nationalgrid

November 16, 2022

SUBMITTED ELECTRONICALLY

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Ave., NW
Washington, D.C. 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: Comments on Implementation of the Inflation Reduction Act Pursuant to Notice 2022-51

Dear Ms. Batchelder and Mr. Paul:

National Grid North America Inc. ("NGNA") respectfully submits these comments to the U.S. Department of the Treasury ("Treasury Department") and the Internal Revenue Service (the "IRS") pursuant to Notice 2022-51.

NGNA, a Delaware corporation, is an indirect wholly-owned subsidiary of National Grid plc, a public limited company incorporated under the laws of England and Wales. NGNA indirectly owns regulated operating company subsidiaries that own and operate electric transmission and distribution facilities in New York and New England, as well as gas distribution networks across the northeastern United States. NGNA, through its subsidiary NGV US LLC ("NGV US"), operates in competitive markets separately from NGNA's core regulated divisions. NGV US indirectly owns National Grid Renewables Development, LLC ("NG Renewables"), formerly known as Geronimo Energy, LLC, and has investments in several joint ventures that own and operate across the United States utility-scale and residential renewable energy assets, battery energy storage systems, and off-shore wind developments in the northeastern United States.

NG Renewables is a leading developer and operator of large-scale renewable energy assets across the United States, including solar, wind, and energy storage. As a farmer-friendly and community-focused business, NG Renewables seeks to repower America's electricity grid by reigniting local economies and reinvesting in a sustainable, clean energy future. NG Renewables supports National Grid's vision of being at the heart of a clean, fair, and affordable energy future for all.

NGNA appreciates the opportunity to comment on issues in connection with the bonus credits available under Sections 45(b)(11) and 48(a)(14) if a qualified facility or energy project is located in an energy community (the "Energy Community Bonus"), and under Sections 45(b)(9)

and 48(a)(12)[1] if certain domestic content requirements are satisfied (the "Domestic Content Bonus").

NGNA respectfully recommends that any guidance or proposed regulations on the Energy Community Bonus (such guidance, the "Energy Community Guidance") include the following items:

1. A qualified facility or energy project is considered to be "located in" an energy community if a significant portion of such qualified facility or energy project is physically situated within the applicable MSA, non-MSA, or census tract.

2. The Energy Community Guidance should provide a safe harbor such that the Energy Community Bonus certainly applies if at least 5 percent of the square footage underlying the qualified facility or energy project is located within the applicable MSA, non-MSA, or census tract.

3. For purposes of the production tax credit under Section 45 ("PTC"), a qualified facility may qualify for the Energy Community Bonus in any year of the 10-year PTC credit period (the "PTC Period"), and having qualified for the bonus, a qualified facility should retain the bonus through the end of the PTC Period. For purposes of the investment tax credit under Section 48 ("ITC"), an energy project should not be subject to recapture of the Energy Community Bonus.

4. Mine status should be determined by reference to MSHA's Mine Data Retrieval System ("MDRS").

5. Closure of a mine should be defined to include a status of "Abandoned", "Abandoned Sealed", or "Temporarily Idled" as listed in the MDRS.

NGNA respectfully recommends that any guidance or proposed regulations on the Domestic Content Bonus (such guidance, the "Domestic Content Guidance") include the following items:

1. As a general matter, the Domestic Content Guidance should use the conceptual framework, fundamental classifications of property, and definitions from 49 C.F.R. §§ 661 (the "FTA Guidance"), in each case as appropriately modified to take into account the differences between energy projects and transit projects.

2. For purposes of the credit determined under Section 48(a), the requirements for the Domestic Content Bonus should be applied only with respect to the energy project and not separately with respect to each qualified facility within the energy project.

3. For purposes of defining the items subject to Section 45(b)(9)(B)(ii) (the "Steel and Iron Requirements"), the Domestic Content Guidance should use definitions that are generally consistent with 49 C.F.R. §§ 661.3 and 661.5 but appropriately modified to take into account the differences between energy projects and transit projects. Furthermore, the Steel and Iron Requirements should not apply to certain

[1] Unless otherwise indicated, all "Section" references are to the Internal Revenue Code of 1986, as amended (the "Code"), and all "Treasury Regulation" references are to the final, temporary, and proposed U.S. Treasury regulations promulgated thereunder.

de minimis components. In addition, the Domestic Content Guidance should include a list of items that are subject to the Steel and Iron Requirements and a list of items that are not subject to the requirements.

4. The Steel and Iron Requirements should be generally consistent with 49 C.F.R. § 661.5 and should specifically provide that the raw materials, including for this purpose scrap steel, can be foreign or domestic.

5. For purposes of the requirements pursuant to Section 45(b)(9)(B)(iii) (the "Manufactured Product Requirements"), the definitions from the FTA Guidance should be incorporated with appropriate modifications for "energy projects" within the meaning of Section 48(a)(9)(A)(ii). Accordingly, a solar project would be a system, an end product, a manufactured end product, and therefore a manufactured product. Items such as solar modules and inverters would be components of the manufactured product; solar modules and inverters would not themselves be manufactured products.[2]

6. The Manufactured Product Requirements should be clarified to require that not less than the adjusted percentage of the total costs of the energy project (in the case of the ITC), or the portion of the energy project in a qualified facility (in the case of the PTC), be attributable to components that are mined, produced, or manufactured in the United States. For this purpose, whether a component is manufactured in the United States is determined without regard to the origin of its subcomponents.

