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SUBMITTED ELECTRONICALLY AND VIA USPS

Internal Revenue Service
CC:PA:LPD:PR (Notice 2022-51)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
United States Department of the Treasury
1500 Pennsylvania Ave., N.W.
Washington, DC 20220

Mr. William M. Paul
Principal Deputy Chief Counsel and Deputy Chief
Counsel (Technical)
Internal Revenue Service
1111 Constitution Ave. N.W.
Washington, DC 20224

Re: Notice 2022-51 -- Responses to Request for Comments on Domestic Content Requirements Under the Inflation Reduction Act of 2022 (the "IRA")

Dear Ms. Batchelder and Mr. Paul:

SOLV Energy ("SOLV") respectfully submits the following comments to the U.S. Department of Treasury ("Treasury") and the Internal Revenue Service (the "IRS") responding to questions raised in Notice 2022-51. SOLV hereby requests a meeting with individuals at Treasury and the IRS to discuss the contents of this letter and practical issues SOLV will face and the government will need to address in its implementing regulations relating to the domestic content requirements set forth in the IRA § 13101(f), to be codified at 26 U.S.C. § 45(b)(9)–(10), and the IRA § 13701(a), to be codified at 26 U.S.C. § 45Y(g)(11)–(12).

SOLV is an Engineering, Procurement, Construction ("EPC"), Operations and Maintenance ("O&M"), and Solar Services company working at a utility-scale level throughout the United States. The company, headquartered in San Diego, California, directly employs over 1,750 personnel across the country, and supports approximately an additional 4,000 jobs through union and labor provider partners. SOLV is responsible for the construction of more than 9 GW of solar energy projects and has a pipeline of active and near-term projects totaling 8.3 GW. The SOLV O&M division also manages approximately 9 GW of commercial and utility-scale solar across 180 sites in 28 states. As such, SOLV is a recognized leader in the solar energy industry and will be impacted by the IRA domestic content requirements.

We appreciate the opportunity to discuss issues with you prior to the issuance of any guidance or proposed domestic content regulations under the sections described above.

Our comments below track the questions raised in Notice 2022-51.

.03 Domestic Content Requirement

(1) Sections 45(b)(9)(B) and 45Y(g)(11)(B) provide that a taxpayer must certify that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was produced in the United States (as determined under 49 C.F.R. 661).

(a) What regulations, if any, under 49 C.F.R. 661 (such as 49 C.F.R. 661.5 or 661.6) should apply in determining whether the requirements of section §§ 45(b)(9)(B) and 45Y(g)(11)(B) are satisfied? Why?

As stated in the IRA sections cited above, 49 C.F.R. § 661 is cited as the basis for determining whether a product is produced in the U.S. 49 C.F.R. § 661 is the regulation implementing domestic content requirements for the Federal Transit Administration (“FTA”), which has a long history of interpreting these regulations through guidance letters, and Subsection 661.3 provides definitions applicable to a domestic content analysis. Based on the FTA’s application of 49 C.F.R. § 661 and the applicable definitions in Subsection 661.3, domestic content is determined by identifying the: (i) end product, (ii) the components, and (iii) subcomponents (which, as discussed further below, need not be U.S. products under 49 C.F.R. 661 and the language of the IRA).

As stated in Sections 45(b)(9)(B) and 45Y(g)(11)(B), the “qualifying facility” is the starting point for this analysis and is the end product, e.g., solar power plant. These sections of the IRA then say steel, iron, and manufactured products that are a “component of a qualified facility” must be produced in the U.S. The components include those articles that are delivered to the jobsite and fully integrated into the qualified facility, e.g., solar modules, tracker system, and inverter stations. Subcomponents include both articles used in the production of components and articles used to integrate components into a qualified facility. It is important for Treasury’s implementing regulations to adopt this rubric.

For the determination for whether steel and iron products are U.S. produced, the IRA specifically says that such determination should be consistent with 49 C.F.R. 661.5. Accordingly, Treasury’s implementing regulations should provide guidance applicable to solar facilities (as opposed to the FTA’s mass transit projects) but be generally consistent with 49 C.F.R. 661.5(c) for determining qualification for steel and iron products, including limiting the application to structural steel and iron products.

