Amp Americas

November 4, 2022

The Honorable Janet L. Yellen
U.S. Secretary of the Treasury
Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-51)
Room 5203, P.O. Box 7604
Ben Franklin Station, Washington, DC 20044

RE: 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:

Amp Americas ("Amp") submits these comments to the U.S. Department of the Treasury ("Treasury") on the implementation and administration of certain provisions of the Internal Revenue Code of 1986 (as amended and restated, the "Code"), as amended by Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (the "IRA"). Amp appreciates the opportunity to provide Treasury its comment on aspects of the IRA.

Amp supports policies that address the imperative to reduce greenhouse gas emissions now. Incentives contained in the IRA will both stimulate rapid deployment of low carbon energy solutions and position the United States for leadership across a diverse portfolio of renewable energy production and manufacturing capabilities.

Founded in 2011 and based in Chicago, Illinois, Amp is an American-owned and operated developer, owner, and operator of facilities that convert dairy waste into carbon negative renewable natural gas ("RNG") and electricity. RNG produced by Amp fuels heavy duty truck fleets and hydrogen fuel cell vehicles and charges electric forklifts. Amp's facilities both reduce on-farm methane emissions upstream and displace higher emission fuels downstream. Accordingly, Amp's facilities are a crucial ingredient in the American energy transition and fight against climate change.

As a pioneer in the dairy RNG industry, Amp registered the first dairy RNG project certified by the U.S. Environmental Protection Agency's Renewable Fuel Standards Program to generate D3 RINs and the first dairy RNG project certified by California's Low Carbon Fuel Standard Program. Our experience building, operating, and reporting on these assets gives us a unique perspective on the implementation and administration of greenhouse gas emissions-based incentive frameworks.

With that introduction, Amp's specific comments are as follows:

I. Treasury should clearly distinguish between products that are considered iron or steel, on the one hand, and products that are considered "manufactured products," on the other hand, for purposes of the domestic content requirements

In the interest of providing taxpayers and their suppliers clear and concise definitions so they can confidently invest in new clean energy projects, Amp strongly recommends Treasury clearly distinguish between products that are considered to be iron or steel, on the one hand, and items that are considered to be "manufactured products," on the other hand, under the domestic content requirements. This is important because, in order to qualify as domestic content, the threshold percentages applicable to steel and iron (100%) are significantly higher than those for manufactured products (40%).

Code Section 45(b)(9)(B)(ii)[1] points to 49 C.F.R. 661.5 to define what steel and iron are for purposes of the domestic content requirements. The language in 49 C.F.R 661.5(c) is quite broad, but ill-suited for the task at hand. The subsection provides that "[t]he 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." However, this definition does not specifically address renewable energy facilities--which are separate and distinct from traditional infrastructure projects--and the role that steel and iron components play in them. Simply put, Treasury must separately define steel and iron for purposes of the domestic content bonus credits, or taxpayers will be paralyzed by the lack of certainty about how to interpret 49 C.F.R. 661.5 in the context of renewable energy facilities.

49 C.F.R. 661.5(c) goes on to state: "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 sub components of other manufactured products or rolling stock, or to bimetallic power rail incorporating steel or iron components." Thus, is it clear that steel and iron in any context should include structural items and perhaps other items that perform a load-bearing function and have no other purpose. However, it is not clear what else could be viewed as "construction materials" for this purpose.

Amp urges Treasury to specify in guidance that, in the context of any property or facility described in any of the Code provisions included in the IRA, steel or iron is any component made primarily of steel or iron that has solely a structural, load-bearing, or support function for the property or facility. In this context, construction materials made primarily of steel or iron should include only those components described in the immediately preceding sentence when the steel or iron content of such materials is greater than 80 percent. The intent of this suggestion is to clarify that, in the context of an agricultural biomass-to-RNG facility, the "steel or iron" classification should apply to components of the facility that are related to its infrastructure. For example, the racking that holds up pipes that traverse distances between items of equipment and that supports various other types of equipment, or the structural steel used to build enclosures for electronic equipment. The "steel or iron" classification should not apply to various fixtures and appliances within the facility that may nonetheless have steel or iron components.

