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Internal Revenue Service
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Room 5203
P.O. Box 5203, Ben Franklin Station
Washington, D.C. 20044

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

Submitted via www.regulations.gov

Siemens Gamesa Renewable Energy appreciates the opportunity to comment on the Internal Revenue Service's (IRS) Notice 2022-51, Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements included in Public Law (P.L.) 117-169, the Inflation Reduction Act of 2022.

Siemens Gamesa is an original equipment manufacturer (OEM) operating at a global scale across the entire wind spectrum – onshore, offshore, and services – that installs and services turbines that generate over 122 gigawatts of wind power around the world.

In the United States, Siemens Gamesa onshore wind turbines represent an installed capacity of over 26 GW, with domestic facilities manufacturing onshore wind blades in Fort Madison, Iowa and nacelles in Hutchinson, Kansas. At full capacity, these facilities have the ability to support over 250 jobs in Iowa and Kansas between them.

For offshore wind, Siemens Gamesa is the global market leader with approximately 50% of the market share across the globe. Siemens Gamesa has committed to supply wind turbine generators (WTGs) for four forthcoming offshore wind projects in the United States representing

Siemens Gamesa Renewable Energy, Inc.
4400 N. Alafaya Trail Q3
Orlando, FL 32826

over 4.3 GW. Moreover, in conjunction with the supply of WTGs for the Coastal Virginia Offshore Wind project, SGRE has signed a long-term lease with the Virginia Port Authority at the Portsmouth Marine Terminal to construct a facility that will support the domestic manufacturing of SGRE's IntegralBlades. The facility – to date the only offshore wind blade facility committed to by an OEM in the United States – will create 260 long-term manufacturing jobs at the Port of Virginia.

Answers are provided below to specific questions posed by IRS in Notice 2022-51:

.01 Prevailing Wage Requirement

.01(5). Please provide comments on any other topics relating to the prevailing wage requirements for purposes of § 45(b)(7)(A) that may require guidance.

IRS should adopt additional guidance to clarify how the Davis-Bacon prevailing wage requirements will apply for purposes of § 45(b)(7)(A) to be consistent with the Department of Labor's (DOL) current application of the Davis-Bacon Act and existing legal precedent.

The IRA does not provide clear definitions of several important terms that are key to applying prevailing wage (and relevant apprenticeship) requirements, including "construction" and "alteration and repair".

a. Definition of "Construction"

The IRS should provide a definition of "construction" that aligns with the way the DOL currently treats construction activities under the Davis-Bacon Act. The term "construction" should refer only to work[1] of a significant nature,[2] performed at the site of work (as defined in subsection (d) below)[3] during the construction period. Each of these is discussed in more detail below.

[1] 29 C.F.R.§ 5.2(j) "The term *construction* . . . mean[s] the following: all types of work done on a particular building or work at the site thereof, *including work at a facility which is deemed a part of the site of the work.*") (The word "construction work" is defined to "generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work."). "The manufacture or furnishing of materials, articles, supplies or equipment . . . is not a building or work [covered by Davis-Bacon] . . . unless conducted in connection with and at the [project] site." *Id.*

[2] "Significant work" has been distinguished in proceedings. *See, e.g., In the Matter of: Paper, Allied-industrial, Chemical and Energy Workers International Union and Local No. 8-652, Dispute Concerning the Applicability of the Davis-bacon Act (dba)*, 2005 WL 3263821, at *2 ("landscaping work, standing alone, can constitute DBA construction work, the DOE determined that the landscaping work was *too trivial* a part of the overall excavation project to be considered construction work").

[3] Davis-Bacon regulations are limited to "[a]ll types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work . . . [performed] by laborers and mechanics employed by a construction contractor or construction subcontractor." 29 CFR 5.2(j)(1). 29 C.F.R.§ 5.2(l) states: "The site of the work" as "the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed" *but* "*provided* that such site is established *specifically for the performance of the contract or project*")("[A] commercial

1. Work of a Significant Nature

In general, prevailing wage and apprenticeship requirements during the construction period should only apply to construction work that creates *new* tangible property that is integral to the production or storage of electricity.[4] IRS guidance should make clear that construction work is limited to work that falls under the definitions in DOL regulations applicable to prevailing wages at 29 CFR 5.2. Under DOL regulations, the term "construction" is intended to cover "construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work."[5]

Construction work should not include transportation of materials or supplies to or from the site of the work.[6] This includes the delivery to the work site of supply items such as sand, gravel, and ready-mixed concrete, even if those materials are delivered directly into a contractor's mixing facilities at the work site.[7] However, if the mechanics and laborers of a material supplier, after transporting items to a worksite, then perform part of a construction contract as a subcontractor (*i.e.*, mixing supply items after delivery), that work should be considered construction work, and laborers or mechanics employed at the site should be subject to applicable prevailing wage and apprenticeship requirements.