7. The Manufactured Product Requirements should clarify that "cost" means the basis of the taxpayer claiming the credit.

Each of these recommendations is discussed further below.

ENERGY COMMUNITY BONUS

Section 45(b)(11) provides that, in the case of a qualified facility which is located in an energy community, the PTC determined under Section 45(a) (determined after application of Section 45(a)(1) through (a)(10), and without the application of Section 45(a)(9)), shall be increased by an amount equal to 10 percent of the amount determined. For this purpose, "energy community" includes (i) a metropolitan statistical area ("MSA") or non-metropolitan statistical area ("non-MSA") which (a) has (or, at any time during the period beginning after December 31, 2009, had) 0.17 percent or greater direct employment or 25 percent or greater local tax revenues related to the extraction, processing, transport, or storage of coal, oil, or natural gas (as determined by the Secretary), and (b) has an unemployment rate at or above the national average unemployment rate for the previous year (as determined by the Secretary) (the foregoing tests collectively, the "Employment Test"); and (ii) a census tract (I) in which (a) after December 31, 1999, a coal mine has closed, or (b) after December 31, 2009, a coal-fired electric generating unit has been retired, or (II) which is directly adjoining to any census tract described in subclause (I) (the "Closure Test"). See Section 45(b)(11)(B).

Section 48(a)(14) provides that, in the case of any energy project that is placed in service within an energy community (as defined in Section 45(b)(11)(B), as applied by substituting

[2] Construction materials made primarily of steel or iron would be subject to the Steel and Iron Requirements and therefore not tested under these rules, which are applicable to manufactured products.

"energy project" for "qualified facility" each place it appears), then for purposes of applying the energy percentage under Section 48(a)(2) with respect to the energy property that is part of such energy project, the ITC energy percentage is increased by either 2 percent (for a project not satisfying the requirements of Section 48(a)(9)(B)), or 10% (for a project satisfying the requirements of Section 48(a)(9)(B)). "Energy project" means a project consisting of one or more energy properties that are part of a single project. Section 48(a)(9)(A)(ii)[3].

a. Location in an Energy Community

The IRS has asked what further clarifications are needed regarding the term "located in" for purposes of the Energy Community Bonus. Section 45(b)(11) and Section 48(a)(14) do not explicitly address whether qualified facilities or energy projects that straddle a qualifying and a non-qualifying MSA, non-MSA, or census tract are eligible for the Energy Community Bonus. As explained more fully below, to give appropriate effect to the Energy Community Bonus, the Energy Community Guidance should provide the following:

1. A qualified facility or energy project is considered to be "located in" an energy community if a significant portion of such qualified facility or energy project is physically situated within the applicable MSA, non-MSA, or census tract.

2. The Energy Community Guidance should provide a safe harbor such that the Energy Community Bonus certainly applies if at least 5 percent of the square footage underlying the qualified facility or energy project is located within the applicable MSA, non-MSA, or census tract.

3. For purposes of the PTC, a qualified facility may qualify for the Energy Community Bonus in any year of the PTC Period, and having qualified for the bonus, a qualified facility should retain the bonus through the end of the PTC Period. For purposes of the ITC, an energy project should not be subject to recapture of the Energy Community Bonus.

Issue 1: Location in an Energy Community Should be Based on Whether Property Within the Applicable Area is More Than a De Minimis Amount of the Qualified Facility or Energy Project

The IRS has specifically asked whether a rule similar to the rule in Section 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 should apply in making the Energy Community Bonus determination. Section 1397C(f) addresses a business entity or proprietorship that uses real property located within and outside of an empowerment zone and includes a qualitative requirement that the amount of real property within the empowerment zone be "substantial" compared to the amount of real property outside of the empowerment zone in order for all of the business to be treated as occurring or situated in an empowerment zone. See Section 1397C(f)(3). Treas. Reg. § 1.1400Z2(d)-1 includes a test for satisfying the Qualified Opportunity Zone Business requirements for real property that straddles a Qualified Opportunity Zone ("QOZ"), under which the QOZ is the location of services, tangible property, or business functions if, among other things, the amount of real property located within the QOZ is substantial compared to the amount of real property located outside of the QOZ.

[3] Our comments focus on the PTC and ITC. These comments may be applied to the clean electricity production credit pursuant to Section 45Y and the clean electricity investment credit pursuant to Section 48E with appropriate modifications to reflect relevant differences.

Treas. Reg. § 1.1400Z2(d)-1(d)(3)(ix). For this purpose, the IRS applies a quantitative test: if the amount of real property based on square footage located within the QOZ is greater than the amount of real property based on square footage outside of the QOZ (and the two are contiguous), then all of the property is deemed to be located within the QOZ. Treas. Reg. § 1.1400Z2(d)-1(d)(3)(ix)(E)(i).

