November 4, 2022

Via Electronic Submission to: www.regulations.gov

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-51)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Comments of AFPM to the Internal Revenue Service on Notice 2022-51

To Whom It May Concern:

Please find below and attached the comments of American Fuel & Petrochemical Manufacturers (AFPM) on Notice 2022-51. AFPM's members and contractors include both union and non-union labor. We believe that organized labor is an important part of our workforce. However, to maximize the carbon reduction benefits of the Inflation Reduction Act (IRA), the Administration should promote maximum flexibility in how companies can demonstrate compliance with the applicable wage and apprenticeship requirements embedded in the law. AFPM appreciates the opportunity to provide feedback on this guidance.

I. Background and Overview of AFPM

AFPM is a national trade association representing most U.S. refining and petrochemical manufacturing capacity. AFPM's members play an irreplaceable role in making modern life possible today while making our collective future more sustainable.

AFPM's members support millions of well-paying jobs, produce thousands of products vital to families and businesses alike, and invest heavily in worker education and advancement initiatives.

AFPM members support more than three million quality jobs in all 50 states. Overall, the average U.S worker's total compensation is $63,000, the average for petrochemical industry workers is $149,000, whereas the average for refining industry workers is $225,000[1]. The refining industry provides high quality jobs and has historically paid wages that exceed average wages. And our companies support many more jobs in our communities. For example, the United Steelworkers leadership pointed out that "each refining job creates 18 other jobs in the community" and the leadership of North America's Building Trades Unions remarked that "domestic energy workers highly value the safety, reliable duration and compensation of oil and gas construction jobs." [2]

The refining and petrochemical industries are an important part of a sustainable energy future.

[1] https://www.afpm.org/newsroom/blog/what-theyre-saying-industries-provide-high-quality-well-paying-jobs
[2] https://www.afpm.org/newsroom/blog/what-theyre-saying-industries-provide-high-quality-well-paying-jobs

AFPM is committed to working with policymakers to identify ways to harness the strengths of the U.S. refining and petrochemical industries to meet the opportunity of reducing emissions while supplying growing global demand for energy and chemicals. We support lowering the carbon intensity of our processes and the fuels we produce. Our union and non-union workforce will both be critical as we invest and innovate to meet the demands of the future.

The International Energy Agency (IEA) forecasts a foundational role for refined petroleum products and liquid fuels in the coming decades, even as the global energy sector evolves and transitions.[3] Continued demand for refined petroleum products and liquid fuels will be driven by improved living standards and population growth, which the United Nations (UN) estimates will swell to include an additional two billion people by mid-century. The key to meeting global demand for affordable energy and petrochemical products is to utilize the most efficient assets, to find low-cost methods to abate carbon emissions, and to utilize the expertise of the U.S. refining and petrochemical sectors in scaling energy technology.

The U.S. refining and petrochemical industries are well positioned to lead the world in these respects. First, the U.S. refining industry is the most complex in the world, meaning it has the flexibility to transform a wide range of crude oil qualities into a vast array of higher value products that help consumers save energy and lower emissions. Additionally, the U.S. refining and petrochemical industries have access to competitive energy and feedstocks, a mature logistics network, highly skilled workforce, and access to export markets. These advantages position the U.S. industries well compared to our international competitors.

U.S. refineries and petrochemical manufacturers invested more than $100 billion to improve refinery efficiency, reduce emissions, and produce cleaner fuels over the last decade alone.[4] The refining sector has successfully reduced the carbon intensity of its operations by 12 percent over the past decade.[5] Not only are the U.S. refining and petrochemical industries reducing their own emissions, but they are critical components in making products and processes more efficient to help customers reduce their emissions. High-tech petrochemicals are key to light-weighting vehicles, and are core components of electric vehicles, wind turbines, solar panels, and thousands of everyday products including vaccines, syringes, and personal protective equipment (PPE).

Despite demonstrable progress, AFPM members continue to set their sights higher, with companies announcing ambitious emissions reduction goals and with associated projects underway. Projects span a range of areas, but include important foundational technologies such as carbon capture and storage (CCS), combined heat and power (CHP), process unit electrification, the production and use of advanced hydrogen, and repurposing capital equipment to produce renewable fuels.[6] Scaling these technologies cost-effectively is critical to maintaining the competitiveness of the U.S. refining and petrochemical industries in the years to come as the world attempts to meet aggressive carbon reduction targets.