However, the section of the IRA addressing manufactured products, B(iii), does not cite to subsection 661.5 (specifically subpart (d), which is the part of the FTA regulations that addresses manufactured products, is not cited). As Congress was aware of the existence of 49 CFR 661.5 and cited it for iron and steel products but elected not to cite to it as the applicable rule for manufactured products, it is clear that Congress did not intend for 49 C.F.R. 661.5(d) to apply to manufactured products but, instead, established its own domestic content requirement. Contrary to the requirements in 661.5(d),

Congress established in B(iii) that not all manufactured products must come from the US. Congress set out that if 40 percent of the manufactured products used in the project are domestic that would be sufficient to qualify for the domestic content bonus. Accordingly, Treasury's regulations should make clear that the test for manufacturing is B(iii) and not 49 CFR 661.5(d).

As stated above, the definition of manufacturing is found in Subsection 661.3 and should be used, in Treasury's regulations to determine whether a product is manufactured in the U.S.

Treasury also asks for comments on the applicability of Subsection 661.6, which includes certifications required by grant recipients in FTA projects. The certification requirement of 661.6 should not be imported into the IRA implementing regulations as its current language is inapplicable to solar projects and does not fit with the requirements of the IRA for the taxpayer certifications.

(b) 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?

The “completion of construction date” should be the same as the placed in service date, but only if the qualified facility would be considered the same upon completion of construction as it would be when placed in service – i.e., when mechanical completion and interconnection to a transmission facility have been accomplished. In other words, interconnection equipment, other utility equipment, etc., that may connect to the qualified facility after completion of construction but before mechanical completion should not be considered part of the qualified facility.

(c) Should the definitions of “steel” and “iron” under 49 C.F.R. 661.3, 661.5(b) and (c) be used for purposes of defining those terms under §§ 45(b)(9)(B) and 45Y(g)(11)(B)? If not, what alternative definitions should be used?

As stated above, the IRA specifically requires the determination of iron and steel products to be consistent with Subsection 661.5. Treasury's implementing regulation for steel and iron domestic requirements should make clear that the requirements apply to steel and iron products for structural use only as stated in Subsection 661.5(c) and should not include steel and iron components of manufactured products. Steel and iron domestic requirements should specifically exclude fasteners, clamps and nuts/bolts/screws, which are subcomponents of the project. Further, such parts are difficult and burdensome to track.

(d) 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?

The taxpayer should be permitted to rely upon certification of domestic content it receives from suppliers and contractors for the project and must maintain cost (price paid) information to demonstrate 40 percent of the overall cost of manufactured products. A taxpayer should also be permitted to reference documentation created in the ordinary course of business (*e.g.*, shipping logs, sale invoices, and shipping records) to demonstrate that a component was produced in the U.S. This could include a binding contract specifically requiring the eligible component be produced in the United States or, as stated above, a certification or written statement by the producer corroborating that the eligible component was produced in the U.S. The implementing regulations should avoid imposing documentation or substantiation standards that do not currently exist in the ordinary course of the solar business. Imposing material changes to the records kept in the ordinary course would be unduly burdensome.

(2) Sections 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) provide that manufactured products that are components of a qualified facility upon completion of construction will be deemed to have been produced in the United States if not less than the adjusted percentage of the total costs of all of such manufactured products of such facility are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States.

(a) Does the term “component of a qualified facility” need further clarification? If so, what should be clarified and is any clarification needed for specific types of property, such as qualified interconnection property?

“Component of a qualified facility” should be defined consistent with the definition of “component” in 49 C.F.R. § 661.3 and includes both articles primarily comprised of iron or steel and other manufactured articles. If a component is structural and primarily composed of iron or steel, then the requirements of § 661.5 should apply to that component. For solar facilities, this would include, for example, iron or steel structural support posts; but would not include steel fasteners used to integrate components into the qualified facility, such fasteners should be treated as subcomponents. In addition, pursuant to 49 C.F.R. § 661.5(c) the U.S. “iron or steel requirements do not apply to steel or iron used as components or subcomponents of other manufactured products . . .”

