November 4, 2022

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Internal Revenue Service
Department of the Treasury
1500 Pennsylvania Ave NW
Washington, DC 20220

Re: Internal Revenue Service's Request for Comments on Energy Security Tax Credits for Manufacturing Under Sections 48C and 45X (Docket IRS-2022-0047), Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits (Docket IRS-2022-0050), and Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements Under the Act Commonly Known as the Inflation Reduction Act of 2022 (Docket IRS-2022-0051)

PRBA – The Rechargeable Battery Association ("PRBA") appreciates the opportunity to submit the following comments in response to the Internal Revenue Service's Request for Comments on Energy Security Tax Credits for Manufacturing Under Sections 48C and 45X (Docket IRS-2022-0047). Specifically, the U.S. Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") seek comments[1] on general and specific questions pertaining to the new advanced manufacturing production credit under new Section 45X (45X credit) and the qualifying advanced energy project credit under Section 48C (48C credit) of the Internal Revenue Code, as added and amended by the Inflation Reduction Act of 2022 ("IRA").[2] PRBA notes that unless marked specifically as pertaining to Section 48C or Section 45X credits, the comments in this submission are applicable to both programs. The IRA is intended to create as many opportunities as possible for entities committed to strengthening the U.S. manufacturing and innovation base while also achieving the important objective of reducing inflation across America for both businesses and consumers. As such, the forthcoming rules should provide manufacturers and innovators with as much flexibility as possible to enhance, rather than restrict, eligibility.

I. Background on PRBA

PRBA is an internationally recognized non-profit trade association based in Washington, D.C. We represent manufacturers of lithium batteries and devices powered by them and various associated industries. Our members include cell and battery manufacturers, battery recyclers, battery collection programs, retailers, airlines, and leading manufacturers of electric vehicles, mobile telephones, tablet and notebook computers, point-of-sale terminals, hand-held scanners, power tools, flashlights, outdoor power equipment, medical devices, and defense products. Our members

[1] *Request for Comments on Energy Security Tax Credits for Manufacturing Under Sections 48C and 45X*, Notice 2022-47 (Dep't Treasury Oct. 11, 2022) (request for comments). PRBA also summitted comments on *Request for Comments on Credits for Clean Vehicles*, Notice 2022-46 (Dep't Treasury Oct. 11, 2022)

[2] P.L. 177-169 §§ 13501, 13502.

manufacture approximately 65% of the lithium-ion battery cells and batteries produced in the world today, as well as batteries that employ other chemistries for energy storage. We have existed for over 30 years—since 1991, when the portable consumer product revolution had just begun.

PRBA was formed in response to the growing need for workable rechargeable battery collection and recycling programs in the United States. To that end, PRBA members established pilot battery collection programs in several states. Based on the success of these pilot programs, PRBA supported the establishment and implementation of a national not-for-profit public education and rechargeable battery recycling program. That program is now known as the Call2Recycle® program. We also were instrumental in enactment of the Mercury Containing and Rechargeable Battery Management Act in 1996, Pub. L. No-142, which made that national program feasible.

Today, much of our work focuses on advocating for the safe manufacturing, handling, transport, collection and recycling of rechargeable batteries. Consequently, PRBA is actively and constructively engaged with international organizations (*e.g.*, the United Nations Sub-Committee of Experts on the Transport of Dangerous Goods), federal agencies (*e.g.*, the Department of Transportation, Occupational Safety and Health Administration, Consumer Product Safety Commission, Environmental Protection Agency), state legislatures, and state and local fire code bodies that impact the storage of lithium batteries.

II. Definitions

As the IRS knows, the implementation of the IRA – and hence those eligible for tax credits – depends significantly on the definitions adopted. However, as set forth below, the IRS has not yet defined some critical terms for public comment. Given the criticality of definitions in this process, PRBA recommends that the IRS propose specific definitions and solicit public input on those definitions before final implementation of the regulations. Such a collaborative process ensures that critical stakeholder feedback is obtained prior to final rulemaking. The process as it stands now is opaque and, in many cases, has impeded stakeholders from determining with a reasonable degree of certainty if specific provisions of the IRA apply to them.