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[3] *See* Marathon Petroleum Corporation, *Perspectives on Climate-Related Scenarios* (June 2021), at 1, available at 2021-MPC-MPLX-ClimateReport.pdf (marathonpetroleum.com).
[4] Industrial Info Resources.
[5] John Beath Environmental.
[6] For more information, including company examples, please see AFPM's 2022 Sustainability Report, available at https://www.afpm.org/data-reports/publications/sustainability-report.

AFPM members are also leaders in producing lower carbon fuels, such as renewable diesel and sustainable aviation fuel (SAF). In fact, 82 percent of recently announced investments in renewable diesel were made by AFPM members. Moreover, AFPM does not see a pathway to the administration's stated goal of "at least 3 billion gallons per year" of SAF by 2030 and "sufficient SAF to meet 100% of aviation fuel demand" by 2050 without the full support, engagement, and investment of the companies that produce liquid fuels.[7] AFPM members are the largest investors in SAF technology, and we want to be a part of the answer.

If the IRA's goals of expanded development of clean fuels, CCS, hydrogen technology, and advanced manufacturing are to be met, then the institutional knowledge, intellectual expertise, and capital impact of our members must be incorporated, not excluded.

AFPM's members also employ among the most highly skilled workforces in the world, and will continue to invest heavily in their advancement, safety, and prosperity. [8] Consequently, the petrochemical and refining industries have made a concerted effort over the last decade to expand and improve their internship and apprenticeship programs. These efforts are paying off. AFPM member companies are forming partnerships with public community colleges to develop the skillsets needed to build, operate, and repair today's most technologically advanced equipment.

AFPM and our members look forward to using our expertise to achieve crucial energy goals and make the IRA a success.

Put simply, this administration seeks to maximize the benefits of the IRA, and our members possess unparalleled expertise in scaling energy projects. Let us be a part of the solution. We hope that our robust engagement with the IRS comment process, and intended involvement throughout the rollout of draft regulations, demonstrates our willingness to materially contribute to the effective implementation of the IRA.

II. Notice 2022-51

AFPM appreciates the opportunity to provide feedback on Notice 2022-51 relating to prevailing wage, apprenticeship, and domestic content requirements. While there will inevitably be coordination between the Department of Labor (DOL) and the Treasury Department in implementing these provisions, AFPM supports the statutory language which makes clear these labor provisions should be overseen by Treasury Department. Not only is this a clear reading of the statute, but from an administrability perspective we also believe this will ease the compliance process. AFPM has the following questions and comments:

A. Prevailing Wage Requirements

1. Guidance is necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A) of the Code, as amended

[7] https://www.energy.gov/sites/default/files/2021-09/S1-Signed-SAF-MOU-9-08-21_0.pdf
[8] https://www2.deloitte.com/content/dam/insights/us/articles/4736_2018-Deloitte-skills-gap-FoW-manufacturing/DI_2018-Deloitte-MFI-skills-gap-FoW-study.pdf

by the Inflation Reduction Act (the "Act"). The Act states: "any laborers and mechanics employed by the taxpayer or any contractor or subcontractor [on covered projects] shall be paid wages at rates not less than the prevailing rates for construction, alteration, or repair of a similar character in the locality in which such facility is located as most recently determined by the Secretary of Labor, in accordance with subchapter IV of chapter 31 of title 40, United States Code."

a. At the outset, the Treasury Department and IRS should confirm that only those provisions of subchapter IV which authorize the Secretary of Labor to determine prevailing rates for laborers and mechanics will be deemed applicable to projects covered by the Act. By way of example, Section 3142(a) of title 40 deals only with application of the section to public buildings and public works and thus has no application to this Act. Section 3142(c) deals with contract stipulations, posting requirements, and provisions for withholding of funds which likewise should not apply to private projects covered by the Act. Section 3143 refers to termination of work by a "contracting officer" of the federal government, which again has no application to this Act. This is not an exclusive list.