We believe that the legislative intent behind the Energy Community Bonus (i.e., incentivizing development of renewable energy in geographic areas impacted by a decline in the fossil fuel economy) is better achieved by applying a qualitative test along the lines of the Section 1397C(f) test, rather than a quantitative test as in Treas. Reg. § 1.1400Z2(d)- 1(d)(3)(ix)(E)(i). Specifically, we believe that the purpose of the Energy Community Bonus is best achieved by applying a standard that qualified facilities or energy projects are "located in" an energy community if a greater than a de minimis portion of the qualified facility or energy project is physically situated in an energy community.

In addition to furthering the legislative intent by encouraging more development in affected areas, this standard would help provide for parity in treatment between similarly situated projects. In particular, we note that the units of geographic measurement specified in Section 45(b)(11) (i.e., brownfield sites, MSAs, non-MSAs, and census tracts) vary greatly in size. In fact, in some cases, a non-MSA may cover a considerable area (e.g., the Southern West Virginia non-MSA covers 11 counties). Thus, a rule that requires a particular percentage of property to be located within the geographic boundaries of a particular MSA, non-MSA, or census tract (as applicable) could produce wildly different results between otherwise similarly situated qualified facilities or projects, all of which are being developed in areas impacted by a decline in the fossil fuel economy, but some of which are located in significantly larger MSAs, non-MSAs, or census tracts. We therefore request that a qualified facility or energy project be considered located in an energy community if more than a de minimis amount of the qualified facility or energy project is physically situated in an energy community.

Issue 2: Safe Harbor that Energy Community Bonus Applies if no Less Than 5% of a Qualified Facility or Energy Project Is Located in the Applicable MSA, Non-MSA, or Census Tract

For the reasons stated above, we do not believe that the legislative intent of the Energy Community Bonus is served by only applying a mathematical framework to determine if a qualified facility or energy project is located in an energy community. However, to eliminate uncertainty for both the IRS and taxpayers in the case of energy projects or qualified facilities that clearly should be considered to be located in an energy community, we request that the Energy Community Guidance incorporate a safe harbor that the Energy Community Bonus applies if at least 5 percent of the square footage underlying either the qualified facility or energy project is physically part of the energy community. A 5 percent safe harbor would be consistent with the legislative purpose of incentivizing development, while also ensuring that more than a de minimis portion of the qualified facility or energy project is located within the energy community. Moreover, providing a safe harbor in the Energy Community Guidance will conserve IRS resources while also providing certainty to many taxpayers, while not foreclosing the ability of other energy projects or qualified facilities that are providing the economic activity that the statute encourages to qualify for the Energy Community Bonus.

We note that applying a 5 percent threshold based on square footage as a proxy for "more than de minimis" is consistent with Treas. Reg. § 1.1400Z2(d)-1(d)(4)(i), which provides that businesses leasing more than a de minimis amount of property to certain trades or businesses

cannot qualify as a Qualified Opportunity Zone Business. Treas. Reg. § 1.1400Z2(d)-1(d)(4)(iii) in turn provides that the term "de minimis amount of property" as used in Treas. Reg. § 1.1400Z2(d)-1(d)(4)(i) means less than 5 percent of the net rentable square feet for real property, and less than 5 percent of the value for all other tangible property.

Issue 3: Redetermination During PTC Period and No ITC Recapture of the Energy Community Bonus

Section 45(b)(11) does not directly address when the determination of Energy Community Bonus qualification is made for a qualified facility for purposes of the PTC. Because the PTC Period extends for 10 years beyond placement in service, it is not clear whether a qualified facility can qualify for the Energy Community Bonus in a year after the facility is placed in service if it did not previously qualify. It is also not clear whether, having previously qualified for the Energy Community Bonus, a qualified facility may lose the bonus in a later year during the PTC Period if circumstances change. Likewise, Section 48(a)(14) does not address whether the Energy Community Bonus is subject to recapture for purposes of the ITC should circumstances change.[4]

As a preliminary matter, we note that the language of Section 45(b)(11)(a) provides that the credit "determined under [Section 45](a)" is increased by the Energy Community Bonus. Paragraph (a) sets forth the formula for calculating the credit on an annual basis. Thus, the statutory language supports the ability to determine whether a qualified facility is eligible for the bonus with respect to each year in the PTC Period. A qualified facility could, therefore, qualify for 100% PTC when placed in service, but qualify for 110% PTC in the second year by meeting the Closure Test if, for example, a coal mine closed in the same or a directly adjoining census tract as the qualified facility during Year 2 of the PTC Period. It is clear from the statutory language that qualification for the Energy Community Bonus may be gained during the PTC Period. Moreover, this reading of the statutory language is consistent with the legislative purpose of encouraging investment in renewable energy within energy communities. Developers of renewable energy should not be encouraged to delay projects in such communities out of concern that a qualified facility will not ever be able to avail itself of a higher credit based on being placed in service too early. For example, the future closure of a coal-fired generating unit is often announced one or more years prior to the actual closure. So as not to encourage delays of development or construction of renewable energy within energy communities, the Energy Community Guidance should clarify that if the energy community definition is met within the PTC Period, the Energy Community Bonus will be available for the remainder of the PTC Period.

