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Internal Revenue Service
CC:PA:LPD:PR (Notice 2024-41)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2024-41, Domestic Content Bonus Credit Amounts under the Inflation Reduction Act of 2022: Expansion of Applicable Projects for Safe Harbor in Notice 2023-38 and New Elective Safe Harbor to Determine Cost Percentages for Adjusted Percentage Rule

To Whom It May Concern:

The undersigned signatories appreciate this opportunity to comment on Notice 2024-41, "Domestic Content Bonus Credit Amounts under the Inflation Reduction Act of 2022: Expansion of Applicable Projects for Safe Harbor in Notice 2023-38 and New Elective Safe Harbor to Determine Cost Percentages for Adjusted Percentage Rule" (Notice 2024-41), which modifies Notice 2023-38, "Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E" (Notice 2023-38).

Signatories to this letter include national associations representing applicable entities as defined under section 6417 (Applicable Entities).[1] The American Public Power Association (APPA) is the national trade organization representing the interests of the nation's 2,000 not-for-profit, community-owned electric utilities. Public power utilities are in every state except Hawaii. They collectively serve over 54 million people in 49 states and five U.S. territories, and account for 15 percent of all sales of electric energy (kilowatt-hours) to end-use consumers. Public power utilities are load-serving entities, with the primary goal of providing the communities they serve with safe, reliable electric service at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of the utilities with the long-term interests of the residents and businesses in their communities.

The Government Finance Officers Association (GFOA) is the professional association of State, provincial, and local finance officers in the United States and Canada. The GFOA has served the public finance profession since 1906 and continues to provide leadership to government finance professionals through research, education, and identifying and promoting best practices. Its more than 24,000 members are dedicated to the sound management of government financial resources.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,069 counties, 40,000 county elected officials and over 3.6 million county employees through advocacy, education, and research.

The National League of Cities (NLC) is the nation's foremost non-partisan network of municipal governments and their leaders, representing all of America's 19,000 cities, towns and villages and more than 218 million people.

The National Rural Electric Cooperative Association (NRECA) is the national trade association representing 63 generation and transmission (G&T) and 832 distribution cooperatives. Each cooperative is governed by a board of directors elected from its membership. Both distribution and G&T cooperatives share an obligation to serve their consumer-members by providing affordable, reliable, and safe electric service. Electric cooperatives power one in eight Americans and serve as engines of economic development for 42 million Americans across 56 percent of the nation's landscape including serving 92 percent of persistent poverty counties in the United States.

Background: Rationale and Purpose of Comment Letter

Notice 2023-38 and Notice 2024-41 (referred to collectively hereafter as "the notices") were both titled as relating to the "Domestic Content Bonus Credit" and mentioned only the domestic content bonus credit,

[1] References to a "section" or "§" are to a section of the Internal Revenue Code of 1986, as amended (("Code" or "I.R.C."), unless otherwise specified.

but not the domestic content elective payment requirement. As a result, we and other Applicable Entity stakeholders initially viewed these notices as not applying with respect to the domestic content requirements for elective payment under section 6417 and have not previously commented.

However, in a recent webinar[2], Treasury clarified that the notices do apply for purposes of determining compliance with the domestic content requirement for elective payment. While Notice 2023-38 did not solicit comments and Notice 2024-41 solicited comments only regarding additional technologies for the notice's safe harbor and nameplate capacity allocation rules, we are nonetheless using Treasury's clarification as an opportunity to comment on the underlying domestic content regime provided under Notice 2023-38 and on the safe harbor provisions of Notice 2024-41.

First, however, we strongly urge Treasury to issue formal guidance as soon as possible clarifying that the notices apply for purposes of elective payment. The vast majority of potential projects that would use elective payment remain idled because of uncertainty about the domestic content requirement (and exceptions to that requirement) for elective payment. **Simply put, Applicable Entities cannot enter contracts today for projects construction of which may take a year, or years, to begin, let alone complete, if they have no certainty as to whether the project may, or may not, qualify for a tax credit**. The domestic content requirement for elective payment guidance will not resolve the lack of domestic supply needed to meet that requirement. Nor will it provide guidance as relates to exceptions to the requirement. However, formal confirmation that Applicable Entities can rely on the notices for determining whether they meet the domestic content requirement for elective payment in the circumstances described in the notices would at least be a step to reducing uncertainty and unleashing some pending clean-energy projects.

