June 28, 2023

Seth Hanlon, Deputy Assistant Secretary
Department of the Treasury
1500 Pennsylvania Ave., NW, Room 3120
Washington, DC 20220

**Re: Additional ACORE Comments in Response to Notice 2023-38**

Dear Deputy Assistant Secretary Hanlon,

On behalf of the American Council on Renewable Energy ("ACORE"), I write to provide additional comments in response to Notice 2023-38 ("the Notice") published by the Department of the Treasury ("Treasury") and Internal Revenue Service ("IRS") containing preliminary guidance on the domestic content bonus provision under the Inflation Reduction Act of 2022 ("IRA"). While the comments below reflect areas of needed clarification, ACORE commends Treasury for guidance that takes critical first steps to provide certainty to taxpayers, while so far reflecting many of the industry's recommendations to facilitate a swift and sustained transition to domestic manufacturing.

**On the consideration of a manufacturer's direct materials and labor costs:**

ACORE members within the finance community have stressed the unworkability of the Notice's statement that the cost of a U.S. Manufactured Product or U.S. Component includes only the manufacturer's direct materials and labor costs as defined in 26 CFR § 1.263A-1(3)(2)(i). Taxpayers who claim the bonus credit, including their developers and contractors, do not have direct access to manufacturers' direct material and labor costs. As discussed in the section below, the Notice problematically requires that taxpayers must have these third-party internal costs for every subcomponent in an Applicable Project component, whether domestic or foreign. If a single cost cannot be derived, then the taxpayer cannot fully compute the domestic content (denominator) against which it is required to measure the U.S.-based costs. It requires a third-party, with whom the taxpayer or its contractor may have no direct contact or privity of contract, to isolate its direct material and labor costs from other capitalized costs under § 263A. It may require due diligence around issues of whether the manufacturer is using a First-in, First-out (FIFO) or Last-In, First-Out (LIFO) method of inventory accounting, and around the manufacturer's selection of other tax methods of accounting. Moreover, manufactured products obtained from foreign manufacturers may not be calculated on the same basis and may not be obtainable or reliable.

Additionally, ACORE wishes to convey member concerns that overly stringent certification procedures will compel manufacturers to reveal sensitive pricing and other proprietary business

details irrelevant to the scope of the overall determination. ACORE members have widely noted concern about creating an unreasonable administrative burden that will stall compliance, as U.S. manufacturers may simply lack the systems necessary to determine the direct materials and labor costs for each constituent manufactured component, and foreign manufactured product costs may be unobtainable or unreliable. All taxpayers face uncertainty regarding qualification for the bonus credit for these reasons.

Furthermore, the above reasons, among others, also demonstrate why the bonus credit is unfinanceable by taxpayers and unadministrable by the IRS. Costs must be verifiable and auditable. To receive financing for the bonus credit through traditional tax-equity partnership structures or through transfers of the credit under Section 6418 requires due diligence and tax opinions at the highest level of certainty. There is considerable concern among ACORE members that such due diligence and tax opinions cannot be obtained based on inventory costs of third-party manufacturers outside the taxpayer's control. The IRS faces the same issues on audit by having to obtain the necessary cost information from third-party manufacturers. It is unlikely that parties who are not supplying domestic content components will have any incentive to share their costs with taxpayers. These issues create the prospect that taxpayers may never be able to certify the project costs under penalties of perjury.

We believe it is clear that "cost" means the taxpayer's cost. The term "cost" is used throughout the Internal Revenue Code. Unless otherwise specified, it consistently refers to the taxpayer's cost of an item. For example, IRC § 1012(a) provides "In general. The basis of property shall be the cost of such property, except as otherwise provided in this subchapter…." Cost equals a taxpayer's basis in property for purposes of calculating gain, loss, or eligible basis for tax credits, such as the ITC under section § 48. Congressional intent has been confirmed that 'cost' denotes the cost incurred by the taxpayer. For purposes of the domestic content bonus, the statutory language refers to the "total costs of all such manufactured products". This clearly means the taxpayer's cost of all such items consistent with the use of cost throughout the Code and in claiming the tax credit. The statutory language does not suggest that "cost" means a third-party manufacturer's internal costs.

ACORE asks Treasury to establish a certification process that balances efficiency and transparency with confidentiality. To that end, ACORE requests that Treasury provide, for purposes of the Adjusted Percentage Rule, that the calculation is made based on the cost incurred (price paid) by the taxpayer, developer or contractor to the manufacturer or supplier for manufactured products delivered to the project site. Assuming an arms-length market transaction, the cost of any manufactured product which is a component of a qualified facility or energy project is its acquisition cost (i.e., the price), including the cost of transporting the component to the project site. Transportation of equipment is a particularly significant expense for the wind sector and is an appropriate capitalized cost to the customer. The taxpayer's cost/price paid to a manufacturer, for either a U.S. manufactured product or non-U.S.

manufactured product, is known to the taxpayer and is auditable. Labor costs and similar costs incurred at the project site for incorporation of components into the qualified facility or energy project are construction costs and are not considered in determining the costs of manufactured components. The taxpayer's costs of all manufactured products are then placed on the same market-based level that is knowable and certifiable. Therefore, ACORE recommends that the full delivered-to-the-site costs paid to the manufacturer associated with delivering manufactured products to the final assembly location be considered for purposes of the Adjusted Percentage calculation.

