November 4, 2022

VIA E-FILING

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**
**Prevailing Wage, Apprenticeship, Domestic Content, Energy Communities**

To Whom It May Concern:

Distributed Solar Development, LLC ("DSD") is transforming the way organizations harness clean energy while building a more sustainable future, and we thank you for the opportunity to comment on such pivotal issues regarding the implementation of the Inflation Reduction Act. With unparalleled capabilities including development, structured financing, project acquisition and long-term asset ownership, DSD accelerates the deployment of renewable energy resources and creates significant value for our commercial, industrial, and municipal customers and partners. Backed by world-leading financial partners like BlackRock Real Assets and rooted in our founding at GE, our team brings a distinct combination of ingenuity, rigor, and accountability to every project we manage, acquire, own, and maintain, therefore it is critical we take part in this commentary.

## GENERAL COMMENTS:

*IRS Request for Comments*: *The IRS requested general comments regarding prevailing wage, apprenticeship, domestic content, and energy community requirements that should be addressed in guidance.*

Issue Presented: The W&A Requirements, Domestic Content Bonus and Energy Communities Bonus all share terms that require clarification. Most of these terms can be easily defined by reference to existing IRS guidance. Further, the statute uses different terms in different contexts that are confusing; for example, the ITC bonuses are applied at the facility level while the Section 48 ITC bonuses are applied to an energy project. We are requesting clarity on these terms.

** Requested Guidance:

1. Whether construction of a qualified facility, energy project, energy property, or energy storage technology has begun is determined pursuant to the existing guidance in Notice 2018-59 and Notice 2013-29, as each has been amended and clarified.
2. The Continuity Safe Harbor in Notice 2018-59 and Notice 2013-29, as each has been amended and clarified, is extended to six years in all cases (other than for projects offshore and on federal land, which continue to have a ten year Continuity Safe Harbor).
3. Whether multiple energy properties are an "energy project" is determined applying the "single project" factors listed in Notice 2018-59.
4. For purposes of determining whether a facility qualifies for the Domestic Content Bonus or Energy Communities Bonus, the taxpayer may choose to treat multiple facilities that are operated as part of a single project as a single facility.
5. For facilities electing ITC in lieu of PTC under Section 48(a)(5), the term "energy project" as used in the Domestic Content Bonus and Energy Communities Bonus shall be deemed to be a "qualified facility".
6. The term "facility", in the case of solar energy, generally means all components of property necessary to generate electricity up to and including the inverter.

**DOMESTIC CONTENT:**

***Issue #1:***

*IRS Request for Comments*: *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 Sections 45(b)(9)(B) and 45Y(g)(11)(B) are satisfied? Why?*

Issue Presented: The term "manufactured product" is not defined, and we request clarity.

** Requested Guidance:

The term "manufactured product" is defined by reference to 49 CFR 661.3.

Purpose: The taxpayer believes this is mere confirmation of Congressional intent, per the language in Section 45(b)(9)(B)(i), which refers taxpayers to the general principles of 49 C.F.R. 661.

***Issue #2:***

*IRS Request for Comments: What should the Treasury Department and the IRS consider when determining "completion of construction" for purposes of the domestic content requirement? Should the "completion of construction date" be the same as the placed in service date? If not, why?*

Issue Presented: The term "completion of construction" is not defined, and we request clarity.

** Requested Guidance:

The term "completion of construction" means when the qualified facility or energy project is placed in service.

Purpose: We believe this definition makes the most sense in light of other references to this date in the statute.

***Issue #3:***

*IRS Request for Comments: Does the adjusted percentage threshold rule that applies to manufactured products need further clarification? If so, what should be clarified?*

Issue Presented: We request clarification regarding how to calculate the "total costs" of manufactured products.

** Requested Guidance:

The term "total costs" means all costs properly capitalized by the taxpayer in the basis of the manufactured product.

Purpose: This concept is already used in the existing "begin construction" guidance in Notice 2018-59, etc., so it provides consistency to use it here as well.