If mechanics and laborers generally employed in construction activities perform incidental transportation activities at the site of work, including: (a) transportation between the construction site and a facility dedicated to the construction site; and (b) transportation of significant portions of the construction work from a location, treated as part of the site of the work, to final physical place(s) where it will remain.[8] Those activities should properly be included within the scope of construction activities. Consistent with legal precedent, the applicable time for prevailing wage or apprenticeship requirements is limited to time spent on the site of work; the time that such mechanics and laborers spend offsite should not be covered.[9]

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or material supplier, which are established by a supplier of materials for the project before opening of bids and not on the site of the work" is also not included in the relevant "site of the work" definition). Thus, there is a distinction between project specific construction versus general manufacturing sites for national distribution; the former extends to sites that may be adjacent/elsewhere so long as they are established for the purpose of the project.

[4] As further discussed below in Section d, IRS should make clear that such property does not include work performed on existing facilities, or property used for the interconnection of a qualified facility to the grid or utility, public roads to or from a qualified facility or energy property and fencing and existing buildings on the site of the project.

[5] 29 CFR 5.2(i).

[6] "[T]he transportation of materials or supplies to or from the site of the work by employees of the construction contractor or a construction subcontractor is not 'construction." 29 CFR 5.2(j)(2). *See Building and Construction Trades Department, AFL-CIO v. United States Department of Labor Wage Appeals Board (Midway Excavators, Inc.)*, 932 F.2d 985 (D.C. Cir. 1991).

[7] "[M]aterial delivery truck drivers who come onto *the site of the work to* merely to drop off construction materials are not covered." *Bldg. & Const. Trades Dep't AFL-CIO v. U.S. Dep't of Lab. Wage Appeals Bd.*, 932 F.2d 985, 992 (D.C. Cir. 1991).

[8] 29 C.F.R. § 5.2(j) ("Construction" includes "[t]ransportation between *the site of the work* . . . and a facility which is dedicated to the construction of the building or work and deemed part of *the site of the work*" and [t]ransportation of portion(s) of the building or work between a site where a significant portion of such holding or work is constructed . . . and the physical place or places where the building or work will remain."

[9] *Id.*

Similarly, IRS guidance should clarify that only activities of a "significant nature" should be included in the scope of construction activities, and specifically exempt activities that are *de minimis*. Although DOL has not elected to set a percentage amount in its regulations for what constitutes significant work (or *de minimis* work), its enforcement practice is to only require prevailing wages for laborers and mechanics who perform construction activities for which more than 20 percent of their work hours are spent on site.[10] However, if such employees spend a substantial amount of their time in any work week (i.e., more than 20 percent) on the site performing manual, physical, and mechanical functions, which are those of a traditional craftsperson, they shall be considered laborers or mechanics for the time so spent.[11] IRS guidance should adopt such a standard, or a similar standard, for establishing what activities constitute those significant enough to be considered activities of a significant nature for purposes of these requirements.

2. Construction Period

To establish when prevailing wage and apprenticeship requirements are applicable, the IRS should clarify that onsite construction work should be considered to start at the earliest of the excavating to change the contour of the land, excavation for any permanent foundation(s), post/piling installation, or anchor bolts into the ground, or the pouring of the concrete pads of the foundation of a qualified facility or energy property (*i.e.*, work to tangible property that is integral to the production or storage of electricity). Preliminary activities, such exploring, conducting surveys, clearing a site, drilling or pile driving and pull testing to determine soil condition, installation of meteorological towers and stations, or removing existing equipment on the site should not be considered construction activities.[12] Treasury guidance should also clarify that construction work should be limited to construction-like activity, including for purposes of repowering a project. Prevailing wage and apprenticeship requirements applicable for construction activities should end when the qualified facility or energy property is at a state of readiness and availability to perform its specifically assigned function, which typically occurs when it has been placed in service.

b. Definition of "Alteration and Repair"

"Alteration, and repair" should only include work performed on the site of work of a qualified facility or energy property and limited to actions that the taxpayer is required to capitalize as costs.[13] The site of work definitions applicable to construction in section (d) should also be

[10] *See* DOL Field Operations Handbook at 15e16(c) ("For enforcement purposes, if . . . an employee spends more than 20 percent of his/her time in a workweek engaged in such activities on the site, he/she is [Davis-Bacon] covered for all time spent on the site during that workweek."), *available at* https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/FOH_Ch15.pdf.