Background: Applicable Entity Risk Tolerance

The path to qualified energy property development by an Applicable Entity will likely vary widely, but generally all paths will include extensive initial financial analysis for determining the overall feasibility of a project. Such a feasibility study will likely estimate the net cost of a project, including total costs less applicable grants, elective payment tax credits, revenue from the project and/or avoided costs where the energy property is to be used by the Applicable Entity itself. Estimated net costs drive the long-term financing needed at the completion of construction. In turn, lenders that provide long-term financing for the project will use this same data in assessing the project. Finally, taking all these factors into account, the Applicable Entity's governing body will decide whether to proceed with the project.

All these decisions and actions occur before negotiating and signing vendor contracts and each depends on certainty as to the ability of the project to meet domestic content requirements – or qualify for one of the available exceptions. Conversely, without certainty, these assessments cannot accurately and reliably

[2] Department of Energy, "Domestic Content Bonus Webinar," June 20, 2024 (https://www.energy.gov/eere/events/domestic-content-bonus-webinar).

be made, and the governing body of an Applicable Entity will likely not approve pursuing the project due to the financial risks to the entity and its ratepayers/and or constituents.

Additionally, whereas a commercial project developer may have little financial exposure, we believe that most Applicable Entities will seek to use elective payment to own qualified energy properties to serve their institutional needs or the needs of their constituents and/or consumers. So, Applicable Entity decisionmakers will be particularly averse to undertaking a project where a substantial portion of the net cost assessment remains uncertain, because all the cost will fall on their consumers. This exposure is not a fault, but a feature of local ownership under local control that needs to be taken into consideration when considering an Applicable Entity's risk tolerance.

As a result, as we have stated previously, simple, clear processes with upfront certainty as to the results will allow Applicable Entities to participate in applicable projects at will and as intended by the Inflation Reduction Act (IRA). Conversely, Applicable Entities will be discouraged from participating in such projects where the process of meeting domestic-content requirements – or the exceptions – is costly and complicated, where the outcome of determinations with respect to domestic content and the exceptions are highly uncertain, or where determinations about compliance can only be made late in a project's development.

Background: Elective Payment and Domestic Content Requirements

Section 6417 allows an Applicable Entity[3] to make an election with respect to an applicable credit to be treated as having made a payment of tax equal to the amount of the applicable credit to the Applicable Entity through the regular tax filing process ("elective payment"), thereby effectively receiving a refund of the applicable credit amount. Certain qualified facilities and qualified energy properties (collectively referred to as qualified energy projects) must meet the domestic content requirement to receive a credit via elective payment.

To meet the domestic content requirement, any steel, iron, or manufactured product that is part of the project at the time of completion must be produced in the United States. For purposes of this requirement, steel and iron must be 100 percent produced in the United States. Manufactured products are deemed to have been manufactured in the United States if 40 percent of the total cost of the components and subcomponents of the project is attributable to components that are mined, produced, or manufactured in the United States.[4]

[3] "Applicable Entities" are defined in Code § 6417(d)(1) and generally include tax-exempt public entities such as state and local governments and subdivisions and instrumentalities thereof, electric cooperatives, Indian tribal governments, and the Tennessee Valley Authority. Signatories to this letter represent Applicable Entities.
[4] Under the § 45Y clean energy PTC, the applicable percentage increases over time from 40 percent to 55 percent.

The applicable credits for which the domestic content requirement must be met for elective payment include:

- Section 45 – Electricity Produced from Certain Renewables, etc. (also known as the production tax credit or PTC);
- Section 45Y – Clean Electricity Production Credit (or Clean PTC);
- Section 48 – Energy Credit (also known as the investment tax credit or ITC); and
- Section 48E – Clean Electricity Investment Credit (or Clean ITC).

The above credits further provide three exceptions to the domestic content requirement for elective payment:

- If the project has "a maximum net output of less than one megawatt [MW] as measured in alternating current"[5] (1 MW Exception);
- 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"[6] (Increased Cost Exception); 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"[7] (Non-Availability Exception).

Notice 2023-38

Notice 2023-38 provides guidance for meeting the domestic content requirement for purposes of qualifying for a domestic content bonus.[8] Where all manufactured product components are not domestically made, an applicable percentage safe harbor is met if the direct costs of domestic manufactured products and components are above the applicable percentage of the total direct costs of all manufactured products and components.