The question of whether a qualified facility or energy project may lose its qualification for the Energy Community Bonus is unique to the Employment Test, in that it is the only energy community definition that relies on data which necessarily varies from year-to-year. The Closure Test considers only data that, once confirmed, does not change. For example, a coal mine that has closed after 1999 will always be a coal mine that has closed after 1999, regardless of future activity. The Employment Test, on the other hand, considers whether an MSA or non-MSA "has an unemployment rate at or above the national average unemployment rate *for the previous year* (as determined by the Secretary)" (emph. added), which may change year-over-year during the

[4] We note that Section 48 does not specifically provide for the potential recapture of the Energy Community Bonus pursuant to regulations or other guidance from the Secretary of the Treasury, as it does for the increased ITC for solar and wind facilities located in certain low-income communities should property cease to be eligible for the increased ITC. See Section 48(e)(5). Thus, we do not believe that Section 48 allows for the possibility of recapture of the Energy Community Bonus. However, given that the policy reasons we discuss in this section apply equally to the loss of a PTC Energy Community Bonus or the recapture of an ITC Energy Community Bonus, we address both in this section.

PTC Period or the ITC recapture period. The statute authorizes the Secretary to determine the application of this standard. The legislative purpose behind the Energy Community Bonus is not served if taxpayers are hesitant to invest in qualified facilities or energy projects located in energy communities out of fear of losing the PTC Energy Community Bonus in a later year or having a recapture of the ITC Energy Community Bonus. We encourage the IRS to consider that it would be contrary to the legislative intent behind the Employment Test to interpret the statute in such a way that a qualified facility or energy project which was at one time eligible for the Energy Community Bonus, is no longer eligible for the Energy Community Bonus in a later year of the PTC Period or is forced to recapture part of the Energy Community Bonus as a result of a decrease in the unemployment rate, when decreasing unemployment is precisely the purpose of the incentive.

We request that the IRS clarify that taxpayers are able to qualify for the Energy Community Bonus in any year of the PTC Period, but having qualified for the Energy Community Bonus, a qualified facility should retain that status through the end of the PTC Period. We further request clarification that, for purposes of the ITC, the Energy Community Bonus is not subject to recapture.

b. Closure of a Coal Mine

The IRS has asked which source or sources of information should be considered in determining census tracts that had a coal mine closed after December 31, 1999, and how should the closure of a coal mine be defined. As described above, an energy community includes a census tract (or directly adjoining census tract) in which after December 31, 1999, a coal mine has closed. National Grid proposes that taxpayers, as well as the Treasury Department and the IRS, look to data provided by the Mine Safety and Health Administration ("MSHA") in determining whether a mine has closed after December 31, 1999. Specifically, guidance should provide that:

1. Mine status should be determined by reference to MSHA's Mine Data Retrieval System.

2. Closure of a mine should be defined to include a status of "Abandoned", "Abandoned Sealed", or "Temporarily Idled" as listed in the MDRS.

Issue 1: Use of MDRS Data

We request that the IRS clarify that taxpayers and the IRS may use data from the MDRS, which can be found at MSHA's website and is therefore accessible by both taxpayers and the IRS. MSHA is an agency of the U.S. Department of Labor, which administers the provisions of the Federal Mine Safety and Health Act of 1977 (the Mine Act). Data and reports maintained by MSHA with respect to mines is widely considered to be the industry standard.

The MDRS may be found here: Mine Data Retrieval System | Mine Safety and Health Administration (MSHA).

Issue 2: MDRS Statuses that Constitute Closure of a Mine

The Mine Act requires MSHA to inspect each surface mine at least twice a year, and each underground mine at least four times a year. Mine status is reported on MSHA Form 2000-209, which is required to be initiated by an Authorized Representative (i.e., an MSHA inspector) whenever a change or update in mine status occurs.

Instructions for Form 2000-209 describe the possible status categories as follows:

New Mine A mine that has been assigned a Mine ID number but no work has begun at the mine site. Once physical development has begun, a status change is required.

Active A mine that operates on a full-time basis. Temporary closure due to unusual or unforeseen circumstances, such as strikes, mine disasters, temporary maintenance shutdowns, etc. does not change this status. These are mines/mills where you could reasonably expect to conduct the statutory four or two regular inspections.

Intermittent Operations that can reasonably be expected to operate sometime during the year. These operation times will vary due to the demand for the product(s) or seasonal conditions. These are operations where two inspections per year for underground mines and one per year for surface mines and/or facilities would reasonably be expected to occur.

Non-producing Operations where production has not yet begun or has ceased, but employees perform some work at the mine/mill. These are operations where two inspections per year for underground mines and one per year for surface mines and/or facilities would reasonably be expected to occur.

Abandoned Mines that will be abandoned for the foreseeable future.[5]

Temporarily Idled (Coal Only)
The work of all miners has been terminated and production related activity has ceased. The mine still has recoverable reserves and it is anticipated that this is a temporary condition and the mine will reopen in the future. This category includes surface mines that are idled beyond seasonal periods and underground mines that do not maintain ventilation or conduct underground examinations. The only activity at these mines would be security checks, visual examination of surface areas to determine conditions, or activity due to another agency's requirements (i.e.: state environmental agency). These mines do not require inspections.

