INDUSTRIAL ENERGY CONSUMERS OF AMERICA (IECA)

COMMENTS ON PUBLIC INPUT ON IMPLEMENTING THE INFLATION REDUCTION ACT'S CLEAN ENERGY TAX INCENTIVES

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Industrial Energy Consumers of America
Comments in Response to IR 2022-172

General Comments

- We applaud Treasury's early engagement with stakeholders in the process of developing guidance with respect to the clean energy tax incentives included in the Inflation Reduction Act. Treasury will have a significant role in determining the success of this historic legislation, and we urge Treasury to draft practical and flexible guidance designed to facilitate the large-scale investment in clean energy technologies which Congress intended to catalyze and which will be necessary to meet the United States' ambitious goals for reducing emissions of greenhouse gases. To this end, there are a number of important clarifications Treasury should make regarding key provisions addressed in the set of Notices issued on October 5, 2022.

Re: Notice 2022-51: 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

Prevailing Wage and Apprenticeship Requirements Generally

- *Establishing Beginning of Construction for Purposes of Determining Whether Prevailing Wage and Apprenticeship Requirements Apply*

    - Taxpayers qualify for increased credit amounts under various credit provisions if certain prevailing wage and apprenticeship requirements are met or if construction of a project or qualified facility begins prior to the date that is 60 days after Treasury publishes guidance with respect to these prevailing wage and apprenticeship requirements.

    - Treasury should confirm that the standards previously set forth for determining when construction begins for other purposes (including under Notice 2013-29, Notice 2013-60, Notice 2014-46, Notice 2015-25, Notice 2016-31, Notice 2017-04, Notice 2018-59, Notice 2019-43, Notice 2020-41, and Notice 2021-5) will generally apply in establishing when construction begins for purposes of determining whether the prevailing wage and apprenticeship requirements will be deemed to have been met when determining a facility's qualification for increased credit amounts. Specific to the new 45V clean hydrogen production tax credit, IECA urges Treasury to adopt the framework established in Notice 2020-12 (Beginning Construction for the Credit for Carbon Oxide Sequestration under Section 45Q) to determine whether a clean hydrogen production facility has begun construction within the meaning of § 45V(e)(2). Under Notice 2020-12 for the 45Q credit, taxpayers may establish the beginning of construction of a qualified facility or sequestration equipment by starting physical work of a significant nature (the "Physical work test") or by paying or incurring at least five percent of the total cost of the facility or equipment ("Five percent safe harbor"). Clean hydrogen can be produced through a broad variety of pathways, including through carbon capture and sequestration. Applying the same tests for establishing when any type of facility has begun construction will promote consistency and minimize the administrative burdens for taxpayers who intend to claim either the 45Q or 45V tax credit. Providing this clarity is also essential to continue to incentive industry that is already moving forward with decarbonization and clean hydrogen projects to continue that work and not delay major construction until rules are defined. Failure to provide that clarity will undermine quicker emissions reductions.

- However, given the expanded relevance of beginning of construction to projects and qualified facilities beyond solar and wind, Treasury should provide new continuity safe harbors which are appropriate for the time needed to construct the specific type of project or qualified facility for which a credit is claimed.

- Further, Treasury should provide taxpayers with the option to cure any failure to comply with prevailing wage and apprenticeship requirements to the extent a taxpayer would be able, but for the continuity requirement, to establish beginning of construction prior to the date that is 60 days after Treasury publishes guidance with respect to the relevant prevailing wage and apprenticeship requirements.

- *Publication of Guidance with Respect to Prevailing Wage and Apprenticeship Requirements*

  - Section 5 of Notice 2022-51 states that Treasury "will explicitly identify when it has published guidance with respect to the prevailing wage and apprenticeship requirements that is relevant for determining whether such requirements have been satisfied . . . ."

  - It would be inappropriate for Treasury to start the 60-day period prior to, or in conjunction with, the proposal of a thorough set of rules for implementing the prevailing wage and apprenticeship requirements. Although the request for comments in Notice 2022-51 provides stakeholders with an opportunity to identify certain key questions that future guidance should address, the deadline for submission of comments to Notice 2022-51 provides insufficient time for stakeholders to prepare detailed comments regarding all areas of expected future guidance. Further, stakeholders should have an opportunity to provide meaningful input on the full gamut of specific rules proposed by Treasury before such rules are considered published guidance. Accordingly, we recommend that Treasury clarify that guidance with respect to the prevailing wage and apprenticeship requirements will not be treated as having been published for purposes of starting the 60-day clock until after Treasury has considered and addressed public comments to a robust set of proposed guidance.

