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

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
United States Department of the Treasury
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Washington, D.C. 20220

Mr. William M. Paul
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Internal Revenue Service
1111 Constitution Ave., N.W.
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Re: Comments Pursuant to Notice 2022-51 Regarding Implementation of Inflation Reduction Act with respect to Prevailing Wage, Apprenticeship, Domestic Content and Energy Communities Requirements

Dear Madam and Sir:

Baker Botts LLP respectfully submits these comments regarding implementation of the Inflation Reduction Act ("IRA") pursuant to Notice 2022-51. Our comments are the result of conferring with a number of our clients who have raised the issues and questions described below. We appreciate the opportunity to submit comments prior to the development of guidance. The IRA reflects important bipartisan policy objectives for Congress and the Administration and our comments are offered in the spirit of ensuring that implementation of guidance provides the certainty needed to incentivize clean energy projects.

I. Prevailing Wage and Apprenticeship Requirements

A. Guidance should clarify that a taxpayer may be deemed to have satisfied the prevailing wage and apprenticeship requirements of sections 45(b)(7) and (8) (and analogous provisions for other credits)—which in each case require the taxpayer to "ensure" that prevailing wages be paid or qualified apprentices be used—by entering into a binding written contract requiring such payment or use.

Section 45(b)(7)(A) provides that "the requirements are that the taxpayer ***shall ensure that*** any laborers and mechanics employed by the taxpayer or any contractor or subcontractor . . . shall be paid [prevailing wages]." Section 45(b)(7)(A) (emphasis added). Similarly, Section 45(b)(8) provides that "[t]axpayers ***shall ensure that*** . . . not less than the applicable percentage of the total labor hours . . . be performed by qualified apprentices." Section 45(b)(8)(A)(i) (emphasis added).

Several other tax credits impose similar prevailing wage and apprenticeship requirements, which in each case require the taxpayer to "ensure" prevailing wages be paid or qualified apprentices be used. *See* sections 48(a)(10)(A)–(11); 30C(g)(2)–(3); 45L(g); 45Q(h)(3)–(4); 45U(d)(2); 45V(e)(3)–(4); 45Y(g)(9)–(10); 45Z(f)(6)–(7); 48C(e)(5)–(6); 48E(d)(3)–(4).

The prevailing wage and apprenticeship requirements throughout the IRA generally provide a "cure" payment mechanism for a taxpayer that claims the increased credit amount but fails to satisfy the prevailing wage and apprenticeship requirements. *See, e.g.*, sections 45(b)(7)(B)(i); 45(b)(8)(D); 48(a)(10)(B); 48(a)(11).

It can be expected that, in entering into agreements to monetize the relevant credits, lenders, tax equity investors, purchaser transferees of credits or other stakeholders offering project financing will have the utmost concern that the project will receive the increased credit amount (the 5 times multiplier) and not the base amount. The willingness of such parties to finance and lend to projects will depend upon the extent to which they are confident that the increased credit amount will apply. This, in turn, will depend upon satisfaction of the prevailing wage and apprenticeship requirements.

We are concerned that the prevailing wage and apprenticeship requirements will be interpreted as being satisfied only by future performance, i.e., payment of prevailing wages or use of qualified apprentices as construction, alteration and repair occurs or, if such payment or use does not occur, by future payment of the cure payments. Yet lenders and investors will be looking for comfort that the project has satisfied the prevailing wage and apprenticeship requirements such that they can be confident that the 5x multiplier will apply. Currently, a developer can only offer to the financing party its representation that it will pay the prevailing wages and use qualified apprentices or, if it fails to do so, it will make the cure payments. This then will force the financing party to evaluate its commitment to the project in terms of its faith in the representations of the developer (or the contractor or the subcontractor) that the prevailing wages will be paid and qualified apprentices will be used.

We wish to point out, however, that the prevailing wage and apprenticeship requirements do not phrase the requirements as being the payment of wages or the use of qualified apprentices but, rather, state that the requirement is one of ***ensuring*** the called-for payment and use of qualified apprentices. *See, e.g.*, section 45(b)(7)(A) ("The taxpayer shall ensure that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor . . . shall be paid [prevailing wages]."); section 45(b)(8) ("Taxpayers shall ensure that . . . not less than the applicable percentage of the total labor hours . . . be performed by qualified apprentices."). In other words, the requirement is not that such payments must occur or qualified apprentices must be used; the requirement is that the taxpayer ***ensure*** such payments occur and such apprentices are used.