b. The Treasury Department and IRS should also confirm that the Act's plain language should control as to which "laborers and mechanics" are covered by the prevailing wage requirement; specifically, that only those classifications of laborers and mechanics for whom prevailing rates have been "determined" by the DOL must be paid such prevailing rates. The Treasury Department and IRS should make clear that classifications of workers on covered projects for whom DOL has not previously issued a prevailing wage determination may be paid by their employers at whatever rates the employers determine to be consistent with the needs of the project. Put another way, the prevailing wage requirement should apply only to covered employees for whom wage determinations have been issued by DOL under its pre-existing DBA-covered contract wage determination. AFPM urges flexibility as to the wage rate for any missing classifications.

c. The Treasury Department and IRS should also confirm that covered employers need not pay prevailing wages to any classifications of employees other than laborers and mechanics to qualify for the tax credits. Specifically, it should be made clear that employees who are exempt from inclusion by virtue of their exempt status as professionals, executives, administrators, computer professionals, etc., are not covered by this Act.

d. The Treasury Department and IRS should also confirm that covered employers need not pay prevailing wages to any employees who do not perform on the site of the construction, alteration, or repair work being performed on the project. Existing case law governing the site of work under the DBA should be adhered to.

e. The Treasury Department and IRS should also confirm that the prevailing wage rates to be paid must be those rates paid to the covered classification of workers in the locality where the construction, alteration, or repair work is to be performed.

f. The Treasury Department and IRS should also confirm that taxpayers, contractors, and subcontractors can only be required to pay prevailing wage rates if they are given adequate advance notice of such rates for each classification of laborers and mechanics who perform work on the covered project.

g. The Treasury Department and IRS should clarify the scope of construction, alteration, and repair work that is needed to be ongoing for an employer to be required to pay prevailing wages in order to qualify for the tax credit. There should be a de minimis threshold exemption before prevailing wage requirements kick in.

2. Guidance is necessary on the correction and penalty mechanism for failure to satisfy prevailing wage requirements.

a. The Treasury Department and IRS should provide clear guidance to employers on the process to correct any deficiencies that may have resulted from payroll, timekeeping, clerical, or other administrative errors. Employers should have the opportunity to cure deficiencies before the government finds them ineligible for the IRA tax credits. Further, an administrative appeal process should be provided to companies who receive negative credit decisions from the government under the IRA. In this regard, it should be noted that the Act provides for entirely different penalties and correction methods than those enforced by DOL on government-funded construction work. The Treasury Department and IRS should make clear that enforcement of the Act's prevailing wage provisions are the sole province of the Treasury Department and/or IRS, and not DOL. It would be intolerable for taxpayers, contractors, and subcontractors to be subject to two separate regulatory enforcement regimes, particularly where the enforcement penalties are inconsistent with each other.

3. Guidance is needed on the documentation and substantiation required to show compliance with the prevailing wage requirements.

a. The Treasury Department and IRS should avoid burdening employers with additional recordkeeping requirements to qualify for the tax credits. As noted above, the text of the Act provides no authority for imposing DOL's enforcement regime on taxpayers, contractors or subcontractors, such as the required submission of weekly certified payrolls. Employers maintain significant information about employee pay and timekeeping, and additional obligations such as those required by the Copeland Act (not incorporated by the text of the Act) are not warranted for compliance and should be avoided absent a previous obligation to maintain such records. Instead, assuming an obligation exists (*see* suggested exception proposed below), the recommendation would be to allow Employers to certify compliance subject to random audits of relevant supporting documentation. The Treasury Department and IRS could approach recordkeeping akin to that required by the U.S. Department of Labor Wage and Hour Division's FLSA implementing regulations at 29 CFR 516.2(a).

4. Guidance is needed for purposes of §45(b)(7)(A) 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.

   a. The Treasury Department and IRS should consider the negative incentivization to pay inconsistent employee wages that could result from a strict policy denying tax credits to companies that pay prevailing wages in years where they do not perform alteration or repair work, even when those employers have performed such work in preceding or succeeding years.

   b. Treasury should confirm that existing operations are not subject to the prevailing wage requirement unless they are engaged in improvements, alterations, or repairs.

5. There are additional areas where guidance is needed.

   a. The Treasury Department and IRS should clarify that apprenticeship requirements only apply to construction and should remove references to alteration and repair.

