

November 4, 2022

Via Federal eRulemaking Portal

Internal Revenue Service
CC:PA:LPD:PR
Room 5203
P.O. Box 7604
Washington, D.C. 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

FuelCell Energy, Inc. (“FCE”) submits this response to the Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements under the Inflation Reduction Act of 2022 (“IRA”). FCE thanks the Department of the Treasury and the Internal Revenue Service for the opportunity to provide written comments regarding these requirements. FCE also appreciates the commitments both agencies have made to develop further guidance for implementing the IRA.

FCE is a global leader in the design, manufacture, operation, and service of ultra-clean, efficient, and reliable fuel cell technology, with a purpose of utilizing its proprietary, state-of-the-art fuel cell platforms to enable a world empowered by clean energy, enhancing the quality of life for people around the globe. FCE provides comprehensive turn-key solutions that include everything from the design and installation of a project to the long-term operation and maintenance of the fuel cell system. The global fleet of FCE’s power plants spans three continents and is leading the industry with millions of megawatt-hours of ultra-clean power produced. Utilizing state-of-the-art fuel cells, FCE’s power plants provide environmentally responsible solutions for various applications such as utility-scale and on-site power generation, carbon capture, local hydrogen production for both transportation and industry, and long duration energy storage. FCE’s customer base includes utility companies, municipalities, universities, hospitals, government entities/military bases and a variety of industrial and commercial enterprises. FCE’s multi-featured platforms can be configured to provide a number of value streams, including electricity, high grade heat and steam, water, and hydrogen, and to concentrate and separate CO₂ from industrial applications using fossil fuels. FCE has already leveraged its proprietary technology to produce commercially available technologies and is continuing its development of other technologies that will provide key solutions to evolving energy demands in markets across the nation.

Given FCE’s role as a manufacturer of energy solutions, FCE wishes to provide the following comments regarding the Domestic Content Requirement, as outlined in Sections 45(b)(9), 48(a)(12), 45Y(g)(11) and 48E(a)(3)(B) of the Inflation Reduction Act.

As the Request aptly notes:

Section 45(b)(9)(B)(i) provides that with respect to any qualified facility, the domestic content requirement is satisfied if the taxpayer certifies to the Secretary (at such time, and in such form and manner, as the Secretary may prescribe) that any steel, iron, or

manufactured product that is a component of such facility (upon completion of construction) was produced in the United States (as determined under 49 C.F.R. § 661).

Section 45(b)(9)(B)(ii) provides that in the case of steel or iron, § 45(b)(9)(B)(i) is applied in a manner consistent with 49 C.F.R. § 661.5. For purposes of § 45(b)(9)(B)(i), § 45(b)(9)(B)(iii) provides that the manufactured products that are components of a qualified facility upon completion of construction are deemed to have been produced in the United States if not less than the adjusted percentage (as determined under § 45(b)(9)(C)) of the total costs of all such manufactured products of such facility are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States.

While the domestic content requirement emphasizes the importance of domestic manufacturing and succeeds at incentivizing taxpayers to prioritize investments that directly benefit the U.S. supply chain, FCE respectfully submits that further clarification is necessary to allow manufacturers to assess whether their products meet the domestic content requirement and qualify for the “bonus credit” of an additional ten percent. Taxpayers would also benefit from the same guidance, given their role in certifying to the Secretary that the product for which they are seeking the “bonus credit” meets the domestic content requirement.

Of particular relevance to these comments, Section 45(b)(9)(B)(i) requires “that any steel, iron, or manufactured product that is a component of such facility ... was produced in the United States (as determined under 49 C.F.R. § 661).” Section 45(b)(9)(B)(ii) similarly provides that in the case of steel or iron, § 45(b)(9)(B)(i) is applied in a manner consistent with 49 C.F.R. § 661.5.

The need for clarity stems from the statutory references to 49 C.F.R. § 661 and the existing framework of Buy America Requirements. 49 C.F.R. § 661, *et seq.*, is a collection of regulations titled “Buy America Requirements.” This particular subset of Buy America Requirements is known as the implementing regulations for the Federal Transit Administration within the Department of Transportation, and it appears within Title 49 of the Code of Federal Regulations, which governs Transportation.

49 C.F.R. § 661.5, which § 45(b)(9)(B)(ii) incorporates by reference, provides:

- (a) ... no funds may be obligated by FTA for a grantee project unless all iron, steel, and manufactured products used in the project are produced in the United States.
- (b) All steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.
- (c) The 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. 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 subcomponents of other manufactured products or rolling stock, or to bimetallic power rail incorporating steel or iron components.
- (d) For a manufactured product to be considered produced in the United States:
 - (1) All of the manufacturing processes for the product must take place in the United States; and
 - (2) All of the components of the product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.

