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December 3, 2022

Holly Porter
Associate Chief Counsel (Passthroughs & Special Industries)
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

Via Email

Re: Comments on Notice 2022-58

Dear Ms. Porter:

Enclosed please find comments on Notice 2022-58 concerning the clean fuel production credit (CFPC) under new Section 45Z of the Internal Revenue Code (Code), as added by Section 13704 of Public Law 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA). Louis Dreyfus Company LLC (LDC) and Eversheds Sutherland (US) LLP would welcome the opportunity to discuss these comments with you or your staff. If you have any questions or comments, please feel free to contact Randy Buchanan at (202) 383-0227 or RandyBuchanan@eversheds-sutherland.us; Jason Dexter at (202) 383-0334 or JasonDexter@eversheds-sutherland.us; or Xenia Garofalo at (202) 383-0349 at XeniaGarofalo@eversheds-sutherland.us. We will be glad to assist in any way.

Sincerely,

Eversheds Sutherland (US) LLP on behalf of Louis Dreyfus Company LLC

cc: Hon. Lily Batchelder, Assistant Secretary (Tax Policy), Department of the Treasury
Thomas C. West, Jr., Deputy Assistant Secretary (Tax Policy), Department of the Treasury
Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
Brett York, Deputy Tax Legislative Counsel, Department of the Treasury
Jennifer Bernardini, Attorney-Advisor, Department of the Treasury
Hon. Douglas O'Donnell, Acting Commissioner, Internal Revenue Service
Hon. William M. Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel (Technical), Internal Revenue Service
Christopher T. Kelley, Special Counsel, Associate Chief Counsel (Passthroughs & Special Industries), Internal Revenue Service

Eversheds Sutherland (US) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.

Re: Requests for Comments on Implementation Guidance for the Inflation Reduction Act

(IRS Notice No. 2022–58)

LDC, founded in 1851, is a leading merchant and processor of agricultural goods. Our activities across a diversified range of business lines span the entire value chain, from origination to distribution, helping to feed and clothe up to 500 million people every year. Our strong values, rich heritage, and clear vision for a safe and sustainable future guide us in our work to contribute to the global effort of providing sustenance for a growing population. We are continually reducing CO_2 emissions by introducing innovative processes, leveraging new technology and opting for renewable energy sources.

As we continue to fulfill our key role to help feed and clothe a growing global population, minimizing our environmental impact is vital to our long-term success by helping to ensure sustainable agricultural production, conserve natural resources and contain the effects of global warming and climate change. To do so, we continually monitor our operations to identify and act on improvement areas, aiming to reduce greenhouse gas (GHG) emissions, water usage, electricity and energy consumption, and solid waste sent to landfill.

Timely Provision of Guidance in Advance of January 1, 2025.

LDC is evaluating capital expenditures and investments while simultaneously considering the CFPC benefits available. Further guidance from Treasury and the IRS is crucial to these decisions. Timely guidance is essential in order to outfit and re-equip facilities to begin production by January 1, 2025, and take advantage of the CFPC before December 31, 2027. The short qualification interval for the CFPC remains an outstanding critical issue while we consider our investment options.

The availability and value of the CFPC under Section 45Z depends on the carbon intensity of the production process. Although the statute specifies use of the GREET model for non-aviation fuels, use of the model will require a number of assumptions. Therefore, until Treasury and the IRS issue guidance on the emission rates for different fuel pathways, any calculation of those values and, by extension, the potential for Section 45Z credits, will depend on individual interpretations of the statue and assumptions for use of the GREET model. Although the statute requires that guidance be issued no later than January 1, 2025, the provision applies only for fuel produced and sold between 2025 and 2027. Carrying out technology and process improvements to lower the carbon intensity at a plant can take many months or even years. For this reason, fuel producers need to begin investing in these improvements now to avoid missing the eligibility window for Section 45Z credits. However, different technologies in different combinations can have different impacts on carbon intensity. Without certainty on the methodology for calculating the emissions rates for the production of a particular fuel, business decisions are unable to be made and hundreds of millions of dollars of capital investment in clean fuel production in the United States will be sidelined or diverted. To ensure the success of the IRA's incentive for clean fuel production under Section 45Z and allow producers to make investments in GHG reduction in a timely manner, we request that, in accordance with Section 45Z(b)(1)(D), individual producers be permitted to file currently a petition with Treasury and the IRS for determination of a provisional emissions rate for fuel pathways.

Guidance Regarding Individual Fuel Pathways in Determining Emissions Rate Values.

Additional guidance is needed with respect to the application of the GREET model, which requires that a number of assumptions be made. LDC would like clarification regarding how Treasury and the IRS will monitor the application of the model to feedstock in varying circumstances. For example, if each feedstock starts with an assumed score based on Argonne GREET (e.g., ethanol 52), how will each individual facility or operator claim Section 45Z credits for environmentally friendly capital expenditure invested to lower carbon impact? Another point for clarification is whether all combined heat and power additions will be considered to have the same environmental impact or if instead each facility will be considered to have its own specific pathway. LDC also would like clarification on how Treasury and the IRS will monitor whether a facility is using the environmentally friendly technologies for which a taxpayer is receiving Section 45Z credits.

In addition, guidance is needed addressing carbon intensity (CI) scores of renewable fuels, as applied to transportation fuel produced at qualified facilities (as defined in Section 45Z(d)(4)). It is our view that such CI scores should be calculated taking into account (i) predominant emission producing activity (e.g., steelmaking versus agriculture) at such qualified facility and (ii) bespoke benchmarks for each category of feedstock renewable fuel (e.g., score of renewable diesel produced from distillers corn oil versus soybean oil). We believe special standards should apply to determine the CI scores of non-virgin vegetable oil feedstocks since such feedstocks are not waste products (e.g., feedstock used in livestock rations). The CI score for such feedstock should take into account upstream factors, such as whether harvesting such feedstock from livestock rations required the use of a replacement fat that may produce notable levels of GHG.

Section 45Z(b)(1)(B)(i) calls for Treasury and the IRS to publish a table of emissions rates for each applicable fuel. Presumably, this will result in a single value for each combination of fuel type and feedstock rather than plant-specific values for each facility. In other words, all facilities using the same feedstock and conversion process will be considered to have the same emissions factor under the emissions rates table. This is different from leading Low Carbon Fuel Standard (LCFS) programs in which each facility obtains a custom pathway for each feedstock, and it effectively eliminates incentives for individual facilities to invest in carbon intensity reductions or to optimize feedstock and markets based on geography. The emissions rate measurement process should include the ability to measure and certify new technologies to encourage innovation. Although we appreciate the certainty and administrability that comes with an emissions rate table, given the variability of emissions rates that are unique to individual plants, we request that Treasury and the IRS provide flexibility for producers to calculate their actual carbon intensity as verified by an unrelated third party, as an alternative to using the annual table. Allowing the emissions rate of a plant to reflect individual infrastructure improvements as they are made would align with the Administration's goal of maximizing GHG reduction in connection with fuel production in the United States.

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Clarification on the Coordinating Rules with Section 45Q and Qualification for Section 45Z Credits.

Although the statute states that a qualified facility under Section 45Z cannot include one for which the Section 45Q credit is allowed for the tax year, this should be construed narrowly in order to maximize the GHG reduction purposes of these credits. For example, carbon capture equipment may be owned by a taxpayer other than the taxpayer that owns the biofuel production facility at which the carbon capture equipment is placed in service. We request that Treasury and the IRS issue guidance clarifying that the owner of the carbon capture equipment may be eligible to claim Section 45Q credits without preventing the taxpayer owning the biofuel production facility from claiming Section 45Z credits. In addition, we request that Treasury and the IRS clarify that for other credits not specifically identified in Section 45Z (e.g., the Investment Tax Credit under Section 48), such credits may be "stacked" to the extent otherwise permitted without jeopardizing the Section 45Z credits so that taxpayers can work to develop creative solutions and partnerships that meet the requirements of multiple credits and accelerate the Administration's GHG reduction goals.

Timely Guidance Regarding the Prevailing Wage and Apprenticeship Requirements.

Timely guidance regarding the prevailing wage and apprenticeship requirements is influential in our investment decisions. Satisfying the prevailing wage and apprenticeship requirements is crucial to full realization of the CFPC (failing to meet the standards results in an 80% decrease of the available tax credit for both transportation fuel and sustainable aviation fuel) and further clarity is needed regarding their implementation. Although Treasury and the IRS published Notice 2022-61 on November 30, 2022, providing some helpful clarity on the prevailing wage and apprenticeship requirements in terms of the standards expected to be used to substantiate whether such requirements have been met, the Notice primarily reiterates standards that have already been provided in the statutory language and prior administrative guidance. Thus, the application of the prevailing wage and apprenticeship requirements is still not entirely clear, particularly given the reliance necessary on wage rate information not yet available for several jurisdictions and job types. The Louis Dreyfus Company Group, which has more than 22,000 employees worldwide, has historically posted opportunities for employment that have remain unfilled. In order to ensure compliance with the prevailing wage requirements, information regarding pay rates and worker classification for the common job types for a facility in the counties where potential qualified facilities are located should be provided quickly so that there is no miscommunication to our potential employees about duties and remuneration. In particular, a wage determination should be provided if a taxpayer timely submits a request to the Secretary of Labor for prevailing wage requirements for a specific job type in a specific county in advance of the implementation of the prevailing wage rate requirement. Similarly, if LDC were unable to retain qualified apprentices, further information than is provided in the recently released Notice 2022-61 regarding the procedure and documentation necessary to satisfy the apprenticeship "good faith" exception is needed, particularly in regard to availability and remittance of such materials. Notice 2022-61 currently provides that the good faith exception will apply "if the taxpayer requests qualified apprentices from a registered apprenticeship program in accordance with usual and customary business

practices for registered apprenticeship programs in a particular industry."[1] Notably, it is not clear how LDC or other taxpayers are expected to apply the standard of "usual and customary business practices for registered apprenticeship programs in a particular industry" without Treasury and the IRS providing more clarity on how to substantiate the standard has been met.

Enhanced Scrutiny Should Apply to the CFPC Eligibility of Used Cooking Oil (UCO) Sellers, Particularly With Respect to Imported Products.

It is our view that UCO sellers should be ISCC-certified or otherwise substantiate the source of UCO to the ultimate origin. This is of key import to mitigate the risk of inefficiently utilized UCO being sold and such sellers benefiting disproportionately from the CFPC. Treasury and the IRS should consider whether additional reporting requirements should apply to UCO sellers in this regard.

Clear Guidance is Needed Relating to the Metrics That will be Used to Evaluate a Qualified Facility's CFPC Eligibility, Including Guidance on the Applicable Production Reporting Requirements to Substantiate CFPC Eligibility.

LDC would like clear guidance detailing the reporting requirements Treasury and the IRS expect to implement to substantiate a taxpayer's CFPC eligibility in respect of a qualified facility's clean fuel production. In addition, LDC would like Treasury and the IRS to provide insight into the expected audit procedures, including information relating to the frequency, timing and how extensive such audit procedures will be. Further, LDC would like information on how quickly Treasury and the IRS anticipate infrastructure improvements will affect a CI score.

As experts in the industry, we understand both the upstream farming variables and the downstream marketplace effects for our products. We welcome the opportunity to discuss this comment letter in further detail in light of our deep knowledge of the global agricultural industry.

Very truly yours,

Louis Dreyfus Company LLC

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[1] Notice 2022-61, Section 4.01.