A. Battery Components

Currently, Section 13502(a)(a)(5)(A) of the IRA provides that qualifying battery components include battery cells and "battery modules." It is reasonable to infer that the term "modules" includes a "battery pack" comprised of multiple modules electrically connected together.[3] In fact, clarifying such a definition is critical to ensuring that the domestic battery pack ecosystem is able to avail itself of the IRA benefits in order to thrive in the United States thereby provide a downstream customer

[3] *See* David Coffin and Jeff Horowitz, U.S. Int'l Trade Commission, "The Supply Chain for Electric Vehicle Batteries," *Journal of International Commerce and Economics* (Dec. 2018) at 5; *see also* A Guide to Understanding Battery Specifications, MIT Electric Vehicle Team at 1 (Dec. 2008), available at http://web.mit.edu/evt/summary_battery_specifications.pdf; *and* Samsung SDI, "The Composition of EV Batteries," available at https://www.samsungsdi.com/column/all/detail/54344.html#:~:text=Simply%20put%2C%20cells%2C%20modules%20and,battery%20is%20installed%3A%20a%20pack.

base for domestic battery cell and module manufacturers. We have provided below edits to the term "Battery module" to help clarify this matter:

> **(iii) BATTERY ~~MODULE~~**
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> The term "battery', which includes a 'battery module' means ~~a module~~—
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> **(I) (aa)** in the case of a ~~module~~ battery using battery cells, with 2 or more battery cells which are configured electrically, in series or parallel, to create voltage or current, as appropriate, to a specified end use, or
>
> **(bb)** with no battery cells, and
>
> **(II)** with an aggregate capacity of not less than 7 kilowatt-hours (or, in the case of a ~~module~~ battery for a hydrogen fuel cell vehicle, not less than 1 kilowatt-hour).

If the full American lithium-ion battery supply chain is not strengthened as described, the domestic industry may continue to lose market share to imports that do not have the same inflationary pressures in their home markets, namely manufacturers in the People's Republic of China that currently control over 80% of the global market.[4] This can be countered, in part, by ensuring a taxpayer is eligible to claim the 45X credit if they produce a qualified battery component and incorporate such component into a product, including an EV, that is then sold to an unrelated party.

B. Recycled Content Eligibility

PRBA also encourages Treasury to clarify in Section 13502(a)(a)(6) that recycled battery materials are eligible under 45X as qualified critical minerals as the current language neglects to specifically mention recycling. Since recycled critical minerals are nearly identical to virgin minerals, are more environmentally sustainable, and promote circularity in the critical mineral supply chain, PRBA believes that recycled critical minerals should be applicable critical minerals for the 45X tax credit. Furthermore, we believe that recycling was intended to be eligible for 45X, as it would be consistent with other credits found within the Inflation Reduction Act. For example, as the Clean Vehicle Tax Credit under Section 30D and the Advanced Energy Project Credit under Section 48C both explicitly mention and make eligible recycled critical minerals and recycling facilities.

III. Qualifying Advanced Energy Project Program under Section 48C

a. Eligibility Criteria

The IRA defines "eligible property" as any property necessary for a qualified advanced energy project under Section 13501(c)(1)(A) for the production or recycling of property or re-equipping, expanding, or establishing an industrial or manufacturing facility.[5] The request for comments discusses two previous allocation rounds for the Section 48C credit, a 2009 allocation round and a

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[4] *See* Andy Coltrhope, *"China continues to dominate lithium battery supply chains but policy support gives US new hope," Energy Storage News* (October 8, 2021), available at https://www.energy-storage.news/china-continues-to-dominate-lithium-battery-supply-chains-but-policy-support-gives-us-new-hope/.

[5] P.L. 177-169 § 13501(c)(A).