49 C.F.R. § 661.5.

Given the scope of 49 C.F.R. § 661.5, it is not readily apparent in what “consistent manner” the IRA directs these requirements be applied. 49 C.F.R. § 661.5(c) limits the application of the “steel and iron requirements” 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.” It further exempts from the requirements “steel or iron used as components or subcomponents of other manufactured products.” Section 45 of the Inflation Reduction Act contains no similar exemption, and further complicates the comparative analysis by employing the term “qualified facility” rather than “project” or “system” as those terms appear within 49 C.F.R. §§ 661; 661.3; 661.5.

To further complicate the issue, Section 45 seems to echo the sentiment of the Build America Buy America Act (“BABAA”), which was enacted as part of the Infrastructure Investment and Jobs Act (“IIJA”) in November 2021. BABAA established a domestic content procurement preference for all Federal financial assistance obligated for infrastructure projects after May 14, 2022, which requires that all iron, steel, manufactured products, and construction materials used in covered infrastructure projects are produced in the United States.

In contrast to the foregoing domestic content regulations which provide that “any” or “all” of the iron, steel, and manufactured products are of U.S. Origin, the Buy American Act (“BAA”) outlines an entirely different standard for determining whether a product may be considered “domestic.” The domestic content restrictions of the BAA similarly apply to federal procurement, and were most recently significantly changed by the issuance of a Final Rule by the Federal Acquisition Regulation (FAR) Council.¹ Under the Federal Acquisition Regulations (FAR), the definition of “domestic end product” is first classified by whether a given product is “wholly or predominantly of iron or steel or a combination of both.” 48 C.F.R. § 52.225-1. “Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components.” *Id.* As a practical matter, the FAR’s “domestic” test requires that the total cost of the components for an end product be calculated first. Under either part of the test, the product must be manufactured in the United States. There are two outcomes:

- (1) If the cost of the steel or iron exceeds 50% of the total cost, an end product is “wholly or predominantly of iron or steel” and can only qualify as “domestic” if the cost of foreign iron and steel constitutes less than 5% of the cost of all components used in the end product.
- (2) If the cost of the steel or iron does not exceed 50% of the total cost, an end product is domestic if more than 60% of the cost of the components are from the United States, except that the percentage must exceed 65% for items delivered in calendar years 2024 through 2028 and 75% for items delivered starting in calendar year 2029.

This standard differs from the requirement of 100% domestic steel or iron under the BABAA, the FTA’s Buy America Requirements codified at 49 C.F.R. 661, and Section 45(b)(9)(B)(i) of IRA. To reconcile these conflicting laws, further guidance on the application of the domestic content requirement is necessary, particularly given the limited scope of the regulations incorporated by reference.

¹ <https://www.regulations.gov/document/FAR-2021-0008-0074>

In addition, further clarification regarding the relationship between the definition of “qualified facility” and “infrastructure” would be helpful, particularly given the existing guidance from the Office of Management and Budget (“OMB”). While the IRA does not limit the bonus credit – or the corresponding domestic content requirement – to “infrastructure,” both the BABAA and 49 C.F.R. 661.5 discuss infrastructure, including “structural steel” in a way that makes compliance with the requirement difficult to assess. The OMB guidance² states in relevant part:

The IIJA’s definition of “infrastructure” encompasses public infrastructure projects. Thus, the term “infrastructure” includes, at a minimum, the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property. Agencies should treat structures, facilities, and equipment that generate, transport, and distribute energy -including electric vehicle (EV) charging -as infrastructure.

When determining if a program has infrastructure expenditures, Federal agencies should interpret the term “infrastructure” broadly and consider the definition provided above as illustrative and not exhaustive. When determining if a particular construction project of a type not listed in the definition above constitutes “infrastructure,” agencies should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indicia of infrastructure, while projects with the latter quality have fewer. Projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project. Federal agencies are strongly encouraged to consult with OMB when making such determinations.

...

For the purposes of this guidance, an article, material, or supply should only be classified into one of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material. For ease of administration, an article, material, or supply should not be considered to fall into multiple categories. Agencies should apply the iron and steel test to items that are predominantly iron or steel, unless another standard applies under law or regulation.

This guidance suggests that “domestic content” of a given item should be assessed based upon the FAR two-part test, rather than an outright requirement that all the iron and steel be manufactured in the United States. This guidance further suggests that the definition of “infrastructure” is malleable enough that the same product may or may not be considered “infrastructure,” depending on the purchaser and placement. While this makes sense from a theoretical perspective, from a practical perspective it makes self-assessment and certification as to the domestic contents extremely difficult for manufacturers and almost impossible for taxpayers. The guidance published by the Treasury Department should clarify which test should be

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

applied and should further clarify the parameters for determining whether an article, material, or supply may be categorized as (1) iron or steel; or (2) a manufactured product for purposes of any “bonus credit” under the IRA.