***Issue #4:***

*IRS Request for Comments: 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?*

Issue Presented: As requested above, we request the IRS provide a definition for "manufactured product". However, we have also requested clarity from the IRS that certain components are *de facto* manufactured products for purposes of the Domestic Content Bonus.

** Requested Guidance:

The following items are manufactured products for purposes of the Domestic Content Bonus:

a. Inverters
b. Solar modules
c. Transformers
d. Tracking equipment

e. SCADA
f. Racking
g. Purlins
h. Canopies
i. Columns
j. Beams
k. Pilings
l. Connection Brackets
m. Nacelles
n. Blades
o. Towers
p. Foundation
q. Energy storage technology

Purpose: To provide clarity that the above components are manufactured products.

***Issue #5:***

*IRS Request for Comments: Does the treatment of subcomponents with regard to manufactured products need further clarification? If so, what should be clarified?*

Issue Presented: The statutory language in Section 45(b)(9)(B)(iii) is ambiguous whether the cost of components incorporated into manufactured products through the manufacturing process needs to be included in the 40% test.

** Requested Guidance:

The total cost of a manufactured product that is manufactured in the United States is taken into account for purposes of the 40% test, regardless of the origin of its subcomponents.

Example: A taxpayer places into service solar modules which use solar energy to generate electricity within the meaning of Section 48(a)(3)(A)(i). Each module is manufactured in the United States by the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials. The subcomponents of the modules that are incorporated into the manufactured product through a manufacturing process may or may not be mined, produced, or manufactured in the United States. For purposes of the Domestic Content Bonus, each module is a manufactured product which was mined, produced or manufactured in the United States, and the taxpayer may take its cost basis in each module into account for purposes of the 40% test.

Purpose: This approach views manufactured products as components of the energy project or qualified facility. The statute clarifies that the origin of subcomponents is not relevant to the 40% test. The

proposed approach generally matches both Section 661 of CFR 49 and FAR Part 25 (on which we understand the 40% Test was based). Specifically, Section 661 of CFR 49 specifically excludes subcomponents, while FAR Part 25 only considers components of the "end product", which "end product" is most analogous to an energy project under the ITC. Finally, requiring us to look to the cost of components of the manufactured products is not practically feasible, because we will typically not have visibility into manufacturers' cost of parts.

***Issue #6:***

*IRS Request for Comments: What records or documentation do taxpayers maintain or could they create to substantiate a taxpayer's certification that they have satisfied the domestic content requirements?*

Issue Presented: We do not as a matter of course know whether products we acquire from manufacturers are domestically manufactured. We require certainty for determining if our procured materials can be taken into account for the Domestic Content Bonus.

** Requested Guidance:

Components will be treated as produced in the United States for purposes of the Domestic Content Bonus if the supplier of such component certifies that such component was mined, produced or manufactured in the United States (within the meaning of the Domestic Content Bonus, including any such guidance as may be issued by the IRS), and the supplier or its affiliate has manufacturing facilities in the United States for the mining, production or manufacturing of components of the same or similar nature, and the taxpayer has no reason to doubt the accuracy of the manufacturer's certification.

Purpose: We cannot have full transparency into supplier activities. We are eager to satisfy the Domestic Content Bonus and encourage the growth of the domestic manufacturing market, as is the purpose of the statute. But without a safe harbor, we have no certainty regarding the availability of the Domestic Content Bonus. If a supplier is making this type of product in the United States, it is reasonable for taxpayer to rely on a certification from the supplier regarding qualification.

***Issue #7:***

*IRS Request for Comments: Please provide comments on any other topics relating to the domestic content requirements that may require guidance.*

Issue Presented: We are concerned that de minimis quantities of non-U.S. materials could cause them to fail the steel or iron test. Likewise, we understand that there is no domestic manufacturing for COTS

(e.g., commercially available off-the-shelf) fasteners. Examples of COTS fasteners are nuts, bolts, pins, rivets, nails, clips and screws. We are requesting exceptions for these minor and de minimis categories.

