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

RE: "Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements," Notice 2022-51 (Oct. 5, 2022)

.03 Domestic Content Requirement

Sunnova Energy International, Inc. is a national provider of solar energy as a service. Founded in 2012, Sunnova services more than 250,000 customers across 40 States and U.S. territories (including Guam, Saipan, and Puerto Rico). While Sunnova's primary business over the last decade has been residential rooftop solar and energy storage, the company has recently expanded into other markets, including commercial solar[1] and development of solar-plus-storage microgrids.[2]

Sunnova appreciates the opportunity to provide these comments on the Internal Revenue Service's ("IRS") "Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements," Notice 2022-51 (Oct. 5, 2022). Sunnova is a member of the Solar Energy Industries Association ("SEIA"), which has also submitted comments in response to Treasury's Notice 2022-51. Sunnova largely joins in those comments. However, Sunnova submits here its own, supplemental comments on Section .03.

<u>Introduction</u>

The Inflation Reduction Act was not the first piece of legislation to deal with American manufacturing requirements. A series of acts known as the "Buy America" laws required the Federal Transit Administration to procure transportation facilities comprised of American-made components. Over the course of several decades, the FTA adopted regulations and issued guidance letters that clarified the domestic content requirements for the agency's procurement contractors. These regulations identified a set of clearly defined "manufactured end products," required that the "components" of those end products be domestically sourced (without regard to those components' subcomponents), and fixed the components of an end product so that regardless of the scope of work on the end product, the made-in-America requirements would not

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[1] https://investors.sunnova.com/news-events-and-presentations/news-details/2022/Sunnova-Expands-Energy-as-a-Service-Offerings-to-Commercial-Businesses/default.aspx.

[2] https://investors.sunnova.com/news-events-and-presentations/news-details/2022/Sunnova-Submits-Application-to-Develop-First-of-its-Kind-Solar-Micro-Utility-in-California/default.aspx.

“shift” from project to project. This is the same approach we recommend Treasury take to implement the domestic content bonus credit provision of the IRA.

Not coincidentally, the IRA itself points to FTA’s Buy America regulations for guidance in how the domestic content bonus can be achieved. Treasury should take full advantage of this reference, study the body of administrative guidance adopted by the FTA, and adopt analogous regulations in implementing the IRA. These regulations should set forth a three-part framework, like those found in the Buy America regulations (*i.e.*, end product, component, and subcomponent); equate “end product” with the “qualifying facilities” set forth in 26 USC § 45 and with the “energy properties” set forth in 26 USC § 48; require only that the components of a manufactured end product be U.S.-sourced to meet the domestic bonus requirements (without regard to their subcomponents); and fix the definitions of components without regard to the scope of a project, so as to avoid the “shifting problem” identified by the FTA. This approach is faithful to the statute’s text, fulfils its purpose of stimulating domestic green energy manufacturing, and provides predictability for taxpayers looking to take advantage of the IRA’s tax credits.

<u>Background</u>

Section 661.5 is an FTA regulation promulgated pursuant to “Buy America” provisions of the Surface Transportation Assistance Act of 1982, the Surface Transportation and Uniform Relocation Assistance Act of 1987, and the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005 (SAFETEA-LU), currently codified at 49 USC § 5323(j).

The problem with § 661.5, as written, is that is has two principles — (i) every manufactured product used on a project must be manufactured in the United States using components that themselves were manufactured in the United States and (ii) subcomponents of a manufactured product can be foreign-sourced — that come into conflict when a subcomponent of a manufactured product is *itself* a manufactured product.

So FTA (at the instruction of Congress in SAFETEA-LU) developed a helpful rubric to simplify things. It defined an “end product” and identified several examples of “manufactured end products.” 49 CFR § 661.3, App’x A. This allowed it to place materials into one of three categories: (i) manufactured end products, (ii) components of those manufactured end products, and (iii) subcomponents of the components. Only the first two categories of materials (manufactured end products and their components) had to be U.S.-sourced. Subcomponents could be disregarded, even if they were themselves “manufactured products.”

In addition to eliminating the interpretive conflict discussed above, this three-tiered paradigm had the added benefit of avoiding a “shifting problem” that FTA contractors had been dealing with. Without a prescribed list of “end products,” the end product of any given project would “shift” depending on the scope of the project, in which case the same component might need to be US-manufactured on one project but not on another. For example, if the FTA were constructing a new bus terminal, an elevator system for that terminal would be a component of the final project, in which case only the elevator itself would need to be domestically manufactured, without regard to the origin of the elevator’s own components. But if the bus terminal were existing, and the FTA were simply retrofitting the terminal with a new elevator system, then the installation of the elevator system would itself be the end product. This would

require all of the elevator's components to be domestically manufactured. In short, the contractor would need an entirely different supply chain for the elevator systems on these two projects.

