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Room 5203
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RE: Treasury Department and the IRS Guidance on Domestic Content Implementation from the IRA

Submitted via email: *www.regulations.gov*; Notice 2022-51

The American Clean Power Association (ACP)[1] appreciates the opportunity to submit the following comments in response to the request for public comment on the Internal Revenue Service's (IRS) *Request for Comments on Domestic Content Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022*.[2] IRS guidance will be crucial to achieve the intent of the Inflation Reduction Act (IRA) regarding domestic content requirements in sections 45(b)(9), 48(a)(12), 45Y(g)(11) and 48E(a)(3)(B) for obtaining the bonus credit.

[1] ACP is the national trade association representing the renewable energy industry in the United States, including in all aspects of offshore wind energy, bringing together over 1,000 member companies, 120,000 members, and a national workforce located across all 50 states with a common interest in encouraging the deployment and expansion of renewable energy resources in the United States. By uniting the power of wind, solar, storage, and transmission companies and their allied industries, ACP seeks to enable the transformation of the U.S. power grid to a low-cost, reliable, and renewable power system. The views and opinions expressed in this filing do not necessarily reflect the official position of each individual member of American Clean Power.

[2] Available at https://www.irs.gov/pub/irs-drop/n-22-51.pdf (Notice).

I. QUESTIONS RAISED BY IRS

Q1. 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).

(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?

ACP recommends that IRS apply Federal Transit Administration (FTA) regulations under 49 C.F.R. Part 661 and relevant FTA guidance applicable to manufactured products and steel and iron products in sections 661.3, 661.5, 661.6, and 661.7. However, we note that section 661.5(d)(2) does not apply; instead, the adjusted percentage test should be used to determine if a component qualifies as domestic. The definitions and regulations that are related to rolling stock (*i.e.*, 49 C.F.R. §§ 661.11, 661.12) should also not be applied.

In the table below, we lay out the specific regulatory provisions in 49 C.F.R. Part 661 (and in certain limited cases, Buy American regulations under the Federal Acquisition Regulation (FAR)) that we recommend IRS apply in the context of the domestic content provisions in the IRA. We provide the context for the recommended language in more detail in separate sections of this document, which are referenced in the left-hand column in the table below.

CFR Reference	Regulatory Definition	Recommended Definition
49 CFR § 661.3; Definition of System	System means a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function. Factors to consider in determining whether a system constitutes an end product include: whether performance warranties apply to an integrated system (regardless of whether components are separately warranted); whether products perform on an integrated basis with other products in a system, or are operated independently of associated products in the system; or whether transit agencies routinely procure a product separately (other than as replacement or spare parts).	The term "system" means a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables, or circuitry, or by other devices, which are intended to contribute together to a clearly defined function.
49 CFR § 661.3; Definition of End Product	End product means any vehicle, structure, product, article, material, supply, or system, which directly incorporates constituent components at the final assembly location, which is acquired for public use under a federally-funded third-party contract, and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s).	End product means any structure, product, article, material, supply, or system, including a qualified facility or energy property, which directly incorporates constituent components at the final assembly location and is ready to provide its intended end function or use without any further manufacturing or assembly changes.
49 CFR § 661.3; Definition of Component	Component means any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.	The term "component" includes any article, material or supply that is directly incorporated into the qualified facility or energy property.

CFR Reference	Regulatory Definition	Recommended Definition
Definition of Subcomponent	No definition in regulations; adapted from guidance.	The term "subcomponent" is any article, material, or supply, whether manufactured or unmanufactured, that is a "lower-level item" (i.e., one step removed from a component in the manufacturing process and that is incorporated directly into a component).
49 CFR § 661.3; Definition of Manufacturing Process	Manufacturing process means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.	Manufacturing process means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from its components.
49 CFR § 661.3; Definition of Manufactured Product	Manufactured product means an item produced as a result of the manufacturing process.	Manufactured product means an item produced as a result of the manufacturing process, including a component of a qualified facility or energy property.
Definition of Final Assembly	No definition in regulations; adapted from guidance.	The term "final assembly" is the location where the constituent components are directly incorporated into the end product (i.e., the project construction site).