** Requested Guidance:

COTS fasteners are treated as manufactured in the United States, regardless of the place of their origin. In the case of steel or iron components, such components will not be treated as foreign manufactured if the cost of foreign iron or steel in such component is five percent or less than the cost of such component.

Purpose: We understand that there is no domestic market for COTS, and likewise that some components made primarily of steel or iron include a de minimis amount of foreign iron and steel for which there is no domestic market. We understand it would be virtually impossible in the medium term to satisfy, in particular, the iron and steel tests without a COTS/de minimis exception. These exceptions generally track both Section 661 of CFR 49 and FAR Part 25, which both provide exceptions for the steel and iron requirements.

***Issue #8:***

*IRS Request for Comments: Please provide comments on any other topics relating to the domestic content requirements that may require guidance.*

Issue Presented: To the extent an ITC project is comprised of two different categories of energy property, such as both solar equipment and energy storage technology, it is unclear whether the Domestic Content Bonus 40% test applies to the project as a whole, or if it applies to each category of energy property separately. We are concerned that if the test applies to the project as a whole, the bar cannot be met – because the market for domestic energy storage technology is (and is expected to remain very small), so we will be disincentivized to include storage technology in our projects.

** Requested Guidance:

To the extent a single project consists of energy property described in more than one subSection of Section 48(a)(3)(A), a taxpayer may choose whether to treat the different types of energy properties as part of the same energy project or separate energy projects. For example, if a taxpayer places in service solar equipment that is energy property described in Section 48(a)(3)(A)(i) and associated energy storage technology described in Section 48(a)(3)(A)(ix), the taxpayer may choose whether to aggregate the solar energy property and energy storage technology into one energy project, or to treat the solar energy property as one energy project and the energy storage technology as another energy project, for purposes of the Domestic Content Bonus.

Purpose: We propose this guidance to confirm that it does not have to aggregate the costs of energy storage technology with other energy generating property in determining if it satisfies the 40% Test. Specifically, there is not a sufficient market to acquire U.S. manufactured energy storage technology. The costs of energy storage technology are relatively high compared to the cost of associated solar panels. If we are required to aggregate energy storage technology with solar technology in a single "energy project", we are unlikely to satisfy the Domestic Content Bonus. Requiring us to aggregate them into a single energy project will therefore disincentivize solar installers from investing in energy storage technology, which is contrary to the purpose of the statute.

***Issue #9:***

*IRS Request for Comments: Please provide comments on any other topics relating to the domestic content requirements that may require guidance.*

Issue Presented: We are concerned that there is ambiguity in the statutory language for the Domestic Content Bonus.

** Requested Guidance:

The Domestic Content Bonus is satisfied if the requirements are met with respect to steel, iron or manufactured products, and do not need to be satisfied for all three prongs.

Purpose: We believe there is ambiguity in the statutory language, which uses "or", and not "and" between "steel, iron or manufactured product". This language is in clear contrast with the language in 49 CFR Part 661.5 ("… all iron, steel, and manufactured products… are produced in the United States.") Given that the IRA cross-references Part 661.5, but Congress did not adopt the same "and" language, the IRA should be read with different meaning by applying the conjunctive "or" test.

***Issue #10:***

*IRS Request for Comments: Please provide comments on any other topics relating to the domestic content requirements that may require guidance.*

Issue Presented: We are concerned that the domestic market for manufactured products is expected to remain tight for years to come, and that taxpayers that want to use domestic equipment will not have enough supply.

** Requested Guidance:

Components comprised primarily of iron or steel should be taken account under both the iron and steel bucket, and the manufactured product bucket. In other words, the cost of

components primarily composed of iron and steel that are manufactured products are included in the numerator and denominator of the 40% test.

