Coalition for American Battery Independence

November 4, 2022

SUBMITTED ELECTRONICALLY

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

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
Department of Treasury

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief Counsel
Internal Revenue Service

Re: Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits (Notice 2022-51)

Dear Ms. Batchelder and Mr. Paul:

Thank you for providing the Coalition for American Battery Independence (CABI)[1] the opportunity to provide comments pursuant to Notice 2022-51 regarding the prevailing wage, apprenticeship, domestic content, and energy content communities requirements for increased or bonus credit (or deduction) amounts under the respective provisions of the Code.

I. Background

Our members are a diverse group of American automakers, battery manufacturers, and materials producers throughout the entire battery supply chain that either have a significant manufacturing presence in the United States, or intend to start or shift significant portions of their manufacturing operations to the U.S. following passage of the IRA. Together, the companies within this coalition represent more than 250,000 U.S. workers across 32 states.

[1] https://www.batteryindependence.us/

CABI is directly focused on re-shoring the supply chain around both vehicle and grid battery manufacturing while creating good-paying manufacturing jobs.

As the U.S. Department of Treasury (Treasury) and the Internal Revenue Service (IRS) work to develop and issue future IRA guidance, we hope the law's implementation will result in a policy environment that leads to a U.S. battery manufacturing renaissance. Given that global demand for battery technologies — ranging from electric vehicles to grid storage — is growing exponentially, we must ensure the IRA's implementation will result in reducing U.S. reliance on overseas supply chains to meet our future clean energy needs. By developing an approach that appropriately considers the critical role that current and future battery companies will play in establishing a domestic battery supply chain, the Treasury and IRS will best position the country to build out a secure and independent U.S. battery industry in the very near future.

With this perspective in mind, below, we have prioritized questions and issues under this section that will have the greatest impact on CABI members and the future of the U.S. battery manufacturing industry.

II. Request for Comments

.01 Prevailing Wage Requirement

(1) Is guidance necessary to clarify how the Davis-Bacon prevailing wage requirements apply for purposes of § 45(b)(7)(A)?

Yes, additional guidance is required on how the Davis-Bacon prevailing wage requirements will apply for purposes of § 45(b)(7)(A). CABI encourages the Treasury and IRS to provide guidance consistent with the Department of Labor's (DOL) current application of the Davis-Bacon Act and existing legal precedent.

(4) Is guidance for purposes of § 45(b)(7)(A) needed 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?

Yes, if "alteration and repair" does **not** include regularly occurring maintenance and only applies to permanent improvements, clarification is needed as to how the taxpayer can receive the increased credit amount if the qualifying facility does not undergo alteration or repair in the taxable year.

Second, further clarification is needed as to whether the transportation of materials or supplies to or from the site of the work by employees of the construction contractor or subcontractor is considered construction, alteration, or repair activities. It is our recommendation that those activities are not included as part of the definition under 45(b)(7)(A), and only those activities performed on the site and facility itself should need to be tracked to meet the prevailing wage requirements.

.02 Apprenticeship Requirement

(1) Section 45(b)(8)(C) provides that each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to a qualified facility must employ one or more qualified apprentices from a registered apprenticeship program to perform that work. What factors should the Treasury Department and the IRS consider regarding the appropriate duration of employment of individuals for construction, alteration, or repair work for purposes of this requirement?

We recommend that the Treasury establish a materiality threshold for the cost and time of alteration and repair activities so as to not impose undue burden on a company for a minor repair.

Additionally, further clarification is needed as to whether the transportation of materials or supplies to or from the site of the work by employees of the construction contractor or subcontractor is considered construction, alteration, or repair activities. It is our recommendation that those activities not be included as part of the definitions of those terms, and only those activities performed on the site and facility itself should need to be tracked to meet the apprenticeship requirements.

(2) Section 45(b)(8)(D)(ii) provides for a good faith effort exception to the apprenticeship requirement.

(a) What, if any, clarification is needed regarding the good faith effort exception?

CABI encourages the Treasury Department to clarify what documentation taxpayers should produce and maintain in order to prove that a good faith effort threshold was met.

(c) Are there existing methods to facilitate reporting requirements, for example, through current Davis-Bacon reporting forms, current performance reporting requirements for contracts or grants, and/or through DOL's Registered Apprenticeship Partners Information Management Data System (RAPIDS) database or a State Apprenticeship Agency's database?

CABI encourages the Treasury Department to leverage existing reporting requirement systems for the purposes of prevailing wage and apprenticeship requirements.

(3) What documentation or substantiation do taxpayers maintain or could they create to demonstrate compliance with the apprenticeship requirements in § 45(b)(8)(A), (B), and (C), or the good faith effort exception?

Additional clarification is needed that states that apprenticeship programs stood up by *companies* can qualify, if certified under the National Apprenticeship Act.