  - Treasury should issue guidance that provides certainty for taxpayers to meet the prevailing wage and apprenticeship requirements. It is critical that taxpayers be able to determine whether the requirements can be satisfied at the time they are negotiating contracts and deploying capital in clean energy projects so that the parties can properly allocate risk. The IRA's new tax incentives are a significant federal investment in renewable and low-carbon energy technology, and the bonus credit is key to the core value of the credits. Up-front certainty will facilitate investment and deployment of clean energy projects.

- *Construction, Alteration, and Repair Work*

  - The prevailing wage and apprenticeship requirements apply to certain "construction," "alteration," and "repair" work performed with respect to a project or qualified facility.

  - Treasury should clarify that routine operation and maintenance activities with respect to a project or qualified facility after such project or qualified facility is placed in service are not considered "alterations" or "repairs" for purposes of the prevailing wage and apprenticeship requirements. To distinguish routine operation and maintenance activities, future guidance should develop a threshold for the type and amount of work that rises to the level of alteration or repair. Treasury should clarify that alteration or repair includes alterations to modify the design or capacity of a project or qualified facility or

reconstruction or rebuilding of projects or qualified facilities which have been damaged or destroyed by casualty. The threshold could be determined using the cost of the potential alterations or repairs, the cost of the potential alterations or repairs relative to the construction costs of the project or qualified facility, and/or the qualitative nature of the potential alteration or repairs, which should require significant replacement or repair of existing components (potentially requiring a portion of the project or qualified facility to be taken "off line" for a significant period of time) as compared to routine maintenance activities. Treasury should exclude certain routine operation and maintenance activities from the definition of "alterations" or "repairs", such as (i) routine preventive and corrective maintenance, (ii) work performed under workmanship or equipment warranties, (iii) work related to civil features, fencing, cabling, landscaping, grounds keeping, and other non-integral structures or portions of a project or qualified facility, and (iv) offsite fabrication of and replacement work for replacement or spare parts.

- Treasury should clarify that construction, alteration, and repair work excludes offsite activities, including offsite fabrication of equipment, storage, or logistics, or activities occurring within temporary laydown or storage areas. If component manufacturing were subject to the prevailing wage and apprenticeship requirements, it would be incredibly burdensome, if not impossible, for taxpayers to ensure that such requirements are met with respect to components procured from outside the United States. Particularly since domestic production is already incentivized through the domestic content bonus, it would be inappropriate to effectively mandate that the prevailing wage and apprenticeship requirements with respect to construction, alteration, and repair of a project or qualified facility can only be met if component manufacturing occurs in the United States. Conversely, if only U.S. manufacturers were subject to prevailing wage and apprenticeship requirements, then U.S. manufacturers would be placed at a competitive disadvantage relative to foreign manufacturers. Accordingly, we recommend that Treasury clarify that construction, alteration, and repair does not include offsite activities (e.g., the fabrication of components prior to installation of such components at a taxpayer's qualified facility) for purposes of satisfying the prevailing wage and apprenticeship requirements.

- *Aggregation/Disaggregation of Facilities and Energy Properties*

  - Treasury should clarify that taxpayers can claim the increased credit amount for a single project comprised of multiple energy properties or facilities if the prevailing wage and apprenticeship requirements are met with respect to the aggregate project but not with respect to each energy property or facility. Additionally, Treasury should clarify that taxpayers can claim the increased credit amount with respect to individual energy properties or facilities that meet the prevailing wage and apprenticeship requirements even if such energy properties or facilities comprise a single project which does not meet the prevailing wage and apprenticeship requirements on an aggregate basis.

- *Documentation and Information Reporting*

  - Treasury should provide a description of the records a taxpayer is required to maintain to substantiate compliance with the prevailing wage and apprenticeship requirements and should clarify how such compliance will be reported to the IRS. Documentation and reporting requirements should not be overly burdensome. In particular, when the taxpayer is not the direct employer of laborers or mechanics involved in construction, alteration, or repair of a project or qualified facility, the taxpayer may not have access to specific payroll

and apprenticeship records and should be able to rely on certifications provided by contractors and subcontractors.

- The guidance should also permit taxpayers to rely on a certification by contractors and subcontractors that they meet the prevailing wage requirements. Contractors and subcontractors should not have to provide payroll records to ensure prevailing wages are paid on the qualifying project. A certification process would ensure data privacy, as well as protect competitive business information.

- Any documentation needed to meet the prevailing wage and apprenticeship requirements should be required to be retained for examination only and not be required to be submitted or approved in advance of claiming the credit. With respect to contractors and subcontractors, the taxpayer should only be required to retain the certification received that they satisfy the prevailing wage requirements.