Purpose: We request clarity on the application of these rules that aligns with Congressional intent but also is reasonably feasible based on medium-term expected growth in the domestic manufacturing market. If the Domestic Content Bonus is interpreted too conservatively, it will be unachievable for almost all solar developers, which will defeat its statutory purpose to build and support domestic supply chains.

## ENERGY COMMUNITY BONUS:

***Issue #1:***

*IRS Request for Comments: What further clarifications are needed regarding the term "located in" for this purpose, including any relevant timing considerations for determining whether a qualified facility is located in an energy community?*

Issue Presented: We are uncertain regarding the timing of the Energy Community Bonus determination.

** Requested Guidance:

The term "previous year" in Section 45(b)(11)(B)(ii)(II) can be measured from any year during which the energy project or qualified facility began construction through when it is placed in service.

Purpose: We are concerned that if "previous year" is defined by reference to the year the project is placed in service, we will have no ability to plan ahead for purposes of financing such projects. Many projects bring in financing and investor parties years ahead, and those parties expect certainty regarding the credit rate. By providing flexibility to choose the year during development by which to measure, we will have greater transactional certainty.

***Issue #2:***

*IRS Request for Comments: Should a rule similar to the rule in § 1397C(f) (Enterprise Zones rule regarding the treatment of businesses straddling census tract lines), the rules in 26 C.F.R. §§ 1.1400Z2(d)-1 and 1.1400Z2(d)-2, or other frameworks apply in making this determination?*

Issue Presented: We request guidance regarding whether an entire project needs to be located in the energy community.

** Requested Guidance:

For qualified facilities or energy projects which straddle multiple census tracts, rules substantially similar to those found in Sections 1.1400Z2(d)-1(d)(3)(ix) and 1.1400Z2(d)-2(d)(4)(vii) apply. If a taxpayer does not meet the foregoing rules, taxpayers are entitled to receive the Energy Communities Bonus under Section 48 multiplied by a fraction, the numerator of which is the allocable cost basis of the energy project that is located in the energy community (without regard to the application of the rules in the foregoing sentence) and the denominator of which is the total cost basis of the energy project. In the case of the Energy Communities Bonus under Section 45, taxpayers can elect to apply the approach in the previous sentence to the relevant single project, or take the Energy Communities Bonus on each individual qualified facility located in the energy community.

Purpose: Large projects may straddle an energy community. This proposal will provide certainty regarding whether their project qualifies for the Energy Community Bonus.

***Issue #3:***

*IRS Request for Comments: For each of the three categories of energy communities allowed under Section 45(b)(11)(B), what past or possible future changes in the definition, scope, boundary, or status of a "brownfield site" under Section 45(b)(11)(B)(i), a "metropolitan statistical area or non-metropolitan statistical area" under Section 45(b)(11)(B)(ii), or a "census tract" under Section 45(b)(11)(B)(iii) should be considered, and why?*

Issue Presented: We are concerned about recapture issues to the extent there are changes in the qualification of an Energy Community that are outside of their control.

** Requested Guidance:

If an energy project or qualified facility is located in an energy community described in Section 45(b)(11)(B)(i), (ii) or (iii) during any year which the energy project or qualified facility began construction through when it is placed in service, a subsequent failure of the location to be described in Section 45(b)(11)(B)(i), (ii) and (iii) will not result in recapture of the ITC or PTC.

Purpose: Each test for purposes of falling within the definition of "energy community" is outside our control. We cannot impact whether a location qualifies as a brownfield, or meets unemployment, employment or tax thresholds. We should not be subject to recapture for changes in circumstances outside of our control.

## WAGE AND APPRENTICESHIP:

***Issue #1:***

*IRS Request for Comments: Please provide comments on any other topics relating to the prevailing wage requirements for purposes of Section 45(b)(7)(A) that may require guidance. Please provide*

*comments on any other topics relating to the apprenticeship requirements in Section 45(b)(8)(B) that may require guidance.*

Issue Presented: We are already trying to implement the W&A Requirements in our contracts, but we are concerned about planning without IRS guidance already in place. We would generally like certainty regarding the following matters.