[1] All of the Code sections that utilize a domestic content bonus amount ultimately point to this provision.

To illustrate the complexity of this issue, consider the case of skids that are incorporated into biogas facilities. Biogas facilities generally feature a design element called a skid. These are subsections of the plant that include equipment and piping installed in specific, engineered arrays to ensure that the biogas facility can operate as intended and required. Skids enable modular construction and are often designed to meet industry codes and standards as a single unit. The manufacturer of the biogas facility equipment fabricates the skid at the manufacturing facility by fixing appliances and equipment, including pipes and other material, onto a steel framework that is built to specifications. The equipment and appliances on each skid varies depending on the manufacturer's design, system size and scope, and where in a facility the specific skid will be installed. After fabrication, the completed product is packaged for shipment and shipped to the project site where it and many other skids are integrated with other equipment to construct the completed facility. Thus, it's clear that a skid should be treated as a manufactured product.

The steel framework incorporated into each skid is itself referred to as a skid and is itself a manufactured product. (For clarity, we refer to these items as "Skid Frameworks" for purposes of this letter.) The Skid Frameworks are made of steel beams that are fabricated to order at a manufacturer's location. They are arranged in specific configurations so that the equipment and appliances can be mounted in precise locations to ensure that the biogas production facility can achieve optimal operation. Moreover, in many cases, air flow under the Skid Framework and between the equipment is critical for the operation of the equipment mounted to the Skid Frameworks. Thus, the Skid Framework is itself integral to the operation of an agricultural waste-to-biogas facility, does not serve a merely structural purpose, and is the product of fabrication processes. Accordingly, even the Skid Framework is fundamentally a manufactured product.

Code Section 45(b)(9)(B)(iii) describes manufactured products, but does not define the concept generally or by reference to 49 CFR 661. Amp recommends that Treasury clearly define "manufactured product" to mean any item produced as the product of a manufacturing or fabrication process and expressly include in that definition any property incorporated into a qualified facility or energy property that is not steel or iron, as defined above. For this purpose, "Manufacturing or fabrication process" should be defined as the application of processes to alter the form or function of materials or of elements of tangible property in a manner that transforms those materials or property into something functionally different. For example, manufacturing or fabrication processes may include, but are not limited to, forming, extruding, bending, material removal, welding, soldering, etching, plating, material deposition, pressing, permanent adhesive joining, shot blasting, brushing, grinding, lapping, finishing, vacuum impregnating, and, in electrical and electronic pneumatic, or mechanical products, the collection, interconnection, and testing of various elements.

Amp also urges Treasury to confirm in guidance that the waiver provisions set out in 49 CFR 661.7 are available for purposes of applying the domestic content requirements and setting forth a method of process for asking for a waiver under the circumstances described therein. Amp observes that Code Section 45(b)(10)(D) provides for certain waivers or relaxation of the domestic content requirements in certain circumstances. While this is appreciated, these waivers are quite specific and narrow. However, they are clearly not exclusive. Code Section 45(b)(10)(B)(i) refers to 49 C.F.R. 661 generally for purposes of determining if steel, iron, or manufactured products were "produced in the United States." 49 C.F.R. 661.7, which is a part of 49 C.F.R. 661, describes a waiver process applicable to four specific instances,

none of which are duplicated in Code Section 45(b)(10)(D). This waiver process applies to steel, iron, and manufactured products. Thus, Code Section 45(b)(10)(D) should be interpreted as an expansion of the class of circumstances in 49 C.F.R. 661.7 in which a waiver will be available, and not as an exclusive list of the circumstances in which a waiver will be available.

II. Treasury should adopt clear and administrable rules and documentation requirements for establishing when a manufactured product is manufactured in the United States

Most manufactured products are complex components comprised of multiple parts or subcomponents. In many cases, it may be very difficult to determine where any single part or subcomponent originated or was manufactured or fabricated. Accordingly, Amp recommends that Treasury publish clear and administrable rules for establishing when a manufactured product is manufactured in the United States.

To set the context, it is important to have in mind the precise language in Code Section 45(b)(9)(B)(iii):

> For purposes of clause (i), the manufactured products which are components of a qualified facility upon completion of construction shall be deemed to have been produced in the United States if not less than the adjusted percentage (as determined under subparagraph (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.

