August 21, 2023

The Honorable Lily L. Batchelder
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Ave. NW
Washington, D.C. 20220

RE: Letter on the Interpretation of “Total Costs” in Notice 2023-38, Domestic Content Bonus Credit Guidance

Dear Assistant Secretary Batchelder,

Thank you for your continuing leadership in advancing and accelerating clean energy deployment. Since its passage, the Inflation Reduction Act (“IRA”) has spurred significant investment across the country. According to a recent Clean Energy Investing in America report by the American Clean Power Association (“ACP”), since August 2022, “82 new utility-scale clean energy manufacturing facilities were announced, bringing an expected 29,000+ new American jobs. $4.8 billion in savings were also announced for over 37 million customers served by utilities building out more clean power.”

But the potential for additional investments in domestic manufacturing is so much greater. If well-implemented, the IRA’s domestic content bonus would contribute meaningfully to maximizing and accelerating investment in domestic supply chains.

The undersigned associations and companies represent clean energy associations, developers, investors, suppliers, and other energy stakeholders aligned around the important policy goal of supporting domestic manufacturing and onshoring the clean energy supply chain. As a matter of policy, we believe we are fully aligned with the Administration’s goals on how to best promote domestic clean energy manufacturing. But, as written, we have concerns the recently issued Notice 2023-38, Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E (“Notice”), would unnecessarily—and likely unintentionally—severely limit the clean energy industry’s ability to use the credit for its intended purpose to drive the onshoring of domestic manufacturing.

Well-established domestic manufacturers eager to maintain and grow their domestic footprints are experiencing difficulty executing supply agreements to utilize the bonus and financial institutions have concerns underwriting the bonus given current uncertainties and risks created by the Notice. To date, few, if any, clean energy projects have been able to finance projects using the bonus. We want to work constructively with you to remedy this so these projects can proceed without delay.

One major shared and overarching concern in the Notice is the focus on a manufacturer’s, rather than a taxpayer’s, costs. Treasury read the IRA’s reference to “total costs” as the direct

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1 Available at https://cleanpower.org/resources/clean-energy-investing-in-america-report/.
costs paid or incurred by the manufacturer to produce or acquire a manufactured component. Nowhere does the statutory language of the IRA require—or even suggest—that “cost” be interpreted as a manufacturer’s internal costs. Instead, Congress intended that the adjusted percentage calculation be based on the costs to the taxpayer to procure or acquire manufactured components. This is supported by the legislative history and text of the statute, as well as how costs have been traditionally viewed by the Internal Revenue Code.

Basing qualification for the bonus credit on a manufacturer’s internal costs puts the burden of proving qualification on the manufacturer instead of the taxpayer receiving the credit. For the reasons described below, this is an unworkable approach that exposes U.S. manufacturers to significant financial and/or compliance risks, as well as creating numerous problems with the administration of the credit. This threatens the potential pipeline of new manufacturing investments from companies who have been waiting on the sidelines for clear guidance. A comprehensive explanation of why using a manufacturer’s costs creates concerns about the bonus credit being unadministrable for both taxpayers and the IRS is detailed in ACP’s comments on the subject (which is excerpted in relevant part and attached hereto).

The associations and companies listed below stand ready to execute our shared vision of deploying clean energy, while simultaneously increasing U.S. manufacturing and jobs. Although not the only issue impeding the domestic content bonus from helping to drive the onshoring of domestic manufacturing, reinterpreting “total cost” as the cost to the taxpayer would be a major step toward the administration unlocking the full potential to implement and accelerate the bonus in a workable fashion in line with existing precedent and congressional intent. Without this change, uncertainty is likely to stall implementation of our shared goal of spurring domestic supply chain investments.

Thank you for your attention to this important matter.

Sincerely,

AES Corporation
ALLETE Clean Energy, Inc.
American Electric Power Co
American Clean Power Association
American Solar Manufacturing LLC
Apex Clean Energy, Inc.
Avangrid, Inc.
Berkshire Hathaway Energy
Blattner Energy, LLC
Brookfield Renewable US
Clearway Energy, Inc.
EDF Renewables
EDP Renewables
Enbridge Inc.
Enel North America, Inc.
ENGIE North America Inc.
First Solar, Inc.
GE Vernova
Greenbacker Capital
Heliene Inc.
Innergex
Intersect Power, LLC
Invenergy LLC
Leeward Renewable Energy, LLC
NextEra Energy Resources, LLC
NexTracker Inc.
NorthRenew Energy, LLC
Ørsted North America Inc.
Pattern Energy Group LP
Pine Gate Renewables, LLC
PRC Wind
RWE Clean Energy, LLC
Scout Clean Energy, LLC
Siemens Gamesa Renewable Energy, Inc.
Solar Energy Manufacturers for America Coalition
TerraForm Power Operating, LLC
TPI Composites, Inc.
Triple Oak
3Sun USA, LLC
Vestas-American Wind Technology, Inc.
Xcel Energy, Inc.
Zero6 Energy, Inc.
Attachment

