November 5, 2021

VIA REGULAR AND ELECTRONIC MAIL

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2021-28) Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Ms. Kinna Brewington
Internal Revenue Service, Room 6129
1111 Constitution Avenue NW
Washington, D.C. 20224

Re: **Comments on 2021-2022 Priority Guidance Plan and Proposed Extension of Information Collection Request Submitted for Public Comment; Requirements Related to Energy Efficient Homes Credit; Manufactured Homes**

To Whom It May Concern:

Miller & Chevalier Chartered respectfully submits this letter in response to the Department of Treasury's ("Treasury") and Internal Revenue Service's ("IRS") 2021-2022 Priority Guidance Plan, which "invite[s] the public to continue to provide [Treasury] with their comments and suggestions…" and the "Proposed Extension of Information Collection Request Submitted for Public Comment; Requirements Related to Energy Efficient Homes Credit; Manufactured Homes," published in the Federal Register on September 7, 2021 (the "Request for Comment").[1]

We appreciate the opportunity to provide comments to this important guidance. Further, we appreciate that Treasury and the IRS have included a project to provide a "[n]otice under

[1] Department of the Treasury, 2021-2022 Priority Guidance Plan, at 2 (Sep. 9, 2021); Proposed Extension of Information Collection Request Submitted for Public Comment; Requirements Related to Energy Efficient Homes Credit; Manufactured Homes, 86 Fed. Reg. 50209-10 (Sept. 7, 2021).

[section] 45L to modify Notices 2008-35 and 2008-36 in consultation with [the Department of Energy ("DOE")] to conform to statutory changes" on the 2021-2022 Priority Guidance Plan.[2]

Our comments can be summarized as follows. First, new forward-looking guidance on the certification of homes for purposes of the section 45L credit is unnecessary because Notice 2008-35 and Notice 2008-36[3] give taxpayers sufficient guidance, especially in light of the fact that legislative changes to section 45L are currently being contemplated. Therefore, a new section 45L guidance project would be a poor use of limited Treasury and IRS resources. It would also be burdensome to taxpayers and certifiers, as the costs of updating their procedures is significant. Second, if Treasury and the IRS do issue new guidance on this topic, that guidance should permit the continued use of "equivalent calculation procedures," along with reliance on calculation procedures provided by earlier RESNET publications in order to minimize the compliance burdens on taxpayers and certifiers. Third, any new guidance should be prospective only, consistent with the long-standing presumption against retroactive guidance.

I. Background

Section 45L offers "eligible contractors" a nonrefundable general business credit (claimed under section 38) for each qualified new energy efficient home that is constructed and then acquired by a person to use as a residence during the taxable year.[4] When originally introduced, the Senate Finance Committee noted that residential energy use for heating and cooling represents a large share of national energy consumption and that a "tax credit for the use of energy-efficient components in a home's envelope … or heating and cooling appliances will encourage contractors to produce highly energy-efficient homes, which in turn will reduce national energy consumption."[5] Thus, as originally enacted, to qualify for a section 45L credit, newly constructed or manufactured homes must meet certain requirements determined by a comparison to a home constructed in accordance with the specifications contained in the 2003 International Energy Conservation Code ("IECC"). The IECC establishes national minimum standards for energy efficient buildings through prescriptive and performance-related provisions.

Section 45L(d)(1) requires that the IRS issue guidance on the procedures and methods for calculating energy and cost savings for purposes of certification "after consultation with the Secretary of Energy." On February 29, 2008, the IRS released Notice 2008-35, which provides guidance under section 45L regarding certifying newly constructed homes, and Notice 2008-36, which provides guidance under section 45L regarding certifying manufactured homes.

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[2] Department of the Treasury, 2021-2022 Priority Guidance Plan, at 9 (Sep. 9, 2021). All section references are to the Internal Revenue Code of 1986, as amended and currently in effect, and the Treasury Regulations promulgated thereunder, unless otherwise specified.

[3] 2008-1 C.B. 647 (Feb. 29, 2008); 2008-1 C.B. 650 (Feb. 29, 2008).

[4] Section 45L(a)(1).

[5] S. Rep. No. 108-54 (May 23, 2003), at 26.