Accordingly, we suggest that consideration be given to providing in guidance that the taxpayer has satisfied its obligation to ensure that the required payments occur and qualified apprentices be used if it enters into a binding written contract requiring such payments or use. The guidance would therefore deem the prevailing wage and apprenticeship requirements to have been satisfied if, for example, the developer and the contractor enter into a binding written contract in which the contractor covenants to pay prevailing wages and use qualified apprentices in accordance with the requirements.

Our proposal is consistent with existing rules regarding the carbon capture credit under section 45Q. Section 45Q(f)(3) attributes the carbon capture credit to the person who owns the carbon capture equipment and "physically or contractually ensures" the capture and disposal of the carbon oxide. Treas. Reg. section 1.45Q-1(h)(2) implements this rule by specifying the terms of a binding written contact pursuant to which a taxpayer will be treated as having "contractually" ensured such performance.

We are not suggesting a look-through rule, under which the payment of prevailing wages or the hiring of qualified apprentices by another person under a binding written contract with the taxpayer would be taken into account for purposes of establishing the taxpayer's satisfaction of the prevailing wage and apprenticeship requirements. *Cf.* Notice 2013-29, section 4.03 (providing a look-through rule, pursuant to which physical work performed by a person under a binding written contract with the taxpayer is taken into account in establishing the taxpayer's satisfaction of the physical work test). Instead, we request guidance providing that, if a taxpayer enters into a binding written contract for the payment of prevailing wages and use of qualified apprentices, then the taxpayer will be deemed to have satisfied the prevailing wage and apprenticeship requirements at the time of entering into such contract. It is at this time that the taxpayer has "ensured" the payment of prevailing wages and use of qualified apprentices. This approach would both be consistent with Congress's use of the term "ensure" through the prevailing wage and apprenticeship requirements and provide early clarity regarding a taxpayer's eligibility for the 5x multiplier. Failure by the other person to pay prevailing wages or use qualified apprentices would cause a breach under the binding written contract—and therefore potential indemnification obligations owed to the taxpayer, or to the laborers and apprentices as third-party beneficiaries—but would not cause the taxpayer to lose its eligibility for the 5x multiplier.

If, as we propose, guidance under sections 45 and 48 (and guidance under analogous provisions for other credits) provides that the prevailing wage and apprenticeship requirements are deemed satisfied by the taxpayer upon entering into a binding written contract that obligates another person to make such payments and use such apprentices, then the taxpayer would be in a position to represent to lenders or investors that such requirements had been satisfied. Such lenders or investors would not have to make their investment decisions dependent upon their assessment of the likelihood that the taxpayer would, in the future, satisfy such requirements.

The prevailing wage and apprenticeship requirements provide that the taxpayer's obligation is to "ensure" that prevailing wages be paid and qualified apprentices be used, but without guidance describing the meaning of "ensure" for this purpose, taxpayers are left in doubt whether they can demonstrate current satisfaction of the prevailing wage and apprenticeship requirements prior to payment of the prevailing wages or use of qualified apprentices. Providing a means for the prevailing wage and apprenticeship requirements to be deemed currently satisfied would increase certainty regarding a taxpayer's eligibility for the 5x multiplier and, in turn, facilitate investment in clean energy projects.

B. Guidance should clarify that the prevailing wage and apprenticeship requirements are applicable to work performed at the facility site and not with respect to work performed off-site in the construction of project components.

Section 45(b)(7)(A) provides:

> The requirements . . . are that . . . any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in – (i) the construction of such facility . . . shall be paid wages . . . at the prevailing rates . . . ***in the locality in which such facility is located*** . . . .

Section 45(b)(7)(A) (emphasis added).

Similarly, section 45(b)(8)(B) provides that the apprenticeship requirements are subject to any applicable requirements for "apprentice-to-journeyworker ratios of the Department of Labor ***or the applicable State apprenticeship agency***." Section 45(b)(8)(B) (emphasis added).