ACP Comments on Notice 2023-38—Excerpt on Total Costs

I. The Cost to the Taxpayer Should be Used

Sections 45(b)(9)(B)(iii) and 45Y(g)(11)(B)(iii) of the IRA provide that “manufactured products which are components of a qualified facility upon completion of construction 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 of such facility are attributable to manufactured products (including components) which are mined, produced, or manufactured in the United States.”

In the Notice, it appears that Treasury read the IRA’s reference to “total costs” as limiting its interpretation of the adjusted percentage rule to the direct costs paid or incurred by the manufacturer to produce or acquire a manufactured component. For the reasons discussed below, a fair reading of the legislative history and the text of the statute demonstrates that Congress intended that the adjusted percentage calculation should instead be based on the costs to the taxpayer to procure or acquire manufactured components. Basing the calculation on the taxpayer’s acquisition cost of all such items would also be consistent with the plain language reading of the domestic content bonus language as well as the use of “cost” in other areas of the Internal Revenue Code, the Buy America and Buy American laws, and the standards for claiming the tax credit. Nowhere does the statutory language of the IRA require—nor even suggest—that “cost” means a third-party manufacturer’s internal costs.

a. Manufacturer’s Cost-Based Approach Inhibits the Use of the Bonus Credit

Basing qualification for the bonus credit on a manufacturer’s internal costs fundamentally puts the burden of proving qualification to the manufacturer instead of the taxpayer. Put plainly, using manufacturer’s costs subjects U.S. manufacturers – who do not receive the bonus credit – to significant financial, compliance and audit risks. In addition, using manufacturer’s internal costs creates numerous problems with administration of the credit:

- The taxpayer is required to calculate a “Total Manufactured Products Cost” based solely on the “direct” labor and material costs (i.e., excluding overhead and profit, and other indirect costs) “paid or incurred . . . by the manufacturer” of each manufactured product. The taxpayer is further required to calculate the direct cost of any domestic manufactured product components that may have been incorporated into non-U.S. manufactured products. Under these rules, the taxpayer is expected to collect internal, direct cost data from multiple third-party manufacturers (including, potentially, foreign manufacturers located abroad). The

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2 See IRC § 45(b)(9)(B)(iii) (emphasis added).
3 Specifically, the guidance issued by Treasury determined that, for purposes of determining the Domestic Manufactured Products and Components Cost for an Applicable Project, the cost of a U.S. Manufactured Product or U.S. Component includes only direct costs as defined in § 1.263A-1(e)(2)(i), that is, direct materials and direct labor costs, that are paid or incurred within the meaning of § 461 by the U.S. Manufactured Product’s manufacturer to produce the U.S. Manufactured Product or by the Non-U.S. Manufactured Product’s manufacturer to produce or acquire the U.S. Component.
calculation is not driven by the amount actually paid by the taxpayer (which will be higher).

- Use of manufacturer’s cost potentially causes the bonus credit to be nonfinanceable because third-party manufacturers’ costs cannot be fully diligenced by lenders, tax equity or transferees of the tax credit: these types of diligence efforts would likely require access to the manufacturers’ confidential tax and inventory accounting records.

- It causes the bonus credit to be unadministrable because the taxpayer claiming and certifying the bonus credit is not the party who incurred the costs and will not have access to all of the manufacturers’ internal (and confidential and proprietary) costs. The IRS will need to examine a taxpayer’s third-party manufacturers’ (and even their suppliers’) direct costs, but those are not within the taxpayer’s control.

- It would require a manufacturer to isolate the relevant direct material and labor costs, separating them from other capitalized costs under § 263A, on an as-produced and as-sold basis. Many manufacturers do not have accounting systems in place to do this on an as-sold basis because inventory cost of goods is typically determined on an annual tax year basis.