[11] US Department of Labor Field Operations Handbook - Chapter 15 [FOH 15e06].

[12] Under DOL regulations for Davis-Bacon, construction activities generally do not include development work (i.e., exploratory, preparatory, pre-construction work at the project site). 29 CFR 5.2(j)(1).

[13] Tax law applies definitions in the context of "incidental repairs" versus capital improvements. Under I.R.C. § 162 and Treas. Reg. § 1.162-4, taxpayers are allowed a deduction for ordinary and necessary trade or business expenses, including for "amounts paid for repairs and maintenance to tangible property if the amounts paid are not otherwise required to be capitalized." This regulation has traditionally applied to the cost of "incidental repairs" that "neither materially add to the value of the property nor appreciably prolong its useful life but keep it in an ordinarily efficient

applicable to alteration and repair activities and performed only by the laborers and mechanics that are defined in section (c).

The terms "alteration"[14] and repair"[15] should refer to making permanent and substantial work on the site of a qualified facility or energy property. This would include the reconstruction or remodeling of existing facilities, buildings, or components thereof, by overhauling, reprocessing, or replacing constituent parts or materials that have deteriorated to a substantial degree and have not been corrected through routine maintenance. This would also include unplanned maintenance that requires replacement or material alteration of the property, significant construction activity, or work that requires skilled labor to restore equipment. The terms would not include normal and routine operation and maintenance activities (including landscaping and vegetation management), preventive maintenance work, and minor repairs (such as cyclical, planned work on capital assets to keep equipment working in its existing state, i.e., preventing its failure or decline).

Application of the prevailing wage requirements to the alteration or repair of a qualified facility or energy project, after such project has been placed in service, should be limited in scope. Guidance should define "alteration or repair" consistent with the tax law rules related to "incidental repairs" and "routine maintenance." Further, guidance should clarify that work performed under service and maintenance contracts are to be considered routine maintenance and adopt a *de minimis* threshold under which any alteration or repair work on a qualified facility or energy project will not require prevailing wages to be paid if the total amount paid by the taxpayer for

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operating condition." Rev. Rul. 2001-4, 2001-1 C.B. 295, 297. On the other hand, capitalization of costs has traditionally been required where repairs are "in the nature of replacements that arrest deterioration and appreciably prolong the life of the property." Id. Treas. Reg. § 1.263(a)-3 includes detailed rules to determine whether amounts are paid to improve tangible property and addresses "routine maintenance," which is deemed not to improve a unit of property (i.e., requiring capitalization). This regulation provides, in part:

> Routine maintenance for property other than buildings is the recurring activities that a taxpayer expects to perform as a result of the taxpayer's use of the unit of property to keep the unit of property in its ordinarily efficient operating condition. Routine maintenance activities include, for example, the inspection, cleaning, and testing of the unit of property, and the replacement of damaged or worn parts of the unit of property with comparable and commercially available replacement parts. . .. Factors to be considered in determining whether maintenance is routine and whether the taxpayer's expectation is reasonable include the recurring nature of the activity, industry practice, manufacturers' recommendations, and the taxpayer's experience with similar or identical property.

Treas. Reg. § 1.263(a)-3(i)(1)(ii).

[14]

[15] 29 C.F.R. § 5.2 (j) The terms construction, prosecution, completion, or repair mean the following:
(1) All types of work done on a particular building or work at the site thereof, including work at a facility which is deemed a part of the site of the work within the meaning of (paragraph (l) of this section by laborers and mechanics employed by a construction contractor or construction subcontractor (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self–Determination Act of 1996, all work done in the construction or development of the project), including without limitation—
(i) Altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site;
(ii) Painting and decorating;
(iii) Manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or, under the United States Housing Act of 1937; the Housing Act of 1949; and the Native American Housing Assistance and Self–Determination Act of 1996 in the construction or development of the project).

such work is less than the greater of: (1) $1,000,000; or (2) 10% of the original capitalized cost of the qualified facility or energy project (as defined above).