FCE respectfully requests that the Treasury Department and the Internal Revenue Service publish guidance that helps to clarify the scope of the domestic content requirement as tethered to 49 C.F.R. 661, either by defining the applicable subcategories of steel or iron, such as by distinguishing between the requirements for “structural” versus “stainless” steel with corresponding definitions, or by explaining the preferred approach to calculating domestic content for use in an acceptable certification to the Secretary, as required by Section 45. FCE further suggests that the Treasury Department and the Internal Revenue Service should interpret the requirement of 45(b)(9)(B)(i) that any steel or iron be produced in the United States according to a graduated schedule, which either permits less than 100% of the iron or steel to be manufactured in the U.S. where the other domestic content requirements are met, or provides that only the structural steel that is a component of a qualified facility must be produced in the United States. Under the latter option, a provision similar to 49 C.F.R. § 661.5(c) could be employed to categorize the types of steel that are subject to the 100% requirement, which also categorizes the types of steel that are not subject to the requirement. This approach would be consistent with the OMB Guidance providing that articles should only be categorized into one of the available categories, as it would allow classification of components into only one of the following three distinct categories: (1) iron, (2) steel, or (3) manufactured products.

Alternatively, or in addition, the Treasury Department and Internal Revenue Service could employ the provisions of Section 45(b)(10)(D)(i) to provide limited duration exceptions to the requirements by recognizing that on a short-term basis, and until the U.S. supply chain adjusts to meet the present market demand, relevant steel and iron are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality. While the purpose of the “bonus credit” is to fortify the U.S. supply chain and to incentivize investment in domestic manufacturing, the present standard may not adequately account for the adjustments that manufacturers will be required to make in order to ensure that their products qualify. While the purpose of the incentive is one that all manufacturers strive to achieve, the guidance should recognize the practical limitations of immediate implementation.

With respect to the specific definitions that the guidance should seek to clarify, “steel” should be defined according to industry standards. Steel is broadly divided into three categories: (1) Carbon Steel, (2) Stainless Steel, and (3) Alloy Steel. The use of an industry standard, like the one promulgated by the American Society for Testing and Materials (ASTM),³ is a preferred method to define steel because it accounts for both composition and usage when defining steel.

Though 49 C.F.R. 661.3, 661.5(b) and (c) provide illustrative examples of what steel and iron are according to their function and use within a project, these classifications are difficult to apply when analyzing technologies and components that do not fall into any of the specifically enumerated items.⁴ This puts manufacturers and taxpayers in the undesirable position of having to speculate or analogize whether the components of their products fall into any of the enumerated categories, and undermines the ability to certify the results of the same to the Secretary. Alternatively, if the Treasury Department and Internal Revenue Service interpret the steel and iron requirements of 45(b)(9)(B) as being solely limited to scope of projects enumerated within 49 C.F.R. 661.5, the practical outcome of employing these definitions will be the same. If the steel and iron requirements are limited to transportation infrastructure, the addition of

³ <https://www.astm.org/products-services/standards-and-publications/standards/steel-standards.html>

⁴ Under the Federal Acquisition Regulations, steel is defined as “an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.” 48 C.F.R. § 52.225-1. This is similar to the industry standard definition for Carbon steel, but it does not account for any other types of steel.

technical definitions for iron and steel will provide further clarity to manufacturers and taxpayers in certifying their qualifications for “bonus credits.”

To streamline the certification process and ensure that taxpayers provide satisfactory documentation of their eligibility for the “bonus credit,” the Treasury Department and Internal Revenue Service should require that manufacturers and/or taxpayers provide Mill Certificates and/or Certificates of Origin for qualifying products. Given the variations between and among “qualified facilities” that will seek the “bonus credit,” requiring submission of a certification that is readily applicable to most or all industries will provide additional clarity. Sales of steel are routinely accompanied by a Mill Certificate stating its origin. Manufactured products similarly are accompanied by a Certificate of Origin, which states the product's Country of Origin. These documents are industry standard and should be accepted by the Secretary when submitted in connection with any taxpayer certification.

In conclusion, FCE reiterates its gratitude to the Treasury Department and Internal Revenue Service in providing this opportunity to comment on Notice 2022-51. FCE realizes that the process of publishing guidance that clarifies these definitions while navigating the existing framework of requirements is an arduous task and appreciates the time and effort the Treasury Department and Internal Revenue Service have already dedicated and continue to dedicate to this process. It is FCE's hope that the guidance will present a workable foundation for accurate self-assessment by manufacturers and taxpayers who are ready, willing, and able to invest in the United States and further strengthen domestic manufacturing capabilities.

Should you need any additional information, Alexandra Isaac, FuelCell Energy's Senior Counsel (aisaac@fce.com) can provide more information as needed.

Sincerely,



Jason Few, President and CEO

cc: Lilyanne H. McClean, Senior Vice President, Global Public Policy and Government Affairs