Notice 2022-51, in section 3.01 asks whether guidance is necessary to clarify how the prevailing wage and apprenticeship requirements apply for purposes of section 45(b)(7)(A) and 45(b)(8)(B). We suggest that guidance clarify that, since the prevailing wage rates are determined where the facility is located, and the apprentice-to-journeyworker ratios may be determined by the applicable State apprenticeship agency, construction work performed off-site (including work outside the United States) is not subject to the prevailing wage and apprenticeship requirements.

Pursuant to extensive pre-IRA guidance with respect to the meaning of "beginning of construction" for clean energy projects, off-site work on the project may be taken into account for

purposes of determining the beginning of construction. For example, under Notice 2020-12, section 5.02(1), with respect to the beginning of construction of carbon capture projects, the taxpayer will be deemed to have begun construction if physical work of a significant nature is performed by a contractor off-site. *See also* Notice 2013-29, section 4.02.

Even though off-site work can be used to establish the beginning of construction under pre-IRA guidance, if off-site construction were considered to be "construction" of a facility for purposes of the prevailing wage and apprenticeship agreements, numerous questions as to application of the requirements would arise. Most importantly, the statute requires that the prevailing rates in the locality in which the facility is located must be applied yet, by definition, the off-site work is not occurring at such locality. Therefore, it would seem quite inappropriate to require that a contractor performing work off-site pay the rates applicable in a different locality. Moreover, off-site contractors commonly make components for multiple facilities under a master supply agreement with the taxpayer, and in such case, the prevailing wages of the off-site workers would vary depending upon the destination of the particular component on which they were working. Even if the rules were applied such that off-site construction was required to pay the prevailing wages in the locality where the off-site work is performed, i.e., the location of the component factory, when the off-site work is performed outside the United States no such rates would have been determined or available. Similarly, off-site work performed outside the United States would have no applicable apprentice-to-journeyworker ratios.

In summary, because off-site construction work has been used pre-IRA to determine the beginning of construction for many clean energy projects, taxpayers need guidance as to the application (if any) of the prevailing wage and apprenticeship requirements to such off-site work. We believe guidance should clarify that the prevailing wage and apprenticeship requirements apply solely to construction, alteration and repair work performed at the facility site and not to off-site work.

II. Domestic Content

Guidance should clarify whether 49 CFR § 661.5(d) provides the appropriate rules for determining when "manufactured products" that are "components" of a qualified facility are treated as produced in the United States and further clarify the meaning of "components" as used in both section 45(b)(9)(B)(i) and 49 CFR § 661.5(d).

The IRA provides a 10% "domestic content" bonus credit under sections 45, 45Y, 48, and 48E for a qualified facility in which, as certified by the taxpayer, any "steel, iron, or ***manufactured product*** which is a ***component*** of such facility (upon completion of construction) was produced in the United States (as determined under section 661 of title 49, Code of Federal Regulations)." *See* section 45(b)(9)(B)(i) (emphasis added); *see also* section 45Y(g)(11)(B) (same); section 48(a)(12)(B) (incorporated by cross-reference); section 48E(a)(3)(B) (incorporated by cross-reference).

While the IRA cites 49 CFR § 661.5 as providing the appropriate rules for determining when iron or steel is treated as produced in the United States, the IRA is silent regarding the appropriate rules under 49 CFR § 661 for determining when a manufactured product that is a component of the qualified facility is treated as produced in the United States. We note that 49 CFR § 661.5(d) directly addresses when manufactured products are treated as produced in the United States under the Buy America Act, and such rules could be readily applicable to the domestic content bonus credit, with additional guidance and clarification from the Secretary as described below.

Under 49 CFR § 661.5(d), a manufactured product is treated as produced in the United States if (i) all of the manufacturing processes for the product take place in the United States and (ii) all of the "components" of the product are of U.S. origin. *See* 49 CFR § 661.5(d); *see also* 49 CFR § 661.3 (defining a "component" as any "article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location"). If guidance under the IRA adopts the rules under 49 CFR § 661.5(d) as the appropriate rules for determining when a manufactured product that is a component of the qualified facility is treated as produced in the United States for purposes of the domestic content bonus credit, then further guidance would be needed regarding the meaning of "components" in 49 CFR § 661.5(d). It would be helpful to have a list of examples in the clean energy context of "manufactured products" that are "components" of a qualified facility within the meaning of section 45(b)(9)(B)(i), and a list of examples of "components" of such manufactured product for purposes of applying the rules under 49 CFR § 661.5(d).