However, once a terminal was identified as a manufactured end product, the status of the elevator system as a component of that project became fixed, giving certainty to contractors as to how to source the system, regardless of the scope of the given project. This provided consistency without sacrificing the "Buy America" edict from Congress; as the FTA made clear, "suppliers would still be required to manufacture replacement components in the United States, thereby preserving a domestic manufacturing base while at the same time recognizing the global marketplace with regard to the procurement of subcomponents." 72 Fed. Reg. 53688-03.

The FTA's three-tiered approach was illustrated in several Decision Letters that it published for contractor guidance. Below is a representative sampling.

- 1/8/15 Decision Letter. At the request of an elevator installer seeking guidance on whether it could use non-structural steel subcomponents that were obtained from foreign suppliers, the FTA determined that: it was required to "distinguish[] between the manufactured end product, its components, and subcomponents"; the elevator was a component of the manufactured end product building; and the elevator's subcomponents need not be manufactured in the U.S.[3]

- 2/9/15 Decision Letter. On a project for construction of a new transportation terminal, a supplier obtained raw polycarbonate panels from abroad; manufactured them into a new material domestically (by cutting, notching, heat treating, sealing, polishing, and framing); and installed the finished polycarbonate panel in translucent wall of terminal. FTA held that the terminal was a manufactured end product, the finished polycarbonate panels were components of the end product, those panels were manufactured domestically, and therefore, the installation complied with Buy America provisions, even though the raw materials for the panels were obtained from a foreign source.[4]

- 1/23/15 Decision Letter. Where a manufacturer modified raw fiberglass panels into finished fiberglass pieces as part of an end-product mobile fiberglass stairway, FTA held that modified fiberglass components were manufactured in the U.S., and therefore the raw fiberglass subcomponent could be imported from China.[5]

- 8/24/15 Decision Letter. Where a contractor was installing a fire suppression system in a subway station, the FTA held that the system was a manufactured end product under 49 CFR § 661.3 (given that it was an integrated system that performed its function

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[3] https://www.transit.dot.gov/regulations-and-guidance/buy-america/kone-elevators-january-08-2015#note7.

[4] https://www.transit.dot.gov/regulations-and-guidance/buy-america/santa-cruz-metro-february-09-2015.

[5] https://www.transit.dot.gov/regulations-and-guidance/buy-america/delta-composites-llc-january-23-2015.

independent of the larger facility) and that the end product and its components, but not subcomponents, needed to be domestically sourced.[6]

Treasury Regulations

Treasury should build off the lessons FTA has learned in issuing regulations for the Buy America laws and adopt the same three-tiered framework with clearly defined end products. Identifying representative end products would not be a difficult task; Treasury could simply point to the facilities identified as "qualified facilities" under 26 USC § 45 and "energy properties" under 26 USC § 48.[7] This would give predictability to taxpayers investing in renewable energy facilities. If taxpayers know what their end product is, they will know what the components of those end products are, and they can source them accordingly. And once a taxpayer knows what components it needs to satisfy the domestic content bonus, it can offer more accurate pricing to its consumers and give more certainty to its tax equity investors.

Fixing end products would also avoid the "shifting problem" for green energy projects. It should not be the case that a taxpayer installing PV systems has to have a different set of suppliers when it (i) installs a new solar + storage system, (ii) retrofits an existing system with a new battery, and (iii) replaces a set of damaged PV panels on an existing system. ***The manufactured end product for all of those projects should be the solar power plant, whose components include PV panels, an inverter, cabling, battery storage, etc.*** Those components, for purposes of the IRA's domestic content bonus, should stay fixed across all projects, regardless of the scope. This will allow taxpayers to rely on a stable set of domestic material suppliers across their projects.

In sum, the FTA's regulatory guidance gave stakeholders simplicity, predictability, and stability. Treasury's regulations on the domestic content bonus should do the same. By adopting the FTA's three-tiered paradigm with clearly identified end-products, Treasury will be affording taxpayers certainty for purposes of settling on their supply chains, offering pricing to their customers, and negotiating with their tax equity investors — all while staying faithful to the IRA's policy aims of stimulating domestic manufacturing of clean energy components.

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[6] https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/regulations-and-guidance/buy-america/69391/fta-letter-mta-re-securiplex-fire-suppression-system-2015-08-24.pdf.

[7] In some instances, the list of end products will not be perfectly coterminous with the list of "energy properties" identified in 26 USC § 48. For instance, "energy storage technology" and "microgrid controller" are newly added examples of "energy properties" under Section 48(a)(3), but those properties can themselves be components of another property. So for instance, a rooftop PV system may be combined with both a battery and a load controller to maximize the output of the rooftop powerplant. Those properties should therefore be identified in Treasury regulations as components of a PV solar system end product (Section 48(a)(3)(1)).

Respectfully submitted,

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