.03 <u>Domestic Content Requirement</u>

.03(1)(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?

IRS should adopt the following requirements, which will allow a taxpayer to certify that it has complied with the domestic content requirements to be eligible for the bonus credit amount:

- A taxpayer should attach the certification statement to the return on which such credit is claimed. In making its certification, a taxpayer may rely upon: (i) language in its contracts with suppliers requiring that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was mined, produced or manufactured in the United States: or (ii) certification from its suppliers that any steel, iron, or manufactured product that is a component of a qualified facility (upon completion of construction) was mined, produced or manufactured in the U.S. Where the taxpayer, itself, was the producer or manufacturer, it shall maintain records of such production or manufacturing activity sufficient to support its certification. Upon audit by the IRS, a taxpayer shall make available for inspection the contracts, supplier certifications, and other records supporting the taxpayer's certification.
- A taxpayer must maintain records supporting the enhanced credit, including the contracts, supplier certifications, and other records supporting the taxpayer's certification that the domestic content requirement has been met, in accordance with section 6001 and Treas. Reg. § 1.6001-1(e).

0.3(2)(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?

0.3(2)(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?

0.3(2)(e) Does the treatment of subcomponents with regard to manufactured products need further clarification? If so, what should be clarified?

In determining the domestic content of a qualified facility or energy property for purposes of the domestic content bonus, consistent with FTA guidance in 49 CFR §§ 661.3 and 661.5 for construction projects, a qualified facility or energy property should be categorized in terms of an end product, components, and subcomponents.

1. Mined, Produced, or Manufactured in the United States

IRS should clarify the meaning of "mined, produced, or manufactured" in the United States." Under the IRA, the manufactured products which are components of a qualified facility upon completion of construction are deemed to have been "produced" in the U.S. if "not less than the adjusted percentage (as determined under IRC § 45(b)(9)(C)) 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*."

IRS should consider a manufactured product to have been "mined, produced, or manufactured" if the product undergoes a "manufacturing process." Consistent with FTA regulations and guidance, IRS should define the manufacturing process as "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 its components." In the case of a manufactured end product, the components should include all preassembled manufactured products delivered to the final assembly location, as well as those products partially or fully manufactured at the site. The following are examples of manufacturing processes: forming, extruding, material removal, welding, soldering, etching, plating, material deposition, pressing, permanent adhesive joining, shot blasting, brushing, grinding, layup, casting, resin application, wire drawing, annealing, swaging, twisting and stranding, integration, testing, mixing, blending, filing, lapping, finishing, vacuum impregnating, chemical synthesis, molding, compression, injection, laminating, casting, machining, pressing, and, in electrical and electronic pneumatic, or mechanical products, the collection, interconnection, and testing of various elements.[16]

As for the U.S. production requirement, under longstanding regulatory precedent, a component is of U.S. origin if it is manufactured in the U.S., regardless of the origin of its subcomponents.[17] Therefore, IRS should clarify that any individual manufactured product that is a component of a qualified facility or energy property will be deemed to have been produced in the U.S. if the manufacturing processes for the product took place in the U.S., regardless of the origin of its subcomponents.

2. Qualified Facility or Energy Property as the System that is an End Product

Eligibility for the domestic content bonus credit amount is determined at the qualified facility level for purposes of section 45;[18] the same determination is made at the energy project level for purposes of section 48.[19] The qualified facility or energy property is the structure or system that directly incorporates the constituent components at the final assembly location and is ready to provide its intended end function or use without any further manufacturing or assembly change(s).

[16] *See* Final Rule, Buy America Requirements, 56 Fed. Reg. 926, 929 (Jan. 9, 1991).
[17] See 49 CFR 661.5(d)(2).
[18] See IRC § 45(b)(9).
[19] See IRC § 45(b)(9); IRC § 48(a)(9)(ii).

As an initial matter, we recommend that IRS define both "system" and "end product" to provide general clarity as well as consistency with FTA regulations. For "system," we recommend that IRS define it to mean "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."