** Requested Guidance:

1. The W&A Requirement applies only to amounts paid with respect to labor provided and services performed after the 60 day cutoff (i.e., the "W&A Start Date"). The W&A Requirement does not apply if labor is provided pursuant to a contract executed prior to the W&A Start Date or for qualified facilities or energy projects placed in service prior to the W&A Start Date.

   Purpose: We would like certainty that any work performed, or contracted for, before the W&A Start Date" is exempt from the W&A Requirements. Likewise, we would like certainty that a project placed in service before the W&A Start Date de facto began construction before the W&A Start Date.

2. We can satisfy the Wage Requirements by paying applicable state prevailing wage rates. Use of qualified apprentices hired through an applicable state qualified apprenticeship program will apply towards the Apprenticeship Requirement.

   Purpose: We understand many states already administer wage and apprentice requirements and programs. We would like certainty that so long as we satisfy those requirements, we will be treated as satisfying the corresponding federal W&A Requirements.

3. Construction, repair and alteration does not include work reasonably anticipated to be performed pursuant to an operations and maintenance agreement at the time of execution of such agreement, including scheduled maintenance and upgrades.

   Purpose: The statute clearly only applies the W&A Requirements to construction, repair and alteration. It does not apply to maintenance. Once placed in service, projects are typically operated pursuant to an operations and maintenance agreement. For purposes of distinguishing between maintenance work and work subject to the W&A rules, we request clarification that any work reasonably anticipated under the operations and maintenance agreement.

4. The IRS should issue proposed guidance on the W&A Requirements that request further comments, and such proposed guidance should clarify that such proposed guidance does not start the 60-day clock.

   Purpose: Given the extensive scope of guidance the IRS is expected to issue on the W&A Requirements, it would be helpful if the IRS first issued proposed guidance and sought further feedback. This guidance should not start the clock on the W&A Start Date.

***Issue #2:***

*IRS Request for Comments: What should the Treasury Department and the IRS consider in developing rules for taxpayers to correct a deficiency for failure to satisfy prevailing wage requirements?*

Issue Presented: We are pleased that the statute includes this opportunity to rectify good faith failures. However, we are concerned that we won't be able to locate laborers and mechanics who performed work years before, and often times were not even directly hired by DSD.

** Requested Guidance:

In the event that we are unable to make any payment contemplated by Section 45(b)(7)(B)(I)(i), we will be treated as making such payment if the we have (1) maintained a list of names and addresses of all such laborers and mechanics; and (2) attempted to make contact to such persons at their last known address and has not received a response within 30 days.

Purpose: This guidance will effectively give us a safe harbor if we maintain proper records and attempt to reach such persons at their last known address. Without this safe harbor, we would fail the relief provision even for failure to track down a single subcontractor from years prior.

***Issue #3:***

*IRS Request for Comments:* What, if any, clarification is needed regarding the good faith effort exception?

Issue Presented: We sometimes develop projects in remote areas, therefore there is a concern that there won't be sufficient pools of available apprentices in these areas.

** Requested Guidance:

With respect to a qualified facility or energy project for which a developer certifies that qualified apprentices are unavailable because either (1) sufficient qualified apprentices are not available within a 25 mile radius of the facility or project; or (2) qualified apprentices are available within a 25 mile radius of the facility or project, but not for at least 90 days, then the developer will be treated as satisfying the Apprenticeship Requirement.

Purpose: The statute already contemplates good faith exceptions for finding apprentice labor. This clarification seems reasonable and in line with statutory intent.

Thank you again for giving DSD the opportunity to comment on these issues. We look forward to the guidance issued in the near future so we can fully take advantage of all the benefits of the Inflation Reduction Act and continue to accelerate the deployment of distributed renewable energy assets.

Sincerely,

Erik Schiemann, CEO

Distributed Solar Development, LLC