2013 allocation round. In both rounds, Treasury – in concert with the Department of Energy ("DOE") – applied preliminary eligibility criteria to evaluate projects before the full selection criteria. In other words, it was a two-step process. In the 2009 allocation round, Treasury and DOE evaluated applications using two specific eligibility criteria: qualification as an advanced energy project and reasonable expectation of commercial viability.[6] In the 2013 allocation round, Treasury and DOE conducted pass/fail eligibility evaluation using technical validity, technology readiness, technology appropriateness for the contemplated role, potential near term technology appropriateness, and corporate viability.[7] PRBA recommends that Treasury base its evaluation of eligibility on the criteria from the 2009 allocation round, which will provide for the greatest amount of flexibility to award the credits and would be less onerous than the 2013 requirements. Congress notably did not include additional eligibility criteria in the legislation. Additionally, while qualification as an advanced energy project should be a threshold matter for in evaluating concept papers, factors such as technology readiness and appropriateness are better evaluated in the selection round after the taxpayer has submitted a full application. This approach advances the purposes of the Inflation Reduction Act, which is to permit greater eligibility in order to help alleviate the impact of inflation for important sectors.

b. Selection Criteria

In determining the qualifying advanced energy projects for Treasury certification under Section 48C, the IRA leaves unmodified provisions of the tax code directing Treasury to consider which projects will provide: the greatest domestic job creation, both direct and indirect; the greatest net impact in avoiding or reducing air pollutants and greenhouse gases; the lowest levelized cost of generated or stored energy; the greatest potential for technical innovation; and shortest project time.[8]

Treasury's request for comments discusses the two previous allocation rounds for the Section 48C credit. In the 2009 allocation round, Treasury and the DOE weighed the existing statutory factors equally and further considered geographic diversity, technology diversity, project size diversity, and regional economic development.[9] In the 2013 round, once eligibility criteria were met, applications were evaluated for potential to expand American manufacturing (25% of the application weight), commercial viability (20%), potential for technological innovation and commercial deployment (20%), domestic job creation (15%), shortest project time (10%), and contribution to reducing pollutants and greenhouse gases (10%).[10]

Because the purpose of the program is to support technically advanced manufacturing programs that create jobs and minimize pollutants and greenhouse gases, PRBA recommends that Treasury give considerable weight to ***qualitative*** elements of factors such as potential for technical innovation, quality of jobs, and positive economic impact on local communities, and adopt a longer-term view when assessing such qualitative benefits. To choose projects entirely based on the highest short-term job creation and net impacts on pollutants would overlook, for example, a project that

6 Internal Revenue Bulletin No. 2009-37 at 334 (Sept. 14, 2009).
7 *Qualifying Advanced Energy Project Credit*, Internal Revenue Service Notice 2012-13 at 44.
8 *See* 26 U.S.C. § 48C(d)(3)(B), left unchanged by P.L. 177-169 § 13531.
9 Internal Revenue Bulletin No. 2009-37 at 334 (Sept. 14, 2009).
10 *Qualifying Advanced Energy Project Credit*, Internal Revenue Service Notice 2012-13 at 47-48.

may have the potential to foster a network of highly skilled workers in the medium term or a projet that has the potential for longer-term economic viability and can contribute significantly to innovation gains in America.

c. Innovative Greenhouse Gas Reduction Projects Should be Considered for Certification Under the Qualifying Advanced Energy Program

By including the catchall phrase "other advanced energy property designed to reduce greenhouse gas emissions, as determined by the Secretary,"[11] Congress intended to include a range of innovative projects that reduce greenhouse gases. PBRA recommends that this language be expansively interpreted to evaluate the full range of innovative projects that utilize existing and emerging technologies that taxpayers propose in concept papers and applications. In implementation, Treasury should refrain from narrowly defining the scope of what may be eligible. A narrow approach may disqualify new, innovative projects that have the potential to be groundbreaking. The objective here is to incentivize innovation rather than limit its potential.