For "end product," we recommend defining it as "any structure, product, article, material, supply, or system, including a qualified facility or energy property, which directly incorporates constituent components at the final assembly location and is ready to provide its intended end function or use without any further manufacturing or assembly changes." FTA regulations recognize that there are several types of end products, including "manufactured end products." Further, the term "manufactured end product" refers to an "infrastructure project" that can encompass, among other things, freestanding structures such as train terminals, bus depots, and other facilities.[20] As applied to energy projects, IRS should make clear that the term "manufactured end product" also encompasses clean energy "infrastructure projects," such as a wind, solar, or energy storage system. Based on these definitions, IRS should make clear that the qualified facility or energy property is the manufactured end product.

Consistent with this approach, as discussed below, we encourage IRS to allow taxpayers to elect to apply the domestic content rules either on a property-by-property basis or on an entire project basis, per the two options below.

Option 1: Project-Level Domestic Content Test for ITC and PTC

Solely for purposes of determining the eligibility for domestic content bonus, under this option, the term "facility" should be viewed as comprising all components of the project necessary to generate electricity, up to and including such property as an inverter.

For an onshore wind facility, the components should consist of a wind-driven generator, tower, power conditioning equipment, transfer equipment, and parts related to the functioning of those items. The wind facility should not include equipment that transmits electricity derived from wind energy.[21]

The term "energy project" should mean a project consisting of one or more facilities that are operated as part of a single project. Factors indicating that multiple facilities are operated as an energy project include: (i) ownership by a single legal entity; (ii) the facilities are constructed on contiguous plots of land; (iii) the facilities are described in a common power purchase agreement or agreements; (iv) the facilities have a common intertie; and (v) the facilities share a common substation.[22]

[20] See 49 CFR § 661.3, Appendix A.
[21] See Former Reg. § 1.48-9(e)(1).
[22] See Notice 2018-59; Notice 2013-29.

Eligibility for the domestic content bonus credit amount should be determined at the energy project level.[23] The manufactured products that are components of a facility that is incorporated into the energy project should be deemed to have been produced in the U.S. if not less than the adjusted percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all manufactured products that are components of all of the facilities incorporated into the energy project are attributable to manufactured products are produced in the U.S.

Option 2: Energy project level for the ITC and at the qualified facility level for the PTC

Under this option, energy property[24] should be viewed as comprising of all components of property necessary to generate electricity up to and including property such as the inverter. Specific types of energy property should include, among other things, solar, wind, energy storage, and interconnection property.

Wind energy property should consist of a wind-driven generator, power conditioning equipment, transfer equipment, and parts related to the functioning of those items. Wind energy property should not include equipment that transmits electricity derived from wind energy.[25] Interconnection property should include property that is part of an addition, modification, or upgrade to a transmission or distribution system, which is required at or beyond the point at which the energy project interconnects to such transmission or distribution system in order to accommodate such interconnection.[26]

The term "energy project" should mean a project consisting of one or more energy properties.[27] Factors indicating that multiple energy properties are operated as an energy project should include: (i) ownership by a single legal entity; (ii) the energy properties are constructed on contiguous pieces of land; (iii) the energy properties are described in a common power agreement or agreements; (iv) the energy properties have a common intertie; and (v) the energy properties share a common substation.[28]

In addition, under this option, the qualified facility[29] should include all components of the property that are functionally interdependent. Components of property should be considered functionally interdependent if the placing in service of each of the components is dependent upon the placing in service of each of the other components in order to generate electricity.[30]

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[23] See IRC § 48(a)(12)(A).
[24] Energy property is similar to, but not the same, as a qualified facility. Under IRS Notice 2013-59, the definition of energy property includes more equipment beyond than that necessary to generate electricity, such as inverters and transformers. On the other hand, a qualified facility is limited to the direct equipment that is necessary to generate electricity.
[25] See Former Reg. § 1.48-9(e)(1).
[26] See IRC § 48(a)(8)(B).
[27] See IRC § 48(a)(9)(A)(ii).
[28] See Notice 2018-59.
[29] In Rev. Rul. 94-31, 1994-1 CB 16, IRS held that a "qualified facility" in the context of wind energy is the wind turbine together with its tower and supporting foundation pad – i.e., the property that is necessary for the production of electricity from wind energy.
[30] See Notice 2013-29; Rev. Rul. 94-31.