We support Treasury's efforts in the notices to provide clarity as to the categorization of components as steel and iron or as a manufactured product. We also support Treasury's efforts to clarify the mechanics of qualifying for the applicable percentage safe harbor with the classification of manufactured product components by applicable project type. Nonetheless, as others have commented, **this regime remains highly problematic, because it relies on the use of a supplier's direct costs – proprietary information a supplier may be unwilling to provide or may only provide at a substantial premium.** Notice 2024-41 also recognizes the challenges presented in obtaining direct cost as a basis for the

[5] Code §§ 45(b)(10)(B), 48(a)(13), 45Y(g)(12)(D), or 48E(d)(5).
[6] Code §§ 45(b)(10)(D), 48(a)(13), 45Y(g)(12)(D), or 48E(d)(5).
[7] Id.
[8] Again, nothing in the notice mentions elective payment.

production-cost factors included in the safe harbor for the designated technologies.

Likewise, the notices' applicable percentage safe harbor provides flexibility in meeting the domestic content requirement where the project's major components are not domestically manufactured, by allowing an applicable percentage calculation based on subcomponents. However, this flexibility comes with a cost: the need to obtain direct cost information not only for project components, but subcomponents, too. While suppliers of components directly and singularly used for tax credit projects may have an incentive to provide such information, many subcomponents listed are not unique to tax credit projects – e.g. junction boxes, pigtails, adhesives, cabling, inverters, and the like. As a result, it will be increasingly difficult and costly to obtain direct cost information about such subcomponents.

Additionally, concerns about obtaining proprietary information from suppliers are compounded in the context of elective payment, where Applicable Entities – on average – are likely to be smaller than for-profit developers seeking to meet domestic content requirements for purposes of obtaining a bonus credit. For example, a developer of a series of 200-megawatt (MW) utility-scale projects has leverage that a local utility trying to install a two MW solar farm does not have. We have heard anecdotally that some suppliers offer to provide such information, but at a cost – either a flat fee or as a percentage of the order. A larger developer is far more likely to be able to negotiate a reduced fee, or eliminate it altogether, versus a smaller owner.

As a result, we strongly associate ourselves with comments questioning this regime and **urge Treasury to consider allowing purchasers to use the purchased cost, rather than direct cost, in determining whether the applicable percentage requirement has been met.**

With regards to substantiation, Notice 2023-38 provides that an owner must retain appropriate records, but provides no clarity as to whether the owner can rely on those records. For example, the notice does not indicate whether an owner that makes an applicable percentage calculation based upon a good faith belief in the accuracy of direct costs reported by the supplier could be penalized if those records – through no fault of the owner – prove inaccurate. The ability to rely on such assertions is important for an owner seeking to claim a domestic content bonus credit, but essential for an Applicable Entity that would otherwise be at risk of receiving no credit at all. **We strongly encourage Treasury to provide that an Applicable Entity that has a good faith belief in the accuracy of records provided by a supplier – including but not limited to direct costs and country of origin – can rely on those records when certifying compliance with the domestic content requirement, even if those records later prove to be inaccurate.**

Likewise, Notice 2038-41 provides that a domestic content certification is made at the time the applicable credit property is placed in service. Again, the risk associated with waiting until the unit is placed in service falls unequally on an Applicable Entity. A last-minute issue that calls into question a bonus credit is problematic; a last-minute issue that calls into question the ability to claim any credit at all could be

financially devastating to the Applicable Entity. Simply put, an Applicable Entity must be able to know that it will qualify for elective payment at the time it becomes financially committed to the project.

We strongly urge Treasury to allow Applicable Entities to certify compliance with the domestic content requirement or qualification for one of its exceptions at the time of financial commitment to the project. We will discuss below a process by which an entity can seek to remedy a change in the status of the use of domestic content after a financial commitment has been made, but far preferable would be a safe harbor available at the time the financial commitment is made.

Notice 2023-38 and Domestic Content Waivers

As discussed above, under the Increased Cost Exception, the domestic content requirement for elective payment is waived where the inclusion of steel, iron, or manufactured products that are produced in the United States increases the overall costs of construction of qualified facilities by more than 25 percent.

We would strongly object if Treasury were to try to incorporate the "direct cost" concept from Notice 2023-38 into the Increased Cost Exception calculation. First, the statute clearly states that the Increased Cost Exception is calculated based on the "overall costs of construction," making no mention of "direct costs." Second, requiring an Applicable Entity to obtain direct cost information for the calculation is untenable. Specifically, if direct cost information were required, then the Applicable Entity would not only have to obtain detailed proprietary information from its ultimate supplier, but also from suppliers from whom no purchase will be made. This is much more work, plus we can see no reason a supplier of domestically manufactured goods would release direct cost information when that information will be used to justify not buying those goods under the Increased Cost Exception.

