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re: Docket No. IRS-2022-0025-01, Request for Comments on Prevailing Wage, Apprenticeship, Domestic Content, and Energy Communities Requirements under the Inflation Reduction Act of 2022

MOYE | WHITE LLP, joined by Southface Institute and GASEIA, appreciates the opportunity to provide comments to the U.S. Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) regarding the recently enacted Section 13502 of the *Inflation Reduction Act* (“IRA”) and pursuant to Notices 2022-50 and 2022-51.

Founded in Denver, Colorado, in 1976, and with offices in Basalt, Colorado, and Atlanta, Georgia, MOYE | WHITE LLP is a full-service law firm offering clients strategic representation in every phase of the business and real estate development life cycles. Our clients include startups, Fortune 100 enterprises, tax-exempt organizations, and associations.

MOYE | WHITE LLP is a Certified B Corporation as well as proud member of, and General Counsel to, the Clean Energy Buyers Association. Our Advanced Energy Team provides representation for renewable energy producers, developers, and manufacturers. Our attorneys provide strategic guidance to advanced energy clients in areas such as power purchase and structuring agreements; transmission and interconnection agreements; project development, site selection, acquisition; representing parties in transactions involving distributed energy resources (DERs), federal and state regulatory compliance; transmission; and, importantly, project financing including tax considerations.

Southface Institute is a sustainable building nonprofit that strengthens equity and the environment by transforming residential and commercial structures at every stage of the building life cycle. Southface is headquartered in Atlanta, Georgia, with a new satellite location in Sarasota, Florida.

Since 1978, Southface has collaborated with other nonprofits, businesses, builders, developers, universities, government agencies, and communities to deliver practical solutions with tangible results for the planet and all its inhabitants.

The Georgia Solar Energy Industries Association (GASEIA) is a statewide, non-profit trade organization representing the interests of the 200+ solar companies located throughout the state. GASEIA serves as the voice for Georgia's solar industry, working to remove market barriers, engage in solar outreach and education, and expand solar markets. GASEIA seeks to encourage the widespread use of solar energy and maintain Georgia's position as a top state in the solar industry.

GASEIA proudly serves the 4,500 Georgians working in the solar industry and supports a statewide industry that generates hundreds of millions of dollars in investments each year. GASEIA's diverse membership ranges from educational organizations to solar developers, engineers, distributors, and financiers. Members conduct business in-state, nationally, and abroad, with individually owned groups and large solar organizations represented. GASEIA is the state affiliate for the national solar trade organization, SEIA.

- I. MOYE | WHITE LLP, Southface Institute, and GASEIA submit the below comments to the Treasury Department Request for Comments regarding Elective Payments of Applicable Credits and Transfer of Certain Credits under the IRA ([Notice 2022-50](#)):

Code § 6418(a). Transfer of Certain Credits.

We respectfully request the Treasury and IRS issue further guidance clearly establishing whether and if appropriate, under what circumstances, the Passive Activity Loss (“PAL”) rules under § 469 of the Internal Revenue Code (the “Code”) apply to transferees/recipients Energy Tax Credits under the IRA.

With regard to analysis of such request, we currently believe the relevant provisions of new Code § 6418(a) are relatively clear that the PAL limitations do not apply to purchasers of tax credits, as follows:

“...the transferee taxpayer specified in such election (and not the eligible taxpayer) shall be treated as *the taxpayer* for purposes of this title with respect to such credit (or such portion thereof).” Emphasis added.

We believe, particularly in view of the objectives of the IRA, the emphasized phrase “the taxpayer” refers to the taxpayer that initially generated the tax credit, not to the “taxpayer” in the generic sense. We note further that this important issue has been considered by others, and that such consideration has been met with varying conclusions.

For instance, the law firm of Norton Rose Fulbright stated recently its understanding that PAL limitations do apply to transferees of solar tax credits.¹ In pertinent part, our Norton Rose

¹ David Burton and Viktoria Vozarova, *Transferability ain't all it's cracked up to be*, Norton Rose Fulbright, Tax Equity News, Aug. 1, 2022. Available at: <https://www.projectfinance.law/tax-equity-news/2022/august/transferability-ain-t-all-it-s-cracked-up-to-be/>.

colleagues state, “[t]he transferability rules do not relax the passive activity loss rules that apply to individuals, so the buyers of the tax credits will continue to, generally, be banks, insurance companies and public traded corporations.”