Abandoned Sealed (Coal Only)
Mines which will be abandoned for the foreseeable future.
The underground openings or auger holes have been sealed.

The descriptions for "Abandoned," "Abandoned Sealed," and "Temporarily Idled" indicate that employment, or specifically employment of miners, has ceased. Accordingly, we request that the IRS provide that a mine with a status in one of these three categories and a status date after 12/31/1999 should be considered "closed" after December 31, 1999 for purposes of the

[5] The instructions for Form 2000-209 also indicate that if when a mine status is changed to "Abandoned", the total number of employees listed in the Form must be changed to 0.

Energy Community Bonus.

DOMESTIC CONTENT BONUS

Section 45(b)(9)(A) provides for an increase in the PTC determined under Section 45(a) with respect to a qualified facility if the requirements in Section 45(b)(9)(B) are satisfied. Section 48(a)(12)(A) provides for an increase in the ITC determined under Section 48(a) with respect to an energy project if the requirements in Section 48(a)(12)(B) are met. Section 48(a)(12)(B) provides that rules similar to the rules of Section 45(b)(9)(B) apply. In this letter we refer to the requirements in Section 45(b)(9)(B) and Section 48(a)(12)(B) as the "Domestic Content Requirements".[6]

Our comments are informed by two principles:

1. The cross-references to the FTA Guidance in Section 45(b)(9)(B)(i) and (ii) reflect Congressional intent to incorporate the conceptual framework from the FTA Guidance, as appropriately modified to take into account both the lower "Buy America" threshold in the Domestic Content Requirements and the differences between energy projects and transit projects.

2. It is particularly important that the Domestic Content Guidance be as specific and straightforward in application as possible. If taxpayers cannot be reasonably certain that they will satisfy the Domestic Content Requirements, they will not incur the additional costs of Buying American, and the Congressional purpose behind the domestic content provisions will be frustrated. While certainty in application is important for any tax incentive, the application of the Domestic Content Requirements to energy projects will be particularly complex. In addition, the increased credit can be lost completely because of a seemingly small mistake—for instance, a project owner misclassifying a foreign-sourced piece of steel as part of a manufactured component rather than an item subject to the Steel and Iron Requirements."[7]

1. Domestic Content Guidance Generally

For purposes of the PTC, the Domestic Content Requirements apply to the "qualified facility" within the meaning of Section 45. For purposes of the ITC, the Domestic Content Requirements apply to the "energy project" (as defined in Section 48(a)(9)(A)(ii)) rather than the qualified facility.

Section 45(b)(9)(B) cross-references 49 C.F.R. § 661. To give appropriate effect to this cross-reference, we believe the Domestic Content Guidance should use the conceptual framework from the FTA Guidance as appropriately modified to take into account the differences between energy projects and transit projects. Specifically, the Domestic Content Guidance should incorporate provisions of 49 C.F.R. §§ 661.3 (definitions) and 661.5 (the general requirements). Because the practical and policy considerations applicable to rolling stock are fundamentally different from those applicable to energy projects, we believe the provisions of 49

[6] Our comments focus on the PTC and ITC. These comments may be applied to the clean electricity production credit pursuant to Section 45Y and the clean electricity investment credit pursuant to Section 48E with appropriate modifications to reflect relevant differences.

[7] Unlike the prevailing wage and apprenticeship requirements in Section 45(b)(7) and (8), the Domestic Content Requirements do not provide rules that allow a taxpayer to correct an initial failure to comply with the requirements.

C.F.R. § 661.11 generally should not apply for purposes of the Domestic Content Guidance.[8] In addition, the Domestic Content Guidance should include the same fundamental classifications of property that are present in the FTA Guidance, including (i) the steel and iron property to which the Steel and Iron Requirements apply and (ii) manufactured products to which the Manufactured Product Requirements apply and the Steel and Iron Requirements do not apply.[9] Furthermore, the Domestic Content Guidance should incorporate the definitions of "component", "end product", "manufactured product", "manufactured end product", "manufacturing process", and "system" with appropriate modifications for energy projects.

As explained more fully below, the application of the Domestic Content Requirements requires two steps. In the first step, all property in a qualified facility or energy project, as applicable, must be segregated into (i) items subject to the Steel and Iron Requirements, all of which must be produced in the U.S., (ii) items subject to the Manufactured Product Requirements (i.e., components) that are manufactured in the United States, and (iii) components not manufactured in the United States. The second step requires determining the costs allocable to the items subject to the Steel and Iron Requirements, the components manufactured in the United States, and the components not manufactured in the United States. The costs allocable to the components manufactured in the United States (excluding items subject to the Steel and Iron Requirements) must be at least 40% of the costs allocable to all components (excluding items subject to the Steel and Iron Requirements).