In 2013, Congress amended section 45L to require comparison to a home constructed in accordance with the specifications of the 2006 IECC, rather than to the 2003 IECC.[6] While there is no legislative history discussing the reason for the change, the DOE has separately determined that the 2006 IECC has a small improvement in energy efficiency compared to the 2003 IECC.[7] The DOE also noted that the 2006 IECC simplified the code format and combined the requirements for certain residential buildings.[8]

In providing guidance on how the energy-saving certification required under section 45(d)(1) is to be made, Notices 2008-35 and 2008-36 refer to the 2003 IECC as required by the statute at the time. Specifically, they provide that in making the certification, heating and cooling energy consumption must be calculated in accordance with the procedures prescribed in the industry publications, Residential Energy Services Network ("RESNET"), No. 05-001 and No. 06-001, or in accordance with a procedure that "produces results comparable to the results obtained under the procedures" prescribed in those RESNET publications (a so-called "equivalent calculation procedure").

RESNET is a non-profit membership corporation focused on building energy efficiency rating and certification systems that publishes certain standards that offer verification of building energy performance for programs including federal tax incentives.[9] As noted in RESNET No. 05-001 and No. 06-001, "[s]ince the credits for new homes are based upon performance as compared with Section 404 of the 2004 IECC Supplement [to the 2003 IECC standard], computer software modeling is required."[10] These publications offer procedures for accrediting software programs that can model and compare the 2003 IECC standard reference home (as modified by the 2004 supplement) and the dwelling unit for purposes of tax credit qualification. Specifically, the aforementioned RESNET publications contain procedures that are designed to verify that software tools automatically generate accurate reference homes that match the IECC standards, and contain formulas for the calculation of the energy load of the tested dwelling unit and for determining the energy reduction of the dwelling unit compared to the 2003 IECC standard-compliant unit.

The IRS has not updated Notice 2008-35 or Notice 2008-36 to reflect the 2013 statutory amendment to section 45L or for any other reason. The IRS has not released any other published guidance that explicitly modifies, clarifies, supersedes, replaces, or otherwise impacts Notice 2008-35 or Notice 2008-36. Since 2006, RESNET has published at least three other relevant

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[6] American Taxpayer Relief Act of 2012, P.L. 112-240, § 408(a), (b) (Jan. 2, 2013).

[7] *See* 75 Fed. Reg. 54131, 54132 (Sept. 3, 2010).

[8] *Id.*

[9] *See* "Standards", *available at* https://www.resnet.us/about/standards/ (accessed Aug. 19, 2021).

[10] As Section 45L(c)(1) provides that the calculations must meet the IECC standards "(including supplements)…in effect on the date of the enactment of this section," the RESNET Publications No. 05-001 and No. 06-001 reference the most current supplement in effect at the time of section 45L's enactment, the 2004 Supplement to the 2003 IECC (the "2004 IECC Supplement").

publications: RESNET Publications 001-13, 001-16, and 001-20. Each of these publications refers to the 2006 IECC.

The equivalent calculation procedure permitted by Notices 2008-35 and 2008-36 allows certification to be made via procedure that produces comparable results as the procedure prescribed under RESNET publications. Consistent with this, the DOE lists on its website "approved software" that applies RESNET Publications 001-13, 001-16, and 001-20 and therefore "*may* be used to verify compliance with the energy efficiency requirements for the tax credit under § 45L of the Internal Revenue Code (45L)."[11] In other words, software that is not on this list may still be used, so long as it meets the equivalent calculation procedure standard set forth in the notices.

As noted above, Treasury and the IRS have stated in their 2021-2022 Priority Guidance Plan (the "PGP") that they plan to issue a notice under section 45L to modify Notices 2008-35 and 2008-36 in consultation with the DOE to conform to statutory changes. In addition, proposed legislation has been introduced that would amend section 45L to replace references to the IECC with references to various Energy Star requirements.[12]

II. New Forward-Looking Guidance is Unnecessary Because Notice 2008-35 and Notice 2008-36 Give Taxpayers Sufficient Guidance

Because Notice 2008-35 and Notice 2008-36 reference the 2003 IECC (rather than the 2006 IECC), they cannot be literally applied. As noted in the PGP, the IRS has proposed issuing guidance to "conform to statutory changes." However, for the last eight years, taxpayers and certifiers have properly applied the guidance in the Notices insofar as it does not contradict the 2013 statutory amendment. This means using "equivalent calculation procedures" (as permitted by Notice 2008-35 and Notice 2008-36) that produce equivalent results to the procedures in RESNET Publications 05-001 or 06-001 if those publications referenced the 2006 IECC (as opposed the 2003 IECC). This approach is well supported by law; both the IRS and the courts have relied on subregulatory guidance even when the statute that the guidance is based on is later amended, so long as that guidance is not inconsistent with the statute as amended.[13]

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[11] "List of Approved Software for Calculating the Energy Efficient Home Credit," *available at* https://www.energy.gov/eere/buildings/list-approved-software-calculating-energy-efficient-home-credit (accessed October 30, 2021) (emphasis added). Currently the DOE website references RESNET Publications 001-13, 001-16, and 001-20. Originally, DOE used the term "must" as opposed to "may" when originally publishing its software list in 2017 before correcting the term to "may." The change reflects an acknowledgment of the equivalent calculation alternative.