CFR Reference	Regulatory Definition	Recommended Definition
48 CFR § 25.003; Definition of Cost of Components (FAR Regulations)	Cost of components means - (1) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or (2) For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.	The term "cost of components" means— (1) For components purchased by the taxpayer, the acquisition cost, including transportation and installation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or (2) For components manufactured by the taxpayer, all costs associated with the manufacture of the component, including labor, transportation costs, plus allocable overhead costs, but excluding profit.
49 CFR § 661.5(c); Steel and Iron Requirements	The steel and iron requirements apply to all construction materials made primarily of steel or iron and used in infrastructure projects such as transit or maintenance facilities, rail lines, and bridges. These items include, but are not limited to, structural steel or iron, steel or iron beams and columns, running rail and contact rail. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured products or rolling stock, or to bimetallic power rail incorporating steel or iron components.	The steel and iron requirements apply to all construction materials made primarily of steel or iron and used in qualified facilities or energy property. These items include, but are not limited to, structural steel or iron and steel or iron beams and columns. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured products. Components and subcomponents that are made of steel and iron that may have a secondary structural or load-bearing function shall be deemed manufactured product components or subcomponents, as applicable.

CFR Reference	Regulatory Definition	Recommended Definition
49 CFR § 661.6; Certification	If steel, iron, or manufactured products (as defined in §§ 661.3 and 661.5 of this part) are being procured, the appropriate certificate as set forth below shall be completed and submitted by each bidder or offeror in accordance with the requirement contained in § 661.13(b) of this part.	A taxpayer must certify to the IRS that it has complied with the domestic content requirements to be eligible for the bonus credit amount. A taxpayer shall attach the certification statement to the return on which such credit is claimed. In making its certification, a taxpayer may rely upon: (i) language in its contracts with suppliers requiring that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was mined, produced or manufactured in the United States; or (ii) certifications from its suppliers that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was mined, produced or manufactured in the United States. Where the taxpayer, itself, was the producer or manufacturer, it shall maintain records of such production or manufacturing activity sufficient to support its certification.

CFR Reference	Regulatory Definition	Recommended Definition
49 CFR § 661.7(c); Nonavailability Waiver	Under the provision of 49 U.S.C. 5323(j)(2), the Administrator may waive the general requirements of 49 U.S.C. 5323(j) if the Administrator finds that the materials for which a waiver is requested are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality.	The IRS may issue nonavailability exemptions, on a case-by-case or general basis, when it can be demonstrated by a taxpayer that a domestic material is not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality. If a nonavailability waiver is granted for a manufactured product, the costs of any such product will be subtracted from consideration of the total cost of all of the manufactured products that are components of the qualified facility or energy property when determining whether the adjusted percentage has been met for purposes of considering whether the domestic content bonus requirements have been satisfied. If a nonavailability waiver is granted for a steel and iron product, any such product does not need to meet the steel and iron requirements for purposes of considering whether the domestic content bonus requirements have been satisfied.

(b) What should the Treasury Department and the IRS consider when determining "completion of construction" for purposes of the domestic content requirement? Should the "completion of construction date" be the same as the placed-in-service date? If not, why?

ACP recommends that instead of using the placed-in-service date, IRS clarify that the completion of construction for purposes of applying domestic content requirements is at the point where the qualified facility or energy property is at a state of readiness and availability to perform its specifically assigned function. This should be without regard to whether it has been placed in service, as readiness is the metric over which project developers (who will, in most instances, be the relevant taxpayer) have control. For example, if transmission upgrades not constructed by the taxpayer are delayed, a project may not be placed-in-service even if it is otherwise physically and electrically ready to safely operate.

(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?

As noted above, ACP urges IRS to use FTA precedent as a guideline for applying steel and iron requirements. Accordingly, IRS should clarify that the steel or iron requirements are limited to "construction materials made primarily of steel or iron" that have a structural, load-bearing, or support function, such as "structural steel or iron, steel or iron beams and columns."[3] These requirements also should not apply to steel or iron used as components or subcomponents of manufactured products.[4] In those circumstances, the item should instead be analyzed under the manufactured product test, which is discussed in more detail below.

(d) What records or documentation do taxpayers maintain or could they create to substantiate a taxpayer's certification that they have satisfied the domestic content requirements?

ACP recommends that the IRS adopt the following requirements, which will allow a taxpayer to certify that it has complied with the domestic content requirements to be eligible for the bonus credit amount:

- A taxpayer should attach the certification statement to the return on which such credit is claimed. In making its certification, a taxpayer may rely upon: (i) language in its contracts with suppliers requiring that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was mined, produced or manufactured in the United States: or (ii) certification from its suppliers that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was mined, produced or manufactured in the U.S. Where the taxpayer, itself, was the producer or manufacturer, it shall maintain records of such production or manufacturing activity sufficient to support its certification. Upon audit by the IRS, a taxpayer shall make available for inspection the contracts, supplier certifications, and other records supporting the taxpayer's certification.