In determining whether an article is manufactured in the United States under 49 C.F.R. § 661.3, FTA precedent indicates that manufacturing is not limited to the factory floor and could include installation activities at the qualified facility. For example, and as discussed above, a solar tracker would be considered an individual component given that its integration into the solar power plant is a manufacturing activity and more than mere assembly.

(b) Does the determination of “total costs” with regard to all manufactured products of a qualified facility that are attributable to manufactured products (including components) that are mined, produced, or manufactured in the United States need further clarification? If so, what should be clarified? Is guidance needed to clarify the term “mined, produced, or manufactured”?

Treasury should make clear in its implementing regulations that the cost of articles primarily comprised of iron or steel should be included in the computation of total costs for manufactured components as that was the intent of the drafters of the IRA and supported by the inclusion of the language “mined, produced or manufactured” in subsection (iii) addressing that 40 percent of the total cost of all manufactured products incorporated into the qualified facility must be of U.S. origin. The “mined, produced or manufactured” phrase indicates that Congress intended to include other products, such as steel and iron products, beyond just manufactured products, in the 40 percent calculation. Cost is determined at the component level and every component is either a U.S. manufactured product or not based on the requirements of 49 C.F.R. § 661.5 for components primarily comprised of iron or steel or § 661.3 for other manufactured components.

(c) Does the term “manufactured product” with regard to the various technologies eligible for the domestic content bonus credit need further clarification? If so, what should be clarified? Is guidance needed to clarify what constitutes an “end product” (as defined in 49 C.F.R. 661.3) for purposes of satisfying the domestic content requirements?

A “manufactured product” can be either a “manufactured end product” or a component. This concept is captured in Appendix A (3) to Subsection 661.3, which provides examples of “manufactured end products” and includes infrastructure projects such as terminals, depots and garages, as well as systems that include multiple pieces of equipment working together as a single unit such as fare card and security systems. The IRA is drafted such that the qualified facility is the end product and that such facility is made up of (1) steel and iron components, and (2) manufactured product components. Under the terms of the IRA and Section 661, all steel and iron components and 40 percent of manufactured product components used in the facility must be produced in the United States, while subcomponents can be foreign produced. For example, if a solar module is considered a manufactured product that is a component of the solar project, as explained further below, and the module’s production is found to meet the definition for U.S. manufacturing process, the origin of all module inputs, e.g., glass, cells, and encapsulant is irrelevant for domestic content purposes as they would be considered subcomponents. Treasury’s implementing regulations should make clear that the end product is the qualified facility.

Subsection 661.3 defines components as “any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an end product at the final assembly location.” In the case of a solar power facility components would include solar modules, inverter stations, and tracker systems. Treasury’s implementing regulations should list those components as described herein as examples. Components can include systems integrated into the qualifying facility. Treasury should include language in the regulations that makes clear that U.S. produced manufactured products can include systems that are fabricated and incorporated in the field as is accepted by the FTA under 49 C.F.R. 661. Subcomponents include both articles used in the production of components and articles used to integrate components into a qualifying facility.

The IRA requires the taxpayer to determine whether any of these components are primarily comprised of iron or steel used for structural or load-bearing purposes.

For components of the solar facility that are not primarily comprised of iron or steel used for that purpose, to qualify for the 40% power plant domestic content calculation, the components must satisfy the definition for U.S. “manufacturing process” set forth in 49 CFR 661.3. While mere assembly does not qualify as U.S. manufacturing, the FTA has found that certain operations, including the installation of components, could be considered manufacturing.¹ Manufacturing is not limited to the factory floor.

Based on the plain language of the IRA, Congress intended the solar project itself as the manufactured end product and that the iron/steel and manufactured products that go into the project are components of that end product. In fact, the IRA states in two different places that manufactured products are components of the qualified facility. The argument then follows that products that go into the manufactured components are subcomponents and are not required to be produced in the US and can come from anywhere.

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

Treasury’s regulations should confirm that the 40 percent adjusted percentage is applied with respect to the qualified facility (i.e., the end product). The regulations should confirm that the 40 percent adjusted percentage compares the total costs of all components comprised of iron or steel and manufactured product components of U.S. origin to the total costs of all components whether of U.S. or foreign origin.