[12] *See* Build Back Better Act, H.R. 5376, § 136304 (introduced Sept. 13, 2021).

[13] For instance, in *Spiegelman v. Commissioner*, the Tax Court considered the taxation of scholarship and fellowship income, which had been modified by statute to include income for teaching or research services. The court examined a revenue ruling issued 25 years before the statutory amendment on the taxability of scholarship and fellowship income and held it remained valid, despite subsequent statutory amendments. 102 T.C. 394 (1994) ("Although we recognize that such rulings are little more than a statement of a party's legal position and are not

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Proposed legislative changes to section 45L would provide a new standard for meeting energy saving requirements, including requiring homes to certify as a "zero energy ready home" under the DOE's program or meet the requirements of Energy Star New Homes or New Construction National Program Requirements. Further, if *no* change is made, section 45L will not apply to any home acquired after December 31, 2021. *See* section 45L(g).

Although the PGP contemplates the issuance of guidance "to conform to statutory changes" (*i.e.,* the 2013 statutory change replacing the reference to the 2003 IECC with a reference to the 2006 IECC), we respectfully submit that such guidance is unnecessary, particularly because such guidance very likely will be either (1) preempted by the proposed substantive amendments to section 45L if enacted, or (2) rendered mostly moot by the pending expiration of the statute. As such, the issuance of guidance would require taxpayers to substantially change compliance procedures in back-to-back years. Moreover, taxpayers' and certifiers' costs would increase significantly, especially because forward-looking guidance (*i.e.*, guidance that applies to homes that have not yet been sold) would still require redoing analyses to determine compliance, as homes are generally certified both in advance and after close of sale.

Further, creating a new set of standards that, based on the current statute, will likely be limited to a single year, would also result in complicated compliance and enforcement issues for the IRS, further straining resources. In our view, Treasury and the IRS should focus their resources on implementing new section 45L legislation (should it be enacted) as opposed to guidance for a statutory change that occurred over eight years ago, and may soon become dead letter in any event.

III. Should New Guidance be Issued, It Should Permit Continued Use of Equivalent Calculation Procedures as well as Reliance on Older Calculation Procedure Provided by Earlier RESNET Publications

As noted above, in the absence of updated guidance from the IRS, some taxpayers have properly relied on Notice 2008-35 and/or Notice 2008-36 insofar as it does not conflict with section 45L as amended in 2013. Congress has obviously seen no issues with this approach, as it has continued to extend the statute without making any substantive changes.[14] If Congress had

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generally considered precedent by this Court, the underlying rationale of [the revenue ruling] is sound."); *see also Newkirk v. Commissioner*, T.C. Summ. Op. 2009-128, 2009 BL353421, *2 n4 (stating that even though Treas. Reg.§ 1.152-1 does not reflect more recent statutory amendments, it "remains valid to the extent not inconsistent with sec. 152 as amended."); *Wheelis v. United States.*, 89 AFTR 2d 2002-3038, (D. Ariz. 2002) (holding that a determination that an older version of the wage withholding regulations was promulgated properly was still valid). *See also* PLR 199912026 (noting that although a revenue ruling reflects prior law, it still remains valid).

[14] *See* Consolidated Appropriations Act, 2021, P.L. 116-260, § 146(a); Further Consolidated Appropriations Act, 2020, P.L. 116-94, § 129(a); Bipartisan Budget Act of 2018, P.L. 115-123, § 40410(a); Consolidated Appropriations Act, 2016, P.L. 114-113, § 188(a); Tax Increase Prevention Act of 2014, P.L. 113-295, § 156(a).

an issue with the way the section 45L credit was being claimed, it would have moved quickly to amend the statute to prevent any abuse, rather than simply extending it.[15]

Nevertheless, we recognize that the IRS may be considering mandating the use of a more recent RESNET publication. While not rising to the level of subregulatory guidance, the instructions to Form 8908 (on which the section 45L credit is claimed) purport to require "heating and cooling energy and cost savings" be calculated "using the procedures described in Residential Energy Services Network (RESNET) Publication 001-16, or an equivalent calculation procedure."[16]

Precautions should be taken to ensure that any new guidance reduces taxpayers' costs and burdens. This is consistent with the legislative intent of the statute: to permit a credit for energy efficient homes that meet the standards of the 2006 IECC (among other requirements). If the IRS were to issue an updated notice or other guidance requiring certification to be in compliance with a later RESNET publication, certifiers (and by extension, taxpayers) would experience an increase in compliance costs as they would have to adopt new systems that would make the calculations in accordance with updated RESNET publications, even though there has been no substantive statutory change for over eight years. This would impose an unfair burden on taxpayers and certifiers, particularly given that this aspect of section 45L has not been an area of documented abuse and that the statute may soon dramatically change or expire.