- A taxpayer must maintain records supporting the enhanced credit, including the contracts, supplier certifications, and other records supporting the taxpayer's certification that the domestic content requirement has been met, in accordance with section 6001 and Treas. Reg. § 1.6001-1(e).

Q2. 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

[3] 49 CFR § 661.5(c).
[4] Id.; *FTA Guidance Letter, Kone Elevators* (Jan. 8, 2015) (elevator guide rails of steel have a primary role to ensure "proper positioning of the elevator within the hoistway" and balance and control speed (in emergency circumstance) – and are not subject to steel requirements under 49 CFR 661.5(b)).

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.

(a) Does the term "component of a qualified facility" need further clarification? If so, what should be clarified and is any clarification needed for specific types of property, such as qualified interconnection property?

(c) Does the term "manufactured product" with regard to the various technologies eligible for the domestic content bonus credit need further clarification? If so, what should be clarified? Is guidance needed to clarify what constitutes an "end product" (as defined in 49 C.F.R. 661.3) for purposes of satisfying the domestic content requirements?

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

As noted above, ACP recommends that IRS use definitions in FTA regulations and guidance as guidelines for determining components and end products, with minor changes tailored to the clean energy industry that are discussed herein. In determining the domestic content of a qualified facility or energy property for purposes of the domestic content bonus, consistent with FTA guidance in 49 CFR §§ 661.3 and 661.5 for construction projects, a qualified facility or energy property should be categorized in terms of an end product, components, and subcomponents.

1. Mined, Produced, or Manufactured in the United States

IRS should clarify the meaning of "mined, produced, or manufactured" in the United States." Under the IRA, the manufactured products which are components of a qualified facility upon completion of construction are deemed to have been "produced" in the U.S. if "not less than the adjusted percentage (as determined under IRC § 45(b)(9)(C)) of the total costs of all such manufactured products of such facility are attributable to manufactured products (including components) which are *mined, produced, or manufactured in the United States*."

IRS should consider a manufactured product to have been "mined, produced, or manufactured" if the product undergoes a "manufacturing process." Consistent with FTA regulations and guidance, IRS should define the manufacturing process as "the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from its components." In the case of a manufactured end product, the components should include all preassembled manufactured products delivered to the final assembly location, as well as those products partially or fully manufactured at the site. The following are examples of manufacturing processes: forming, extruding, material removal,

welding, soldering, etching, plating, material deposition, pressing, permanent adhesive joining, shot blasting, brushing, grinding, layup, casting, resin application, wire drawing, annealing, swaging, twisting and stranding, integration, testing, mixing, blending, filing, lapping, finishing, vacuum impregnating, chemical synthesis, molding, compression, injection, laminating, casting, machining, pressing, and, in electrical and electronic pneumatic, or mechanical products, the collection, interconnection, and testing of various elements.[5]

In the case of solar power generation facilities, for example, trackers are partially manufactured on-site through a complex and exacting process, which requires specialized knowledge and extensive training for installers and adherence to a detailed installation manual and electrical wiring diagram. In this regard, manufacturing the trackers on-site requires extensive "collection, interconnection, and testing of various elements," which the FTA has recognized constitutes a "manufacturing processes" for "mechanical products," such as a trackers.[6] The various subcomponents of a tracker have a useful function only when they are integrated in a specific way that results in a distinct new product—i.e., a tracker—that is "functionally different from that which would result from mere assembly of the elements or materials."[7] The process of identifying a qualified facility or energy property that is a manufactured end product, components, and subcomponents is discussed in more detail in the sections below.

As for the U.S. production requirement, under longstanding regulatory precedent, a component is of U.S. origin if it is manufactured in the U.S., regardless of the origin of its subcomponents.[8] Therefore, IRS should clarify that any individual manufactured product that is a component of a qualified facility or energy property will be deemed to have been produced in the U.S. if the manufacturing processes for the product took place in the U.S., regardless of the origin of its subcomponents.

2. Qualified Facility or Energy Property as the System that is an End Product

Eligibility for the domestic content bonus credit amount is determined at the qualified facility level for purposes of section 45;[9] the same determination is made at the energy project level for purposes of section 48.[10] The qualified facility or energy property is the structure or system that directly incorporates the constituent components at the final assembly location and is ready to provide its intended end function or use without any further manufacturing or assembly change(s).