**On the definition of "component":**

The Notice deviates from the underlying statute and Buy America Act ("BAA") precedent in establishing two separate categories of "components": an "Applicable Project Component" category and a "Manufactured Product Component" category. The "Applicable Project Component" category correctly aligns with the well-established definition of "component" under 49 C.F.R. 661.3 except in its noticeable omission of the phrase "at the final assembly location." ACORE recommends that the definition restore this final clause to read that a "component" is: "any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an Applicable Project *at the final assembly location*." We respectfully request Treasury to further clarify that the "final assembly location" is the project site and the "Applicable Project" is the "end product," which is important to defining the scope of components that fall within a qualified facility.

Relatedly, and more concerningly, the Notice establishes a new "Manufactured Product Component" category, which is defined as "any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into an Applicable Project Component that is a Manufactured Product." The Notice separately provides that a "Manufactured Product is considered to be produced in the United States…if…(1) all of the manufacturing processes for the Manufactured Product take place in the United States; and (2) all of the Manufactured Project Components of the Manufactured Product are of U.S. origin."

Together, the "Manufactured Product Components" category and latter definition silently elevate manufactured product subcomponents to the component level, rendering the initial guidelines as (1) essentially impracticable, as developers would need to conduct an analysis of every subcomponent within an Applicable Project Component (2) and contradictory to the statute, Congressional intent, BAA standards, and areas of the Notice itself (i.e., "Consistent with 49 CFR § 661.5(d), a Manufactured Product Component that is manufactured is a U.S. Component if it is manufactured or produced in the United States, *regardless of the origin of its subcomponents"*) in treating an Applicable Project Component as produced outside of the U.S. if  but a single one of its subcomponents is not of domestic origin. In citing 49 CFR § 661.5(d) yet contriving a "Manufactured Product Components" category that by its very definition refers

to subcomponents under that established law, the Notice erases any distinction between subcomponents and components.

This holds true even where Treasury has ventured to outline components in its safe harbor categorizations under Table 2 of the Notice. One would generally not consider solar adhesives to be the dividing line between foreign and domestic products, yet this is seemingly the line Treasury has drawn in labeling adhesives and other well-established solar module subcomponents as "Manufactured Product Components," while separately requiring that all such components (or *de facto* subcomponents) be produced in the United States. The inconsistency is manifest when compared to wind. The categorization of a wind turbine, consisting of the nacelle, hub and blades are listed as manufactured product components. Such categorization treats a wind nacelle, which may incorporate hundreds of internal subcomponents, the same as the adhesive in a solar module.

The consequences associated with the "Manufactured Product Component" category also carry over to the Adjusted Percentage calculation. In the example associated with Table 1 of the Notice, Treasury describes a manufactured product (Manufactured Product 2) whose component costs sum to $180, reflecting the $30 and $50 costs of two U.S.-produced components (Components 2A and 2B, respectively) and the $100 cost of one foreign-sourced component (Component 2C). Given that the overall cost of Manufactured Product 2 is $200, and Treasury's example calculation is the quotient of $180 and $300, this would seem to imply that the $20 cost incurred by the U.S.-based manufacturer would be included in the denominator of such calculation but not the numerator. A similarly unexplained cost ($25) is observed in the example calculation regarding Manufactured Product 1. Not only are the costs of Manufactured Product Components immaterial to the intended scope of these rules, given that they correspond to subcomponents, their inclusion would seem to be for the sole purpose of cutting against eligibility.

To avoid setting an unattainable standard and return to the meaning of the statute, ACORE respectfully urges Treasury to reverse course by clarifying in future guidance that the Applicable Project should be identified as the end product and revising the definition of "Manufactured Product Component" referring to articles directly incorporated into an Applicable Project Component to mean Applicable Project Components that are manufactured products. The amended definition should be that "any article, material, or supply that is separately delivered to the project site and incorporated into the project (i.e., Applicable Project) at such site is a component of the project and must be characterized as (i) steel or iron, (ii) a manufactured product, or (iii) an unmanufactured product. Each component that is a manufactured product is either U.S. origin or non-U.S. origin and taken into account under the Adjusted Percentage Rule accordingly. The origin of subcomponents should be disregarded as expressly referenced in the notice based on 49 CFR 661.5(d), except in limited circumstances where the subcomponent is imported into the United States highly manufactured, and then subjected to an assembly

process without any other meaningful manufacturing processes. This exception should only be applied in limited circumstances and where specified in guidance, such as a photovoltaic cell in a photovoltaic module.

In connection with the safe harbor chart provided in the Notice, the provided safe harbor for wind includes a nacelle. Items that are included within the nacelle but shipped to the project site separately out of necessity due to size or weight, such as generators and certain other subcomponents, should be disregarded for purposes of the Applicable Percentage calculation to the extent that such separately delivered items are delivered to the project site and assembled into the safe harbor component, which extends to wind blades, nacelles, and hubs.

