



October 30, 2023

VIA ELECTRONIC SUBMISSION

The Honorable Daniel Werfel
Commissioner
Internal Revenue Service
1111 Constitution Ave. NW
Washington, DC 20224

Re: Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements; REG-100908-23; 88 Fed. Reg. 60018 (Aug. 30, 2023).

Dear Commissioner Werfel:

On August 30, 2023, the Internal Revenue Service (IRS) published a proposed rule titled “Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements.”¹ The proposed rule provides guidance on the prevailing wage and apprenticeship (PWA) requirements applicable to many of the clean energy tax incentives established by the Inflation Reduction Act of 2022 (IRA).² This letter constitutes the Office of Advocacy’s (Advocacy) public comments on the proposed rule.

Advocacy is concerned that the initial regulatory flexibility analysis (IRFA) in the proposed rule lacks essential information required under the Regulatory Flexibility Act (RFA).³ IRS cannot evaluate the impact of the rule on small entities without a properly completed IRFA. Specifically, the IRFA inadequately describes the affected small entities and underestimates potential impacts to those entities. Although the proposed rule will significantly impact private construction firms that work on clean energy projects, IRS failed to provide a specific analysis of the costs that those small entities face. Because the IRA’s credits and deductions are only available to the taxpayer investing in a clean energy project, small construction firms will bear the costs of complying with the proposed rule without access to its tax benefits. In addition, the IRFA does not discuss significant alternatives that would accomplish the stated objectives of the

¹ Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements, 88 Fed. Reg. 60018 (Aug. 30, 2023).

² Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

³ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

proposal, which minimizes its significant economic impact on small entities beyond accommodations that are already included in the rulemaking.

For these reasons, IRS must reassess the economic impact of the proposed rule and consider significant alternatives in a supplemental IRFA. Advocacy further recommends that IRS reconsider its preferential treatment of project labor agreements and any other discretionary provisions that favor larger, union firms when considering the impacts of this rule on small entities.

I. Background

A. The Office of Advocacy

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small entities before federal agencies and Congress. Advocacy is an independent office within the U.S. Small Business Administration (SBA) that seeks to ensure small business concerns are heard in the federal regulatory process. Advocacy also works to ensure that regulations do not unduly inhibit the ability of small entities to compete, innovate, or comply with federal laws. The views expressed by Advocacy do not necessarily reflect the views of the SBA or the Administration.

The RFA, as amended by the Small Business Regulatory Enforcement Fairness Act,⁴ gives small entities a voice in the rulemaking process. For all rules that are expected to have a significant economic impact on a substantial number of small entities, the RFA requires federal agencies to assess the impact of the proposed rule on small entities and to consider less burdensome alternatives.⁵ If a rule will not have a significant economic impact on a substantial number of small entities, agencies may certify the rule.⁶ The agency must provide a statement of factual basis that adequately supports its certification.⁷

The Small Business Jobs Act of 2010 requires agencies to give every appropriate consideration to comments provided by Advocacy.⁸ The agency must include a response to these written comments in any explanation or discussion accompanying the final rule's publication in the Federal Register, unless the agency certifies that the public interest is not served by doing so.⁹

Advocacy's comments are consistent with Congressional intent underlying the RFA, that "[w]hen adopting regulations to protect the health, safety, and economic welfare of the nation, federal agencies should seek to achieve statutory goals as effectively and efficiently as possible without imposing unnecessary burdens on the public."¹⁰

⁴ Pub. L. No. 104-121, tit. II, 110 Stat. 857 (1996) (codified in scattered sections of 5 U.S.C. §§601-612).

⁵ 5 U.S.C. § 603.

⁶ *Id.* § 605(b).

⁷ *Id.*

⁸ Small Business Jobs Act of 2010, Pub. L. No. 111-240, §1601, 214 Stat. 2551 (codified at 5 U.S.C. § 604).

⁹ *Id.*

¹⁰ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

B. The Inflation Reduction Act's Clean Energy Tax Incentives

The IRA is a budget reconciliation bill signed into law on August 16, 2022.¹¹ The law includes an investment of \$369 billion to help build a clean energy economy.¹² That investment is primarily enacted through changes to the Internal Revenue Code¹³ that extend and expand energy and technology tax incentives.¹⁴

The IRA provides increased credit or deduction amounts that generally apply for any taxpayer that satisfies certain requirements regarding the construction, installation, alteration or repair of a qualified clean energy facility, property, project, or equipment.¹⁵ The increased incentive amounts are generally worth five times the value of the base rate.¹⁶ In general, a facility only qualifies for the increased rate if it meets or is grandfathered into certain PWA requirements.¹⁷

To qualify for the increased incentive amounts, the IRA's PWA provisions require taxpayers to ensure that:

- (1) any laborers and mechanics employed by the facility owner, contractors, or subcontractors are paid "wages at rates not less than the prevailing rates[.]"¹⁸
- (2) a percentage of the total labor hours spent to construct the facility are performed by "qualified apprentices."¹⁹

The IRA includes correction and penalty provisions available in certain situations if a taxpayer fails to satisfy the PWA requirements.²⁰

¹¹ Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818.

