November 10, 2021

The Honorable Chuck Schumer
Majority Leader
United States Senate
Washington, D.C. 20510

The Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, D.C. 20515

The Honorable Ron Wyden
Chairman
Senate Committee on Finance
United States Senate
Washington, D.C. 20510

The Honorable Richard Neal
Chairman
House Ways and Means Committee
United States House of Representatives
Washington, D.C. 20515

Dear Leader Schumer, Speaker Pelosi, Chairman Wyden, and Chairman Neal:

The Electric Power Supply Association (EPSA)[1] applauds the passage of the bipartisan infrastructure package as we believe it will improve grid reliability, facilitate the deployment of clean energy technologies, and improve critical infrastructure cybersecurity, among other important initiatives for our nation. This generational investment in America's infrastructure will only serve to enhance our nation's position in the 21st century. EPSA and its members are at the forefront of the clean energy revolution and support the laudable energy transition goals of this Administration and the 117th Congress. However, we write to you today to voice our grave concerns regarding the inclusion of a 15% corporate minimum tax on book income included in the current Build Back Better legislation.

As the legislation stands today, there would be an imposition of a 15% alternative minimum tax (AMT) on corporations that have an average annual adjusted financial statement income that exceeds $1 billion over a designated three-year period. This is a marked change from the Administration's earlier proposal, included in the Green Book.[2] In that proposal, the Treasury Department suggested a 15% minimum tax on companies reporting pre-tax net income of $2 billion or more on their financial statements. In its rationale, Treasury pointed out that such a minimum tax would be levied on approximately 120 companies and "a significant share of these firms pay zero income tax or receive tax refunds." The current legislation's lowering of the threshold to $1 billion for the AMT sweeps in many more companies that are vested in providing essential services such as electricity.

[1] Founded in 1992, EPSA is the national trade association that advocates for well-functioning competitive wholesale electricity markets. Healthy competitive markets provide the best foundation to reliably power the nation's homes and businesses at the lowest cost—as well as to foster the innovation and sustainable environmental progress needed to meet the future. EPSA member companies provide approximately 150,000 megawatts of reliable, competitively priced electricity from environmentally responsible generation facilities using a diverse mix of fuels and technologies, including natural gas, wind, solar, hydropower, nuclear, and coal.

[2] https://home.treasury.gov/system/files/131/General-Explanations-FY2022.pdf

The first concern our members have with the draft legislation is that it will require companies that use “mark to market” (MTM) accounting to include unrealized MTM revenues and losses in the annual calculation of financial statement income. This will unfairly penalize companies that are appropriately managing their risk exposure to commodity price changes by hedging in the financial markets. We believe this provision either needs to be eliminated or give companies a 3-year period to phase in or trigger date to give companies time to adjust their holdings and existing contracts.

Our second concern is that if a company triggers the AMT in a single year, it will be subject to paying the AMT in all future years, even if its book income falls significantly below $1 billion. This will significantly hamper corporate merger and acquisition activity because, for example, a company could have significantly higher than normal book income in one year simply because of asset sales, and then be caught paying AMT going forward. While there is general language in the text allowing the Treasury department to possibly protect companies from this situation, it is unclear on what basis Treasury will make that determination. Additionally, we have concerns that this approach punishes companies who relied on the benefits of the deductibility of accelerated depreciation when deciding to invest in job-creating generation infrastructure projects.

Lastly, the revised AMT language currently eliminates the 2020 pandemic year as a year to measure the 3-year average financial income to determine applicability of the tax. EPSA believes the original 3-year test should be applied (counting the 3 years prior to the tax year as opposed to the 3-year period including the tax year). The original language[3] proposed a three-year lookback average of financial income to determine applicability of the corporate AMT. This was reasonable in our view because there is no transition period currently contemplated by the corporate AMT for a novel tax that only the United States seeks to tax on purely financial income. A three-year lookback rule of applicability, which includes 2020 for the first year of implementation of the corporate AMT, recognizes the especially difficult year that American business suffered as it fully employed American workers while suffering historic losses. Utilization of the 2020 financial year enables American business to transition to this historic tax more smoothly, as recognition of these historic losses in determining corporate AMT applicability ensures that only companies with a solid history of financial profits will be hit by the novel tax.

As we stated previously, the EPSA member companies have been at the forefront of the energy transition and such an exorbitant tax levied upon these companies would negatively impact their ability to continue these clean energy investments at the planned pace. In addition, consumers would end up bearing the brunt of these costs and energy transition delays – a result which we believe Congress does not intend.

[3] https://rules.house.gov/sites/democrats.rules.house.gov/files/BILLS-117HR5376RH-RCP117-17.pdf

The current Build Back Better draft contains many elements that will go a long way in furthering our ability to mitigate climate change, establish a steady course for the energy transition, and enable America to lead the world in this endeavor. EPSA stands together with other energy providers, including members of the Edison Electric Institute, in calling on Congress to remedy this error. In refusing to do so, Congress risks undermining the Administration's clean energy and climate goals, as well as its own.

Accordingly, EPSA respectively requests that the 15-percent corporate minimum tax on book income be stricken from your consideration in the final Build Back Better legislation.

Thank you for your consideration of this request from America's competitive power producers.

Respectfully,

Todd A. Snitchler

Todd A. Snitchler
Electric Power Supply Association
President & CEO