- It would require manufacturers to guarantee costs well ahead of market norms, subjecting them to further financial and legal risks. Energy equipment prices may be fixed many months or even years in advance. Meanwhile, many commodity and component inputs can have much shorter fixed pricing schedules. The mismatched time frame puts a new and significant constraint on U.S. manufacturers when balancing costs and contractual obligations.

- It will require manufacturers to reveal highly confidential cost information, profit margins, and sourcing information which will negatively impact competition and have negative market impacts for U.S. manufacturers.

- A U.S. taxpayer/developer may not be dealing directly with a foreign manufacturer and may have no privity of contract or leverage to obtain such internal costs. In some instances, the beneficiary of the domestic content bonus may even be a third-party transferee with no relationship to the energy industry, further limiting their ability to verify and diligence manufacturers’ direct costs.

- It is more likely that manufacturers’ internal costs, which are not visible to third parties, can be gamed than a taxpayer’s direct costs for manufactured product components. A taxpayer’s project costs are routinely checked or diligenced by accountants for tax reporting, financing parties and investors, and are audited by the IRS. Thus, taxpayers have certainty they can provide correct information to certify their eligibility for the domestic content bonus credit.

b. Legislative History

If a statute is ambiguous, the standard approach to add clarity is to inspect the legislative history of the statute to try to discern the Congressional intent in enacting the statute. In a recent conversation with senior staff at Senate Finance Committee, it was represented that the intent of the statute was that costs would be viewed as those incurred by the taxpayer to procure or acquire manufactured components. It seems reasonable for the administration to accord
authoritative weight to those who worked on the drafting of the legislative text for interpreting its intent with respect to undefined terms.

c. Statutory Text

The plain language of the statute also supports a reading that focuses on the costs to the taxpayer rather than the manufacturer. While the statute does not explicitly define costs, it refers to the “costs incurred by the taxpayer” in multiple instances and does not contain a single reference to the costs to the manufacturer. In addition, the language of the statute refers throughout to the “taxpayer” and their responsibility in certifying that the conditions of various base and bonus tax credits are met. In fact, there is no reference in the language of the statute that refers to a manufacturer’s costs, either direct or indirect. Rather, the term “cost,” either with the modifier “incremental,” “total,” or “overall,” is used throughout the legislation to refer to the costs incurred by the taxpayer. For example, the incremental costs of replacing an eligible vehicle with a zero-emission vehicle is the difference between market-value of those vehicles paid by the taxpayer. In addition, the low-carbon transportation materials grant program provides that the incremental value of the tax credit is equal to the difference between the higher priced low-carbon materials and traditional materials, indicating that the relevant cost consideration is the cost to the taxpayer.

d. Internal Revenue Code

The term “cost” is used throughout the Internal Revenue Code. Unless otherwise specified, it always refers to the taxpayer’s cost of an item.\(^4\) 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.

e. Buy America and Buy American Precedent

The statute cites 49 C.F.R. Section 661, the implementing regulations for the Federal Transit Administration (“FTA”) Buy America rules, to serve as a guidepost for implementing the domestic content provisions in the IRA. The FTA Buy America regulations provide details about determining costs in section 661.11. That section states that the cost of acquiring a component is “the price that a bidder or offeror must pay to a subcontractor or supplier for that component or subcomponent” and the cost of manufacturing a component is “the cost of labor and materials incorporated into the component or subcomponent, an allowance for profit, and the administrative and overhead costs attributable to that component or subcomponent under normal accounting principles.”\(^5\) These regulations spell out that the cost when purchasing components is the price that an offeror pays to a subcontractor, which is simply the purchase price when buying from a supplier. As for the manufacturing cost when making the component oneself, the Buy America regulations specifically instruct manufacturers to factor in administrative costs, overhead, and profit margins, all of which are explicitly not direct costs.\(^6\) In application, the costs

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\(^4\) See, e.g., IRC § 1012(a) (“In general. The basis of property shall be the cost of such property, except as otherwise provided in this subchapter. . . .”).

\(^5\) 49 C.F.R. § 661.11(m)(1) and 49 C.F.R. § 661.11(m)(2).

\(^6\) 49 C.F.R. § 661.11(m)(2).
associated with acquiring and manufacturing components are nearly in parity when conducting domestic content calculations.