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[5] *See* Final Rule, Buy America Requirements, 56 Fed. Reg. 926, 929 (Jan. 9, 1991).
[6] *See id.; see* FTA Guidance Letter, Kone Elevators (Jan. 8, 2015) (installation of an elevator on-site is a manufacturing process; constituent parts of the elevator are subcomponents—and not components—of the building).
[7] *See* 49 CFR 661.3.
[8] See 49 CFR 661.5(d)(2).
[9] See IRC § 45(b)(9).
[10] See IRC § 45(b)(9); IRC § 48(a)(9)(ii).

As an initial matter, we recommend that IRS define both "system" and "end product" to provide general clarity as well as consistency with FTA regulations. For "system," we recommend that IRS define it to mean "a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables, or circuitry, or by other devices, which are intended to contribute together to a clearly defined function."

For "end product," we recommend defining it as "any structure, product, article, material, supply, or system, including a qualified facility or energy property, which directly incorporates constituent components at the final assembly location and is ready to provide its intended end function or use without any further manufacturing or assembly changes." FTA regulations recognize that there are several types of end products, including "manufactured end products." Further, the term "manufactured end product" refers to an "infrastructure project" that can encompass, among other things, freestanding structures such as train terminals, bus depots, and other facilities.[11] As applied to energy projects, IRS should make clear that the term "manufactured end product" also encompasses clean energy "infrastructure projects," such as a wind, solar, or energy storage system. Based on these definitions, ACP urges IRS to make clear that the qualified facility or energy property is the manufactured end product.

Consistent with this approach, as discussed below, we encourage IRS to allow taxpayers to elect to apply the domestic content rules either on a property-by-property basis or on an entire project basis, per the two options below.

Option 1: Project-Level Domestic Content Test for ITC and PTC

Solely for purposes of determining the eligibility for domestic content bonus, under this option, the term "facility" should be viewed as comprising all components of the project necessary to generate electricity, up to and including such property as an inverter.

With respect to a solar facility, the components should include equipment that uses solar energy to generate electricity, power conditioning equipment, transfer equipment, and parts related to the functioning of those items.[12] This should include PV panels (or other arrangements of solar cells), fiber-optics, fuel cells, turbines, boilers, mounting equipment, support structures, tracking equipment, monitoring equipment, transformers and other power conditioning equipment, and inverters.[13]

For an onshore wind facility, the components should consist of a wind-driven generator, tower, power conditioning equipment, transfer equipment, and parts related to the functioning of

[11] See 49 CFR § 661.3, Appendix A.
[12] See Former Reg. §1.48-9(d)(3). The section 1.48-9 regulations provided guidance on the definition of energy properties for purposes of the pre-1991 investment tax credit and are no longer in effect. However, they provide a useful roadmap to the extent that they are not inconsistent with the current version of IRC § 48.
[13] See Notice 2018-59.

those items. The wind facility should not include equipment that transmits electricity derived from wind energy.[14]

For a battery energy storage facility, the components should include equipment that permits the system to absorb, store, and deliver energy. This includes integrated battery storage enclosures (which comprise containers with battery modules, cells and racks, auxiliary equipment such as thermal management systems and fire suppression systems, DC wiring, battery interface cabinets, uninterrupted power supply, and other integral equipment), communications equipment, power conditioning equipment transfer equipment, transformers, and parts related to the functioning of those items.

The term "energy project" should mean a project consisting of one or more facilities that are operated as part of a single project. Factors indicating that multiple facilities are operated as an energy project include: (i) ownership by a single legal entity; (ii) the facilities are constructed on contiguous plots of land; (iii) the facilities are described in a common power purchase agreement or agreements; (iv) the facilities have a common intertie; and (v) the facilities share a common substation.[15]

Eligibility for the domestic content bonus credit amount should be determined at the energy project level.[16] The manufactured products that are components of a facility that is incorporated into the energy project should be deemed to have been produced in the U.S. if not less than the adjusted percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all manufactured products that are components of all of the facilities incorporated into the energy project are attributable to manufactured products are produced in the U.S.