IV. Credit Enhancements

a. Apprenticeship Requirements

PRBA notes that the IRA specifies that projects under Section 48C that begin construction prior to a "safe harbor" period ending 60 days after the date that Treasury issues prevailing wage or apprenticeship guidance are eligible for the bonus rate even if the prevailing wage and apprenticeship requirements are not satisfied. However, to assist taxpayers in complying in full with the requirements, Treasury should provide straightforward, specific clarification on the safe harbor period.

b. Energy Communities

The IRA specifies that census tracts with "an unemployment rate at or above the national average unemployment rate for the previous year (as determined by the Secretary)" are eligible for a credit multiplier.[12] "Year" could mean either calendar year, the federal government's fiscal year, or another twelve-month period. As unemployment rates vary from year to year, additional guidance is needed so that companies are better able to plan whether they may be eligible for this credit enhancement. Treasury should clarify the benchmarks and base year(s) used to identify energy communities or enumerate which census tracts are eligible in its upcoming guidance.

V. Section 45X Effective Date

Section 13505 of the IRA creates a new production tax credit for each eligible component that is produced in the United States and sold as part of the taxpayer's business. While it is clear from the

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[11] *Request for Comments on Energy Security Tax Credits for Manufacturing Under Sections 48C and 45X*, Notice 2022-47 at 12 (Dep't Treasury Oct. 11, 2022).

[12] P.L. 177-169 § 13501(f)(11)(B)(ii)(II).

legislation that the credit is only available for components sold after 2022, additional clarity is needed on whether the production of the eligible component necessarily needs to occur and be completed after 2022. Given the statute's structure and relevant legislative history,[13] components produced and sold after December 31, 2022 should be eligible for the full amount of the credit even if the portion of the component was produced before January 1, 2023. Treasury should confirm that this is the case and provide this clarification in the near term Internal Revenue Bulletin guidance, as this is a matter of importance to planning and production that is already underway for taxpayers.

VI. Elective Payment of Applicable Credits

Section 6417 of the IRA allows certain taxpayers to elect to elect to treat certain credits as direct payment rather than a credit against their federal income tax liability, including the credit for advanced manufacturing production under Section 45X. With respect to the time period of election, the structure of the statute indicates that under Section 6417(d)(1)(D), a direct pay election is in effect for five years, and a revocation of such election applies for the year the revocation is made and the rest of years in the 5-year period. Further, there appears to be no prohibition on the ability to make a second election if qualification requirements are met, which makes sense as eligibility should not be arbitrarily constrained. As the issue of a second election here is important, Treasury should clarify that a taxpayer making an election under section 6417(d)(1)(D) is able to make such election, and then, in the year following the initial 5-year period, make another election for that year and each of the 4 succeeding years ending before 2033.

VII. Conclusion

For the reasons outlined above, and consistent with the foregoing comments, PRBA urges Treasury to develop implementing regulations that allow for the review of as many innovative projects as possible using both qualitative and quantitative factors for credit eligibility under the Qualifying Advanced Energy Project Program. PRBA also recommends that Treasury issue draft regulations as "Advanced Notices of Proposed Rulemaking" so that interested parties are better able to assess the specific regulatory provisions that Treasury is contemplating in order to comment more meaningfully. This is particularly critical to address the definitions that will be required as part of the IRA's implementation. Requesting comments without providing adequate information to the public will impede meaningful stakeholder participation.

PRBA and its members are committed to the safe manufacturing, transport, collection, storage, and recycling of all types of batteries. PRBA therefore looks forward to the opportunity to continue to work with Treasury on these important issues to our members.

[13] In response to an inquiry from Senator Mark Warner, Senate Finance Chairman Ron Wyden specified that the Section 45X credit "is intended for any eligible components produced and sold after December 31, 2022, regardless of the portion of the component that was produced before January 1, 2023." 168 Cong. Rec. S4166 (daily ed. Aug. 6, 2022) (statements of Sens. Wyden, Warner).

Please contact me at 202.719.4109 or gkerchner@wiley.law if we can be of further assistance.

Sincerely,

George A. Kerchner

George A. Kerchner
Executive Director