2. Application of Domestic Content Requirements to the PTC and ITC

We respectfully request that the Domestic Content Guidance clarify the application of the Domestic Content Requirements to the ITC. For purposes of the PTC, the Domestic Content Requirements are applied to each qualified facility in the energy project pursuant to Section 45(b)(9). For purposes of the ITC, Section 48(a)(12)(A) provides that the Domestic Content Requirements specified in Section 48(a)(12)(B) are applied to the energy project. Section 48(a)(12)(B) states: "Rules similar to the rules of Section 45(b)(9)(B) apply." We believe the intent of the cross-reference is to apply the principles of Section 45(b)(9)(B) in determining whether the Domestic Content Requirements are satisfied with respect to the energy project. However, it is possible to read the cross-reference to Section 45(b)(9)(B) as also requiring that each qualified facility within an energy project separately satisfy the Domestic Content Requirements. Although this would create no additional burden with respect to the Steel and Iron Requirements, this would require that each ITC run the gauntlet of satisfying the Manufactured Product Requirements with respect to the entire project and with respect to each qualified facility within the entire project. This result does not seem justified. Accordingly, we respectfully request that the Domestic Content Guidance clarify that, for purposes of the ITC, the Domestic Content Requirements are

[8] Certain concepts and definitions addressed in 49 C.F.R. § 661.11 could be helpful in the Domestic Content Guidance. See, e.g., 49 C.F.R. § 661.11(d) (manufacture of components at final assembly location), (f) (definition of "subcomponent"), (r) (definition of "final assembly").

[9] We note that Section 48(b)(9)(B) leaves open the possibility that there is a third category of property not subject to either set of rules. In our view, clearing, grading, and other site preparation activities primarily involving the movement of earth (to the extent the costs for which are not otherwise allocable to "energy property") should not be subject to either the Steel and Iron Requirements or the Manufactured Product Requirements because they do not relate to any steel, iron, or property incorporated into or at the site. To the extent such property is not otherwise excluded from the definition of "energy project", we respectfully recommend that the Domestic Content Guidance provide that such property is not subject to either the Steel and Iron Requirements or the Manufactured Product Requirements.

applied only with respect to the energy project and not separately with respect to each qualified facility within the energy project.

3. Steel and Iron – Scope of Property Subject to Requirements

As noted above, it is important that the Domestic Content Guidance be as specific and straightforward in application as possible. This is particularly important for the Steel and Iron Requirements because a project owner's misclassification of a foreign piece of steel or iron as part of a manufactured product rather than an item subject to the Steel and Iron Requirements could result in a failure to satisfy the Domestic Content Requirements.

For purposes of defining the items subject to the Steel and Iron Requirements, the Domestic Content Guidance should use definitions that are generally consistent with 49 C.F.R. §§ 661.3 and 661.5 but appropriately modified to take into account the differences between energy projects and transit projects. With the transit-specific parts removed, 49 C.F.R. § 661.5(c) provides, in pertinent part:

> The steel and iron requirements apply to all construction materials made primarily of steel or iron... These items include, but are not limited to, structural steel or iron, steel or iron beams and columns… These requirements do not apply to steel or iron used as components or subcomponents of other manufactured products…

In our view, 49 C.F.R. § 661.5(c) draws a distinction between construction materials made primarily of steel or iron, which are subject to the Steel and Iron Requirements, and steel and iron used as components or subcomponents of machinery and equipment, which are not. We believe that the Domestic Content Guidance should incorporate this distinction.

Furthermore, we respectfully request that the Domestic Content Guidance provide that the Steel and Iron Requirements do not apply to certain *de minimis* components that are essential for but incidental to the construction and are incorporated into the physical structure of the project, including washers, screws, fasteners, miscellaneous wire, and ancillary tubes. These items are generally small, difficult to track, and purchased from multiple suppliers, making it difficult or impossible to determine and verify production and sourcing. Accordingly, if these items were subject to the Steel and Iron Requirements, it would put an additional strain on IRS and taxpayer resources to verify compliance with the requirements, and it would be harder for taxpayers to be reasonably certain that they will satisfy the Domestic Content Requirements. As noted above, if taxpayers cannot be reasonably certain that they qualify, they will not incur the additional costs of buying domestic content, and the Congressional purpose behind the domestic content provisions will be frustrated.

In addition, to provide additional certainty for taxpayers, we respectfully request that the Domestic Content Guidance include a list of items that are subject to the Steel and Iron Requirements and a list of items that are not subject to the requirements. We believe the list of items that are subject to the Steel and Iron Requirements should include, in the case of a solar project:

- Foundational piles;
- Structural supports, including substation structural supports and dead-end structures;
- Lightning masts and grounding plates;
- Foundational rebar and piers; and
- Prefabricated grating.

We believe the list of items that are not subject to the Steel and Iron Requirements should include, in the case of a solar project:

- *De minimis* components that are essential for but incidental to the construction and are incorporated into the physical structure of the project, including washers, screws, fasteners, miscellaneous wire, and ancillary tubes;
- Mechanically driven subcomponents of machinery, including tracker torque tubes;
- Solar module clamps; and
- To the extent not excluded from the definition of "energy project":
    - operations and maintenance buildings,
    - fencing, gates, security systems, and other site control property, and
    - clearing, grading, and other site preparation activities primarily involving the movement of earth to the extent the costs for which are not otherwise allocable to "energy property".