Option 2: Energy project level for the ITC and at the qualified facility level for the PTC

Under this option, energy property[17] should be viewed as comprising of all components of property necessary to generate electricity (or in the case of energy storage, absorb, store, and deliver energy for conversion to electricity) up to and including property such as the inverter. This should include PV panels (or other arrangements of solar cells), fiber-optics, batteries, fuel cells, turbines, boilers, mounting equipment, support structures, tracking equipment, monitoring equipment, transformers and other power conditioning equipment, and inverters.[18] Specific types

[14] See Former Reg. § 1.48-9(e)(1).
[15] See Notice 2018-59; Notice 2013-29.
[16] See IRC § 48(a)(12)(A).
[17] Energy property is similar to, but not the same, as a qualified facility. Under IRS Notice 2013-59, the definition of energy property includes more equipment beyond than that necessary to generate electricity, such as inverters and transformers. On the other hand, a qualified facility is limited to the direct equipment that is necessary to generate electricity.
[18] See Notice 2018-59.

of energy property should include, among other things, solar, wind, energy storage, and interconnection property.

Solar energy property should include equipment that uses solar energy to generate electricity, power conditioning equipment, transfer equipment, and parts related to the functioning of those items. In general, this process should involve the transformation of sunlight into electricity through the use of such devices as solar cells or other collectors. However, solar energy property used to generate electricity should include only equipment up to (but not including) the stage that transmits or uses electricity.[19]

Battery energy storage property should include equipment that permits the system to absorb, store, and deliver energy. This should include integrated battery storage enclosures (which comprise containers with battery modules, cells and racks, auxiliary equipment such as thermal management systems and fire suppression systems, DC wiring, battery interface cabinets, uninterrupted power supply, and other integral equipment), communications equipment, transformers, power conditioning equipment, transfer equipment, and parts related to the functioning of those items.

Wind energy property should consist of a wind-driven generator, power conditioning equipment, transfer equipment, and parts related to the functioning of those items. Wind energy property should not include equipment that transmits electricity derived from wind energy.[20]

Interconnection property should include property that is part of an addition, modification, or upgrade to a transmission or distribution system, which is required at or beyond the point at which the energy project interconnects to such transmission or distribution system in order to accommodate such interconnection.[21]

The term "energy project" should mean a project consisting of one or more energy properties.[22] Factors indicating that multiple energy properties are operated as an energy project should include: (i) ownership by a single legal entity; (ii) the energy properties are constructed on contiguous pieces of land; (iii) the energy properties are described in a common power agreement or agreements; (iv) the energy properties have a common intertie; and (v) the energy properties share a common substation.[23]

In addition, under this option, the qualified facility[24] should include all components of the property that are functionally interdependent. Components of property should be considered

[19] See Former Reg. §1.48-9(d)(3).
[20] See Former Reg. § 1.48-9(e)(1).
[21] See IRC § 48(a)(8)(B).
[22] See IRC § 48(a)(9)(A)(ii).
[23] See Notice 2018-59.
[24] In Rev. Rul. 94-31, 1994-1 CB 16, IRS held that a "qualified facility" in the context of wind energy is the wind turbine together with its tower and supporting foundation pad – i.e., the property that is necessary for the production of electricity from wind energy.

functionally interdependent if the placing in service of each of the components is dependent upon the placing in service of each of the other components in order to generate electricity.[25]

With respect to onshore wind energy, the components of wind qualified facility should include the tower, nacelle, blades, and pad. They should *not* include transformers, roadways, fencing, on-site power collection systems, and monitoring and meteorological equipment. The components of a solar qualified facility should include the panels/modules, trackers, piers, and the supporting pad.

3. Manufactured Product as a Component of a Qualified Facility & Subcomponents

As noted above, the IRA provides specific provisions for "manufactured products" that are "components of a qualified facility." To clarify these provisions, ACP recommends that IRS adopt a definition for a "manufactured product" as "an item produced as a result of the manufacturing process, including a component of a qualified facility or energy property." For components, ACP recommends that IRS define a "component" as including any article, material or supply that is directly incorporated into the qualified facility or energy property. To distinguish a subcomponent from a component, IRS should also define a "subcomponent" to be any article, material, or supply, whether manufactured or unmanufactured, that is a "lower-level" item (i.e., one step removed) from a component in the manufacturing process and that is incorporated directly into a component.

Along with the definitions above, the IRS should also provide explicit clarity on which products are components, and which are subcomponents, for all covered technologies. With respect to a wind turbine that is a qualified facility and a manufactured end product, the components, such as the tower, nacelle, foundation, and blades, should be considered manufactured products directly incorporated into the manufactured end product (i.e., the facility) because they are all delivered to the site of construction and undergo the manufacturing process to create a manufactured end product (i.e., the wind turbine or set of wind turbines that are capable of generating electricity delivered through a circuit to the facility's point of interconnection to the grid). For example, any subcomponents of these components, such as the gearbox, rotor shaft, drive train, and generator that are subcomponents of a nacelle, should be able to be procured from a non-domestic supplier without impacting the categorization of the nacelle at the component level.