Last, the guidance should recognize that the unique size and weight of certain components of a qualified facility, to include offshore wind, necessitate the manufacture of those components at the final assembly location or at an adjacent location. The guidance should confirm, consistent with 49 CFR 661.11(d) and our prior briefing paper on domestic content 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." Thus, as described above, the generator, turbine, and other items may qualify as a domestic manufactured product – even if they include subcomponents of foreign origin and even if those components are fabricated onsite – provided that those components are subjected to a manufacturing process within the meaning of 49 CFR 661.3 that is separate and distinct from the construction, assembly, or installation of the end product (i.e., the qualified facility or energy project).

**On exceptions to the phaseout of elective payments:**

The IRA provides that direct pay elections pursuant to Section 6417 will phase out for projects failing to meet the domestic content requirement beginning in 2024 with two exceptions: (1) 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 (2) or relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.

As the Notice does not elaborate on this provision, ACORE urges that future regulations allow Treasury to determine nonavailability for products on a sector-wide basis and accordingly authorize waivers even if the product is not eligible for direct pay. Such nonavailability designations can be re-evaluated by Treasury on an annual basis in concert with federal agencies such as the Department of Energy and with a notice and comment opportunity for stakeholders to endorse sustaining or suspending the waiver in question. As a practical matter, ACORE recommends that the costs of manufactured products for which a nonavailability waiver has been granted be subtracted from the Adjusted Percentage calculation, while steel and iron

products receiving a waiver should simply be exempted from the 100 percent steel and iron requirement and that particular attention be given to the offshore wind sector.

For products that have not received a sector-wide waiver yet are still considered nonavailable to certain taxpayers, ACORE respectfully asks Treasury to provide a case-by-case certification process requiring attestation that domestic obtainment of such products would result in significant delay (e.g., 45 days or longer) or cancellation of construction activities associated with a qualified facility. ACORE would suggest that sector-wide or case-specific waivers be generally limited to products that increase the overall costs of the construction of qualified facilities by no more than 25 percent, in alignment with the threshold prescribed in 45(b)(10)(D)(I) and 45Y(g)(12)(D)(I).

**On the definition of qualified facilities and energy projects:**

In defining the scope of domestic content requirements, additional clarification is needed on the definitions of "qualified facility" under §45 and "energy property" under §48, which should parallel those already well established in existing law. ACORE requests that Treasury define "qualified facility" as comprising only the assets necessary to the production of electricity in accordance with the narrow delineation under Rev. Rul. 94-31. The definition of "energy project" should be defined as comprising one or more "energy properties" as part of a single project in accordance with the definition of qualified property, broadly mirroring the term "energy property" pursuant to §48. Factors indicating that properties are part of a single project include (i) ownership by a single legal entity, (ii) the facilities are constructed on contiguous parts of land, (iii) the facilities are described in a common power purchase agreement(s), (iv) the facilities have a commend interties, (v) and the facilities share a common substation. Energy property comprises all of the assets in the project up to the associated substation but excludes various on-site construction materials.

These definitions should hold with respect to the tech-neutral §45Y and §48E credits, with one exception in the case of §48E whereby a "qualified facility" also includes qualified interconnection property past the substation level for projects with an output of 5 megawatts or less. It is important that Treasury allow taxpayers to elect to comply with the domestic content regulations on a project-wide or property-by-property basis. Explicit clarification that qualified facilities and energy projects are the end product is also needed.

**Other areas of requested clarification:**

- A solar cell is a "highly manufactured" subcomponent as defined in BAA rules and its function therefore remains constant after assembly into a solar module.
- The general rules regarding steel, iron, and manufactured components apply to any such item delivered to the project site, including those not listed in the Safe Harbor categorizations.

- Wind facility components include all manufactured products delivered to or manufactured at the final assembly location, excluding the subcomponents integrated and incorporated therein.
- Total costs under the Adjusted Percentage calculation exclude items that are not incorporated into the qualified facility under §45 or §45Y, but may include those incorporated into an energy project under §48 or §48E.
- Explicit definitions for the term "subcomponents" paired with a more comprehensive listing of component and subcomponent elements to supplement Table 2 of the Notice of Intent.

Thank you for your consideration of these additional comments. ACORE welcomes your attention using a two-step approach. First, address the definition of "Manufactured Product Components" and the safe harbor provisions found within Table 2 of the Notice of Intent; Second, provide clear guidance reflecting 'cost' equal to the taxpayer's total cost of an item. A full outline of the two-step approach is attached as further detailed support. Also attached is a blackline of the Notice offering proposed edits, with emphasis on the calculation for the Adjusted Percentage Rule based on a taxpayer's price paid, that would achieve comprehensive results. In pursuit of our common goal to maximize the transformational benefits of the IRA, ACORE remains committed to supporting your efforts alongside allied trade organizations to generate clear, reasonable, and timely guidance.

Please do not hesitate to contact me at nyholm@acore.org with any questions you may have.

Sincerely,
/s/
Allison Nyholm
Vice President of Government Affairs
American Council on Renewable Energy

cc:

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