For the avoidance of doubt, the foregoing list is not meant to be exhaustive. We would welcome further additions to this list.

4. Steel and Iron – Produced in the United States

For purposes of specifying the Steel and Iron Requirements, the Domestic Content Guidance should provide rules that are generally consistent with 49 C.F.R. § 661.5. 49 C.F.R. § 661.5(b) provides: "All steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives." The Domestic Content Guidance should clarify that the raw materials, including for this purpose scrap steel, can be foreign or domestic.

5. Manufactured Products – Identifying the Manufactured Product in an Energy Project

The application of the FTA Guidance depends crucially on the definitions of "component", "end product", "manufactured product", "manufactured end product", "manufacturing process", and "system". As we noted above, we believe that the Domestic Content Guidance generally should incorporate the definitions from the FTA Guidance with appropriate modifications for "energy projects" within the meaning of Section 48(a)(9)(A)(ii). The following conclusions flow from this framework.

- An energy project is a "system" because it is "a machine, product, or device, or a combination of such equipment, consisting of individual components, whether separate or interconnected by piping, transmission devices, electrical cables or circuitry, or by other devices, which are intended to contribute together to a clearly defined function." See 49 C.F.R. § 661.3 ("System"). Furthermore, EPC contracts and BOP contracts generally include performance warranties that apply to the entire energy project. Id. In addition, the products in an energy project "perform on an integrated basis with other products in a system". Id. Finally, the products comprising an energy project generally are not procured separately, other than as replacement or spare parts. Id.

- An energy project is an "end product" because it is a system that "directly incorporates constituent components at the final assembly location … and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s)."

- Energy projects are "manufactured end products" because they are "[i]nfrastructure projects not made primarily of steel or iron." See 49 C.F.R. § 661.3, Appendix A ("Manufactured end products"). Furthermore, the Federal Transit Administration has issued several guidance letters clarifying that electric transmission and distribution systems and gas transmission and distribution systems are manufactured end products.[10] If electric and gas transmission and distribution systems are manufactured end products, energy projects also should be manufactured end products.

- An energy project is a "manufactured product" because a manufactured end product is a manufactured product.[11] In addition, an energy project is "an item produced as a result of the manufacturing process" because constructing an energy project involves "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." See 49 C.F.R. § 661.3 ("Manufactured product", "Manufacturing process").

- A component of an energy project is "any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location." See 49 C.F.R. § 661.3 ("Component").

Applying this framework to a solar project leads to the following conclusions. The solar project is a system, an end product, a manufactured end product, and therefore a manufactured product. Items such as solar modules and inverters are components of the manufactured product; solar modules and inverters are not themselves manufactured products.[12]

6. Manufactured Product Requirements – Manufactured Products and Components

[10] See Letter from Dana C. Nifosi, FTA Chief Counsel, to Douglas Bauder, Southern California Edison, Re: Buy America–Southern California Edison, Assistance on Interpreting Buy America (Apr. 30, 2014), *available* at https://www.transit.dot.gov/regulations-and-guidance/buy-america/southern-california-edison-sce-april-30-2014; Letter from Dana C. Nifosi, FTA Chief Counsel, to Diane Nakano, Sacramento Regional Transit District, Re: Buy America–Sacramento Regional Transit District, Phase 2 of the South Sacramento Corridor Project (Jul. 10, 2014), *available* at https://www.transit.dot.gov/regulations-and-guidance/buy-america/sacramento-regional-transit-district-july-10-2014; Letter from Dana C. Nifosi, FTA Chief Counsel, to Sam Mayman, Los Angeles County Metropolitan Transportation Authority, Re: Buy America–Subcomponent Compliance Confirmation (Aug. 21, 2013), *available* at https://www.transit.dot.gov/regulations-and-guidance/buy-america/los-angeles-county-metropolitan-transportation-authority-august; Letter from Dorval R. Carter, Jr., FTA Chief Counsel, to Bradley J. Thomas, Charlotte Area Transit System, Re: Buy America–Analysis and Classification of the Materials Used by AT&T (Aug. 8, 2013), *available* at https://www.transit.dot.gov/regulations-and-guidance/buy-america/charlotte-area-transit-system-august-08-2013; Letter from Peter Rogoff, FTA Chief Counsel, to Jeffrey F. Boothe, New Starts Working Group, Re: Buy America–Challenge to Application of Buyer America Regulations (Sep. 7, 2012), *available* at https://www.transit.dot.gov/regulations-and-guidance/buy-america/new-starts-working-group-september-07-2012.

[11] Although 49 C.F.R. § 661 does not explicitly state that a manufactured end product is a manufactured product, that conclusion is implicit in the FTA Guidance and is a natural inference from the defined terms. That being said, we respectfully recommend that the Domestic Content Guidance explicitly state this conclusion.

[12] Construction materials made primarily of steel or iron would be subject to the Steel and Iron Requirements and therefore not tested under these rules, which are applicable to manufactured products.