This statutory language clearly indicates that manufactured products and portions of those manufactured products that constitute components must be evaluated to determine if such components have been mined, produced, or manufactured in the United States. The statute does not require an analysis of the items of property that comprise a component. The statutory language also clearly indicates that it is sufficient that components be "mined, produced, or manufactured in the United States" (emphasis added).

To create a clear and administrable rule in this regard, Treasury must first distinguish between manufactured products, components, and items of property that are incorporated into components, which we refer to here as subcomponents. Amp's proposal for the definition of manufactured product appears in the first section of this letter. Amp further recommends that Treasury define "component" to mean manufactured products, articles, materials, or supplies that are separately delivered to the project site and incorporated into or affixed to the qualified facility or energy property and "subcomponent" to mean an individual part that is incorporated into a component during a manufacturing, fabrication, or assembly process.

Treasury must also provide taxpayers a method for calculating when a component is made in the United States for purposes of Code Section 45(b)(9). As noted above, it can be extremely difficult to determine whether each individual item in a component was mined, produced or manufactured. To ensure that taxpayers can realistically utilize the domestic content bonus credit, Treasury must both ensure that a taxpayer can prove compliance and that compliance is achievable. Thus, as an initial matter, Amp recommends that Treasury provide in guidance that any component is considered to be mined, produced,

or manufactured in the United States if the component was manufactured, fabricated, or assembled in the United States, regardless of where its subcomponents originate.

Further, the rule adopted by Treasury should provide for a minimum threshold percentage for each component integrated into a manufactured product that must be met in order for the manufactured product as a whole to be treated as mined, produced, or manufactured in the United States. This allows suppliers a margin of error in calculating whether a component was mined, produced, or manufactured in the United States. This margin of error is very important for purposes of ultimately financing the installation of a renewable energy facility because there is no reasonable cause or "fail safe" mechanism in case of inadvertent error in calculating qualification for the domestic content bonus credit. Moreover, obtaining the necessary assurances about very rigid information in complex supply chains is very difficult in the context of negotiating tax equity investments. If developers and project owners are forced to meet very rigid requirements concerning whether manufactured products are mined, produced, or manufactured in the United States in order to get tax equity investors (or transferees of tax credits under Code Section 6418) comfortable enough to invest, there is a very material chance that developers will simply stop attempting to utilize the domestic content bonus credit.

For these reasons, we recommend that Treasury publish in guidance a safe harbor that specifies that any item that is a manufactured product shall be deemed to have been mined, produced, or manufactured in the United States if all of the manufacturing processes resulting in the conversion of components into a manufactured product took place in the United States. For this purpose, care should be taken to define manufacturing processes consistently with the concept of production of items of property under Code Section 45X.

A taxpayer should also have the ability to otherwise demonstrate that a manufactured product was mined, produced, or manufactured in the United States, e.g., by making available documentation that the minerals or metallurgical ingredients used to produce a manufactured product were extracted or processed in the United States. In this case, the taxpayer should be required to demonstrate that the manufactured product was either mined, produced, or manufactured in the United States, in each case by reference to a threshold amount of the subcomponents incorporated into a manufactured product. For example, if a taxpayer can document that more than 50% of the subcomponents that comprise the biogas cleaning equipment installed at a biogas production facility were manufactured in the United States, all such biogas cleaning equipment, assuming it is a manufactured product, should qualify as mined, produced, or manufacturing in the United States.

Amp further recommends that in determining the origin of each subcomponent, each sub component must be treated as either entirely domestic or entirely foreign, based on the place where the component is mined, produced, or manufactured. Furthermore, the individual costs of subcomponents, even if of foreign origin, should be included in the cost of a component that is mined, produced, or manufactured in the United States.

III. Treasury should clearly state in guidance that offsite work (e.g., work at an original equipment manufacturer site) is not construction, repair, or modification of property or a facility for purposes of the apprenticeship requirements

Code Section 45(b)(6)(B) provides that the tax credit rate applicable to qualified facilities will be met when, among other things, certain apprenticeship requirements are met. Code Section 45(b)(8)(A) states that these requirements are applicable to a taxpayer or its contractor or subcontractor during "construction." However, construction is not defined in the Code for this purpose.