For the entire solar system (qualified as energy property), the following should be considered components: solar modules, trackers, racking, and inverters. The subcomponents should include, but not be limited to, torque tubes, fasteners, module glass, and cells—and not subject to domestic content requirements.

[25] See Notice 2013-29; Rev. Rul. 94-31.

Finally, IRS should clarify that manufactured products that are components of a qualified facility should be *only* those that are directly incorporated into the qualified facility, as defined by the system that produces energy (or which absorbs, stores, and delivers energy, in the case of energy storage), or energy property. Other items should not be treated as part of the manufactured end product.

Finally, for a battery energy storage system that is a qualified facility and a manufactured end product, components should be the following manufactured products: the integrated battery storage enclosure and inverters, among others, because they undergo manufacturing processes to create a manufactured end product (a battery storage system that is capable of absorbing, storing, and delivering energy). Any subcomponents of these components, such as the battery cells, modules, racks, climate control systems, fire suppression systems, DC wiring, battery interface cabinets, uninterrupted power supply, and other integral equipment that are subcomponents of the integrated battery storage enclosure, should be able to be foreign-sourced without impacting the categorization of the integrated battery storage enclosure at the component level.

4. Steel and Iron Product as a Component of a Qualified Facility

As noted above, ACP urges IRS to use FTA precedent as a guideline for applying the steel and iron requirements. Accordingly, IRS should clarify that the steel or iron requirements are limited to "construction materials made primarily of steel or iron" that have a structural, load-bearing, or support function, such as "structural steel or iron, steel or iron beams and columns." These requirements also should not apply to steel or iron used as components or subcomponents of manufactured products. IRS should also make clear, under FTA precedent, that components of manufactured products that are made of steel and iron should be deemed manufactured component products even when the components have a secondary structural or load bearing function. [26]

For example, wind towers (including flanges) should be considered manufactured products and not steel and iron products. Wind towers are a critical part of the wind turbine system; they house critical electrical components of the turbine and elements designed to enhance worker safety (i.e., ladders). In addition, the height of the tower is crucial to achieving hub heights needed for generating increased electricity. While wind towers lend to the structural integrity of the wind turbine, that function is merely secondary to the more important functions they provide, on which a wind turbine system is interdependent. Said another way, because wind towers are components of a manufactured product (the wind turbine system), towers should not be subject to the steel and iron requirements.[27]

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[26] *See* 49 CFR 661.5(c) ("[Domestic steel and iron] requirements do not apply to steel or iron used as components or sub components of other manufactured products."); *see also* FTA Guidance Letter, Applicability of FTA's Buy America Rules to a Traffic Signal System (June 8, 2011) (traffic signal system's mast base, which was "constructed to support the [traffic light's] mast arm," is treated as a manufactured component product of the larger traffic signal system end product, despite its secondary load-bearing function).

[27] See 49 CFR § 661.5(c).

Similarly, solar trackers operate by rotating the solar modules to track the sun's movements throughout the day to maximize the electrical generation output of solar modules. Even though solar trackers incidentally lend to the structural integrity of the solar module, their primary function is to optimize energy generation; like the elevator guiderails in *Kone Elevators*,[28] they should not be subject to the steel and iron requirements. Put differently, because trackers are components of a manufactured product (the solar array), trackers should not be subject to the steel and iron requirements.[29]

Finally, integrated battery storage enclosures include steel containers that house the batteries, battery management systems, climate control systems, and other subcomponents as an interdependent part of the energy property. Even though steel containers lend to the structural integrity of the energy storage facility, that function is secondary to their primary function in controlling the ambient environment for battery operations and ordering subcomponent wiring and other systems. In other words, because steel containers are components of a manufactured product (the integrated battery storage enclosure), steel containers should not be subject to the steel and iron requirements.[30]

(b) Does the determination of "total costs" with regard to all manufactured products of a qualified facility that are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States need further clarification? If so, what should be clarified? Is guidance needed to clarify the term "mined, produced, or manufactured"?

The manufactured products that are components of a facility that is incorporated into the qualified facility or energy project should be deemed to have been produced in the United States if not less than the adjusted percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all manufactured products that are components of all of the facilities incorporated into the energy project are attributable to manufactured products that are produced in the U.S. Consistent with the IRA, in determining whether the applicable adjusted percentage has been satisfied for a qualified facility or energy property, ACP urges the IRS to divide the total cost of the manufactured products that are components of the qualified facility or energy property and that are mined, produced, or manufactured in the U.S. by the total costs of all of the manufactured products that are components of the qualified facility or energy property.

Consistent with the discussion above, we encourage IRS to allow taxpayers to elect to apply the domestic content rules either on a property-by-property basis or on an entire project basis and, therefore, provide the following options for applying the manufactured product test.

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[28] FTA Guidance Letter, Kone Elevators (Jan. 8, 2015) (elevator guide rails of steel have a primary role to ensure "proper positioning of the elevator within the hoistway" and balance and control speed (in emergency circumstance) – and are not subject to steel requirements under 49 CFR 661.5(b)).
[29] Id.
[30] Id.

Option 1: Project-Level Test for ITC and PTC

Under this option, eligibility for the domestic content bonus credit amount would be determined at the project level. The manufactured products that are components of each energy property incorporated into the energy project should be deemed to have been produced in the U.S. if not less than the adjusted percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all manufactured products that are components incorporated into the energy project are attributable to manufactured products that are produced in the U.S.

To illustrate this option, a taxpayer intends to claim the ITC in connection with an energy project consisting of: (1) a solar energy property (i.e., solar arrays and supporting equipment); and (2) interconnection energy property (i.e., a transformer). Both the solar energy property and the interconnection energy property would be eligible for the domestic content bonus credit amount if: (A) not less than the adjusted percentage (e.g., 40%) of the costs of the manufactured product components of both the solar energy property and interconnection property are attributable to manufactured products that were produced in the U.S.; and (B) the steel and iron construction materials that are not part of a manufactured product and that are incorporated into the solar energy property and interconnection property conform with the requirements of 49 CFR § 661.5.

In the way of another example, a taxpayer intends to claim the PTC in connection with an energy project consisting of twenty wind turbines (each of which is a qualified facility), cables, and a transformer. The energy project would be eligible for the domestic content bonus credit amount if: (A) not less than the adjusted percentage (e.g., 40%) of the costs of the manufactured product components of all twenty wind turbines, cables, and transformer are attributable to manufactured products that were produced in the United States; and (B) any steel and iron construction materials that are not part of a manufactured product and that are incorporated therein conform with the requirements of 49 CFR § 661.5.

Option 2: Energy project level for the ITC and at the qualified facility level for the PTC

Under this option, eligibility for the domestic content bonus credit amount would be determined at the energy project level.[31] The manufactured products that are components of each energy property incorporated into the energy project should be deemed to have been produced in the U.S. if not less than the adjusted percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all manufactured products that are components of all of the *energy properties and facility* incorporated into the energy project are attributable to manufactured products that are produced in the U.S.

[31] See IRC § 48(a)(12)(A).

For example, an energy project incorporates two energy properties: (1) solar energy property (e.g., solar arrays and supporting equipment); and (2) interconnection energy property (e.g., a transformer). Both the solar energy property and the interconnection energy property should be eligible for the domestic content bonus credit amount if: (A) not less than the adjusted percentage (e.g., 40%) of the costs the manufactured product components of both the solar energy property and interconnection property are attributable to manufactured products that were produced in the U.S.; and (B) the steel and iron construction materials that are not part of a manufactured product and that are incorporated into the energy property and interconnection property conform with the requirements of 49 CFR § 661.5.

With respect to a qualified facility, under this option, eligibility for the domestic content bonus credit amount should be determined at the qualified facility level.[32] The manufactured products that are components of a qualified facility upon completion of construction would be deemed to have been produced in the United States if not less than the adjusted percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all such manufactured products are attributable to manufactured products are produced in the U.S.

For example, a wind qualified facility should be eligible for the domestic content credit amount if (A) not less than the adjusted percentage (e.g., 40%) of the costs the manufactured product components of the facility (e.g., tower, nacelle, and blades) are attributable to manufactured products produced in the United States; and (B) the steel and iron construction materials that are not part of a manufactured product and that are incorporated into the facility conform with the requirements of 49 CFR § 661.5.

1. Origin of Components

In determining the origin of components and associated costs, each component of a qualified facility or energy property should be treated as domestic if the component is mined, produced, or manufactured in the U.S. If a component is determined to be of domestic origin, its entire cost should be used in calculating the cost of domestic content of the qualified end product. For a component mined, produced, or manufactured in the U.S., the individual costs of subcomponents, even if of foreign origin, should be included in the cost of a component and the entire component is considered domestic.