B. Apprenticeship Requirements

1. The Treasury Department and IRS should issue guidance to clarify how the apprenticeship requirements apply to Section 45(b)(8) of the Act, which specifies that designated percentages of the total labor hours of the construction, alteration, or repair work … with respect to such facility

shall … be performed by qualified apprentices [who are further defined as being individuals participating in a registered apprenticeship program].

2. The Treasury Department and IRS should confirm that the Act does not require each and every taxpayer, contractor, or subcontractor to employ apprentices in the percentage designated for total work hours on the project. All that is required by the Act is that the overall percentage of total work hours be met or exceeded on the project as a whole. Toward this same end, the Treasury Department and IRS should confirm that the percentage of total labor hours should be calculated separately for construction, alteration, or repair on a qualifying project.

3. The Treasury Department and IRS should provide an exception for employers that negotiated in good faith with recognized bargaining unit representatives with respect to wages, hours, and working conditions—including employee staffing levels. Such agreements may come in the form of collective bargaining agreements or Project Labor Agreements ("PLA's") and would reflect and conflict with the results of negotiations regarding the precise types of staffing ratios that the legislation is seeking to implement. For the same reasons as set forth above, an exception should be allowed for any such agreement.

4. The Treasury Department and IRS should issue guidance on how taxpayers should handle situations where the contracted service (trash collection, port-a-potty removal) does not lend itself to having an apprenticeship program. Specifically, clarification should be provided as to which resource(s) taxpayers can rely upon for guidance on which occupations are apprentice-able for purposes of Davis-Bacon Act compliance.

5. The Treasury Department and IRS should clarify and confirm that the good faith exemption from the apprenticeship requirement can be met as a result of efforts beyond the single example listed in the Act. Good faith efforts should include proof of reasonable (but unsuccessful) outreach to potential apprentices to participate in registered apprenticeship training; illness, injury, or voluntary departures of apprentices under circumstances that do not allow for immediate replacements; documentation of situations where safety concerns of utilizing apprentices jeopardize the overall construction of a project; or unwillingness of state agencies to approve specific clean energy job classifications as "apprenticeable trades."

6. The Treasury Department and IRS should confirm that there are no limits on how long an apprentice must work on a covered project in order to satisfy the percentage of total work hours requirement. Nor should there be any minimum or maximum time limit imposed on how long apprentices must be enrolled in a registered apprenticeship program in order to be counted towards the total work hours percentage.

7. The Treasury Department and IRS should confirm that there is no geographic requirement for apprenticeship program registration in order to be counted towards the total work hours percentage on a covered project.

8. Certain states (California being the most prominent example) delay or refuse to register new apprenticeship programs based on a so-called "needs" test; a test that has been disavowed by the USDOL. The Treasury Department and IRS should confirm that a state's delay or refusal to register an apprenticeship program for clean energy construction covered by the Act qualifies the project for the good faith exemption.

C. Domestic Content

1. The iron and steel requirements under §45(b)(9)(ii) necessitate the steel and iron manufacturing processes to take place in the United States. This applies to all construction materials made primarily of steel or iron and used in infrastructure projects and is a hard one for us to achieve even if per the statute some of the sub-components do not need to meet the requirements. AFPM is concerned that this domestic content requirement is unattainable at 100% of steel and iron and 40% of manufactured for the industries represented by AFPM. Furthermore, in addition to addressing our noted concerns, AFPM recommends that a waiver process be established by the Treasury Department and IRS including required information to be included in any waiver request and have designated resources available for review and processing of these waivers.

2. Unlike the steel and iron requirements in §45(b)(9)(ii), the manufactured product requirements in §45(b)(9)(iii) does not explicitly cross reference §661.5 Buy America Requirements. We would like to have clarity on the applicability of §661.5 Buy America Requirements to the manufactured product requirements and examples and guidance on application of the domestic rules to energy or storage facilities would be helpful.

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AFPM appreciates the opportunity to comment on Notice 2022-51 and welcomes the opportunity to have additional discussions on these issues. Please do not hesitate to contact me with any questions or if AFPM or I can otherwise be of assistance.

Sincerely,

Conner Brace

Senior Manager, Government Relations

cc: The Honorable Lily L. Batchelder, Assistant Secretary for Tax Policy
Mr. William M. Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical)