Comment from American Council on Renewable Energy

Dear Office of Associate Chief Counsel:

The American Council on Renewable Energy (“ACORE”) respectfully submits these comments in response to the U.S. Department of the Treasury and Internal Revenue Service request for public comment on implementing key provisions of the Inflation Reduction Act of 2022. ACORE is a 501(c)(3) national nonprofit organization that works to unite finance, policy and technology to lead the transition to a renewable energy economy.

ACORE welcomes the opportunity to provide feedback on four of the six notices requesting comment: Notice 2022-49 (Energy Generation Incentives); Notice 2022-51 (Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements); Notice 2022-47 (Energy Security Tax Credits for Manufacturing); and Notice 2022-50 (Elective Payment of Applicable Credits and Transfer of Certain Credits). The breadth and depth of our membership’s interests and priorities are reflected in the attached comments.

Sincerely,
Allison Nyholm
VP of Policy
American Council on Renewable Energy

November 4, 2022

Via Electronic Submission

Office of Associate Chief Counsel
(Passthroughs & Special Industries)
Internal Revenue Service
1111 Constitution Ave, NW
Washington, DC 20224

Re: Comments pertaining to Notices 2022-49; 2022-51; 2022-47; and 2022-50

Dear Office of Associate Chief Counsel:

The American Council on Renewable Energy ("ACORE") respectfully submits these comments in response to the U.S. Department of the Treasury ("Treasury") and Internal Revenue Service ("IRS") request for public comment on implementing key provisions of the Inflation Reduction Act of 2022 ("IRA"). ACORE is a 501(c)(3) national nonprofit organization that works to unite finance, policy and technology to lead the transition to a renewable energy economy.

Treasury has a pivotal role in the advancement of clean energy production and deployment toward the advancement of the Administration's climate goals. ACORE supports Treasury's efforts to solicit robust and broad public engagement on critical clean energy tax incentives in the IRA. Prompt completion of implementation guidance fleshing out key program details is the critical first step to maximizing the impact of the IRA and achieving U.S. greenhouse gas emissions reductions. Our member companies, which include clean energy investors, developers, manufacturers, utilities, and corporate buyers, are awaiting clarity to assess how best to structure transactions and utilize incentives under the new law. As Greg Wetstone, ACORE President & CEO previously stated, "We think there is a great deal of capital ready to flow into the renewable sector, but players on all sides of the transactions want to be rock solid on the benefits that they would be receiving."

ACORE welcomes the opportunity to provide feedback on four of the six notices requesting comment: Notice 2022-49 (Energy Generation Incentives); Notice 2022-51 (Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements); Notice 2022-47 (Energy Security Tax Credits for Manufacturing); and Notice 2022-50 (Elective Payment of Applicable Credits and Transfer of Certain Credits). The breadth and depth of our membership's interests and priorities are reflected in the comments that follow.

Request for Comments on Certain Energy Generation Incentives (Notice 2022-49)

Beginning of Construction and Continuity:

The Inflation Reduction Act[1] in part provides: (1) historic extensions and expansions of existing tax credits, (2) new, important bonus credits and credit qualifications, (3) and credits for investment in new low-carbon emission technologies. Many of the changes in the IRA have phased-in effective dates, and a project's beginning construction date will significantly impact the taxpayer's credit value and requirements.[2] Because of its importance, ACORE recommends that Treasury issue guidance confirming that the Physical Work Test and the Five Percent Safe Harbor definitions from prior guidance be applied consistently to any start of construction requirements stipulated under the IRA.[3] Certainty around the beginning of construction concepts will help the industry develop and deploy maximum clean energy technologies and help the Administration meet its carbon emissions goals; while any uncertainty regarding the ability to claim credits will hamper deployment.

To maximize certainty, ACORE recommends that Treasury extend the six-year continuity safe harbor for projects that began construction before January 1, 2022.[4] ACORE similarly urges Treasury to extend the five-year continuity safe harbor for projects that commence construction on or after January 1, 2022.

Additionally, for the same reasons, ACORE recommends the retention of (1) the 10-year Continuity Safe Harbor for offshore wind and Federal lands projects[5] (2) the rules tolling the continuity requirement for projects that present national security concerns[6] and (3) allowing taxpayers not satisfying the safe harbor to demonstrate either the continuous construction test or the continuous efforts test, regardless of the method used to begin construction.[7]

Last, the ACORE recommends that the taxpayer have the option to treat co-location of batteries plus solar or wind as separate or single project facilities for purposes of beginning construction.

Facilities Placed in Service in Connection with Low-Income Communities

ACORE seeks further clarity around the programs established by §§ 48(e) and 48E(h), particularly around the process for taxpayers seeking an allocation of the environmental justice capacity limitation. If the program is to provide benefit to projects beginning January 1, 2023, members have expressed the need for near-term certainty on how applications will be solicited, reviewed, and allocated in an expedient and transparent manner. To help ensure that preference be given to projects that demonstrate tangible and long-term community benefits, ACORE recommends that projects be required to demonstrate commercial certainty via executed site control documents and offtake or power purchase agreements. Further, ACORE asks that prioritization be given to projects based on the commercial operation date

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[1] P.L. 117-169, August 16, 2022, A bill to provide for reconciliation pursuant to title II of S. Con. Res. 14.
[2] Some examples of important phase-in dates include whether the prevailing wage and apprenticeship provisions apply, domestic content phase-ins, and whether the taxpayer will receive the existing credits or the new technology-neutral credits that begin in 2025.
[3] See Notices 2013-29, 2013-60, 2014-46, 2015-25, 2016-31, 2017-4, and 2018-59.
[4] See Notice 2021-41.
[5] See Notice 2021-41.
[6] See Notice 2019-43.
[7] See Notice 2021-05.

specified by such agreements. ACORE also recommends that Treasury consider allowing projects enrolled in state-level programs targeted at low-income communities to qualify for the program, due to their heightened certainty of benefit. And finally, ACORE seeks clarification on how a notification will be made that the annual environmental justice capacity limitation of 1.8 GW has been fulfilled. ACORE recommends all interested taxpayers, including program applicants, be notified immediately after the capacity limitation has been reached. Additionally, ACORE urges such notification also occur in the event there are unused or excess allocations that will be carried over to the next calendar year.

Phasing Out of Credits:

Additional clarification is needed regarding the phaseout of the § 45Y and § 48E credits, particularly around the determination of the applicable calendar year in which the "the annual greenhouse gas emissions from the production of electricity in the United States are equal to or less than 25 percent of the annual greenhouse gas emissions from the production of electricity in the United States for calendar year 2022." We recommend that Treasury, the Department of Energy, and the Environmental Protection Agency issue further guidelines on which agency or agencies will be responsible for conducting this analysis, how often this analysis will occur, what coordination is required, and whether existing methodologies, such as that used by the Environmental Protection Agency in its annual compilation of the Inventory of Greenhouse Gas Emissions and Sinks, will be used for this purpose.

Additional comments:

ACORE urges that Treasury allow hybrid projects (i.e. solar plus storage) flexibility to elect a production tax credit for solar and an investment tax credit for storage. Additional hybrid examples fall into this category, which could include co-located projects, and where there may be hybrid assets. In the case of the § 48 credit, multiple energy properties may be co-located at a site, and we urge that Treasury allow for such distinctions.

Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements (Notice 2022-51)

Prevailing Wage:

Regarding Davis-Bacon Requirements:

On March 18, the U.S. Department of Labor ("Labor") issued a notice of proposed rulemaking on Davis-Bacon Act (DBA) enforcement, in which it found its own existing wage determination process to be substandard and often "behind schedule."[8] Stakeholders have consistently objected to the method used to calculate prevailing wages, which relies heavily on self-selected and often outdated samples of larger construction firms. Will this process be relied upon in the crucial determination of prevailing wages for clean energy occupations and projects, many for the first time? ACORE asks that Treasury and Labor work collaboratively to provide predictable and fair rates of compensation without straying from the

[8] Updating the Davis-Bacon and Related Acts Regulations, 87 Fed. Reg. 15,698, (March 18, 2022) (to be codified at 29 CFR Parts 1, 3, and 5).

established and trusted approach of DBA, as changes in that approach risks delaying implementation of IRA.

ACORE recommends that Labor's Wage and Hours Division (WHD) use data from the Bureau of Labor Statistics (BLS) to more accurately assess the prevailing wages for various "green" or "green tech" occupations, presenting an opportunity both to reform the current process and avoid the market pitfalls of inaccurate determinations, which threaten to blunt growth in the clean energy sector.[9] ACORE also urges WHD to solicit greater survey responses from small, rural, tribal, and minority- and women-owned companies, providing assistance where necessary. Currently, survey responses are generally received from large businesses, often with greater administrative resources to complete the survey form.[10]

ACORE also recommends that these surveys be assessed at an individual county, over regional level, to better account for local particularities. Concerningly, some prevailing wages are determined using multi-county or state-level data far from where projects are located.[11] A parcel of 17 counties is certainly not what should constitute "locality," yet this was the sample used by WHD to calculate the wages of highway equipment operators in Forsyth County, North Carolina.[12] Moreover, projects of a "similar character" may be easier to find in some parts of the country over others. It is again imperative for Treasury to solicit greater input from small, rural, tribal, and minority- and women-owned companies, which stand to be the most negatively affected by flawed wage determinations.

Concerning documentation or substantiation for compliance:

ACORE recommends that Treasury permit entities to use the information and certification provided by third-party contractors and subcontractors to document compliance. With this approach, Treasury can avoid unnecessary disruption to long standing contract procedures used by public power entities and other organizations that must rely heavily on third-party contractors and subcontractors to perform construction, alteration, or repair work. To the greatest extent possible, ACORE urges Treasury to prioritize consistency and uniformity in its clarification of final documentation or substantiation standards, with strong deference to the current reporting methods of the entities described previously.

Additional comments:

ACORE strongly urges Treasury to provide a comment period following its issuance of guidance, and to correspondingly delay the start of the statutory 60-day timer for prevailing wage and apprenticeship requirements. While we applaud the Treasury's sense of urgency in this matter, ACORE also requests that an opportunity be provided for stakeholders to raise questions and concerns. A comment period would allow stakeholders to alert Treasury of important errors, ambiguities or additional considerations. Indeed, the industry is willing to work with Treasury on the most bankable, transactionable, and reasonable version of guidance, which a "grace period" for comments ideally will facilitate.

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[9] Sherk, J. (2017). "Labor Department Can Create Jobs by Calculating Davis–Bacon Rates More Accurately." The Heritage Foundation. https://www.heritage.org/jobs-and-labor/report/labor-department-can-create-jobs-calculating-davis-bacon-rates-more.

[10] *Id.* See also March 2011 GAO report on changes needed to improve wage surveys under the Davis-Bacon Act, https://www.gao.gov/assets/gao-11-152.pdf.

[11] *Id.*

[12] *Id.*

Apprenticeship Requirements:

Considerations around appropriate duration of employment:

Clarification is needed from Treasury regarding how the apprenticeship requirements will apply in circumstances when a taxpayer adjusts a project contract to include new construction, alteration, or repair work not originally scoped. ACORE asks that Treasury allow developers adequate time to evaluate and signal the need for additional apprentices — which will vary depending on the project status, type, location, and other factors — without falling out of compliance.

ACORE recommends that Treasury further clarify the requirement for situations in which the duration of construction, alteration, or repair work outlasts an apprentice's tenure or stay in a selected apprenticeship program, an apprentice seeks leave, or requires removal for other reasons. ACORE urges Treasury to prioritize consistency and allow flexibility to meet apprenticeship requirements in these instances. Additionally, ACORE seeks to maximum certainty for developers during contract negotiations and changes, and requests that Treasury allow for grace periods.

Finally, ACORE appreciates clarification from Treasury regarding project sites as it relates to apprentices. For projects under development, there may be multiple sites where work is conducted during construction phases. For example, an offshore wind project may involve product assembly at a port facility before being transported and installed miles offshore. For purposes of meeting apprenticeship requirements, it is appropriate that all sites relevant to the project be considered in the aggregate as one project.

ACORE asks Treasury to clarify these rules in such a manner that they maximize the involvement of apprentices throughout project development at the site of construction itself. An ACORE member subset has conveyed that increasing the opportunities for apprentices to engage in construction, alteration, and repair work on renewable projects is a key step toward fostering a diverse clean energy workforce.

Clarification needed around good faith effort exception:

ACORE members operating small businesses in low- and middle-income (LMI) communities have expressed concern that the apprenticeship requirements will not allow them to use their own apprenticeship programs. These in-house programs are often developed by clean energy start-ups in the face of a lack or shortage of qualifying state and DOL apprenticeship programs, a challenge that persists in many disadvantaged communities and could be exacerbated under a tight labor market.

Crucially, our members have shared examples of potential clean energy projects tied to affordable housing or multifamily LMI units that hinge on receipt of the full credit amount guaranteed by apprenticeship compliance. Yet these same projects are located in areas without ready access to qualifying state or DOL apprenticeship programs. If Treasury continues on the current path, highly impactful projects such as these will be lost, unless it accommodates reliance on the existing pool of local apprentices that small companies have spent time and capital developing precisely for this reason. Local apprenticeship programs such as these are also more likely to recruit apprentices from the neighborhoods in which their work is performed, building a necessary bridge between LMI, minority, and Tribal residents and opportunities to join the clean energy workforce, which might otherwise be unavailable in these communities.

ACORE members have also raised the concern that the reliance on state and DOL programs and other mainstream applications of apprenticeship rules will undermine Tribal Employment Rights Office (TERO) Ordinances, guaranteeing Tribes a certain portion of employment opportunities related to projects on or near tribes, reservations and villages.[13] These hiring preferences, which may differ from the apprenticeship rules laid out in the IRA, are often built into long standing agreements between Tribes and companies licensed to operate on their lands. ACORE asks that Treasury defer to tribes and prioritize tribal sovereignty in all circumstances.

Under the good faith exemptions, ACORE strongly recommends that Treasury consider allowing locally owned and operated apprenticeship programs to partner with those administered by DOL or states or to become eligible for the requirements in some other way. If such accommodations are not made, some of our members expect the apprenticeship requirements to effectively isolate LMI and minority communities, where an organized labor presence is limited or simply nonexistent. Local apprenticeship programs will also play a crucial role in circumstances when the demand for qualified apprentices exceeds the available supply after the requirements take effect.

In giving local apprenticeship programs the consideration they deserve, ACORE urges Treasury to be aware that these programs often offer comparable, if not superior, standards of training and project performance. ACORE also recommends that such programs be allowed to demonstrate that they conform to the same set of criteria used for those at the state and federal levels.

ACORE requests that Treasury provide clarity with respect to situations in which legitimate circumstances inhibit a project developer from accessing qualified apprentices for reasons that do not fall under the two exceptions currently provided. For example, ACORE asks that Treasury specify whether it will apply the same standard of compliance to a highly remote project located several hours from the nearest qualified program. Where possible, ACORE recommends Labor define these exceptions broadly, appreciating the geographic remoteness of many clean energy projects and awarding leniency to developers who, for this or other reasons, are unable to comply with the apprenticeship requirements.

In summary, ACORE strongly supports Treasury adopting a comprehensive approach with respect to involving apprentices at every project stage while, at the same time, giving developers the flexibility and time they need in selecting them. This approach will help to ensure that the apprenticeship requirements are equitable and viable in practice for all parties.

Regarding documentation or substantiation to demonstrate compliance with apprenticeship requirements:

ACORE members have expressed their desire for Treasury to devise and maintain a standardized digital platform that is used for all apprenticeship reporting that is user-friendly, especially for smaller businesses, and accepts information from any state, Labor, or other apprenticeship program. Generally, it is the recommendation of ACORE that Treasury avoid a piecemeal approach to reporting, which is unlikely to generate accurate data and would create an additional burden for taxpayers documenting compliance on more than one project. ACORE members have also conveyed that the simplicity of the

[13] Council for Tribal Employment Rights. "Most Frequently Asked Questions about TERO." Accessed Friday, October 28, 2022. https://cter-tero.org/tero-faq/#1.

reporting process is positively correlated with the number of contractors who will be willing and able to follow it, helping to keep labor costs steady, especially as the demand for contracted services grows.

As with prevailing wages, ACORE again recommends that Treasury permit entities to use the information and certification provided by third-party contractors and subcontractors to document compliance with prevailing wage requirements. This approach by Treasury will allow public power entities and other organizations that rely heavily on third-party contractors and subcontractors to preserve effective and long-standing contract procedures.

Other comments:

ACORE asks Treasury to provide rules governing the process by which taxpayers solicit qualified apprentices for projects. Specifically, will taxpayers be permitted to contact any qualified apprenticeship program or will taxpayers need to first submit a request in their respective county, state, region, or territory? ACORE also requests that Treasury ensure that developers cannot avoid the requirements by submitting an apprenticeship request that is blatantly unfeasible. Such clarification will also help to spread out the demand for apprentices.

ACORE recommends that Labor leverage its IRA funding to provide robust technical assistance to human resources and project management staff in achieving successful compliance with the IRA's prevailing wage and apprenticeship requirements, including how-to guides, training sessions, and help networks. ACORE strongly supports providing technical assistance and capacity building efforts to small or minority- and women-owned entities to reduce the administrative costs of compliance.

Additionally, ACORE recommends that Treasury strongly consider the possibility of a mechanism to segment the demand for apprentices by technology. While the IRA is a boon for renewable projects of all kinds, some may take longer to take off than others. Our members have pointed to the risk of more mature technologies taking up a major swathe of the labor workforce before others have the opportunity to submit their requests. ACORE also recommends that the same mechanism be leveraged by the Treasury to ensure that small businesses are not left out by larger companies with the ability to move more quickly due to greater administrative experience and capacity.

As the labor market shows signs of constriction, and the Davis-Bacon Act undergoes separate reexamination by the Labor Department, Treasury is faced with an extraordinary opportunity and, by extension, a critical responsibility to maximize the climate and economic potential of the IRA. The never-before-seen growth that Treasury can secure for American clean energy is contingent on rules that reflect, to the greatest extent possible, both supply and developer side input, priorities, and challenges. ACORE restates its strong support for the Treasury's diligent pursuit of stakeholder input, and requests that Treasury continue to solicit input after guidance is issued and throughout its implementation.

Domestic Content Requirement:

On certification that any steel, iron, or manufactured product was produced in the United States:

One relevant portion of the 49 CFR 661 language is the definition of "end product" in 49 C.F.R. 661.3 which can be used for determining which components fall within the qualified facility. This section defines an "end product" as that "which is ready to provide its intended end function or use without any further manufacturing or assembly change(s).” Further, the term “component” is defined as “any article, material, or supply, whether manufactured or unmanufactured, that is *directly incorporate*d into the end product at the final assembly location.” (Emphasis added.) Therefore, ACORE recommends that applicability of this provision only include those components involved in the intended end function and include those which are assembled at the site of the use of the end product.

IRA § 45(b)(9)(B)(ii) states that the requirement for iron and steel “shall be applied in a manner consistent with § 661.5 of title 49, Code of Federal Regulations.” This referenced section provides that a “component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.” ACORE therefore asks that § 45(b)(9)(B) and § 45Y(g)(11)(B) would not be applicable to the origin of the subcomponents of the qualified facility for the purposes of determining the steel and iron content.

On what is considered when determining “completion of construction”:

ACORE recommends that the completion of construction be defined as the date by when the qualified facility or energy property is at a state of readiness and available to perform its specifically assigned function, even if the project is not connected to transmission. Achievement of such readiness is the metric over which project developers have control, unlike the interconnection required for the actual in-service date under IRS guidance.

On substantiating certifications of satisfying domestic content requirements:

ACORE recommends that written certification by the taxpayer be sufficient for compliance and will minimize the burden on both the IRS and the taxpayer. This recommendation also includes a requirement for the taxpayer to retain records as may be needed to substantiate that statement for three years and be able to provide such records upon request to the IRS. As noted above, because the origin of the subcomponents is not relevant for the domestic content determination, such records would therefore not be required for subcomponents.

Regarding the term “component of a qualified facility”:

In the case of a § 45 facility, the end product is the qualified facility. The manufactured product definition does not apply to the qualified facility as a whole, but to the components of the qualified facility. § 45(b)(9)(B)(i) provides “any steel, iron, or *manufactured product which is a component of such qualified facility* (upon completion of construction) was produced in the United States” and § 45(b)(9)(B)(iii) then provides that such manufactured products “shall be deemed to have been produced in the United States if not less than the adjusted percentage...of the total costs of all such manufactured products are attributable to *manufactured products (including components)* which are mined, produced, or manufactured in the United States . . .” (emphasis added). Further, § 45(b)(9)(B)(iii) also refers to “*the manufactured products which are components of a qualified facility.*” The statute is clear that the adjusted percentage is applicable to just those manufactured products that are components. As detailed above, the term “component” includes any article, material or supply that is separately delivered to the project site to be incorporated into the end product, i.e., the qualified facility. Accordingly, any component that is delivered to the project site must fall into the category of (i) manufactured product, (ii) steel or iron, or (iii) other construction material, such as poured concrete, that is not a manufactured product or steel or iron. It would be incorrect to treat the end product, i.e., the qualified facility, as a single manufactured product. It similarly would be incorrect to treat the term "manufactured product," as used in § 45(b)(9)(B)(iii), to refer to an item that is something other than a component. Rather, the term "manufactured product," as used in § 45(b)(9)(B)(iii), must be read to be synonymous with a manufactured component as that term is used in 49 CFR 661.3.

Although 49 CFR 661 is not referenced here, ACORE recommends the use of the language in 49 C.F.R. 661.3 defining components as those directly incorporated into the end product at the final assembly location in the same manner as applicable to iron and steel. Such components therefore would be those that are part of the structure of the qualified facility needed to serve its intended purpose. ACORE asks that this be interpreted consistent with IRS Revenue Ruling 94-31 finding that the term "facility" means the wind turbine together with the tower on which the wind turbine is mounted and the pad on which the tower is situated,[14] and that solar arrays have an analogous interpretation such as the inclusion of the pad or similar support structure for the facility.

On the term manufactured product:

ACORE recommends that additional clarification be provided on the term manufactured product that is consistent with the definition under 49 CFR 661.3 as a product which is the result of a manufacturing process that results in a "new end product functionally different from that which would result from mere assembly of the elements or materials." Moreover, as noted previously, ACORE recommends that such products be those incorporated into the end product at the final assembly and the origin of the subcomponents not be considered within the determination of the domestic content of the manufactured product.

Further, ACORE asks that construction-related activity at the final project site not be interpreted as "manufacturing." As noted above, the term "component" is defined in 49 CFR 661.3 as "any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location." In general, a preassembled item that is manufactured off-site and then delivered to the final assembly location (i.e., the project construction site) is a single component and the various pieces and elements contained within it are classified as subcomponents.[15] It follows that construction-related activity at the site, even if such activity includes welding, wiring, or similar actions that might constitute manufacturing if conducted off-site, does not convert such construction or assembly of components into manufacturing. To do so would allow foreign-sourced components delivered to the site to be treated as a disregarded subcomponent. As relevant here, 49 CFR 661.11(d) provides that "a component may be manufactured at the final assembly location if the manufacturing process to produce the component is an *activity separate and distinct from the final assembly of the end product*." This definition corresponds to the definitions of "manufactured product" and "manufacturing process" under 49 CFR 661.3, and addresses the on-site issue directly. Accordingly, ACORE recommends that manufacturing of a component on-site only apply to manufacturing activity which is separate and distinct from final assembly of the end product (i.e., the qualified facility/energy project). For example, if a manufacturer set up a facility on site to refurbish generators, which entails a manufacturing activity, then the production of such generators would constitute a separate

[14] See Internal Revenue Service Memorandum 200347024, January 21, 2003, https://www.irs.gov/pub/irs-wd/0347024.pdf.

[15] *Cf. S.J. Amoroso Constr. Co. v. U.S.*, 26 Cl. Ct. 759, 768 (1992), *affd*., 12 F.3d 1072, 1087 (Fed. Clr. 1993).

manufacturing activity. On the other hand, if an activity involves the installation or assembly of certain components into the end product, it is not manufacturing.

On the exceptions to the domestic content requirements:

Additional clarity is needed on the allowance for exceptions if the inclusion of steel, iron, or manufactured products which are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent, or if relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality. Specifically, ACORE asks that Treasury's guidelines explain 1) at what point in time and how the 25 percent cost increase is determined and 2) what information is required and what methodology will be used to demonstrate that the domestic steel, iron or manufactured products "are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality."

Other comments:

ACORE asks Treasury to clarify that any § 45 qualified facilities that elect the § 48 ITC and satisfy the domestic content requirements are entitled to the bonus credit from meeting those requirements. For hybrid assets such as solar plus storage, ACORE recommends that each asset be allowed to independently meet domestic content requirements to achieve bonus credit.

Last, ACORE urges Treasury to expedite the process for publishing waivers specific to components that are not currently available so that projects may satisfy commitments for commercial operation. Consistent with the IRA's goals to reduce energy costs for rate payers, projects that are nearest construction are more likely to be affected by longer lead times from domestic producers, reducing the credit subsidy against costs of these facilities. For example, domestically produced transformers have an average 12-month queue or longer.

Energy Communities:

ACORE requests that Treasury clarify that the 10 percent energy community bonus is "stackable" or additive, i.e., a developer satisfying the energy community requirement can increase the total credit received from 30 percent to 40 percent of total capital investment (assuming requisite prevailing wage and apprenticeship requirements are satisfied).

Considerations regarding definition of "located in":

Several of our members have inquired as to whether offshore wind projects can qualify for the energy community bonus. ACORE is supportive of such eligibility. We recommend that Treasury clarify that wind projects qualify for the bonus, so long as they are located in a geographic area that satisfies the definitions found in § 45(b)(11)(B). We suggest using the physical point of interconnection as the determination of project eligibility, such that an offshore wind project qualifies for the energy community bonus if the onshore substation is 1) located on a brownfield site, 2) a qualified metropolitan statistical area or non-metropolitan statistical area (N/MSA), or 3) a qualified or adjoining census tract.

Other potential locations could include areas such as construction ports used for equipment staging, due to the sizeable concentration of workers coming to these sites throughout the construction phase.

Our members have also sought clarification on the duration of an energy community designation, and request that Treasury clarify how long such a designation will last. For example, unemployment rates often fluctuate. While § 45(b)(11)(B)(ii) stipulates that energy communities can be defined as an N/MSA having an unemployment rate at or above the national average unemployment rate for the previous year, what happens if such an area has dramatic increase in employment levels over the course of a year, or the national unemployment rate rises at a rate faster than a specific area? Because projects can take several years to plan, site, and construct, there is concern that changing employment rates will impact project feasibility. There is a similar concern around the changing nature of census tracts as they evolve, where an area that was part of a certain census tract when a mine or plant closed could be absorbed into a different census tract over time.

For this reason, we recommend Treasury clarify that a project qualifies for the energy community bonus, after a developer seeks a determination, if the project is located in an area that satisfies the requirements in § 45(b)(11)(B) at the commencement of construction. This will ensure that project developers that seek to invest in energy communities are not penalized when construction timelines are extended or delayed.

Further, we seek clarification that projects that have successfully qualified for the energy community bonus will not lose their status over time. For example, if a developer elects the PTC, and the qualifying brownfield site, N/MSA, or census tract subsequently loses eligibility during the 10 years from which the project was placed in service, ACORE asks that the developer not be penalized.

Regarding changes to definition, scope, boundary, or status of "brownfield site", "metropolitan statistical area or non-metropolitan statistical area" or "census tract":

ACORE seeks clarification on the eligibility of projects that span multiple N/MSAs or census tracts. For example, what happens when a renewable project is located in both a census tract that qualifies for the energy community bonus and a census tract that does not? Because utility-scale wind projects often span multiple counties, it is foreseeable that a project may be sited primarily, or perhaps marginally, in a qualified energy community. We recommend the IRS clarify that so long as a portion of a project is located in a qualifying N/MSA or census tract, the project qualifies for the energy community adder. We recommend the energy community adder then be awarded on a pro rata basis. We also recommend that Treasury affirm that projects in adjoining census tracts qualify for the energy community bonus even if the adjoining census tracts span different states.

ACORE also recommends Treasury provide a broader consideration for communities that have been impacted by a closure that may not be geographically adjacent to the closed coal mine or generation site. For example, a coal mine or plant closure may have substantial impact on areas engaged in downstream activities such as transportation, storage, refining, processing, etc., that would not otherwise qualify for the bonus credit.

ACORE also urges the Treasury to clarify that sites contaminated by petroleum or petroleum products meet the definition of brownfield site under 42 U.S.C. 9601(39)(D) and thereby qualify for the energy community bonus. ACORE also urges the Treasury to give consideration to Superfund sites, as defined by 42 U.S.C. 9601 et seq., as qualifying as energy communities.

Other comments:

Commenters have suggested that the IRA could designate about 50 percent of US land area as an energy community.[16] While ACORE is encouraged to see such broad eligibility, uncertainty around shifting census tracts and N/MSAs, fluctuating unemployment rates, lack of information on local government revenues, and other factors may lead to confusion about which geographic areas do in fact qualify for the energy community bonus. Members have asked whether Treasury will promulgate a list of eligible areas, to be updated annually, to help target investment towards these impacted areas. Members have also suggested that this list be paired with a list of eligible LMI communities, in order to further direct development towards disadvantaged areas.

Request for Comments on Energy Security Tax Credits for Manufacturing Under § 48C and § 45X (Notice 2022-47)

§ 45X Advanced Manufacturing Production Credit:

For purposes of advanced manufacturing production, ACORE asks that the definition of "produced" be aligned with existing definitions of "manufactured product" and "manufacturing process" to support significant manufacturing processes at the component level. Defining the term "produced," may accelerate investments: A credit is received if it is "produced" by a taxpayer and "sold" by such taxpayer. The U.S. has existing definitions of "manufactured product" and "manufacturing process" (i.e., under the Buy America Act and through the Federal Transit Administration as codified in 49 CFR 661). These definitions focus on significant alteration and transformation of materials and elements to form a new product. The Buy America Act also addresses steel and iron requirements. To fully support the administration's intent to establish and expand a true U.S. domestic clean energy supply chain, ACORE recommends that Treasury the align to these definitions.

Again, in the case of a § 45 facility, the end product is the qualified facility. The manufactured product definition does not apply to the qualified facility as a whole, but to the components of the qualified facility. § 45(b)(9)(B)(i) provides "any steel, iron, or *manufactured product which is a component of such qualified facility* (upon completion of construction) was produced in the United States" and § 45(b)(9)(B)(iii) then provides that such manufactured products "shall be deemed to have been produced in the United States if not less than the adjusted percentage...of the total costs of all such manufactured products are attributable to *manufactured products (including components)* which are mined, produced, or manufactured in the United States . . ." (emphasis added). Further, § 45(b)(9)(B)(iii) refers to "*the manufactured products which are components of a qualified facility.*" The statute is clear that the adjusted percentage is applicable to just those manufactured products that are Components.

On definitions of an "eligible component":

ACORE requests that Treasury clarify the definition of Qualifying Battery Components under § 45x(c)(5)(B) as follows:

- Electrode active materials may include electrode active material relevant for flow batteries, such as liquid-based electrolytes, flow battery electrolytes, flow battery electrolyte containment, ion-

[16] Raimi, D. & Pesek, S. (September 2022). What is an "Energy Community"? Resources for the Future. https://www.resources.org/common-resources/what-is-an-energy-community/.

conducting membranes, separators, electrodes, membrane-electrode assemblies, bipolar plate assemblies, monopolar plate assemblies and components thereof.

- A "module with no battery cells" is a module without "battery cells" as specifically defined in Section 45X(c)(5)(B)(ii). This clarification is required because some electrochemical modules contain cells that differ from the cell definition specified in the IRA language, and in such cases, ACORE asks that these modules meet the definition of "a module with no battery cells," provided such modules meet the requirement of having an aggregate capacity of not less than 7 kilowatt-hours.
- The battery module definition includes flow battery modules and components thereof, which may include electrolyte, electrolyte storage, electrochemical stacks, electrochemical power units, pumps, piping, sensors, thermal management, battery management systems, controls, and compressors.
- A battery module may also include functional elements that are created or assembled at the project site, provided such elements are integral to charging, storing or discharging energy from such module. The integration, incorporation, or assembly of such module may occur in part at the energy storage project site.

On the definition of related persons:

Section 45X(d)(1) defines persons as related "if such persons would be treated as a single employer under the regulations prescribed under [Internal Revenue Code] section 52(b)." This definition is used in other energy tax contexts (*e.g.,* section 45(e)(4)) and is familiar to clean energy participants. An unrelated person is therefore anyone that is not a related person under section § 45X(d)(1).

Further, section 45X(a)(3)(i) allows that "at the election of the taxpayer (in such form and manner as the Secretary may prescribe), a sale of components by such taxpayer to a related person shall be deemed to have been made to an unrelated person."

It is important that Treasury issue guidance that permits sales to related parties to qualify for the section 45X tax credit to the greatest extent as administratively possible. Guidance should make clear that, as provided in the IRA, a taxpayer may treat a sale of a component, or a final product (if an eligible component is integrated, incorporated, or assembled into that product) to a related party as an eligible sale to an unrelated party to the extent that either: (i) such related party sells such component to an unrelated party; or (ii) the taxpayer makes an election to that extent.

Some manufacturing firms are vertically integrated and may sell eligible components to related parties, and ACORE asks that Treasury's guidance not discourage these bona fide business arrangements. Rather, reporting requirements can be carefully crafted to address any concerns of potential abuse while also avoiding administrative burdens.

On the determination of the credit:

In the determination of the measure of capacity used to calculate the credit, ACORE asks Treasury to affirm that the designated capacity is the manufacturer's labeling of the capacity rating at the time of production, not the capacity in use at the project site.

Moreover, ACORE recommends that this credit apply to components used for the repowering of wind turbines and other facilities where appropriate. For example, in the context of wind turbine repowering, qualifying components would include the blades and rotor, gearbox and generator, and would exclude the nacelle housing.

In the determination of the credit for electrode active materials as equal to 10% of the costs incurred by the taxpayer with respect to the production of such materials, clarification is needed on the method for calculating these costs.

On offshore wind vessels:

A June 2022 report from the National Renewable Energy Laboratory found that: "New vessels are required to alleviate risks of missing the national offshore wind energy target, with wind turbine installation vessels posing the biggest risk followed by feeder barges, cable laying vessels, service operation vessels, crew transfer vessels, scour protection vessels, heavy lift vessels, and anchor handling tug supply vessels."[17]

It is therefore imperative that the full range of needed vessels receive adequate credits under these provisions. Given the unique nature of these vessels, ACORE recommends that the credits be applicable to any offshore wind vessel without necessitating a determination of "how much a vessel will be used for offshore wind," as asked in the comment request. ACORE requests that Treasury establish non-burdensome requirements for project developers to state where such a vessel is being used for the offshore wind developments.

Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits (Notice 2022-50)

Elective Payment of Applicable Credits (§ 6417):

ACORE urges Treasury to minimize the time frame for direct payments, giving consideration to minimizing construction and bridge financing that is typically required for project development. § 6611 provides the IRS a 45-day grace period to act on refunds before interest applies. The current process for tax refunds can be long and does not create the type of certainty and timing needed to make large investments. Clean energy developers rely on the capital represented by the refunds to pay down old project financing and invest in new projects. We understand the IRS' concerns regarding manpower and the importance of addressing potential fraud. We would welcome the opportunity to work with the Administration and other stakeholders on an expedited process for direct pay refunds.

To expand the pool of investors, clarification is required on eligibility of tax-exempt counterparties (e.g., endowments) to invest in renewable projects and be able to claim direct pay for credits proportionate to their ownership interest. This would include a partnership's ability to elect direct pay for the proportion of ownership interest held by tax-exempt entities. Further, § 6417 and § 6418 require the respective elections to be made at the partnership level. ACORE asks that Treasury guidance clarify what happens in cases where a partnership's interests are owned by tax-exempt partners (who are eligible for § 6417 but not § 6418) and taxable partners (who are eligible for § 6418 but not § 6417). ACORE recommends that the respective elections be made available to the eligible partners.

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[17] Shields, M. et al. (June 2022). The Demand for a Domestic Offshore Wind Energy Supply Chain. National Renewable Energy Laboratory, https://www.nrel.gov/docs/fy22osti/81602.pdf.

ACORE asks that consideration be given to establishing a voluntary "early warning" system providing the IRS with notice of expected direct pay claims, similar to that of the former § 1603 program of the American Recovery and Reinvestment Act of 2009. Perhaps if the IRS were made aware of potentially eligible projects through a voluntary filing by a taxpayer while the project is under construction, IRS could verify the eligibility of the project for the direct pay election and expedite the subsequent refund. Other potential warning systems could involve third party attestations or taxpayer registrations.

Ultimately, a detailed plan outlining the internal Treasury and IRS processes will help to ensure proper project planning and enhance options for obtaining project financing. While Treasury seeks to simplify its processes, making the necessary reporting requirements as streamlined as possible will allow projects smaller in scale to access direct pay efficiently. Further, allocating credits for low-income communities on a rolling basis will ensure better distribution of the credits and, thus, opportunity.

Further, § 56A(c)(9) indicates that for purposes of the Corporate Alternative Minimum Tax, Adjusted Financial Statement Income is adjusted to disregard any amount treated as a payment of tax under § 6417. Clarity is requested to ensure that the cash received from the sale of a credit under § 6418 is excluded from income for purposes of the corporate book minimum tax under section 55(b)(2).

Transfer of Certain Credits (§ 6418):

ACORE urges that promulgated guidance be as clear and comprehensive as possible, and that guidance be issued in sufficient time to allow developers to complete clean energy projects and consummate transfer transactions. Further, ACORE requests that Treasury guidance address areas where the statute is unclear to lessen uncertainty and risk. Important examples include who is subject to the tax in the case of a recapture event or a redetermination of the amount of credit that was transferred.

Developers will still need to monetize the depreciation benefit from clean energy property, which are especially valuable given their treatment under the book minimum corporate tax. They are expected to continue to use current transaction structures (flip partnerships, leases, sale-leasebacks, etc.) to do so. Developers may enter into these structures to transfer tax credits as well. It is therefore important that the transferability guidance accommodate the use of traditional tax benefit transfer transactions and allow for the continued use of partnership structures in concert with transferability. ACORE recommends that the partnership rules be made as flexible as possible to allow the partnership to determine which credits otherwise allocable to a partner are transferred, and which are flowed through to other partners. Similarly, ACORE asks for flexibility to be applied to distributions of cash realized from tax credit transfers. ACORE respectfully urges that acceptable partnership and financing structures include the following:

- **Flip partnerships.** Two partners own an investment fund containing tax credits of which the tax equity investor typically receives 99 percent until the year it reaches an agreed upon rate of return, triggering an inversion of the ownership ("the flip") toward the investment fund sponsor who receives 95 percent of the tax credits thereafter.
- **Lease structure**. The owner or lessor of a solar or wind project is a flow-through entity for tax purposes and is initially owned by the developer. The tax equity investor contributes capital to flow through the master-entity for tax purposes so that a master-tenant entity can elect to purchase ownership in the other, with proceeds going to the developer. The master-tenant enters into two leases: *w*ith the property owner to use the assets *and* the host to sell electricity. The property owner elects to pass through the ITC to the master tenant lessee ("inverted lease"), while keeping the depreciation as shelter for the rents paid by the master tenant lessee.

- **Sale leaseback.** The investor becomes the sole owner of the project, typically purchasing it for 80 percent or more of the cost to develop it. The developer leases the project from the investor ("the leaseback") under negotiable terms that typically depend on (1) the length of the lease, (2) price of equipment, or (3) residual. The developer controls the project and signs a power purchase agreement (PPA) with the host. The investor, as sole owner of the project, receives 100 percent of the ITC and depreciation. At the end of the lease, the developer has the option to buy the project from the investor at fair market value. The investor forfeits all interest with the decision to sell.

ACORE requests that Treasury consider guidance based on the structure of both partnerships and agreements necessary to realize the full utilization of transferability, ACORE underscores the following points based on the interaction between existing code and the IRA statute.

Partial Transfers/Multiple Transferees. In accordance with § 6418(a)(1), ACORE recommends that Treasury's guidance confirm that the transferor taxpayer may transfer only a portion of any Eligible Credit. This would include the transferor taxpayer retaining a portion of the Eligible Credit for use against its own income tax liability and transfer the remaining portion. ACORE also asks that the guidance also confirm that the transferor taxpayer may transfer any portion of an Eligible Credit to multiple transferees.

Multi-Year Transfers. ACORE recommends that Treasury's guidance recognize that the transfer of an Eligible Credit may be made under a single transfer agreement with one or more transferee taxpayers that covers multiple taxable years, consistent with how the credits operate, and including the entire 10- or 12-year credit period. Moreover, ACORE asks that Treasury confirm that the transferee taxpayer(s) may pay for any such Eligible Credits to be transferred to them over the credit period on an upfront payment basis combined with Paygo payments in order to address any variability in production and applicable credits over the term of the transfer agreement. This assumes that all administrative requirements for an election to be made for each taxable year, along with the amount of the tax credits for such year are identified, and all related information returns or other administrative information is provided as required.

Future Payments. ACORE recommends that § 6418(b)(1) be clarified to ensure the requirement for consideration to be paid in cash is satisfied if the transferee agreement provides that the cash may be paid at a future time (e.g., when the credits are actually transferred and claimed).

Partnership Transfers/Allocations. ACORE requests that the guidance confirm the partners in a partnership may agree to designate the tax credits that are transferred specifically to a partner or among the partners. Under such guidance, the partners would be able to specially allocate the tax-exempt income from the cash consideration received from a transfer of Eligible Credits in a manner that is consistent with Treas. Reg. § 1.704-1(b)(4)(ii), and that the partners may distribute the cash in any manner agreed upon by the partners in the partnership agreement. ACORE urges Treasury to provide optionality for disproportionate allocations with the tax equity class. Further, ACORE asks that Treasury state that any transfer of credits or special allocations or distributions in connection with a transfer of credits under § 6418 will not affect satisfaction of the safe harbor for wind farm partnerships provided under Revenue Procedure 2007-65.

Single Project Election. ACORE asks that Treasury provide in its guidance that a single project election under which a taxpayer with multiple facilities, such as a wind farm, can elect to sell/transfer all or a portion of the total PTCs generated for such single project in a taxable year. Treasury and the IRS have previously provided a single project election for purposes of determining whether construction has begun on a project. *See* Notice 2013-29, 2013-1 C.B. 1085. Moreover, ACORE recommends that the standards for such a single project election be used to create a similar election for transfers of tax credits under § 6418.

Hybrid Assets. For purposes of hybrid assets, ACORE recommends that Treasury consider allowing for single project elections as described above.

Application of Basis Reduction/Recapture Rules. In the case of Eligible Credits involving an ITC (i.e., §§ 48, 48C, and 48E), § 6418(g)(3)(A) requires that the rules under § 50(c) apply to the applicable investment credit property as if the transferred Eligible Credit was allowed to the transferor taxpayer. Thus, under § 50(c)(1), using the modified percentage of 50% for any energy credit or clean energy investment credit under § 50(c)(3)(A), the transferor taxpayer must reduce its tax basis in the investment credit property by 50% of the ITC credit amount determined with respect to such property. This application is sensible because the transferor taxpayer owns the applicable investment credit property, and it is the transferor taxpayer's basis or qualified investment upon which the ITC is grounded and the transferor taxpayer has recovered a portion of its cost/investment through the transfer of the Eligible Credit. The transferee taxpayer is not required to make any adjustments to basis since it does not own the investment credit property.

In the case of a partnership that owns ITC property, under § 50(c)(5), the adjusted basis of a partner's interest in a partnership must be appropriately adjusted to take into account adjustments made under § 50(c) in the basis of the investment credit property held by the partnership. In the case of a transferred Eligible Credit, the partners in a transferor partnership do not actually receive an allocation of the credit but rather receive an allocation of tax-exempt income consistent with the partners' distributive shares of the "otherwise eligible credit" under § 6418(c)(1)(B). In these circumstances, ACORE recommends that the basis reduction prescribed under § 50(c)(5) be made in a manner consistent with the allocation of tax-exempt income (as discussed earlier). Generally, a partner who receives an allocation of tax-exempt income on account of a transferred credit would receive a reduction in its outside basis consistent with the 50% reduction amount under § 50(c)(1) and (3). Thus, a partnership that owns ITC property would be able to specially allocate the tax-exempt income and the corresponding adjustment to partnership basis based on the agreement of the partners with respect to a sale of a portion of the ITC.

Under § 6418(g)(3)(B), a recapture event includes a circumstance in which the investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the transferor taxpayer. These same terms are used to define a recapture event under § 50, and ACORE asks that these terms be construed consistently. Importantly, Treas. Reg. § 1.47-2 defines the terms "disposition" and "cessation" for ITC recapture purposes, and those terms have a well-established meaning under the ITC with respect to this regulation. Likewise, Treas. Reg. § 1.47-3 provides longstanding exceptions to those rules, including Treas. Reg. § 1.47-3(f) which deals with a mere change in form of the taxpayer's business. Finally, Treas. Reg. § 1.47-6 includes rules for partnerships, including the disposition of partner's interests in the partnership, which are commonly referenced by tax practitioners and applied by taxpayers in the renewable industry. Further, ACORE recommends that Section 6418(c)(3)(B) be applied in a manner that is consistent with those regulations and longstanding rules.

Under § 6418(g)(3)(B), in the case of a recapture event before the close of the recapture period (as described in § 50(a)(1)), the transferor taxpayer is required to provide notice of the recapture event to the transferee taxpayer "in such form and manner as the Secretary shall prescribe," and the transferee taxpayer is required to provide notice of the recapture amount (as defined in § 50(c)(2)), if any, to the transferor taxpayer, again "in such form and manner as the Secretary shall prescribe." Section 50(a)(1) provides for a 5-year recapture period and annual recapture percentages that start at 100% and decrease by 20% each year until reaching zero at the end of the fifth-year anniversary of the placed-in-service date for the investment credit property. Thus, the recapture percentages are 100% if the investment credit property is disposed of, or if it ceases to be investment credit property, within one full year after the placed-in-service date; 80% within the second year; 60% within the third year; 40% within the fourth year; and 20% within the fifth year after the placed-in-service date. After the fifth-year anniversary, the credit is fully vested and no longer subject to recapture. Recapture is taken into account by the taxpayer by increasing the taxpayer's income tax for the taxable year within which the recapture event occurred and by the applicable recapture percentage.

Under § 50(c)(2), if during any taxable year there is a recapture amount determined with respect to any investment credit property the basis of which was reduced under § 50(c)(1), then the basis of such property (immediately before the event resulting in such recapture) must be increased by an amount equal to such recapture amount. For purposes of this basis increase, the recapture amount is the increase in tax determined under § 50(a)(1) (or adjustment in carrybacks or carryovers under § 50(a)(4) with respect to unused credits under § 39), but the basis increase is limited to 50% of the recapture amount because it is energy credit or clean energy investment credit property under § 50(c)(3)(B) – consistent with the original basis reduction.

Section 6418(g)(3) does not specifically address the application of the recapture rules to the transferor taxpayer and the transferee taxpayer. Rather, § 6418(g)(3)(A) applies the basis reduction rules of § 50(c)(1) and (3) to the transferor taxpayer, and § 6418(g)(3)(B) provides for reciprocal notices – from the transferor taxpayer to the transferee taxpayer of a recapture event and, conversely, from the transferee taxpayer to the transferor taxpayer of the recapture amount. Nonetheless, the application of the recapture rules may be inferred from the statutory language, including the statutory sequence of notices, and the incorporation of the § 50(a)(1) increase in tax and recapture percentages and the § 50(c) basis reduction and recapture adjustment rules. The example below illustrates the application of these rules in the context of a transferred credit:

> **Example.** The transferor taxpayer (X), an eligible taxpayer, owns investment credit property under § 48 that has an eligible cost basis of $100 and that qualifies for the increased credit rate of 30%, resulting in a $30 ITC. X transfers the entire amount of this $30 ITC to another taxpayer (Y). X must reduce its basis in the investment credit property by $15 (i.e., 50% of the value of the ITC determined) under § 50(c)(1) and (3) – resulting in an adjusted basis of $15 (which is a reduction in basis available for depreciation allowances to X). Within the third full year following the placed-in-service date, the property has a recapture event (i.e., disposition or cessation of use), resulting in a 60% recapture percentage under § 50(a)(1) and a $18 recapture amount. X must provide notice to Y of the recapture event under § 6418(g)(3)(B)(i) and Y must provide notice to X of the recapture amount under § 6418(g)(3)(B)(ii). Y, as the taxpayer with respect to the transferred Eligible Credit, must increase its income tax by the $18 recapture amount in the taxable year within which the recapture event occurred. X, as the taxpayer who originally reduced its basis under § 50(c)(1) on account of the Eligible Credit, must increase its adjusted basis in the applicable investment credit property by $9 under § 50(c)(2) after application of § 50(c)(3)(B).

In the case of a partnership, ACORE recommends that any recapture amount be allocated to the partners in a manner that is consistent with the earlier discussion of the allocation of tax-exempt income and the reduction in the outside basis of the partners' interests in the partnership.

The application of the basis reduction and recapture rules is not clear under § 6418(g)(3). ACORE therefore asks Treasury take the following actions in its guidance with respect to the basis reduction and recapture provisions in § 6418(g)(3):

1. Clarify whether the increase in tax required under § 50(a)(1) is to be made with respect to the transferor taxpayer or the transferee taxpayer(s) and explain the interplay between the corresponding basis reductions or increases with the applicable recapture amount. ACORE also asks Treasury to clarify these rules with examples.
2. Confirm that the longstanding definitions and rules relating to "disposition" and "cessation" are applicable under § 6418(g)(3), including the portions of the ITC regulations under § 47 that are applicable (e.g., Treas. Reg. § 1.47-2, -3, and -6).
3. Clarify the application of the basis reduction and recapture rules to partnerships. ACORE also asks Treasury to clarify these rules with examples.
4. Confirm that § 50(a) will apply to the eligible taxpayer (i.e., the transferor), and that tax credits cannot be recaptured from the transferee.

Excessive Credit Transfer/Penalty. ACORE asks that Treasury confirm and/or clarify the following matters with respect to the determination of an excessive credit transfer and the 20% penalty amount:

1. Provide specific procedures for the examination of an Eligible Credit and the determination of any excessive credit transfer, including the application of the procedures under subtitle F of the Code and the assessment and collection of any excessive credit transfer and penalty amount.
2. Specify which party (transferor taxpayer, transferee taxpayer, or both taxpayers) and which item (credit, return, or both) are subject to examination by the IRS or other agency.
3. Confirm that deficiency procedures (subchapter B of chapter 63 of the Code) apply to any determination of an excessive credit transfer, including with respect to the amount of the excessive credit transfer and the 20% penalty amount. The Guidance should provide all of the normal rights of the transferor taxpayer or transferee taxpayer to challenge and appeal any adjustment to an Eligible Credit or deficiency in tax.
4. Clarify that only one tax deficiency and penalty may be determined with respect to the same Eligible Credit – i.e., no "stacking" of tax and penalties including any "stacking" of tax and penalties with respect to the transferor taxpayer and transferee taxpayer for the same credit amount.
5. Define the term "reasonable cause" consistent with other contexts under the Code in which this term is used in waiving penalties (e.g., § 6664).

Effective Date Clarification. ACORE asks Treasury to confirm that PTCs allowable for taxable years beginning after December 31, 2022 are permitted to be transferred, even if the facility to which they relate was placed in service prior to the January 1, 2023 effective date of § 6418.

Administrative Process/Review. ACORE urges Treasury to adopt flexible procedures for taxpayers to supply information necessary to verify the transfer of Eligible Credits and to prevent errors and abuse. ACORE recommends that those procedures should be limited to information returns and/or registration as Congress has suggested in the statute. Further, the ACORE recommends that Treasury not impose any preliminary review or audit process that impedes the ability of taxpayers to transfer Eligible Credits on a timely and efficient basis and for transferee taxpayers to claim the Eligible Credits on their tax returns. Last, ACORE asks Treasury to confirm and clarify the application of the transfer provisions under § 6418 to estimated tax payment obligations by specifically allowing taxpayers to offset their quarterly estimated taxes with transferred credits (without penalty under § 6655).

Election to Transfer Credits. Regarding the time and manner of the election on the transferor taxpayer's tax return, ACORE asks that Treasury indicate what specific information is needed at the time of the election. Prioritizing guidance with respect to instructions and details on making the election on tax filings will help set the deal making timeline under a transferability structure, especially for the initial effective tax year 2023. In this instance, ACORE recommends Treasury to direct that the transferee need not be named at the time of the election, this would provide the transferor more time to find and enter into a commercial agreement with a suitable transferee as long as the timing would adhere to § 6418(d).

Credits and Estimated Quarterly Tax Payments. ACORE asks Treasury to provide guidance on how a transferee can claim and apply the transferred credits on its quarterly estimated tax payments in the tax year in which the credit is originated. A mechanism whereby the transferee need not wait until after the tax filing in order to claim the credits, particularly in the case the transferee pays quarterly estimated tax payments, enables transferability for potential transferees given the benefit received from the tax credits would be recognized sooner. This correlates with the question posed in Notice 2022-50 Section 3 .02 (8) where a registration system can help prevent duplication and fraud, as well as facilitate applying credits to estimate tax payments during the year by the transferee. ACORE recommends that any proposed registration system be devised in a way to allow transferees to claim and apply the credits to estimated tax payments as applicable.

Other Topics That May Require Guidance:

As the Treasury considers implementation of the 3-year carry back provisions, ACORE asks that Treasury account for ordering rules under § 38 and allow investment tax credit use after other credits are exhausted.

Further, ACORE recommends that Treasury account for increased utilization and market entrants, such as front of meter participants. In doing so, ACORE asks that Treasury consider expanding § 25D to allow for credit transfers.

Thank you for the opportunity to submit these comments. Please do not hesitate to contact me at nyholm@acore.org with any additional questions you may have.

Sincerely,

/s/

Allison Nyholm
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American Council on Renewable Energy