With respect to onshore wind energy, the components of wind qualified facility should include the tower, nacelle, blades, and pad. They should *not* include transformers, roadways, fencing, on-site power collection systems, and monitoring and meteorological equipment.

3. Manufactured Product as a Component of a Qualified Facility & Subcomponents

As noted above, the IRA provides specific provisions for "manufactured products" that are "components of a qualified facility." To clarify these provisions, IRS should adopt a definition for a "manufactured product" as "an item produced as a result of the manufacturing process, including a component of a qualified facility or energy property." For components, IRS should define a "component" as including any article, material or supply that is directly incorporated into the qualified facility or energy property. To distinguish a subcomponent from a component, IRS should also define a "subcomponent" to be any article, material, or supply, whether manufactured or unmanufactured, that is a "lower-level" item (i.e., one step removed) from a component in the manufacturing process and that is incorporated directly into a component.

Along with the definitions above, the IRS should also provide explicit clarity on which products are components, and which are subcomponents, for all covered technologies. With respect to a wind turbine that is a qualified facility and a manufactured end product, the components, such as the tower, nacelle, foundation, and blades, should be considered manufactured products directly incorporated into the manufactured end product (i.e., the facility) because they are all delivered to the site of construction and undergo the manufacturing process to create a manufactured end product (i.e., the wind turbine or set of wind turbines that are capable of generating electricity delivered through a circuit to the facility's point of interconnection to the grid). For example, any subcomponents of these components, such as the gearbox, rotor shaft, drive train, and generator that are subcomponents of a nacelle, should be able to be procured from a non-domestic supplier without impacting the categorization of the nacelle at the component level.

Finally, IRS should clarify that manufactured products that are components of a qualified facility should be *only* those that are directly incorporated into the qualified facility, as defined by the system that produces energy (or which absorbs, stores, and delivers energy, in the case of energy storage), or energy property. Other items should not be treated as part of the manufactured end product.

4. Steel and Iron Product as a Component of a Qualified Facility

IRS should use FTA precedent as a guideline for applying the steel and iron requirements. Accordingly, IRS should clarify that the steel or iron requirements are limited to "construction materials made primarily of steel or iron" that have a structural, load-bearing, or support function, such as "structural steel or iron, steel or iron beams and columns." These requirements also should not apply to steel or iron used as components or subcomponents of manufactured products. IRS should also make clear, under FTA precedent, that components of manufactured

products that are made of steel and iron should be deemed manufactured component products even when the components have a secondary structural or load bearing function. [31]

For example, wind towers (including flanges) should be considered manufactured products and not steel and iron products. Wind towers are a critical part of the wind turbine system; they house critical electrical components of the turbine and elements designed to enhance worker safety (i.e., ladders). In addition, the height of the tower is crucial to achieving hub heights needed for generating increased electricity. While wind towers lend to the structural integrity of the wind turbine, that function is merely secondary to the more important functions they provide, on which a wind turbine system is interdependent. Said another way, because wind towers are components of a manufactured product (the wind turbine system), towers should not be subject to the steel and iron requirements.[32]

.03(2)(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"?

The manufactured products that are components of a facility that is incorporated into the qualified facility or energy project should be deemed to have been produced in the United States if not less than the adjusted percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all manufactured products that are components of all of the facilities incorporated into the energy project are attributable to manufactured products that are produced in the U.S. Consistent with the IRA, in determining whether the applicable adjusted percentage has been satisfied for a qualified facility or energy property, IRS should divide the total cost of the manufactured products that are components of the qualified facility or energy property and that are mined, produced, or manufactured in the U.S. by the total costs of all of the manufactured products that are components of the qualified facility or energy property. Consistent with the discussion above, we encourage IRS to allow taxpayers to elect to apply the domestic content rules either on a property-by-property basis or on an entire project basis and, therefore, provide the following options for applying the manufactured product test.

Option 1: Project-Level Test for ITC and PTC

Under this option, eligibility for the domestic content bonus credit amount would be determined at the project level. The manufactured products that are components of each energy property incorporated into the energy project should be deemed to have been produced in the U.S. if not less than the adjusted percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all manufactured products that are components incorporated into the energy project are attributable to manufactured products that are produced in the U.S.