¹² Dep't of the Treasury, *Treasury Announces Guidance on Inflation Reduction Act's Strong Labor Protections* (Nov. 29, 2022), <https://home.treasury.gov/news/press-releases/jy1128>.

¹³ Internal Revenue Code (I.R.C.), Title 26 U.S.C., as amended.

¹⁴ Pub. L. No. 117-169, Subtitle D—Energy Security.

¹⁵ The IRA introduced a two-tier "base" rate and "increased" rate structure for many of the statute's energy tax incentives. *See* Pub. L. No. 117-169 §§ 13101(f), 13102(k), 13104(d), 13105(a), 13204(a), 13303(a)(1), 13304(d), 13404(d), 13501(a), 13701(a), and 13704(a). The prevailing wage and apprenticeship requirements apply to I.R.C. §§ 30C (alternative fuel vehicle refueling property tax credit), 45 (production tax credit), 45Q (carbon sequestration tax credit), 45V (clean hydrogen tax credit), 45Y (clean energy production tax credit), 45Z (clean fuel production tax credit), 48 (investment tax credit), 48C (advanced energy project tax credit), 48E (clean electricity investment tax credit), and the energy efficient commercial buildings deduction under section 179D. The prevailing wage requirements also apply to I.R.C. §§ 45L (energy efficiency home tax credit) and 45U (nuclear power production tax credit).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See, e.g.,* Pub. L. No. 117-169 § 13101(f). The term "prevailing rates" refers to wages at rates for similar work in the location of the facility site "as most recently determined by the Secretary of Labor in accordance with subchapter IV of chapter 31 of title 40, [U.S.C.]." *Id.*

¹⁹ *Id.* Qualified apprentices are those who participate in a registered apprenticeship program that complies with certain federal requirements. *See id.*

²⁰ *See id.*

C. The Proposed Rule

On August 30, 2023, IRS published the proposed rule regarding the increased credit or deduction amounts available for taxpayers satisfying the PWA requirements.²¹ The PWA requirements went into effect for projects that began construction on or after January 29, 2023, pursuant to IRS's publication of initial guidance in Notice 2022-61.²²

The proposed rule provides guidance on various aspects of the PWA requirements including, but not limited to:

- Taxpayer recordkeeping.²³
- The incorporation of certain Davis-Bacon Act²⁴ guidance.²⁵
- Paying wages in accordance with applicable wage determinations.²⁶
- Apprenticeship requirements and the "Good Faith Effort" exception.²⁷
- Correction and penalty provisions, including penalty waiver.²⁸

Notably for small businesses, the proposed rule would provide that the penalty payment requirement for failure to satisfy the PWA requirements would not apply to a laborer or mechanic employed under a pre-hire collective bargaining agreement with one or more labor organizations that meets certain conditions (project labor agreement).²⁹ This preferential treatment for project labor agreements would be available to the taxpayer so long as any correction payment is paid on or before a return is filed claiming an increased credit amount.³⁰

The proposed rule includes an initial regulatory flexibility analysis.³¹ The IRFA states that "section 45 and these proposed regulations may affect a variety of different entities across several different green energy industries as there are 12 different credits with increased credit amount provisions."³² It then states that "the current estimated number of respondents to these proposed rules is 70,000 taxpayers," but does not estimate the number of small businesses within

²¹ Increased Credit or Deduction Amounts for Satisfying Certain Prevailing Wage and Registered Apprenticeship Requirements, 88 Fed. Reg. 60,018 (Aug. 30, 2023).

²² Notice 2022-61, 87 Fed. Reg. 73,580 (Nov. 30, 2022). To read Advocacy's comments on Notice 2022-61, see Off. of Advoc., Letter to the Department of the Treasury and the Internal Revenue Service, (Jan. 13, 2023), <https://advocacy.sba.gov/2023/01/13/advocacys-comments-on-irss-ira-prevailing-wage-and-apprenticeship-initial-guidance/>.

²³ 88 Fed Reg. at 60,035-36.