Also, as discussed above, under the Non-Availability Exception there is an exception to the domestic content requirement for elective payment where relevant steel, iron, or manufactured products are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality. Also, as discussed above, the applicable percentage safe harbor gives purchasers greater flexibility in meeting the domestic content requirement. i.e., where manufactured products are not domestically made, the purchaser can use the direct costs of subcomponents to determine whether the applicable percentage has been met. However, in the context of the non-availability waiver, we would strongly urge Treasury not to require an Applicable Entity to consider manufactured product subcomponents. For example, where there are no responsive or responsible responses to a request for proposal (RFP) or bid for domestically made solar modules, the purchaser should not be required to try to determine whether subcomponents of such manufactured products could meet the applicable percentage safe harbor. Instead, the entire module should be granted a Non-Availability Exception. As we have discussed in past comments, the burden of the test of whether a product is "reasonably available" falls on both the purchaser and supplier – the purchaser must make a reasonable effort to obtain the product, and suppliers must make a reasonable effort to supply it. In the example above, an inability to provide a responsive or

responsible bid to supply domestically made solar modules should be taken as, per se, proof suppliers cannot, or will not, make domestically manufactured solar modules "reasonably available" for the project.

Notice 2024-41

We support the Notice 2024-41 elective safe harbor for determining cost percentages (elective cost-percentage safe harbor) for the adjusted percentage rule provided under Notice 2023-38 as modified by 24-41. While the prescribed cost percentages will not be a perfect match for every project and will only be of use for technologies for which cost percentages are provided, we believe this is a substantial improvement over the direct cost requirements imposed under Notice 2038-38 and confirmed under Notice 2024-41. It is also an excellent example of how the Treasury Department and Energy Department can work together to simplify and clarify the process of meeting the domestic content requirement. Safe harbor cost percentages greatly simplify the process of meeting the applicable percentage threshold and do not require the use of proprietary information from suppliers. They also reduce redundant calculations by what will be tens of thousands of owners seeking to determine whether they meet the domestic content requirement.

We believe this will be particularly helpful to smaller entities that could be challenged by the complexity of obtaining and tracking the direct costs of every manufactured product (and potentially every manufactured product subcomponent) in a project. It will also be helpful to entities that might not have the leverage to extract such cost information from suppliers (at all or in a cost-effective manner).

We also believe that the elective cost-percentage safe harbor could be extremely useful in the context of the exceptions to the domestic content requirement for elective payment. Specifically, we believe that the cost-percentage safe harbor coupled with other key policy choices could provide much-needed certainty needed for entities seeking a non-availability waiver or an increased cost waiver within the technologies covered in the notice.

Key policy choices needed are:

1. Clarification regarding the treatment of subcomponent and production cost percentages;
2. Clarification that an RFP or bid that results in no responsive or responsible[9] responses is proof of non-availability of the respective component/components;
3. Clarification, as noted above, that the increased cost exception is based on the cost to the purchaser not direct costs for the supplier; and
4. Clarification that components for which a waiver is obtained are deemed domestic content for purposes of the applicable percentage safe harbor with the component constituting the percentage prescribed under the elective cost-percentage safe harbor.

[9] A responsive bid meets all requirements of the bid submission while a responsible bidder meets the performance and financial qualifications established by the project owner.

First, Treasury should clarify that the cost-percentages for the subcomponents and production of a component can be added to provide a total cost-percentage for the component itself. So, for example, for a ground-mount tracking solar photovoltaic project, the cost percentages of the PV module subcomponents, including production, add to 66.3 percent of the cost of manufactured products for the project and, so the PV modules, per se, are considered to be 66.3 percent of the cost of manufactured products for purposes of the applicable percentage safe harbor. This may seem obvious, but because it is not stated explicitly in the notice, it should be clarified.

Second, a number of federal agencies currently interpret provisions comparable to the exceptions to the domestic content requirements for elective payment. This includes for purposes of implementing the Buy American Act,[10] the "Buy America" provisions of various authorizing statutes,[11] and the Build America, Buy America Act (BABA)[12] (collectively referred to as Buy American provisions, hereafter). **Treasury should follow the precedent of other agencies implementing Buy American provisions and provide that an RFP or a request for bid that results in no responsive or responsible proposals or bids is proof of non-availability of the respective component or components.** Again, as noted above, non-availability is a test for the purchaser and suppliers, and if suppliers cannot or do not meet a reasonable request to supply a product (or products), then that product (or products) is not "reasonably available."

Third, the increased cost waiver should be based on the cost of the goods being sought as a percentage of the overall cost of construction. Requiring the calculation to rely on direct costs would be unworkable as noted above.