[31] *See* 49 CFR 661.5(c) ("[Domestic steel and iron] requirements do not apply to steel or iron used as components or sub components of other manufactured products."); *see also* FTA Guidance Letter, Applicability of FTA's Buy America Rules to a Traffic Signal System (June 8, 2011) (traffic signal system's mast base, which was "constructed to support the [traffic light's] mast arm," is treated as a manufactured component product of the larger traffic signal system end product, despite its secondary load-bearing function).
[32] See 49 CFR § 661.5(c).

To illustrate this option, a taxpayer intends to claim the ITC in connection with an energy project consisting of: (1) a solar energy property (i.e., solar arrays and supporting equipment); and (2) interconnection energy property (i.e., a transformer). Both the solar energy property and the interconnection energy property would be eligible for the domestic content bonus credit amount if: (A) not less than the adjusted percentage (e.g., 40%) of the costs of the manufactured product components of both the solar energy property and interconnection property are attributable to manufactured products that were produced in the U.S.; and (B) the steel and iron construction materials that are not part of a manufactured product and that are incorporated into the solar energy property and interconnection property conform with the requirements of 49 CFR § 661.5.

In the way of another example, a taxpayer intends to claim the PTC in connection with an energy project consisting of twenty wind turbines (each of which is a qualified facility), cables, and a transformer. The energy project would be eligible for the domestic content bonus credit amount if: (A) not less than the adjusted percentage (e.g., 40%) of the costs of the manufactured product components of all twenty wind turbines, cables, and transformer are attributable to manufactured products that were produced in the United States; and (B) any steel and iron construction materials that are not part of a manufactured product and that are incorporated therein conform with the requirements of 49 CFR § 661.5.

Option 2: Energy project level for the ITC and at the qualified facility level for the PTC

Under this option, eligibility for the domestic content bonus credit amount would be determined at the energy project level.[33] The manufactured products that are components of each energy property incorporated into the energy project should be deemed to have been produced in the U.S. if not less than the adjusted percentage (as determined pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all manufactured products that are components of all of the *energy properties and facility* incorporated into the energy project are attributable to manufactured products that are produced in the U.S.

For example, an energy project incorporates two energy properties: (1) solar energy property (e.g., solar arrays and supporting equipment); and (2) interconnection energy property (e.g., a transformer). Both the solar energy property and the interconnection energy property should be eligible for the domestic content bonus credit amount if: (A) not less than the adjusted percentage (e.g., 40%) of the costs the manufactured product components of both the solar energy property and interconnection property are attributable to manufactured products that were produced in the U.S.; and (B) the steel and iron construction materials that are not part of a manufactured product and that are incorporated into the energy property and interconnection property conform with the requirements of 49 CFR § 661.5.

With respect to a qualified facility, under this option, eligibility for the domestic content bonus credit amount should be determined at the qualified facility level.[34] The manufactured products that are components of a qualified facility upon completion of construction would be deemed to have been produced in the United States if not less than the adjusted percentage (as determined

[33] See IRC § 48(a)(12)(A).
[34] See IRC § 45(b)(9).

pursuant to IRC § 45(b)(9)(C)) of the total costs (including subcomponent costs) of all such manufactured products are attributable to manufactured products are produced in the U.S. For example, a wind qualified facility should be eligible for the domestic content credit amount if (A) not less than the adjusted percentage (e.g., 40%) of the costs the manufactured product components of the facility (e.g., tower, nacelle, and blades) are attributable to manufactured products produced in the United States; and (B) the steel and iron construction materials that are not part of a manufactured product and that are incorporated into the facility conform with the requirements of 49 CFR § 661.5.

1. Origin of Components

In determining the origin of components and associated costs, each component of a qualified facility or energy property should be treated as domestic if the component is mined, produced, or manufactured in the U.S. If a component is determined to be of domestic origin, its entire cost should be used in calculating the cost of domestic content of the qualified end product. For a component mined, produced, or manufactured in the U.S., the individual costs of subcomponents, even if of foreign origin, should be included in the cost of a component and the entire component is considered domestic.

2. Items Not Included in Total Cost Calculations

Total cost calculations should not include property, items, or materials that are not incorporated into the qualified facility (i.e., the facility that produces energy) or energy property.

