



November 4, 2022

The Honourable Janet Yellen
Secretary
United States Treasury
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220

RE: American Biogas Council Comments in Response to IRS Notice 2022-51: Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022

Dear Secretary Yellen,

Thank you for the opportunity to submit comments in response to the U.S. Department of Treasury notices released on October 5, 2022. The American Biogas Council is the voice of the US biogas industry dedicated to maximizing carbon reduction and economic growth using biogas systems. We represent more than 350 companies in all parts of the biogas supply chain who are leading the way to a better future by maximizing all the positive environmental and economic impacts biogas systems offer when they recycle organic material into renewable energy and soil products.

We applaud the U.S. Department of Treasury's initiative and leadership in setting guidelines for these newly created tax credits and are pleased at the thoughtfulness that you have shown in your Department's support of biogas as a vital way of addressing our current and future climate-based challenges and priorities. At their core, biogas systems protect our air, water, and soil, and are a crucial part of the solution to the challenges these credits seek to address. We further appreciate the ability to provide input on such critical changes to the tax incentives and are grateful to be considered in this regard.

We therefore make the comments set forth in this letter in response to the October 5th notice regarding the Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022.

(2) Section 45(b)(7)(B)(i) generally provides a correction and penalty mechanism for failure to satisfy prevailing wage requirements. What should the Treasury Department and the IRS consider in developing rules for taxpayers to correct a deficiency for failure to satisfy prevailing wage requirements?

The ABC encourages the Treasury Department and IRS to consider the impact to the investor and the project when developing the timeline for which the correction and penalty mechanism would be implemented.

(3) What documentation or substantiation should be required to show compliance with the prevailing wage requirements?

The ABC suggests that the IRS and Treasury Department compare the final cost of contracted labor for a qualifying project be compared against the local rates and availability of labor for a similar undertaking. Ultimately it will be difficult to compare the project's cost when factoring in the Prevailing wage requirement when laborers are fighting for a bid, however, the Treasury Department and IRS could develop some sort of baseline measure by which projects of specific scales could be compared.

(4) Is guidance for purposes of § 45(b)(7)(A) needed to clarify the treatment of a qualified facility that has been placed in service but does not undergo alteration or repair during a year in which the prevailing wage requirements apply?

The ABC encourages the Treasury Department and IRS to provide guidance for facilities that are placed in service, but which have not undergone alterations or repair during a year in which the prevailing wage requirements apply so that any confusion or misinterpretation as to which facilities *do* qualify can be dealt with smoothly. Ultimately, the more guidelines the Treasury Department and IRS can provide to projects on the front-end will result in smoother administration on the back end.

Apprenticeship Requirement

- (1) Section 45(b)(8)(C) provides that each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to a qualified facility must employ one or more qualified apprentices from a registered apprenticeship program to perform that work. What factors should the Treasury Department and the IRS consider regarding the appropriate duration of employment of individuals for construction, alteration, or repair work for purposes of this requirement?

The ABC encourages the Treasury Department and IRS to consider the timeliness of projects in consideration for maximum eligibility for tax credits when determining the appropriate duration of employment for purposes of the Apprenticeship requirement. Ultimately, the ABC supports the development of qualified apprentices in this field, however, these projects will be vast undertakings and project completion will be imperative for certain credit eligibility. The ABC recommends the IRS consider the repercussions of requiring immutable employment contracts with regards to hastening project completion. An alternative measure would be to use the percentage of a project, rather than a specific duration of time. Additionally, as with the Prevailing Wage requirement, we ask that the IRS consider location and availability of local labor forces regarding the apprenticeship requirement.

- (2) Section 45(b)(8)(D)(ii) provides for a good faith effort exception to the apprenticeship requirement.

- (a) What, if any, clarification is needed regarding the good faith effort exception?

The ABC encourages the IRS to include administrable requirements to demonstrate compliance with the good faith efforts standard in Section 45(b)(8)(D)(ii) (e.g., how to demonstrate efforts to find an apprentice and/or that no apprenticeship program was available for the labor needed). Furthermore, we ask that the IRS include specific disqualifying examples for clarification to the good faith effort exception. The clear intention of this provision is to encourage project developers to comply with the apprenticeship requirements to the best of their abilities. However, there will be instances where it may be on the cusp of reasonability for what constitutes a "good faith effort." Even minimal guidelines for distance considerations in hiring, or contractual term lengths would help to give guidance for where to draw the line for compliance efforts and reasonability.

Domestic Content Requirement

- (1) Sections 45(b)(9)(B) and 45Y(g)(11)(B) provide that a taxpayer must certify that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was produced in the United States (as determined under 49 C.F.R. 661).

No comment.

- (a) What regulations, if any, under 49 C.F.R. 661 (such as 49 C.F.R. 661.5 or 661.6) should apply in determining whether the requirements of section §§ 45(b)(9)(B) and 45Y(g)(11)(B) are satisfied? Why?