III. Energy Communities

A. Guidance should clarify the definition of "brownfield site" in section 45(b)(11)(B)(i).

An "energy community" is defined to include a "brownfield site." Section 45(b)(11)(B)(i). A "brownfield site" for this purpose is defined by cross-reference to "subparagraphs (A), (B), ***and*** (D)(ii)(III) of section 101(39) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601(39))." *Id.* (emphasis added). We request guidance clarifying whether the use of "and" in Section 45(b)(11)(B)(i) means that, in order to be a "brownfield site" for purposes of such section, the site must satisfy all of the three CERCLA provisions that are cross-referenced or whether any one of the three would suffice.

B. Guidance should clarify the time at which the unemployment rate under Section 45(b)(11)(B)(ii)(II) is determined.

An "energy community" is defined to include a metropolitan statistical area or non-metropolitan statistical area which, among other things, has "an unemployment rate at or above the national average unemployment rate ***for the previous year*** (as determined by the Secretary)." Section 45(b)(11)(B)(ii)(II) (emphasis added). The reference to "the previous year" in section 45(b)(11)(B)(ii)(II) is ambiguous and may be interpreted as the year before each tax year in which the taxpayer claims the section 45 credit during the 10-year production period. Under such an

interpretation, a given community could qualify as an "energy community" in some tax years (for example, the early years after a qualified facility is first placed in service) but lose its "energy community" status in other tax years (for example, the later years as the qualified facility increases the employment rate in that community). Such interpretation of section 45(b)(11)(B)(ii)(II) would discourage taxpayers from locating qualified facilities in low-income communities because by doing so, they risk increasing the employment rates in those communities to the national average and thereby risk losing their eligibility for the "energy community" bonus credit after such time. This is the exact opposite of the incentive intended by Congress.

To avoid this result, we recommend that guidance clarify that the unemployment rate described in section 45(b)(11)(B)(ii)(II) refers to the year preceding the year in which construction of the qualified facility begins. Such a timing rule would provide early and continued certainty regarding a taxpayer's eligibility for the "energy community" bonus credit, which in turn would encourage development of qualified facilities in low-income communities.

C. Guidance should clarify the applicable year of the census tract described in section 45(b)(11)(B)(iii).

An "energy community" is defined to include a census tract in which, after December 31, 1999, a coal mine has closed, or after December 31, 2009, a coal-fired electric generating unit has been retired, or any adjoining census tract. We request guidance clarifying the applicable year of the census tract for this purpose (for example, the census tract in effect at the time the coal mine closed or unit retired, the census tract in effect at the time the qualified facility begins construction, or the census tract in effect for the year in which the credit is claimed).

D. Guidance should clarify how and when the location of energy property will be determined when such property is mobile.

Section 48(a)(14) provides an increased credit amount for an energy project "placed in service within an energy community." Guidance is needed regarding the satisfaction of this requirement, when the energy project is comprised in whole or in part of mobile energy property that can be relocated outside the energy community.

An energy project is defined in section 48(a)(9) as a project consisting of one or more energy properties that are part of a single project. The IRA has expanded the definition of "energy property" to include certain property that may not be permanently affixed to the ground, such as energy storage property and fuel cell property. Indeed, the taxpayer may have specifically designed the property and placed it into service with the intent that it be mobile.

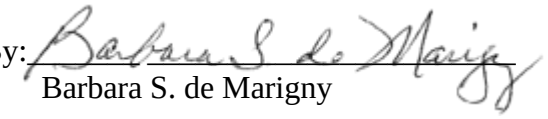
Because the IRA provides the increased section 48 credit amount for an energy project that is "placed in service within an energy community," it is presumably the location of the energy project at the point in time that it is placed in service that matters for purposes of this determination. However, guidance that confirms that the location of the energy project on the placed-in-service date governs, even though mobile energy property forming all or part of the energy project may

be relocated outside the energy community (whether during or after the recapture period), would be extraordinarily helpful in providing security to taxpayers and investors that the increased credit amount is not at risk.

We appreciate the opportunity to submit comments and would welcome the opportunity to discuss any of these issues with you prior to the issuance of guidance or proposed regulations on these matters.

Respectfully Submitted,

Baker Botts, LLP

By: 
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