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

The implementing regulation should confirm that the 40 percent adjusted percentage in § 45(b)(9)(B)(iii) is determined by reviewing the cost of each U.S. manufactured product that is a component of the qualifying project and does not require any analysis of the origin of the subcomponents that make up that manufactured product component (i.e., if a manufactured product component is produced in the U.S. the cost of that product is included toward the 40 percent regardless of the origin of the parts that make up that manufactured product). As an example, if a component of the qualified facility, such as a solar module, is determined to be a component of U.S. origin, then the entire cost of that component is treated as domestic content. The implementing regulation should also confirm that the origin of the subcomponents is immaterial if the component undergoes a manufacturing process in the United States consistent with Subsection 661.3.

(3) Solely for purposes of determining whether a reduction in an elective payment amount is required under § 6417, §§ 45(b)(10)(D) and 45Y(g)(12)(D) provide an exception for the requirements contained in §§ 45(b)(9)(B) and 45Y(g)(10)(B) (respectively) if the inclusion of

¹ See letter dated June 8, 2000, from Federal Trade Administration (FTA) Acting Administrator to David R. Perkins, President, Macton Corporation.

steel, iron, or manufactured products that are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent or relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

(a) Does the determination of “overall costs” and increases in the overall costs with regard to construction of a qualified facility need further clarification? If so, what should be clarified?

The “overall cost of construction” is not clear in the statute. If the test is that a specific steel order or manufactured product would need to increase the overall cost of construction by 25 percent this would be a virtually impossible test to meet and would result in the possibility of U.S. manufacturers escalating prices to a point that makes projects uneconomical. The test should be described in the regulations such that an exception is applicable for a manufactured product that increases the overall cost of manufactured products by 25 percent. Similarly, a waiver should be granted if a steel or iron product increases the overall cost of steel and iron products by 25 percent.

(b) What factors should the Secretary include in guidance to clarify when an exception to the requirements under section §§ 45(b)(10)(D) and 45Y(g)(12)(D) applies? What existing regulatory or guidance frameworks, such as the Federal Acquisition Regulation (FAR) and Build America Buy America (BABA) guidance, may be useful for developing guidance to grant exceptions under §§ 45(b)(10)(D) and 45Y(g)(12)(D)?

The requirement for an item to be produced in the U.S. should not apply with respect to such item if not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities and of a satisfactory quality in the time frame needed to complete the qualified project on its construction schedule.

Treasury should maintain a list of products that have been determined to be unavailable, which it may borrow from FAR 25.104 and add to for items specific to the solar industry. This determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.

(c) Do the “sufficient and reasonably available quantities” and “satisfactory quality” standards need further clarification? If so, what should be clarified?

Non-availability can be demonstrated by documented market research appropriate to the circumstances, including seeking of domestic sources through RFIs or RFQs or declarations showing unsuccessful attempts to purchase manufactured products or steel and iron with the required specifications. Importantly, the implementing regulations should make clear that unavailability includes circumstances where the offered delivery date for the U.S. product would result in a delay to the scheduled completion date of the qualified facility by 45 days or more. The economical delivery of a solar project requires the timely delivery of critical components.

(4) Sections 48 and 48E have domestic content bonus amount rules similar to other provisions of the Code. Section 48(a)(12) has domestic content requirement rules similar to § 45(b)(9)(B) and § 48E(a)(3)(B) has domestic content rules similar to the rules of § 48(a)(12). What should the Treasury Department and the IRS consider in providing guidance regarding the similar domestic content requirements under § 48(a)(12) and § 48E(a)(3)(B)?

(5) Please provide comments on any other topics relating to the domestic content requirements that may require guidance.

Thank you for the opportunity to submit these comments. As requested above, SOLV would appreciate the opportunity to meet with Treasury and the IRS to discuss these issues in greater detail and to answer any questions that you may have regarding how the IRA requirements would work on a large solar project, such as the projects SOLV constructs regularly.

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SOLV looks forward to working with Treasury and the IRS in crafting guidance that supports the IRA's purposes and encourages the development of solar projects across the United States.

Sincerely,



George Hershman
CEO SOLV Energy