For Amp and other similarly situated entities in the RNG industry, the construction period onsite is relatively short because much of the equipment and materials are fabricated at a manufacturer's facility and then shipped to the project location where they are then integrated and installed. Much of the work at the manufacturer's facility is assembling components and mounting them on skids (discussed above). This assembly work is not construction; it is manufacturing performed by a manufacturer (which is almost always unrelated to the project developer and owner) prior to the construction phase of any project.

If hours worked by laborers and mechanics at manufacturing facilities are included in total labor hours for the purposes of the apprenticeship requirements, Amp and other similarly situated RNG entities would face an insurmountable task of sourcing material only from those manufacturers that can obtain qualified apprentices. This would dramatically increase the impact of the wage and apprenticeship rules far beyond Congress' clear intent to develop the construction workforce. Therefore, Amp recommends that Treasury expressly state in guidance that work performed offsite is not considered work in the context of construction, repair, or modification of a project for the purpose of calculating the total labor hours under the apprenticeship requirements.

IV. Treasury should utilize standard beginning-of-construction rules for purposes of determining when a project is required to meet the prevailing wage and apprenticeship requirements

Code Section 48(a)(9) states that the base credit rate shall be multiplied by five times when certain prevailing wage and apprenticeship requirements are met. However, Code Section 48(a)(9)(B)(iii) states that these requirements will apply only to "a project the construction of which begins" before that day that is 60 days after Treasury publishes guidance concerning the prevailing wage and apprenticeship requirements. However, any guidance that Treasury releases must address not only the prevailing wage and apprenticeship requirements, but also the meaning of the "construction of which begins" component of the rule. This phrase, as used in Code Section in Code Section 48(a)(9)(B)(iii), is exactly the same as the statutory language used in the sunset provisions of various current and prior iterations of Code Section 48. Accordingly, Amp urges Treasury to issue guidance concerning this standard that is substantively identical to prior guidance interpreting this concept and to new guidance interpreting this concept in other circumstances under Code Section 48.

The existing beginning-of-construction rules are well established. They are familiar to and understood by both taxpayers and Treasury. The value of certainty that comes with using established rules cannot be understated. Clear and understood rules provide the predictability that financing parties require and that helps developers grow their businesses so that they can build more renewable energy facilities.

For these reasons, Amp suggests that Treasury issue guidance combining the beginning-of-construction rules in Notice 2018-59 and Notice 2021-41 and specifying a four-year continuous construction safe harbor. Amp further suggests that Treasury also specifically state in this guidance that after a taxpayer acquires safe harbored property, any actions taken that would constitute continuous construction demonstrate sufficient development of a project such that safe harbored equipment may be transferred to an unrelated person.[2]

Implementing new beginning-of-construction rules would create unnecessary uncertainty regarding interpretation that will reduce the attractiveness of the new credits and increase administrative burden for Treasury. In addition, issuing beginning-of-construction rules in the context of the prevailing wage and apprenticeship requirements that are different from those in other contexts under Code Section 48 would be confusing for taxpayers and only lead to inadvertent and unnecessary error. Moreover, new or different rules are not warranted either under principles of statutory interpretation or for any apparent policy reason. Accordingly, Amp urges Treasury to utilize the existing and understood rules concerning beginning-of-construction requirements in Notices 2018-59 and 2021-41, in the context of the prevailing wage and apprenticeship requirements under Code Section 48(a)(9), and in similar contexts in other sections of the Code concerning U.S. federal income tax credits.

V. Conclusion

Amp appreciates the opportunity to communicate these points to Treasury in advance of the release of any guidance interpreting the new tax credits enacted as part of the IRA. In the event you have any questions or would like to discuss any of the points raised herein, please contact Amp's General Counsel, Jim Waddell, at Jim.Waddell@AmpAmericas.com.

Sincerely,

DocuSigned by:
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Grant Zimmerman
Chief Executive Officer
Amp Americas

[2] *See* Section 8 of Notice 2018-59.