A qualified facility or energy project, as applicable, satisfies the Domestic Content Requirements only if any manufactured product that is a component of such facility was produced in the United States. I.R.C. §§ 45(b)(9)(B)(i), 48(a)(12)(B). However, the foregoing requirement is deemed to be satisfied if the qualified facility or energy project, as applicable, satisfies the Manufactured Product Requirements set forth in Section 45(b)(9)(B)(iii):

> not less than the adjusted percentage … of the total costs of all such manufactured products of such facility are attributable to manufactured products (including components) which are mined, produced, or manufactured in the United States.

The application of the Manufactured Product Requirements depends crucially on the definition of "manufactured product" and "component". For the reasons described above, under the FTA Guidance, an energy project is the "manufactured product" and, in fact, the sole manufactured product with respect to a qualified facility. In addition, items that are directly incorporated into the energy project at the project site, such as solar modules and inverters, are the "components". In our view, to give appropriate effect to the Manufactured Product Requirements in light of this conclusion, the rule should be read as follows:

> not less than the adjusted percentage … of the total costs <u>of the portion of the energy project in</u> such facility are attributable to <u>components</u> which are mined, produced, or manufactured in the United States.

We believe this is consistent with Congressional intent to incorporate the fundamental principles of the FTA Guidance subject to a lower "Buy American" threshold (i.e., an adjusted percentage less than 100%).

The application of the Manufactured Product Requirements requires a determination as to whether a manufactured product has been produced in the United States. Pursuant to 49 C.F.R. § 661.5:

> (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.

Energy projects sited in the United States generally should satisfy 49 C.F.R. § 661.5(d)(1) because they are constructed at the site. However, if the Domestic Content Guidance were to require that all components be manufactured in the United States, that would have the practical effect of eliminating the lower "Buy American" threshold in the Manufactured Product Requirements. Accordingly, in our view, to give appropriate effect to the lower "Buy American" threshold under the Domestic Content Requirements, the rule in 49 C.F.R. § 661.5(d)(2) should be replaced with the Manufactured Product Requirements.

Accordingly, under this reading, the Manufactured Product Requirements require that not less than the adjusted percentage of the total costs of the energy project (in the case of the ITC), or the portion of the energy project in a qualified facility (in the case of the PTC), be attributable to components that are mined, produced, or manufactured in the United States. Applying the FTA Guidance, a "component is any article, material, or supply, whether manufactured or

unmanufactured, that is directly incorporated into" the energy project at the site. See 49 C.F.R. § 661.3 ("Component"). For this purpose, whether a component is manufactured in the United States is determined without regard to the origin of its subcomponents. See 49 C.F.R. § 661.5(d)(2).[13]

In our view, alternative readings of the Manufactured Product Requirements do not give appropriate effect to the Congressional intent to incorporate the FTA guidance subject to the lower "Buy American" threshold (i.e., an adjusted percentage less than 100%). For instance, the Manufactured Product Requirements could be read to contemplate that the manufactured products are parts of a qualified facility or energy project. In this view, solar modules and inverters would be manufactured products rather than components. However, that reading would conflict with the FTA Guidance, pursuant to which the entire energy project is a manufactured product. Furthermore, an interpretation of the statute pursuant to which manufactured products were parts of a qualified facility or energy project would be difficult for both the IRS and taxpayers to administer. Determining whether the Manufactured Product Requirements were satisfied could require determining the location of manufacture of all components of all manufactured products and the relative cost of all such components. This could impose a significant burden on IRS resources to verify compliance with these requirements. Taxpayers would face a similar compliance burden, as well as significant uncertainty as to whether they had complied with the requirements.

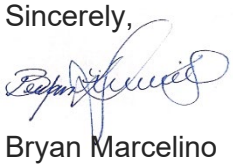
7. Manufactured Product Requirements – Total Costs

We respectfully recommend that the Domestic Content Guidance provide that "cost" means the basis of the taxpayer claiming the credit. There is a well-established body of law governing the determination of the basis of property for federal income tax purposes. See, e.g., I.R.C. §§ 263(a), 263A, 1012 ("The basis of property shall be the cost of such property"). We believe the statutory language indicates that "cost" means the cost of the taxpayer. In addition, because the taxpayer is the last buyer of the property in a potentially long series of buyers and sellers, applying the taxpayer's cost ensures an apples-to-apples comparison of costs (as opposed to, for instance, using the manufacturer's sale price for some purposes and the EPC contractor's price for other purposes). Furthermore, we believe that interpreting the provision to mean taxpayer's cost will ensure that foreign and domestic products will be treated similarly with respect to allocations of installation labor, overhead, other indirect costs, and profit.

[13] We respectfully recommend that the Domestic Content Guidance address how to apply the sourcing rules with respect to a component that is assembled offsite using a process that does not constitute "manufacturing". We believe a reasonable approach would be to apply the sourcing rules and the Manufactured Product Requirements to the constituent parts of the component.

Thank you for the opportunity to submit these comments. Please feel free to contact us with any questions you may have regarding this submission.

Sincerely,



Bryan Marcelino
Head of Tax Strategy & Planning