Prevailing Wage Requirements

- *Prevailing Wage Rate*

  - Pursuant to the prevailing wage requirements, a taxpayer must ensure that any laborers and mechanics employed by the taxpayer, or any contractor or subcontractor, are paid wages at rates not less than the prevailing wage rates for construction, alteration, or repair of a similar character in the locality in which a project or qualified facility is located as most recently determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40 (commonly known as the Davis-Bacon Act).

  - Treasury should clarify how the prevailing wage requirements apply in the event that the Secretary of Labor updates prevailing wage rates during the construction, alteration, or repair of a project or qualified facility. Taxpayers should not be required to monitor prevailing wage rates across various localities over the course of different multi-year contract terms and to update contractual wages whenever a new rate is published. Instead, Treasury should clarify that taxpayers can satisfy the prevailing wage requirements by ensuring that laborers and mechanics are paid prevailing wage rates applicable at the time construction contracts are executed for the duration of those contracts. Alternatively, if Treasury does require taxpayers to update contractual wages when the Secretary of Labor amends prevailing wage rates, taxpayers should be provided with at least a 90-day grace period to comply with newly published rates.

  - Treasury should clarify how taxpayers can establish compliance with the prevailing wage requirements when the Secretary of Labor has not published a prevailing wage rate for a particular position. In such cases, taxpayers should be permitted to apply prevailing wage rates published by the relevant state or county for such position, apply the prevailing wage rate published by the Secretary of Labor for a comparable position, or to make a good faith effort to otherwise determine prevailing wage rates for such position without being subject to a penalty upon any subsequent determination that a wage paid by the taxpayer in good faith was insufficient.

- *Correction and Penalty Related to Failure to Satisfy Wage Requirements*

  - Pursuant to the statutory correction and penalty mechanism, if a taxpayer fails to pay prevailing wages with respect to a project or qualified facility for any year, it is nevertheless

deemed to have satisfied the prevailing wage requirements if the taxpayer: (i) pays each laborer or mechanic an amount equal to the difference between the prevailing wage rate that should have been paid and the amount of wages actually paid, plus interest and (ii) pays the IRS a penalty based on the total number of laborers or mechanics for which the taxpayer was not in compliance with the prevailing wage requirement.

- To avoid unnecessary complications to engineering, procurement, and construction contracts, it is critical that Treasury provide taxpayers with flexibility in curing any failure to pay prevailing wages. We recommend that Treasury permit payment of correcting wages and penalties on the taxpayer's behalf by the applicable contractor or subcontractor which failed to pay the applicable prevailing wages. Treasury should treat such payments as made by the taxpayer as long as the taxpayer obtains adequate evidence of payment by the contractor or subcontractor. Treasury should also clarify what documentation constitutes sufficient evidence of payment for this purpose.

Apprenticeship Requirements

- *Applicable Percentage of Total Labor Hours*

  - Under the apprenticeship requirements, taxpayers must ensure that, with respect to the construction of any project or qualified facility, not less than the applicable percentage of the total labor hours of the construction, alteration, or repair work (including such work performed by any contractor or subcontractor) is performed by qualified apprentices. The applicable percentage of total labor hours that qualified apprentices must perform in the construction, alteration, or repair of a project or qualified facility is determined based on when construction of that project or qualified facility begins.

  - We recommend that Treasury clarify that the standards previously set forth for determining when construction begins in other contexts (including under Notice 2013-29, Notice 2013-60, Notice 2014-46, Notice 2015-25, Notice 2016-31, Notice 2017-04, Notice 2018-59, Notice 2019-43, Notice 2020-41, and Notice 2021-5) will apply in establishing when construction begins for purposes of determining the applicable percentage. However, given the expanded relevance of beginning of construction to projects and facilities beyond solar and wind, Treasury should provide new continuity safe harbors which are appropriate for the time needed to construct the specific type of project or qualified facility for which a credit is claimed.

  - Treasury should clarify that the applicable percentage requirement does not apply to each taxpayer, contractor, or subcontractor who employs individuals to perform construction, alteration, or repair of a project or qualified facility. Rather the applicable percentage requirement should apply only with respect to the total labor hours of the relevant construction, alteration, or repair work with respect to a project or qualified facility.

- *Participation*

  - In order to meet the apprenticeship requirements, each taxpayer, contractor, or subcontractor who employs four or more individuals to perform construction, alteration, or repair work with respect to the construction of a project or qualified facility must employ one or more qualified apprentices to perform such work.

