Comments of the
Business Council for Sustainable Energy

RE: Department of Treasury and Internal Revenue Service Notice 2022-51, Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements, Included in the Inflation Reduction Act

November 4, 2022

The Business Council for Sustainable Energy (BCSE) appreciates the opportunity to respond to Notice 2022-51 from the Internal Revenue Service and Treasury Department in advance of upcoming guidance regarding the Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements under the Inflation Reduction Act of 2022 (P.L.117-169), or IRA.

In this notice the Treasury Department seeks general as well as specific comments on issues pertaining to the prevailing wage, apprenticeship, domestic content, and energy community requirements for increased or bonus credit (or deduction) amounts under those respective provisions of the Code. The Inflation Reduction Act authorizes taxpayers to qualify for increased credit amounts, or an increased deduction amount if certain prevailing wage and apprenticeship requirements are satisfied. In addition, taxpayers may claim an increased credit for satisfying prevailing wage requirements or may qualify for bonus credits if certain domestic content requirements are satisfied. Finally, taxpayers may qualify for increased credit amounts for investment in energy communities.

About the BCSE

The BCSE, founded in 1992, is a broad-based clean energy trade association. Its members span many industry sectors, including energy efficiency, energy storage, natural gas, renewable energy, sustainable transportation and emerging decarbonization technologies. BCSE also has an independent small- and medium-size businesses initiative under its banner, the Clean Energy Business Network (CEBN). Together, the BCSE and CEBN represent a broad range of the clean energy economy, from Fortune 100 companies to small businesses working in all 50 states supporting over 3 million U.S. jobs.

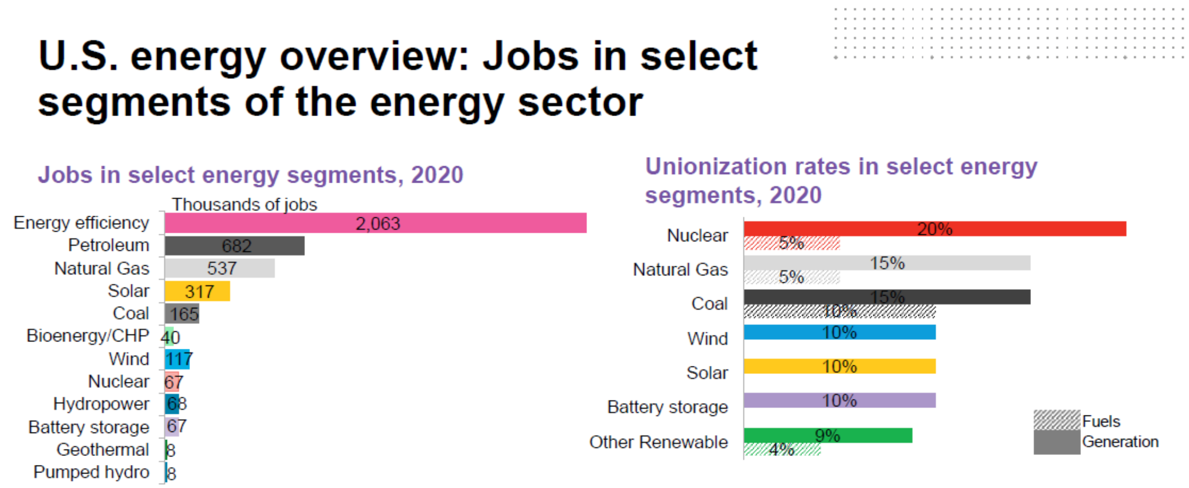
BCSE General Comments in Support of IRA Clean Energy Incentives

BCSE believes the clean energy incentives under the Inflation Reduction Act represent an historic milestone, which was decades in the making and will put the U.S. on a path to meet its greenhouse gas emission reduction goals with strong and long-term federal policy support. By deploying a broad portfolio of clean, homegrown energy technologies we can increase and strengthen U.S. energy security, create millions of U.S. jobs, and cut greenhouse gas emissions. Congress recognized this by extending existing and establishing new, expanded, and modernized tax credits for a broad range of technologies, including renewable energy, energy efficiency, energy storage, sustainable transportation, hydrogen production and carbon capture and storage, among other areas.

The long-term and predictable credits will have great impact and will provide the public policy certainty business urgently needs, leading to steady economic growth and new job creation.

The BCSE-BNEF 2022 *Sustainable Energy in America Factbook* highlights just how significant the clean energy economy has become in the U.S, with a record $105 billion invested into clean energy sectors in 2021 and over 3 million jobs. The expanded clean energy credits in the Inflation Reduction Act will lead to further economic activity, deployment, investments, and job growth.

Figure 1: From the 2022 Sustainable Energy in America Factbook, published March 3, 2022



BCSE encourages thoughtful consideration of the issues and recommendations included in the submissions of individual BCSE members. Information about BCSE and its members can be found here. Of note, as a diverse coalition, not all members take a position or endorse the recommendations included in this submission.

Clarity of the Guidance and a Set Duration Will Help to Attract Financing for Clean Energy Projects and Increase Employment

BCSE appreciates the Treasury Department's effort to work expeditiously to develop guidance to provide clarity and certainty to taxpayers and other stakeholders so the climate and economic benefits of this historic legislation can be felt as quickly as possible while following the statutorily required administrative steps and being responsive to public input. The clarity and set duration of the guidance will be critical to help attract financing for clean energy projects.

BCSE believes that given the nature of, and the "newness" of, the labor and domestic content requirements, the guidance to provide clarity on these issues should be some of the first that the Treasury Department issues under the Inflation Reduction Act.