The statute also notes that to qualify for the domestic content waiver a taxpayer must show that the inclusion of manufactured products produced in the U.S. would increase the overall cost of construction of qualified facilities or projects — the costs incurred by the taxpayer — by more than 25 percent. The statute is ambiguous as to whether the cost differential between a domestic and foreign produced product is based on their direct manufacturing cost or the overall price paid. Using a direct cost benchmark, for a project to successfully apply for an unreasonable cost waiver, project developers would have to show that a foreign supplier’s manufactured cost was at least 25 percent less than a like domestic product. It seems clear that Congress did not mean for this waiver, which was borrowed from the FTA Buy America, to require a standard other than the one that has been used – i.e., cost for the taxpayer.

To reiterate, FTA Buy America regulations, as directly referenced in the IRA, should have been the natural source for definitions and precedent. However, rather than interpreting total costs, consistent with those regulations, to mean the purchase or manufacturing cost for the taxpayer, Treasury selected “direct costs” — as outlined by Treas. Reg. §1.263A-1(e)(2)(i) — as the defining metric of the domestic content percentage calculation. The direct cost definition from §1.263A-1(e)(2)(i) was designed to be applied mostly to highly technical, real property accounting for the IRS and does not generalize well to ordinary manufactured goods.

While not explicitly referenced in the IRA, Buy American regulations also serve as precedent supporting a focus on costs to the taxpayer. Buy American has a similar adjusted percentage requirement as the one contained in the IRA. When determining that percentage or the cost differential between foreign and domestic components, only the purchase price is considered. Buy American Act and Buy America agree on a straightforward definition for determining costs, and by explicit reference in the IRA, should have served as the signpost to the definition for total costs instead of §1.263A-1(e)(2)(i).

f. Solution: A Cost to the Taxpayer Approach for Domestic Content Eligibility

In light of the above, cost should mean a taxpayer’s cost under the tax law. Cost inputs must be verifiable and auditable. The cost incurred by the taxpayer are verifiable and auditable. Assuming an arms-length market transaction, the cost of any manufactured product, including its Manufactured Product Components, that is a component of a qualified facility or energy project is its acquisition cost (i.e., the price). These are the same costs that form the basis of the qualified property for purposes of tax credits and are readily and routinely audited by the IRS. This should include the costs of acquiring a component—“the price that a bidder or offeror must pay to a subcontractor or supplier for that component or subcomponent”8—which by nature also includes the cost of manufacturing a component—“the cost of labor and materials incorporated into the component or subcomponent, an allowance for profit, and the administrative and overhead costs attributable to that component or subcomponent under normal accounting principles.”9

8 49 C.F.R. § 661.11(m)(1).
9 49 C.F.R. § 661.11(m)(2).
g. A Cost to the Taxpayer Approach Mitigates Risks Related to “Gaming”

Utilizing a taxpayer cost approach mitigates concerns regarding “gaming” costs to meet the adjusted percentage rule. Prices are transparent to the taxpayer and can be easily evidenced and supported through commercial contracts and supply agreements. In contrast, manufacturers’ costs are not transparent to the taxpayer and are solely under control of the suppliers. As discussed above, taxpayers or credit recipients may not even have contractual relationships with the suppliers, limiting their ability to fully trace and run diligence on upstream supply chain costs. If Treasury is concerned about participants “gaming” the bonus credit calculations, taxpayer costs – evidenced by the taxpayer’s supply contracts, purchase orders, payment records, etc. – would be more transparent and abuse-proof than manufacturers’ costs – which would require open access to manufacturer’s internal documentation and internal accounting records.

In practice, domestic component manufacturers will compete with other domestic and foreign suppliers. These products will be sold to projects that elect and qualify for the bonus credit and those that do not. Domestic components may justify a modest price premium to cover additional costs or to share the value of the bonus credit – both directly benefiting the U.S. manufacturing. However, inflating the price significantly reduces the market competitiveness of the manufacturer. Furthermore, large discrepancies in taxpayer costs for similar components will be a red flag for the presence of abuse – especially to third party stakeholders in the transaction.

Finally, Treasury already has transparent and well-documented anti-abuse provisions to ensure that qualification of the domestic content bonus is calculated based on natural market pricing. The bonus credit is available where the taxpayer certifies to the Secretary under penalties of perjury: “The requirement described in this clause is satisfied with respect to any qualified facility if the taxpayer certifies to the Secretary (at such time, and in such form and manner, as the Secretary may prescribe) that any steel, iron, or manufactured product which is a component of such facility (upon completion of construction) was produced in the United States.”

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10 § 45(b)(9)(B)(i) (emphasis added).