2. Items Not Included in Total Cost Calculations

Total cost calculations should not include property, items, or materials that are not incorporated into the qualified facility (i.e., the facility that produces energy) or energy property.

3. Labor, Transportation and Installation Costs

[32] See IRC § 45(b)(9).

Certain labor, transportation and installation costs of manufacturing a component should be included in the total cost calculation.[33] This includes assembly of a component and similar costs incurred at the project site for the actual manufacturing of the component (e.g., contractor and subcontractor labor costs for manufacturing a component from subcomponents). The costs of transporting manufactured components to the project site and installation thereof into the qualified facility should also be included in the total cost allocation for components.

II. ADDITIONAL COMMENTS ON GUIDANCE

A. Repowered Facilities

ACP urges IRS to provide that the domestic content requirements apply only with respect to "new" property incorporated into the qualified facility and should not apply to any used property from an existing facility. A qualified facility can be repowered (including partial repowers) even if energy production is not increased, as long as the 80/20 rule is satisfied (i.e., the fair market value of the used property is not more than 20% of the facility's total value). The costs of manufactured components thus should not include any costs associated with the used property, but should include only the costs of the newly acquired manufactured components that are incorporated into a qualified facility. Otherwise, this would inadvertently discourage the use of repowered sites.

For energy storage technology, new capacity added to existing projects as described section 48(c)(6)(B) should be considered independently from the existing used property, i.e., only the additional equipment installed should be included in the cost basis for qualifying the domestic content of that additional capacity. The full energy storage facility should not be considered a repowered facility for this purpose.

B. Section 45 Projects that Elect Section 48 Should Be Eligible for Bonus Credits

IRS should clarify that all energy property, including those making an election under sections 48(a)(5) and 48(a)(15) are eligible for the domestic content bonus credit. As a policy matter, those facilities are clearly intended to qualify for the bonus. The fact that such electing facilities are treated as "energy property" and that section 48(a)(12)(C) provides the domestic content bonus credit "in the case of an energy project which satisfies the requirements of paragraph (9)(B)" supports such treatment.

C. Exceptions for Nonavailability

[33] FTA does not define cost of components. FAR regulations at 48 CFR 25.003 define cost of components as:
(1) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
(2) For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

Sections 45(b)(10)(D) and 45Y(g)(12)(D) provide an exception, on a case-by-case or general basis, for the requirements contained in sections 45(b)(9)(B) and 45Y(g)(10)(B) (respectively) if relevant steel, iron, or manufactured products are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality (nonavailability exception). Under the text of the IRA, these waivers are explicitly available to qualified facilities or energy property that are eligible to (and do elect) direct pay under section 6417. In addition, the IRA provides, in section 45(b)(9)(B)(ii), that "[i]n the case of steel or iron, clause (i) shall be applied in a manner consistent with section 661.5 of title 49, Code of Federal Regulations." 49 CFR 661.5(a), in turn, provides that "[e]xcept as provided in Section 661.7…all iron, steel, and manufactured products used in the project are produced in the US." 49 CFR 661.7 also provides for various waivers based on public interest, non-availability, and price differential. Therefore, we encourage IRS to consider adopting limited waivers to ensure the incentive remains effective at attaining its goal of promoting use of domestic material. If the credit is determined to apply only to projects that meet 100 percent domestic content requirements, yet a subset of critical components remain infeasible to produce in the U.S. due to insufficient domestic amounts, the provision could be rendered entirely ineffective, contrary to congressional intent.

In short, we urge IRS to grant nonavailability waivers for all projects that meet waiver requirements, even if they do not qualify for direct pay. Specifically, consistent with 49 CFR § 661.7(c), nonavailability exemptions should be issued, on a case-by-case or general basis, when it can be demonstrated by a taxpayer that a domestic material is not produced in the U.S. in sufficient and reasonably available quantities and of a satisfactory quality; however, such waivers should be limited to products that cost no more than 30% of the total costs of a project.

If a manufactured product is given a waiver, the costs of any such product will be subtracted from consideration of the total cost of all of the manufactured products that are components (including steel and iron products) of the qualified facility or energy property for purposes of determining whether the adjusted percentage has been met.

III. CONCLUSION

We appreciate the opportunity to respond to this request for comments on the domestic content requirements and look forward to continuing engagement with IRS on this issue.

Sincerely,

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