section, does not include a transaction that primarily involves the expansion of manufacturing capacity for legacy semiconductors, but only to the extent not described in paragraph (b)(10)(iii) of this section.

(2) *Legacy semiconductor.* The term *legacy semiconductor* means, consistent with 15 CFR 231.110—



(i) A digital or analog logic semiconductor that is of the 28 nanometer generation or older (that is, has a gate length of 28 nanometers or more for a planar transistor);

(ii) A memory semiconductor with a half-pitch greater than 18 nanometers for Dynamic Random Access Memory (DRAM) or less than 128 layers for Not AND (NAND) Flash that does not utilize emerging memory technologies, such as transition metal oxides, phase-change memory, perovskites, ferromagnetics relevant to advanced memory fabrication; or

(iii) A semiconductor identified by the Secretary of Commerce in a public notice issued under 15 U.S.C. 4652(a)(6)(A)(ii).

(3) *Exception from the definition of legacy semiconductor.* Notwithstanding paragraph (c)(2) of this section, the following are not legacy semiconductors:

(i) Semiconductors critical to national security, as defined in 15 CFR 231.120; or

(ii) A semiconductor with a post-planar transistor architecture (such as fin-shaped field effect transistor (FinFET) or gate all around field-effect transistor); and

(iii) For the purposes of packaging facilities, semiconductors packaged utilizing three-dimensional (3D) integration.

(d) *Example.* The provisions of this section are illustrated by the following example.

(1) *Example: Applicable transaction credit claimed.* On October 15, 2024, X Corp, a C corporation that is a calendar-year taxpayer, placed in service Property A, qualified property with a basis of \$1 million. X Corp's qualified investment, as determined in § 1.46–3(c), for the taxable year is \$1 million. X Corp's advanced manufacturing investment credit for the taxable year is \$250,000 (\$1 million × 0.25) and, assume that X Corp's income tax liability is \$400,000. X Corp does not determine any other credits in 2024. X claims an advanced manufacturing investment credit of \$250,000 for its 2024 taxable year. On January 15, 2026, X Corp engages in an applicable transaction, as defined in section 50(a)(6)(D) and paragraph (b)(3) of this section and did not cease or abandon the transaction within 45 days of a determination and notice by the Commissioner. X Corp has not determined or claimed any general business credits since its 2024 taxable year. The aggregate decrease in credits allowed under section 38 for all prior years resulting from reducing to zero any credit determined under section 46

that is attributable to the advanced manufacturing investment credit is \$250,000 (\$250,000 (credit allowed) – \$0 (credit that would have been allowed)). X Corp's tax under chapter 1 is increased by \$250,000 (1.0 × \$250,000). Pursuant to section 48D(c), for the 2026 taxable year, X Corp is not an eligible taxpayer and is ineligible to claim or carryforward the advanced manufacturing investment credit.

(2) [Reserved]

(f) *Applicability date.* This section applies to property that is placed in service after December 31, 2022, and during a taxable year ending on or after [DATE OF PUBLICATION OF FINAL RULE].

**Douglas W. O'Donnell,**

*Deputy Commissioner for Services and Enforcement.*

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### 29 CFR Part 2550

[Application No. D–12022]

Z–RIN 1210 ZA07

#### Reopening Comment Period for the Proposed Amendment to Prohibited Transaction Class Exemption 84–14 (the QPAM Exemption)

**AGENCY:** Employee Benefits Security Administration, U.S. Department of Labor.

**ACTION:** Notice of proposed amendment to class exemption; reopening of comment period.

**SUMMARY:** As discussed in the DATES section below, the Department of Labor's Employee Benefits Security Administration (EBSA) is announcing that it is reopening the comment period for the proposed amendment to prohibited transaction class exemption 84–14 (the QPAM Exemption).

**DATES:** The public comment period for the proposed amendment to the class exemption published on July 27, 2022, at 87 FR 45204, will reopen on the date of publication of this notice and close on April 6, 2023.

**ADDRESSES:** Please submit all written comments to the Office of Exemption Determinations through the Federal eRulemaking Portal at [www.regulations.gov](http://www.regulations.gov) at Docket ID number: EBSA–2022–0008.

**FOR FURTHER INFORMATION CONTACT:** Erin Scott Hesse, Office of Exemption

Determinations, Employee Benefits Security Administration, U.S. Department of Labor. Telephone: (202) 693–8546 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:** The Department published a proposed amendment to prohibited transaction class exemption 84–14 (the Proposed QPAM Exemption Amendment) on July 27, 2022, with a 60-day comment period that was set to expire on September 26, 2022.<sup>1</sup> The Department received two letters requesting an extension of the comment period after the Department published the Proposed QPAM Exemption Amendment.<sup>2</sup> After carefully considering the extension request, the Department extended the initial comment period for an additional 15 days until October 11, 2022 in a **Federal Register** Notice published on September 9, 2022<sup>3</sup> and received 31 comment letters.

In that same **Federal Register** notice of September 9, 2022, the Department announced on its own motion that it would hold a virtual public hearing on November 17, 2022 (and if necessary, on November 18, 2022), to provide an opportunity for all interested parties to testify on material information and issues regarding the Proposed QPAM Amendment.<sup>4</sup> The Department received 13 requests to testify at the hearing. The notice also indicated the Department would: (1) reopen the public comment period from the hearing date until approximately 14 days after the Department publishes the hearing transcript on EBSA's website; and (2) publish a **Federal Register** notice announcing that it has posted the hearing transcript to EBSA's website and providing the date the reopened comment period closes.

The Department held the virtual public hearing on November 17, 2022 and reopened the comment period on the hearing date.<sup>5</sup> The reopened comment period in connection with the hearing closed on January 6, 2023, and the Department received 150 additional comments. The hearing transcript may be accessed here: <https://www.dol.gov/agencies/ebsa/laws-and-regulations/>

<sup>1</sup> 87 FR 45204.

<sup>2</sup> See Public Comment #1 from American Bankers Association et al. and Public Comment #2 from American Retirement Association. The extension requests can be accessed here: <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/>.

<sup>3</sup> 87 FR 54715.

<sup>4</sup> Id.

<sup>5</sup> The hearing did not continue on November 18, 2022, because the Department was able to schedule all witnesses that requested to testify on one day.