Section 45(b)(8)(E)(ii) defines "qualified apprentice" as "an individual who is employed by the taxpayer or by any contractor or subcontractor and who is participating in a registered apprenticeship program, as defined in section 3131(e)(3)(B)." Section 3131(e)(3)(B) of the Code defines a "registered apprenticeship program" as an "apprenticeship registered under the Act of August 16, 1937 (commonly known as the "National Apprenticeship Act"; 50 Stat. 664, chapter 663; 29 U.S.C. 50 et seq.) that meets the standards of subpart A of part 29 and part 30 of title 29, Code of Federal Regulations."

Based on this, it is clear that apprenticeship programs stood up by companies should qualify, so long as they are certified under the National Apprenticeship Act, however, specifically enumerating this in the guidance is critical to avoiding any confusion.

.03 Domestic Content Requirement

(1) 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?

In 49 C.F.R. 661.5(d)(2), the regulation states that subcomponents are not required to be produced in the United States so long as the final component of the project is domestically manufactured. We encourage the Treasury to maintain that standard, and not require subcomponents to be domestically sourced due to the burden that will place on taxpayers to track and report to the Treasury.

(2) 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 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.

> **(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"?**

Yes, further guidance from the Treasury Department and IRS regarding the determination of "total costs" attributable to manufactured products that are mined, produced, or manufactured in the U.S. is essential. Without an accurate depiction of the applicable costs, the tax credit designed to incentivize the utilization of domestically manufactured products will fail to meet Congressional intent.

> **(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?**

It is imperative that the Treasury Department and IRS issue guidance clarifying what constitutes an "end product" for battery facilities as well as what constitutes a "component" of a battery facility.

Pursuant to Section 45(b)(9)(B)(i), the Treasury Department and IRS must look to 49 § CFR 661 to determine what constitutes a domestic product and, more specifically, what a domestic "end

product" is. As outlined in 49 § CFR 661.3, an "end product" "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 change(s)." CABI members believe that, in the case of batteries, the *battery facility* would be considered the end product as it is ready to provide its intended end function without any further manufacturing or assembly changes.

Additionally, 49 § CFR 661.3 states that an eligible "component" is something "directly incorporated into the end product at the final assembly location." Since the end product for batteries is the battery facility, a battery module should be considered a component as this is incorporated into the battery facility at the final stage. The battery module, and all other manufactured components, must be of U.S. origin, per 49 § CFR 661.5, meaning that all manufacturing processes of the battery module must be located within the U.S.

However, for a component (e.g., a battery module) to be considered manufactured, the subcomponents that go into the component must be substantially transformed or combined to create a new and functionally different product, as defined under 49 § CFR 661.11. Additionally, per 49 § CFR 661.3, the manufactured product must be functionally different from the result of just assembling at the material inputs. Therefore, for a battery module that is composed of cells to be considered a component manufactured with U.S. origin, all cells must also meet the requirements listed above. This is because a battery module and battery cell are not functionally different. A battery module stores energy through the combination of battery cells, which individually store the energy. A new function and substantial transformation is made when you combine electrode materials to form a battery cell. As a result, there is significant value added when manufacturing a cell compared to manufacturing a module.

When creating a domestic content bonus tax credit, Congress intended to support the creation of a domestic battery supply chain. If the assembly of a battery module is considered to meet the threshold of a manufactured product of U.S. origin then the domestic content bonus tax credit will be subsidizing foreign battery supply chains instead of domestic battery supply chains. It is crucial that there is significant value and functionality added into a domestic component to ensure critical portions of the domestic supply chain are supported, and this includes the domestic manufacturing of battery cells that go into domestic battery modules. Anything less would be counterintuitive and stray away from Congressional intent to support the establishment of a strong and resilient domestic battery supply chain.

Additionally, we request that the Treasury Department and IRS issue guidance specifically around how shared hybrid equipment, such as inverters, will be counted for domestic content

purposes when electing a storage investment tax credit and a wind or solar production tax credit.

(d) Does the adjusted percentage threshold rule that applies to manufactured products need further clarification? If so, what should be clarified?

Yes, further clarification is needed on whether the percentage threshold rule applies to individual manufactured products or the sum of all manufactured products. CABI encourages the Treasury and IRS to apply the rule across all manufactured products in a qualified project.

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

Yes, CABI believes that domestic content requirements should not apply to subcomponents.

(5) Please provide comments on any other topics relating to the domestic content

Clarification is needed on Section 45(b)(10)(D)(i), particularly on how the exception process would be invoked, applicant burden of proof, and definition of "satisfactory quality." For example, if a taxpayer finds that the purity of iron needed to manufacture their battery facility is not available in sufficient quantity domestically, what does the taxpayer need to show to be able to seek a waiver under the exception that "relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality"?