²⁴ 40 U.S.C. §§ 3141-48.

²⁵ The proposed rule would incorporate relevant Davis-Bacon Act (DBA) statutory and regulatory guidance, including guidance relating to wage determinations and the meaning of pertinent terms such as "laborer" and "mechanic"; "construction, alteration, or repair"; "wages"; and "employed." The proposed rule does not incorporate the rules under the DBA regarding provisions required to be included in contracts, provisions related to the reporting of certified payroll records by contractors to contracting agencies, various enforcement processes that are available to the Department of Labor and the contracting agencies to address noncompliance, or the DBA's \$2,000 monetary coverage threshold. See 88 Fed Reg. at 60,022.

²⁶ *Id.* at 60,025-26.

²⁷ *Id.* at 60,029-32.

²⁸ *Id.* at 60,027-29.

²⁹ *Id.* at 60,045.

³⁰ *Id.*

³¹ *Id.* at 60,037-38.

³² *Id.* at 60,038.

that group or the industries that they may belong to.³³ The IRFA also states that the costs of the regulation “will vary across different-sized taxpayers and across the type of facilities and projects in which such taxpayers are engaged,” but provides no specific analysis of the cost burden to small entities.³⁴ The IRFA does not examine specific alternatives that would minimize the potential impacts of the regulation to small entities, as required by the RFA.³⁵

II. Advocacy’s Small Business Concerns

Advocacy has three principal concerns with the IRFA in the proposed rule. Under the RFA, an IRFA must contain:

- 1) A description of why regulatory action is being taken.
- 2) The objectives and legal basis for the proposed regulation.
- 3) A description and estimated number of regulated small entities.
- 4) A description and estimate of compliance requirements, including any differential for different categories of small entities.
- 5) Identification of duplication, overlap, and conflict with other rules and regulations.
- 6) A description of significant alternatives to the rule.³⁶

First, Advocacy is concerned that the IRFA does not adequately describe, or attempt to describe, the regulated small entities. Second, the IRFA does not adequately estimate potential impacts to regulated small entities. Third, Advocacy believes the IRFA does not adequately discuss specific alternatives that might reduce the impacts on small entities.

A. The Proposed Rule Does Not Adequately Describe and Estimate the Number of Small Entities

The IRFA in the proposed rule does not adequately describe or attempt to estimate the number of regulated small entities. The IRFA does not provide additional information related to those entities, such as associated industries and North American Industry Classification System (NAICS) classifications. As a result, the IRFA does not provide other information necessary to understand the impact of the rule, such as a breakdown of affected entities into smaller size groups (e.g., by revenue or number of employees).

Although Advocacy recognizes that tax regulations are generally applicable across industries, the IRA was enacted to incentivize investment in clean energy projects and facilities. Therefore, industries associated with clean energy construction are likely to be disproportionately impacted by the proposed rule. Advocacy believes that the IRFA should include an analysis of NAICS codes in the construction sector.

Almost all construction firms are small. Advocacy’s most recent data shows that 98 percent of all construction industry employers are small businesses, and more than 65 percent of construction

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ 5 U.S.C. § 603.

workers are employed by small businesses.³⁷ Advocacy is particularly concerned that the IRFA fails to recognize the rule's direct regulation of small construction contractors and subcontractors. The proposed rule requires taxpayers to verify compliance for contracted work to qualify for the increased tax incentives. Verification of contracted work is only possible if taxpayers impose contractual terms on their contractors and subcontractors. By regulating the taxpayer-contractor relationship, the rule has a direct effect on the business of contracting firms who work on the taxpayer's behalf. Therefore, IRS should examine the extent of contracting work by affected taxpayers to better understand the impact of the proposed rule on the full population of affected small firms.

For these reasons, Advocacy recommends that IRS revise its IRFA to better identify and describe the distribution of all regulated small entities.

B. The Proposed Rule Does Not Adequately Estimate Impacts to Small Entities

The IRFA found in the proposed rule does not adequately estimate the economic impact to small entities. IRS should provide estimates of all costs to small entities, including any cost savings to firms that result from the tax incentives, to explain the net effect of the rule. IRS should also analyze the relative impact of any costs to small entities based on firm size. Analysis of impacts by firm size will allow the agency to assess whether small firms can meet the requirements as proposed with the resources they have or through flexibilities where appropriate.