- Treasury should clarify that no minimum threshold applies (e.g., based on hours worked or period of employment) in order for a qualified apprentice to count toward a taxpayer's, contractor's, or subcontractor's satisfaction of the participation ratio. Additionally, Treasury should clarify that a qualified apprentice may be engaged by the applicable taxpayer, contractor, or subcontractor by means of direct employment, a temporary labor or labor supply arrangement, or bona fide training program.

- *Good Faith Exception*

  - A taxpayer is deemed to have satisfied the apprenticeship requirements with respect to a project or qualified facility if such taxpayer has requested qualified apprentices from a registered apprenticeship program and either: (i) the request is denied (provided that such denial is not the result of a refusal by the taxpayer or any contractors or subcontractors engaged in the performance of construction, alteration, or repair work with respect to such qualified facility to comply with the established standards and requirements of the registered apprenticeship program) or (ii) the registered apprenticeship program fails to respond to such request within five business days after the date on which the registered apprenticeship program receives the request.

  - Treasury should clarify what documentation constitutes sufficient evidence for purposes of establishing an apprenticeship program's denial of or failure to respond to a request for qualified apprentices.

  - Treasury should clarify that the good faith exception applies when a contractor or subcontractor, or a potential contractor or subcontractor in connection with a bona fide bid, requests qualified apprentices on behalf of the taxpayer as long as the requesting party provides the taxpayer with sufficient evidence as to the apprenticeship program's denial of or failure to respond to such request.

  - Treasury should clarify that requests for qualified apprentices do not have to be made under a binding contract to hire such apprentices if provided in order for the request to count toward the good faith effort exception. Such clarification would avoid inefficient employment arrangements when, subsequent to a request, the taxpayer determines that it can more efficiently meet the apprenticeship requirements in another manner.

  - Treasury should clarify when a request for qualified apprentices from a registered apprenticeship program must be made relative to the work required such that the taxpayer may qualify for the good faith effort exception. In particular, Treasury should clarify that a request made prior to the beginning of construction should qualify with respect to any work performed during the entire period of construction.

Re: Notice 2022-50: Request for Comments on Elective Payment of Applicable Credits and Transfer of Certain Credits

Credit Transferability

- *Multiple Transferees*

  - Section 6418(a) provides that an eligible taxpayer can elect to transfer all (or any portion) of an eligible credit determined with respect to such taxpayer for any taxable year to "a

taxpayer," referred to as the "transferee taxpayer," which is not related to the eligible taxpayer.

- Treasury should clarify that the eligible taxpayer can transfer portions of an eligible credit to multiple transferee taxpayers. If eligible taxpayers were restricted from transferring portions of an eligible credit to multiple transferee taxpayers in a given year, the effectiveness of transferability in broadening the investment base in clean energy technologies would be significantly diminished, contrary to Congressional intent.

- *Recapture*

  - Section 6418(g)(3) provides that if, during any taxable year, applicable investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period: (i) such eligible taxpayer shall provide notice of such occurrence to the transferee taxpayer and (ii) the transferee taxpayer shall provide notice of the recapture amount, if any, to the eligible taxpayer.

  - The Code does not specify whether the recapture amount increases tax of the eligible taxpayer or the transferee taxpayer. Because the eligible taxpayer controls the risk of recapture, Treasury should clarify that any recapture amount increases the eligible taxpayer's tax. Such a rule would greatly reduce transaction costs with respect to a transfer election under section 6418, eliminating the need for complex contractual protections with respect to recapture events that would likely transfer that risk to the eligible taxpayer that controls whether recapture occurs.

- *Audit*

  - Section 6418(g)(2) provides that, upon a determination by the IRS that any portion of an eligible credit which is transferred to a transferee taxpayer pursuant to section 6418(a) constitutes an "excessive credit transfer," the tax imposed on the transferee taxpayer for the taxable year in which such determination is made shall be increased by an amount equal to the sum of the amount of such excessive credit transfer, plus an amount equal to 20 percent of such excessive credit transfer. Section 6418(g)(2)(B) provides that the 20 percent penalty shall not apply if the transferee taxpayer demonstrates to the satisfaction of the IRS that the excessive credit transfer resulted from reasonable cause.

  - Treasury should clarify how an excessive credit transfer will be determined. In particular, Treasury should clarify whether the eligible taxpayer or the transferee taxpayer is responsible for substantiating the amount of credit allowable with respect to a project or qualified facility for the taxable year in which the credit is transferred.

  - Treasury should clarify how the transferee taxpayer can establish "reasonable cause" for purposes of avoiding the 20 percent penalty on an excessive credit transfer. We recommend that the transferee taxpayer be permitted to establish reasonable cause by obtaining a certificate from the eligible taxpayer affirming the amount of eligible credit. Such a rule would reduce transaction costs with respect to a transfer election under section 6418.