Fourth, Treasury should follow the precedent of other agencies implementing Buy American provisions and provide that components for which an Increased Cost Exception or Non-Availability Exception is obtained should be deemed domestic content for purposes of the applicable percentage safe harbor.[13] This should apply only for purposes of determining whether a project meets domestic content requirements for elective payment, and not for the domestic content bonus credit. Congress clearly intended to set a high bar for qualifying for the bonus credit, and thus provided no exceptions to the domestic content requirement for qualifying in that case. Conversely, Congress clearly intended to balance the goals of allowing for elective payment, while also "reasonably" encouraging the use of domestic content for such projects, by providing the various exceptions.

Collectively, these policy choices could provide a substantial measure of simplicity, clarity and reliability in the implementation of the domestic content requirement for elective payment. For example, consider a utility that issues an RFP for two MWs of solar capacity, construction of which will begin in 2024. The

[10] Buy American Act, Pub. L. 72–428, 47 Stat. 1489.
[11] See, e.g., 49 U.S.C. § 5323(j)(1) (Federal Transit Administration), 23 U.S.C. 313 (Federal Highway Administration), 7 U.S.C. 903 (Rural Utilities Service).
[12] Build America, Buy America Act, Pub. L. 117-58, 135 Stat. 429.
[13] *See, e.g.*, 49 C.F.R. § 661.7(c)(1), or 7 C.F.R. § 1787.1.

RFP states that responses should comply with domestic content requirements for elective pay. No responsive or responsible responses to provide domestically manufactured solar modules are received for the project. Under the proposal discussed above, the lack of a responsive or responsible response to supply modules would qualify modules under the project for a Non-Availability Exception. Modules would, therefore, be deemed domestic content for purposes of the applicable percentage safe harbor. Because solar modules constitute 66.3 percent of the manufactured product costs for the project under the elective cost-percentage safe harbor provided under Notice 2024-41, the project would therefore exceed the 40 percent applicable percentage.

As noted above, an Applicable Entity should be allowed to certify compliance with the domestic content requirement, or qualification for one of its exceptions, at the time of financial commitment to the project. However, if Treasury were to require a project to seek to remedy a change in the status of such a project after an initial financial commitment, the same process discussed above could provide a measure of certainty. Taking the above example of a utility seeking to install two MW of solar capacity, but assume that the utility receives and accepts an offer that would comply with the domestic content requirement. However, during construction, there is a supply chain disruption, a reasonable effort to find an alternative is unsuccessful, and the solar modules needed for the project can no longer be obtained domestically. Again, the panels would qualify for the Non-Availability Exception, be deemed domestic content, and under the Notice 2024-41 safe harbor be deemed to constitute 66.3 percent of the manufactured product costs and, so, the project would meet the 40 percent applicable percentage threshold.

Domestically Non-Available Articles

Under *Federal Acquisition Regulations* (FAR), a list of domestically non-available articles under the Buy American statute is maintained and updated every five years.[14] A non-availability determination is made "not necessarily (when) there is no domestic source for the listed items, but (when) domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand."[15]

As we have discussed in previous comments, we believe domestic supply for many of the key components for qualifying projects will not be adequate to meet such a threshold. As a result, the vast majority of Applicable Entities seeking elective payment are expected to qualify for one of the exceptions to the domestic content requirements for elective payment. **As a matter of simplification, and to provide maximum certainty for entities seeking elective payment, we would strongly encourage Treasury to consider working with the Department of Commerce and/or Department of Energy to develop a comparable list of domestically non-available articles.**

A domestically non-available article list could also be coupled with the elective cost-percentage safe harbor to provide project-level, technology-specific exceptions to domestic content requirements for

[14] 48 C.F.R. 25.104.
[15] 48 C.F.R. 25.103(b)(1)(i).

elective payment. It would be most efficient for Treasury to make this determination in a process akin to the establishment of safe harbors under Notice 2023-38 and Notice 2024-41. For example, Treasury could periodically announce a list of key items that, for purposes of elective payment, are domestically non-available. In turn, Treasury could make the calculation of whether – given non-availability of certain manufactured products and the parameters of the elective cost percentage safe harbor – the domestic content requirements for certain project types are deemed to have been met. A five-year period for updating this list seems reasonable, but if a shorter period is used, then project owners should be able to rely on the list for a period after the update. For example, if the list is updated every two years, changes should not apply until a year after the update.

Conclusion

Again, we greatly appreciate the opportunity to submit these comments and look forward to working with Treasury and the IRS toward the successful implementation of elective payment, the domestic content requirements for elective payment, and the exceptions to those requirements.

Sincerely,

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