Advocacy believes that the proposed rule is likely to discourage small developers, contractors, and subcontractors from bidding on clean energy projects. In a survey from Associated Builders and Contractors (ABC),³⁸ 97 percent of the organization's participating small firm membership reported that the PWA requirements would make them less likely to bid on clean energy projects.³⁹

Advocacy also believes that IRS substantially underestimates the cost of the proposed rule. The proposed rule estimates that the annual burden per respondent will be two hours.⁴⁰ In contrast, 94 percent of ABC's surveyed small firm membership believe that compliance with the proposed rule will take more than two hours, with 66 percent of small members reporting that compliance will take more than nine hours.⁴¹

For these reasons, Advocacy recommends that IRS revise its IRFA to analyze costs based on entity size and industry characteristics. This would help IRS understand the cost burden faced by the smallest regulated entities.

³⁷ See U.S. Census Bureau, *2017 Statistics of U.S. Business Annual Data Tables by Establishment Industry* (May 2021), <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>.

³⁸ Associated Builders & Contractors, *About ABC* (2023), <https://www.abc.org/About-ABC/About-ABC>.

³⁹ Associated Builders & Contractors, *ABC Survey Results on Inflation Reduction Act Government-Registered Apprenticeship and Prevailing Wage Requirements* 15 (Oct. 18, 2023), <https://www.abc.org/Portals/1/2023/IRA/ABC%202023%20IRA%20Survey%20Results.pdf?ver=KqQM0kwUvpAwKkeslNnVJw%3d%3d> [hereinafter *ABC Survey on IRA PWA Requirements*].

⁴⁰ 88 Fed. Reg. at 60,037.

⁴¹ *ABC Survey on IRA PWA Requirements*, *supra* note 38, at 18.

C. The Proposed Rule Does Not Adequately Consider Regulatory Alternatives that Will Lower the Burden to Small Entities

The IRFA fails to include a description of significant regulatory alternatives that would reduce the cost burden of the regulation to small entities. Instead, IRS briefly revisits its decision not to adopt certain Davis-Bacon Act requirements in the proposed rule. The RFA requires that an IRFA discuss significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes, and which minimize any significant economic impact on small entities.⁴²

IRS's failure to analyze significant alternatives prevented the public from reviewing and commenting on measures that would reduce the costs of the regulation to small entities while simultaneously achieving the agency's goals. For instance, small business representatives told Advocacy that the proposed rule's preferential treatment of project labor agreements will increase the compliance costs of the regulation to small construction firms because they are primarily non-union.⁴³ As discussed, small construction firms report that the IRA's PWA requirements will make them less likely to bid on clean energy projects. This is because small contractors and subcontractors will face increased costs from the PWA requirements but will not directly benefit from the IRA's tax incentives. Heightened compliance costs resulting from the proposed rule could further discourage small firms from bidding on these important projects. In the agency's discussion of significant alternatives, Advocacy encourages IRS to reconsider the rule's preferential treatment of project labor agreements and any other regulatory provisions that might reduce small firm participation in clean energy infrastructure development.

IRS must revise its IRFA to include significant regulatory alternatives which accomplish its objectives for the rulemaking. Advocacy further encourages the agency to provide a detailed analysis of each potential alternative and to discuss how that alternative may reduce the economic burden on small entities.

III. Conclusion

Advocacy is concerned that the proposed rulemaking and IRFA lack information that is necessary to evaluate the impact on small entities. A completed IRFA could help inform IRS's decision making and would supply useful data to small entities that wish to comment on the proposed rule. Advocacy is also concerned that the proposed rulemaking does not specifically analyze impacts to small entities in the construction industry. Advocacy urges IRS to further analyze the impact of the proposed rule on all impacted small entities and explore regulatory alternatives before proceeding to a final rule. This analysis should be published in a supplemental IRFA to provide small entities an opportunity to comment. Advocacy is available to assist the agency in its outreach to small entities and in its consideration of the impact upon them.

⁴² 5 U.S.C. § 603(c).

⁴³ The U.S. Bureau of Labor Statistics annual Union Members Summary for 2022 reported that only 12.4% of private sector construction workers were represented by unions and 11.7% were members of unions. See U.S. Dep't of Labor, U.S. Bureau of Labor Statistics, *Union Members Summary—2022*, tbl.3 (Jan. 19, 2023), <https://www.bls.gov/news.release/union2.nr0.htm>.

If you have any questions or require additional information, please contact me or Assistant Chief Counsel Meagan Singer at (202) 921-4843 or by email at meagan.singer@sba.gov.

Sincerely,

/s/

Major L. Clark, III
Deputy Chief Counsel
Office of Advocacy
U.S. Small Business Administration

/s/

Meagan Singer
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Copy to: The Honorable Richard L. Revesz, Administrator
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