Draft Guidance Concerning Labor Issues Should Be Made Available for Public Comment Prior to Issuing Final Guidance

The Inflation Reduction Act created new bonus incentives for taxpayers who meet certain requirements concerning prevailing wages and apprenticeships. In general, a taxpayer satisfies the prevailing wage requirements with respect to a qualified facility if the taxpayer ensures that any laborers and mechanics employed by the taxpayer or any contractor or subcontractor in the construction of such facility or the alteration or repair of such facility, are 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.

A taxpayer satisfies the apprenticeship requirements with respect to the construction of any qualified facility if the taxpayer ensures that a percentage of the total labor hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) with respect to such facility is, performed by qualified apprentices. The statute includes definitions of who would qualify as a "qualified apprentice" or what qualifies as a "registered apprenticeship program."

Clean energy industries, including wind, solar, battery storage, and natural gas, already employ more union workers and pay significantly higher wages than the national average, as much as 34% higher.[1] Even so, BCSE believes these new bonus credits may support increased employment across clean energy industries and support education and training for the next generation of clean energy industry workers.

Given the complexity of the labor issues, the fact that these are new areas of the tax code, and the new set of stakeholders interested in these issues, including those in the labor community, it is critical that the Treasury Department get the guidance right to meet the intended objectives of the statute. Therefore, BCSE encourages the Treasury Department to issue draft guidance, and to allow a reasonable public comment period on the draft guidance before the Department issues final guidance. BCSE recognizes the importance of issuing guidance in an expeditious manner but feel that allowing the public to review and comment on draft guidance will facilitate the learning and understanding of how this new area of the law is to be implemented and taking the time now, can avoid complications and problems in the long run.

Clear guidance is critical to lay out the compliance requirements and the expectations for documentation needed to qualify for the bonus credits. For example, the terms "alteration" and "repair" appear to be narrowly defined, which will create risk for project financing, particularly if unexpected repairs are needed to systems after they are placed in service. Clear guidance on how these and other terms will be defined will be critical to accelerating deployment of clean energy.

The Treasury Department must also recognize that clean energy projects are often vast undertakings and project completion is imperative for certain credit eligibility. Therefore, the Treasury Department should consider the repercussions of requiring immutable employment contracts with regards to hastening project completion. An alternative measure would be the percentage of a project, rather than a specific duration of time. The Treasury Department should also consider project location and availability of local labor forces regarding the apprenticeship requirement.

Comments on Domestic Content Requirements

The Inflation Reduction Act requires 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.

The Treasury Department notice 2022-51 requests input on whether the term "component of a qualified facility" needs further clarification and, if so, what clarifications are needed. The notice also references existing guidance under the Build America Buy America Act (BABAA) as a potential model for the domestic content requirement for the clean energy bonus credits. The Build America Buy America Act was included as part of the Infrastructure Investment and Jobs Act, IIJA, (P.L.117-58) and guidance was issued on April 18, 2022.[2]

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[1] BCSE-BNEF 2022 Sustainable Energy in America Factbook, U.S. Energy Overview: Jobs in select segments of the energy sector

[2] https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf

Concerns have been expressed that the Build America Buy America guidance is not an appropriate model for many clean energy sector projects. The Build America Buy America provisions in the IIJA are directed at infrastructure projects, which are defined as transportation projects, such as roads, bridges, ports, etc. These major infrastructure projects are not analogous to clean energy projects. As an example, in the case of certain clean energy projects there is some level of transformation of the sub-components, which are ultimately assembled in the United States. The Treasury Department should be as permissible as possible in determining a U.S.-made component. Further, the process should be clear and should not be overturned after a determination is made. To do otherwise would have a chilling effect on project financing.

Public Notice and Comment Needed on Guidance Related to Energy Communities

The Inflation Reduction Act allows bonus credits for projects located in "energy communities," which means areas that are brownfield sites, areas in which local employment or tax revenue has been based on the extraction, processing, transport, or storage of coal, oil, or natural gas and which have a high unemployment rate; or where there have been coal mines or coal-fired electric generating units that have closed or been retired.

The energy community requirements are another new area of the statute where BCSE encourages the Treasury Department to issue draft guidance for public comment, and to allow a reasonable comment period on the draft guidance before the Department issues final guidance. As previously stated, BCSE recognizes the importance of issuing guidance in an expeditious manner but allowing the public to review and comment on draft guidance will facilitate the learning and understanding of how this new area of the law is to be implemented and taking the time now, can avoid complications and problems in the long run.

Clarity is needed in several areas related to determining eligibility to receive bonus credits for projects deployed in energy communities. For example, clarity will be needed in the guidance to define words such as "closed," since it is conceivable that sources may be open then closed periodically. BCSE also recommends specifying which data sources are being used to determine criteria, such as employment levels, and to use those data sources on an on-going basis. BCSE also recommends identifying the energy communities the Treasury Department recognizes for eligibility of the credit and then maintain that group of energy communities for a significant length of time. This type of clarity and certainty will be critical to attract financing and to attract the type of deployment and revitalization that is intended under the Inflation Reduction Act.

BCSE also recommends that the Treasury Department consider the impact to investors and to the project when determining the correction and penalty mechanism for non-compliance.

Conclusion

Thank you for the opportunity to share the Council's views on this notice. BCSE looks forward to providing more detailed comment on draft guidance when it is released. Should you wish to discuss these comments further, please contact BCSE President Lisa Jacobson via email at ljacobson@bcse.org.