3. Labor, Transportation, and Installation Costs

Certain labor, transportation, and installation costs of manufacturing a component should be included in the total cost calculation.[35] This includes assembly of a component and similar costs incurred at the project site for the actual manufacturing of the component (e.g., contractor and subcontractor labor costs for manufacturing a component from subcomponents). The costs of transporting manufactured components to the project site and installation thereof into the qualified facility should also be included in the total cost allocation for components.

.03(5) Please provide comments on any other topics relating to the domestic content requirements that may require guidance.

i. Repowered Facilities

IRS should provide that the domestic content requirements apply only with respect to "new" property incorporated into the qualified facility and should not apply to any used property from

[35] FTA does not define cost of components. FAR regulations at 48 CFR 25.003 define cost of components as:
(1) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
(2) For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

an existing facility. A qualified facility can be repowered (including partial repowers) even if energy production is not increased, as long as the 80/20 rule is satisfied (i.e., the fair market value of the used property is not more than 20% of the facility's total value). The costs of manufactured components thus should not include any costs associated with the used property but should include only the costs of the newly acquired manufactured components that are incorporated into a qualified facility. Otherwise, this would inadvertently discourage the use of repowered sites.

ii. Exceptions for Nonavailability

Sections 45(b)(10)(D) and 45Y(g)(12)(D) provide an exception, on a case-by-case or general basis, for the requirements contained in sections 45(b)(9)(B) and 45Y(g)(10)(B) (respectively) if relevant steel, iron, or manufactured products are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality (nonavailability exception). Under the text of the IRA, these waivers are explicitly available to qualified facilities or energy property that are eligible to (and do elect) direct pay under section 6417. In addition, the IRA provides, in section 45(b)(9)(B)(ii), that "[i]n the case of steel or iron, clause (i) shall be applied in a manner consistent with section 661.5 of title 49, Code of Federal Regulations." 49 CFR 661.5(a), in turn, provides that "[e]xcept as provided in Section 661.7…all iron, steel, and manufactured products used in the project are produced in the US." 49 CFR 661.7 also provides for various waivers based on public interest, non-availability, and price differential. Therefore, we encourage IRS to consider adopting limited waivers to ensure the incentive remains effective at attaining its goal of promoting use of domestic material. If the credit is determined to apply only to projects that meet 100 percent domestic content requirements, yet a subset of critical components remain infeasible to produce in the U.S. due to insufficient domestic amounts, the provision could be rendered entirely ineffective, contrary to congressional intent.

IRS should grant nonavailability waivers for all projects that meet waiver requirements, even if they do not qualify for direct pay. Specifically, consistent with 49 CFR § 661.7(c), nonavailability exemptions should be issued, on a case-by-case or general basis, when it can be demonstrated by a taxpayer that a domestic material is not produced in the U.S. in sufficient and reasonably available quantities and of a satisfactory quality; however, such waivers should be limited to products that cost no more than 30% of the total costs of a project.

If a manufactured product is given a waiver, the costs of any such product will be subtracted from consideration of the total cost of all of the manufactured products that are components (including steel and iron products) of the qualified facility or energy property for purposes of determining whether the adjusted percentage has been met.

.04 <u>Energy Community Requirement</u>

.04(1). Section 45(b)(11)(A) provides an increased credit amount for a qualified facility located in an energy community. What further clarifications are needed regarding the term "located in" for this purpose, including any relevant timing considerations for determining whether a qualified facility is located in an energy community? Should a rule similar to the rule in § 1397C(f) (Enterprise Zones rule regarding the treatment of

businesses straddling census tract lines), the rules in 26 C.F.R. §§ 1.1400Z2(d)-1 and 1.1400Z2(d)-2, or other frameworks apply in making this determination?

Offshore wind projects will have direct, economic benefits for energy communities (ECs) but, because most projects will be in federal waters (on the Outer Continental Shelf), none of the generation facilities of these projects will be located in any of the three relevant categories for an EC. Nevertheless, consistent with the intent of the EC provision, offshore wind has the potential to benefit these intended energy communities by generating a large amount of economic activity in them. In order to ensure offshore wind activities are similarly incentivized to "locate in" such communities, offshore wind facilities should be eligible for this bonus credit if: (1) the land its interconnection facility is located in is an EC; and (2) a port facility substantially used for staging and crewing for the project is located in an EC.

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Thank you for allowing the opportunity to provide comments. We look forward to working with the Department of the Treasury as it considers the most effective and efficient ways to implement the provisions included in the Inflation Reduction Act.