The ABC is broadly supportive of domestic content requirements as it incentivizes U.S. industry and further investment in U.S. manufacturing. However, given the constraints on the length of the tax credits to which domestic content applies as well as technical requirements for project components, it may be challenging to comply with this requirement. ABC encourages the IRS to provide waiver provisions for steel and iron domestic content provisions under certain circumstances.

The ABC also requests that the scope of this requirement be defined. For example, does this requirement pertain to the overall project cost, facility cost, construction or equipment, or steelwork? As said previously, the ABC is exceptionally supportive of further development of the U.S. renewable energy industry. Biogas digesters have a significant role to play in leading us to a decarbonized nation. However, we need clear guidance and a transparent process to comply with these requirements.

- (c) Should the definitions of "steel" and "iron" under 49 C.F.R. 661.3, 661.5(b) and (c) be used for purposes of defining those terms under §§ 45(b)(9)(B) and 45Y(g)(11)(B)? If not, what alternative definitions should be used?

ABC suggests that the IRS and Treasury Department utilize the same definitions for the sake of consistency in regulation.

- (2) Sections 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) provide that manufactured products that are components of a qualified facility upon completion of construction will be deemed to have been produced in the United States if not less than the adjusted percentage of the total costs of all of such manufactured products of such facility are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States.

No comment.

- (e) Does the treatment of subcomponents with regard to manufactured products need further clarification? If so, what should be clarified?

The ABC recommends that the Treasury Department and IRS provide as much clarification as possible with regards to “components of a qualified facility,” products that are “mined, produced, or manufactured in the United States,” “manufactured product,” “end product[s],” and treatment of subcomponents. Ultimately, any confusion in the application of these definitions will only serve to inhibit the smooth administration of these new regulations and further delay project developers.

- (3) Solely for purposes of determining whether a reduction in an elective payment amount is required under § 6417, §§ 45(b)(10)(D) and 45Y(g)(12)(D) provide an exception for the requirements contained in §§ 45(b)(9)(B) and 45Y(g)(10)(B) (respectively) if the inclusion of steel, iron, or manufactured productions that are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent or relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

No comment.

- (a) Does the determination of “overall costs” and increases in the overall costs with regard to construction of a qualified facility need further clarification? If so, what should be clarified?

The ABC suggests the IRS provide a calculable example as to what is included in the definition of “overall costs.” ABC encourages the IRS to clarify if there are any costs associated with a project that would be specifically excluded from the “overall costs” calculation with regards to increased construction costs.

- (b) What factors should the Secretary include in guidance to clarify when an exception to the requirements under section §§ 45(b)(10)(D) and 45Y(g)(12)(D) applies? What existing regulatory or guidance frameworks, such as the Federal Acquisition Regulation (FAR) and Build America Buy America (BABA) guidance, may be useful for developing guidance to grant exceptions under §§ 45(b)(10)(D) and 45Y(g)(12)(D)?

The ABC supports the use of FAR and BABA frameworks for establishing a regulatory framework for clarifying when an exception may apply to the requirements under sections §§ 45(b)(10)(D) or 45Y(g)(12)(D).

- (c) Do the “sufficient and reasonably available quantities” and “satisfactory quality” standards need further clarification? If so, what should be clarified?

ABC encourages the IRS and Treasury Department to provide as much clarifying information as possible for any remaining defined phrases.

- (4) Sections 48 and 48E have domestic content bonus amount rules similar to other provisions of the Code. Section 48(a)(12) has domestic content requirement rules similar to § 45(b)(9)(B) and § 48E(a)(3)(B) has domestic content rules similar to the rules of § 48(a)(12). What should the Treasury Department and the IRS consider in providing guidance regarding the similar domestic content requirements under § 48(a)(12) and § 48E(a)(3)(B)?

ABC encourages the Treasury Department and the IRS to provide exemplary models to depict the distinct difference between the domestic content *requirement* and the domestic content *bonus*. Specifically, the ABC recommends the Treasury Department and IRS provide a model-project that would satisfy both the initial domestic content requirement, as well as the effect the subsequent domestic content *bonuses* would affect the tax credit received. A

model that depicts the varying degrees of compliance would allow for developers to adequately compare their projects against the model and determine for themselves the degree to which they will comply with the *bonus* domestic content requirements.

ABC also requests that further guidance be given to the definition of domestic content for a manufactured product. The definition of § 45(b)(9)(B) implies that the weighted aggregate of all the manufactured products used by the taxpayer must be at least 40% domestic, however the definition of domestic content of each individual manufactured product is vague.

In closing, the ABC continues to support the Department of Treasury and IRS in administrating the newly created credits under the IRA. Furthermore, the ABC believes that these newly created credits will continue to serve as a catalyst for the United States in reaching 100 percent carbon pollution-free energy by 2030, and in doing so will stabilize and broaden the market, as well as incentivize innovative technologies and crop production practices moving forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Patrick Serfass". The signature is stylized and cursive.

Patrick Serfass
Executive Director
American Biogas Council