

August 14, 2023

Ms. Lily Batchelder
Assistant Secretary, Tax Policy
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Room 3058
Washington, DC 20220

Re: Follow-up Comments of the Business Council for Sustainable Energy on the Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E (Notice 2023-38)

Dear Ms. Batchelder:

The Business Council for Sustainable Energy (BCSE) is pleased to submit comments to the Department of Treasury (Treasury) and the Internal Revenue Service (IRS) in response to [IRS Notice 2023-38](#) (Notice) that was released on May 12, 2023, providing interim guidance on domestic content requirements under Inflation Reduction Act (IRA).

The Council appreciates the work of the staff at the Treasury and the IRS to implement the tax provisions of the IRA to support clean energy projects and investment.

The BCSE advocates for energy and environmental policies that promote markets for clean, efficient, and sustainable energy products and services. Since its founding in 1992, BCSE has been focused on policy adoption that will increase the deployment of energy efficiency, natural gas, renewable energy, as well as energy storage, sustainable transportation, and emerging decarbonization technologies. As a diverse coalition, not all BCSE members take a position or endorse the issues discussed in this submission.

BCSE would like to acknowledge the contributions of its members in preparing these comments, including the National Hydropower Association.

Release Domestic Content Guidance for Public Comment and Finalize Regulations

Under the IRA, a domestic content bonus is available for certain applicable Production Credits for renewable electricity (§§ 45, 45Y) and Investment Credits for renewable energy (§§ 48, 48E).

It applies to facilities or projects built using the required amounts of domestically produced steel or iron, and manufactured products. When the domestic content requirements are met, Production Tax Credit facilities receive a 10 percent bonus, and Investment Tax Credit projects receive up to a 10-percentage point bonus.



Importantly, starting in 2024, for an applicable entity using elective pay, the domestic content requirement can also result in a reduction of the applicable credit amount (for sections 45, 45Y, 48, and 48E) if it is not met.¹

BCSE supports the intent of the IRA law regarding improving domestic manufacturing and enhancing the security of critical supply chains. BCSE members seek clear guidance in a timely manner that will allow for efficient implementation.

Of note, the Notice did not specifically address whether this guidance would apply to entities seeking to utilize elective pay.

This lack of clarity and specific guidance is creating confusion and may jeopardize important investments. Several areas of clarification are needed related to elective pay, including the specific timelines and procedures for the pre-registration and approval processes and requesting waivers, among others.

BCSE urges Treasury and the IRS to release guidance for comment on domestic content as it relates to elective pay and transferability as soon as possible. This is especially urgent as the rules on domestic guidance will impact applicable entities utilizing direct pay as of January 1, 2024.

Domestic Content Requirements May Create Barriers to Implementation

The Notice includes definitions and rules for determining whether an energy facility or project meets: (1) the 100% domestic sourcing mandate for steel and iron and (2) the manufactured products requirement, both of which must be satisfied to qualify for the bonus credit. The Notice bases the domestic content rules on the Buy America Requirements administered by the Federal Transit Administration (FTA).

The proposed regulation requires the taxpayer to utilize only the direct materials and labor costs as defined by 26 §1.263A-1(3)(2)(i) incurred by a third-party, the manufacturer (both foreign and domestic), for the purposes of calculating the Domestic Costs for an Applicable Project.

This provision would require the taxpayer to delineate certain direct costs (materials and labor costs) from other costs that are capitalized under §263A that are incurred by the manufacturer.

Without clear guidance on the needed documentation and submitted processes, including applying for a waiver, this provision may create administrative barriers to implementation, plus potentially undue recapture risk to the taxpayer. First, this provision would require the taxpayer and others performing due diligence on their behalf to attempt to obtain sensitive company business pricing information from manufacturers. This is information that the manufacturer may be reluctant to disclose.

¹ Please see: <https://www.irs.gov/pub/irs-drop/n-23-38.pdf>



Even if the manufacturer were able to provide this information, its accounting methods and software may not allow for this information to be discerned because those systems cannot separate direct labor and materials costs from other capitalized costs on an as-sold basis under § 263A. Finally, since the taxpayer benefits from the credit but takes on the recapture risk, this provision could create large administrative burdens on both counterparties (i.e., requiring indemnification).

BCSE recommends that the Treasury Department provide clear guidance and maximum flexibility to demonstrate compliance of the domestic content requirements, including referencing the cost incurred by the taxpayer to be inclusive of the manufacturer's costs and profit as well to as include the cost of transportation.

This modification is consistent with the IRS' traditional use of the term "cost" and solve the issues of due diligence and compliance for the purposes of audit and verification. These costs would then be in alignment with other aspects of costs incurred by the taxpayer for the energy property or qualified facility.

Expand Certain Onsite Activities for Domestic Content Calculation

Certain manufacturing processes that occur onsite should be eligible for inclusion in the domestic content calculation. BCSE recommends that Treasury Department modify the Notice to include costs incurred onsite that are clearly part of the Manufacturing Process in the domestic cost calculation (i.e., adopt the provisions found in 49 § 661.11(d)). The Buy America requirements provide a well-known, easily includable reference Treasury Department can utilize. Factors that Treasury can consider in determining whether on-site activity is manufacturing, or mere assembly include the nature of the activities being performed, who is performing the work (e.g., the OEM or a general contractor), and whether manufacturing is complete such that the warranty has been issued.

Provide Clarity on Definitions of Applicable Project Component and Manufactured Product Component and Create Parity with Buy America Requirements

The proposed regulation creates two categories of components, an Applicable Project Component and a Manufactured Product Component. BCSE seeks clarity to ensure that a taxpayer is only required to assess the provenance of components, not subcomponents, which is consistent with existing domestic content requirements for manufactured products under 49 CFR 661.5.

Update Table of Categorization of Applicable Project Components to Include Hydropower and Pumped Storage

The proposed regulation provides guidance to the taxpayer on a non-exhaustive list of Applicable Project Components that are subject to either the Steel or Iron Requirement or Manufactured Product Requirement. These are based on the Buy America regulations found in 49 § 661. As hydropower and pumped storage components are not captured in this table,



investors are not certain on which components are captured under which requirement. Also, due to the inclusion of the Manufactured Project Component, there is ambiguity regarding which components are considered subcomponents. Without both the modification of the Applicable Project Component definition and an inclusion of hydropower and pumped storage property examples in Table 2, the existing uncertainty for investors and developers will keep capital on the sidelines and suppress investment in this sector. BCSE cites the submission made by the National Hydropower Association and its proposed insertion to Table 2.

BCSE appreciates the opportunity to share its views in response to the request for comments on the interim guidance on domestic content.

Please do not hesitate to contact [me](#) with any questions.

Thank you for your consideration.

Sincerely,

Lisa Jacobson
President