Any new guidance should also permit reliance on the equivalent calculation procedure method that current guidance permits. This means using "equivalent calculation procedures" (as permitted by Notice 2008-35 and Notice 2008-36) that produce equivalent results to the procedures in RESNET Publications 05-001 or 06-001 if those publications referenced the 2006 IECC (as opposed the 2003 IECC). In other words, if a calculation procedure can achieve comparable results as a procedure set forth in guidance (*e.g.*, an updated RESNET publication), then taxpayers should be permitted to use that "equivalent" procedure along with previous procedures. A corollary of this principle is that taxpayers and certifiers should continue to be permitted to use software that is not specifically approved by the DOE to run the calculation, so long as they can demonstrate that the software they use is in fact an equivalent calculation procedure.

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[15] Congress will often restrict a statute while extending it if it believes it needs to do so to prevent abuse. For example, in 2010 and again 2019, Congress acted to prevent claims for the Alternative Fuel Mixture Credit that it determined to be abusive. *See* Further Consolidated Appropriations Act, 2020, P.L. 116-94, § 133(b)(1) (preventing claims for Alternative Fuel Mixture Credit for mixtures based on, inter alia, liquefied petroleum gas); Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, P.L. 111-312, § 704(b) (preventing Alternative Fuel Mixture Credit claims for so-called "black liquor"). These same acts also extended the section 45L credit.

[16] https://www.irs.gov/pub/irs-pdf/i8908.pdf (Rev. Feb. 2021). The instructions also require, however, that certification be performed in accordance with Notice 2008-35 and Notice 2008-36, as appropriate.

This is especially important to protect taxpayers and certifiers from inflated costs that will erode the value of the credit. Vendors of DOE-approved software have increased the cost for taxpayers to use their software as their software is updated to adhere to later RESNET Publications. Often, the cost to just use listed software alone can be up to five percent of the tax credit and close to eight percent of the net benefit, given that some software vendors have modified their business models to charge on a per-home basis as opposed to allowing certifiers to purchase the software. Allowing for equivalent calculation procedures provides certifiers the ability to reduce cost for compliance, which ultimately ensures that taxpayers get to enjoy more of the benefit as intended by Congress.

Finally, any new guidance should have a phase-in period during which certifiers and taxpayers can continue to rely on Notice 2008-35 and/or Notice 2008-36 while they update their procedures. This, too, will help ensure that taxpayers and certifiers are protected from a sharp increase in compliance costs.

IV. To the Extent New Guidance is Issued, Such Guidance Must Not Apply Retroactively

Congress, the courts, and Treasury and IRS generally disfavor and restrict retroactive regulations. Treasury and the IRS have stated publicly with regards to notices that if no proposed regulations or other guidance is released within 18 months after the date the notice is published, taxpayers may continue to rely on the notice but, until additional guidance is issued, Treasury and the IRS will not assert a position adverse to the taxpayer based in whole or in part on the notice."[17] The issuance of any guidance under section 45L that retroactively prohibits reliance on Notice 2008-35 or Notice 2008-36 would conflict with this policy statement.

Meanwhile, while prior to 1996, regulations were presumed to be retroactive unless prescribed differently under section 7805 by Treasury and the IRS,[18] Congress amended section 7805 to explicitly bar retroactive regulations. Under current section 7805(b)(1), no temporary, proposed, or final regulations can apply prior to the date on which any notice substantially describing the expected contents of the regulation is issued to the public. In this case, the IRS has issued no notice that substantially describes any regulations that would be issued under section 45L (other than Notice 2008-35 and Notice 2008-36) and is thus not permitted to issue retroactive regulations unless an exception applies.

[17] *See* U.S. Treasury Dep't, Policy Statement on the Tax Regulatory Process (Mar. 5, 2019), available at https://home.treasury.gov/system/files/131/Policy-Statement-on-the-Tax-Regulatory-Process-3-4-19.pdf.

[18] As discussed further below, even when regulations were presumed to be retroactive, Treasury and the IRS' decision to make a regulation retroactive was reviewed for abuse of discretion.