On the other hand, the authors of the Tax Notes article, *Digging into Direct Pay and Credit Transfers Under the IRA*, view the IRA and being ambiguous on this issue.² The author states:

“When writing guidance for the new transfer option, the IRS and Treasury could consider whether individual taxpayers can participate in transfers. There’s a question whether the new credit transfer option overrides the passive activity rules in [§ 469 of the Code] that prevent taxpayers from taking a credit for businesses in which they aren’t considered to materially participate. *The idea is that the credit in a transfer is severed from the activity because the transferee never gets an ownership interest in the business, so the passive activity rules shouldn’t apply.*” Emphasis added.

As the Tax Notes author astutely states, “if individuals can buy credits, the result will be a large increase in the population of potential credit buyers.”³

- II. MOYE | WHITE LLP, Southface Institute, and GASEIA submit the below comments to the Treasury Department Request for Comments regarding Energy Communities Requirements under the IRA ([Notice 2022-51](#)):

Code § 45(b). Energy Community.

We respectfully request the Treasury and IRS issue further guidance clearly establishing regulations for when an energy community, as determined under Code § 45(b)(11)(B)(ii)(I), is no longer eligible for an additional 10 percent tax credit under § 45(b)(11)(A).

With regard to analysis of such request, we currently believe the relevant provisions of Code § 45 are unclear as to whether the qualified facility must be placed in an energy community throughout the 10-year period referenced in § 45(a)(2)(A)(ii) or if the project will qualify for the additional ten percent credit (“Bonus Credit”) throughout the ten year period if, on the date it is placed in service, the facility is located in an energy community.

Unlike the other additional tax credit adjustments listed in § 45(b)(1) through (10), each of which has a clear time frame for qualifying for the tax credit which will apply throughout the ten year period, § 45(b)(11) is unclear as to whether the facility must always be in an energy community throughout the ten year period, or if the facility will qualify for the Bonus Credit if the facility is in an energy community on the date the facility is placed in service.

The IRS should clarify that if a facility qualifies for the Bonus Credit on the date the project is placed in service, the project will qualify throughout the life of the tax credit provided in § 45(a). In the event that during the ten year period of the production tax credit, (i) the rate of unemployment decreases, or (ii) the rate of direct employment or local tax revenues related to extraction, processing, transport, or storage of coal, oil, or natural gas decrease, the objectives of the IRA would be diminished if the taxpayer who underwrote a project to receive a ten percent bonus credit

² Marie Sapirie, *Digging into Direct Pay and Credit Transfers Under the IRA*, Tax Notes, Sep. 12, 2022. Available at: <https://www.taxnotes.com/tax-notes-federal/energy-taxation/digging-direct-pay-and-credit-transfers-under-ira/2022/09/12/7f21z>.

³ *Id.* at 8.

should not be penalized because the legislation worked as intended (*e.g.* energy communities became less dependent on employment by or taxes from extraction, processing, transport, or storage of coal, oil, or natural gas and/or unemployment decreased) on a timeline that is faster than ten years.

Providing this guidance aligns with Treasury’s second core principle in relation to this notice, “Clarity and Certainty: Treasury will work expeditiously to provide clarity and certainty to taxpayers, so the climate and economic benefits of this historic legislation can be felt as quickly as possible.”⁴

The IRS and Treasury made the distinction of when a facility qualifies clear when detailing the energy community requirements under new Code § 48(a)(14), by stating the additional 10% tax credit for the investment tax credit is based on when a facility is placed in service. Failure to implement similar guidance for the additional tax credit under Code § 45 can have vast impacts beyond just for the facility owner as, under new Code § 6418(a), a tax credit claimed under Code § 45(a) is an applicable credit that is eligible for transfer. In the event the IRS does not provide clear guidance, both a transferor and transferee face uncertainty when a credit is transferred as to whether the credit amount is eligible for the bonus tax credit under § 45(b)(11).

In order to provide taxpayers and transferees with greater clarity and certainty as it relates to the additional 10% credit available to facilities under § 45(b)(11)(B)(II), the IRS and Treasury should clarify the additional 10% credit is only evaluated based on an average of the year and the two immediately years immediately preceding the year in which the project is placed in service. This extended timeline also allows for proper planning for the development of facilities who would seek additional credits under § 45 as these projects often take years to go from design to underwriting to implementation. Accordingly, providing clarity under § 45 to align with the rules issued under § 48 as it relates to energy communities will provide greater clarity and certainty to taxpayers, assisting them in carrying out the legislation’s intent of promoting clean energy

Sincerely,

/S/
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MOYE | WHITE LLP

/S/
James Marlow, President
Southface Institute

/S/
Pete Corbett, Chairman
GASEIA

⁴ United States Department of Treasury, *Treasury Seeks Public Input on Implementing the Inflation Reduction Act’s Clean Energy Tax Incentives*, October 5, 2022. Available at: <https://home.treasury.gov/news/press-releases/jy0993>