Section 7805(b)(3) contains a limited exception under which a regulation may apply retroactively to prevent abuse.[19] "Abuse" is undefined in the statute and legislative history but in amending section 7805, Congress stated that retroactive regulations "are generally inappropriate."[20]

Moreover, the courts generally have a strong presumption against enforcing retroactive laws and regulations.[21] While there is no robust case law on what constitutes abuse under current section 7805(b)(3), the courts have required that the abuse targeted by that provision be clear from the statute.[22] As section 45L was amended only to update references from the 2003 IECC to the 2006 IEC (and then extended multiple times without further statutory change), there is no congressional authorization to issue retroactive regulations, nor would it be clear from the statute that taxpayers would be engaging in abusive transactions by relying on older IRS guidance.

Further, under case law examining pre-amendment section 7805, under which regulations generally would have retroactive effect, the courts nonetheless reviewed the failure to limit a regulation to prospective application only for an abuse of discretion. The court generally evaluated a the validity of a retroactive regulation according to four factors: (1) whether the taxpayer justifiably relied on settled prior law or policy and whether or to what extent the putatively retroactive regulation alters that law; (2) the extent, if any, to which the prior law or policy has been implicitly approved by Congress, as by legislative reenactment of the pertinent Code provisions; (3) whether retroactivity would advance or frustrate the interest in equality of treatment among similarly situated taxpayers; and (4) whether according retroactive effect would produce an inordinately harsh result.[23]

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[19] Section 7805 also provides exceptions for regulations issued within 18 months of the date of the enactment of the statutory provision; procedural corrections; regulations relating to internal Treasury Department policies, practices, or procedures; and congressional authorization of retroactive regulations.

[20] H.R. Rep. No. 104-506, at 44.

[21] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

[22] *See Stobie Creek Invs., LLC v. United States*, 82 Fed. Cl. 636, 671 (2008), *aff'd*, 608 F.3d 1366 (Fed. Cir. 2010) (holding that the retroactive application of Treasury Regulation § 1.752–6 was inappropriate and noting that "it would be an incongruous result to defer to Treasury's determination that a particular regulation must apply retroactively in order to prevent abuse when Congress saw fit to decree the end of one named abuse on a retroactive basis" but not all potential abuses, including the one targeted by the regulation); *Sala v. United States*, 552 F. Supp. 2d 1167, 1201–02 (D. Colo. 2008), *rev'd on other grounds*, 613 F.3d 1249 (10th Cir. 2010) (holding that Treasury Regulation § 1.752–6 could not be applied retroactively and noting it was "contrary to the purpose of the statute to allow the Secretary to promulgate retroactive regulations" without "some check on the Secretary's ability to declare something abusive").

[23] *See, e.g., Klamath Strategic Investment Fund LLC v. United States*, 440 F. Supp. 2d 608, 623 (E.D. Tex. 2006) (applying the four-factor test to evaluate a retroactive regulation and holding that (1) the case law was settled for 25 years; (2) a failure to amend the relevant statute by Congress, implicitly endorsing the interpretation by the courts;

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Even if evaluated under an abuse of discretion standard, Treasury and the IRS should not apply section 45L regulations or other guidance retroactively because: (1) taxpayers, following long-standing principles, applied the IRS guidance to the extent that it was not inconsistent with the statute; (2) Congress did not amend section 45L to address outdated IRS guidance and instead extended section 45L multiple times; (3) retroactive guidance would likely disbar some homes that were previously properly certified under Notice 2008-35 or Notice 2008-36 from qualifying, and so result in unequal treatment for similar taxpayers; and (4) it would be especially unfair to impose retroactive rules now (with no significant notice) when taxpayers and certifiers have adopted business models and practices based on proper reliance on IRS guidance.

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(3) finding no unequal treatment for similarly situated taxpayers; and (4) finding that no advance notice by the IRS constituted a hard result). The *Klamath* court held that a regulatory change that is in conflict with this long line of cases without any prior notice was an abuse of discretion. *See also Snape Drape Inc. v. Commissioner*, 98 F.3d 194, 202 (5th Cir. 1996) (noting that "the Internal Revenue Service does not have carte blanche" authority to issue retroactive regulations"); *Anderson, Clayton Co. v. United States*, 562 F.2d 972, 981 (5th Cir. 1977) (outlining the four factors).

Thank you for the opportunity to submit these comments on this important guidance. We strongly believe that new guidance is unnecessary and potentially wasteful in the light of possible statutory changes, and would impose significant burdens on taxpayers. If guidance is necessary, it should provide for existing equivalent calculation procedures and should not be retroactive. We would welcome the opportunity to meet with Treasury and the IRS to discuss the issues outlined in this comment letter in greater detail or to answer any question that you may have.

Respectfully Submitted,

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